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April 18, 2022

VIA US MAIL & E-FILED

Honorable Kimberly D. Bose
Secretary
FEDERAL ENERGY REGULATION COMMISSION
888 First Street NE
Room 1A
Washington, D.C. 20426

Re: Comment on Draft Environmental Impact Statement, Docket Nos. P-14803-001 and P-2082-063

Dear Ms. Bose:

We represent Klamath Irrigation District ("KID") and their interests in the proper operation and maintenance of the Klamath Irrigation Project (the "Klamath Project") and rights in stored water in Upper Klamath Lake ("UKL"). KID has reviewed the Draft Environmental Impact Statement ("DEIS") entitled "License Surrender and Decommissioning for the Lower Klamath Project No. 14803-001, formerly part of the Klamath Hydroelectric Project (P-2082-063)" (hereinafter referred to as the "Project"), and has identified numerous inadequacies in the document. As such, KID respectfully requests FERC consider these comments and recirculate a DEIS that has fully addresses the issues noted herein.

A. The National Environmental Policy Act

NEPA Generally. The National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*. ("NEPA"), is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to" the United States. 42 U.S.C. § 4321. NEPA requires agencies to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b), in order for agencies like FERC to "make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(c).

"NEPA requires two things: that an agency 'consider every significant aspect of the environmental impact of a proposed action,' and that it 'inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143 (9th Cir. 2010) (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983)). In particular, NEPA requires an agency to "prepare an [environmental impact statement] EIS to evaluate the potential environmental consequences of any proposed '*major Federal action* [ ] significantly affecting the quality of the human environment." *Consol. Salmonid Cases*, 688 F. Supp. 2d 1013, 1018 (E.D. Cal. 2010) (quoting 42 U.S.C. § 4332(C). The purpose of NEPA is to require an agency, *prior to taking action*, to "carefully consider the impacts of and alternatives to major environmental decisions." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012); 42 U.S.C. §§ 4321, 4331.

Judicial Review of a NEPA Document. Judicial review of federal agency action under NEPA is governed by the APA. *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1066 (9th Cir. 1995). The court's inquiry thus focuses on whether the agency decision can be considered "arbitrary and capricious." *Arizona Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1111 (D. Ariz. 1998). Under the APA, courts "shall hold unlawful and set aside" agency action, findings, or conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

As to evaluation of the adequacy of an EIS, "[a]gencies must adequately consider a project's potential impacts and the consideration given must amount to a 'hard look' at the environmental effects." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1191 (9th Cir. 2002); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) ("NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action."). "Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *see also id*., at fn. 21 (endorsing the "hard look" doctrine).

B. The Draft EIS Fails to Adequately Inform Both the Public and the Relevant Decision Makers in Several Respects

1. The Draft EIS's Statement of Purpose and Need is Too Narrow, Rendering the Range of Alternatives Considered Inadequate

"Project alternatives derive from an Environmental Impact Statement's 'Purpose and Need' section, which briefly defines 'the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.'" *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 155 (9th Cir. 1997) (quoting 40 C.F.R. § 1502.13). Therefore, "an agency cannot define its objectives in unreasonably narrow terms." *Id*. Elaborating on this standard, the Ninth Circuit has held that a project's statement of purpose and need is unreasonable if it "'define[s] the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality.'" *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998)).

Here, the Project's statement of purpose and need (the "Statement") does exactly that; it creates a result in which the implementation of the Project is a foregone conclusion and renders the EIS essentially useless for its purpose, which is to inform decision makers and help steer the decision in an environmentally sound direction. The DEIS claims that the Project's objectives include:

> 1. Advance the long-term restoration of the natural fish populations in the Klamath River Basin, with particular emphasis on restoring the salmonid fisheries used for commerce, recreation, subsistence, and Tribal cultural purposes.
>
> 2. Improve the long-term water quality conditions associated with the Lower Klamath Project, including water quality impairments due to the bacterium Microcystis aeruginosa and associated toxins, water temperature, and levels of biostimulatory nutrients.
>
> 3. Ameliorate conditions underlying high disease rates among Klamath River salmonids.
>
> 4. Restore anadromous fish passage to viable habitat currently made inaccessible by the Lower Klamath Project dams.

DEIS[1], at 1-6. As can be seen above, the Statement focuses solely on improving river conditions for anadromous salmonids. First, the Project is not the result of a broader effort to save the

[1] The entirety of the DEIS can be found at P-14803-001 2082-063 Lower Klamath Surrender DEIS (klamathrenewal.org), and the pagination cited herein is native to the document itself.

Klamath salmonids, but rather was *necessitated* by the dam owners' ("PacificCorp") economic analysis comparing the value of relicensing with the potential revenue generated by the dams. *See* Klamath Hydroelectric Settlement Agreement ("KHSA")[2], at 2–3, 6. Thus, the Project's actual purpose is to ensure an orderly surrender of the dams, with the least possible adverse impacts to the interests of the relevant "Indian tribes, environmental organizations, fishermen, ***water users***, and local communities," including impacts to "local property values and businesses." KHSA, at 2 (emphasis added).

The Statement's narrow focus on fish populations in the Klamath River necessarily produced *only* alternatives laser-focused on minimizing impacts to fish, at the expense of all of the other interested parties to the KHSA, which were major factors in the planning of this Project. This is not to say that Klamath River salmonids should be wholly sacrificed for the benefit of these other parties. Rather, additional alternatives must be considered that seek to minimize impacts to KID and other similarly situated water users, as well as the other parties listed in the KHSA, *and* also provide protection to the salmonids, sucker fish, and other biological resources currently supported by UKL water.

Further, it is clear from the Environmental Impact Report ("EIR") prepared pursuant to the California Environmental Quality Act, Public Resources Code § 21000, *et seq*. ("CEQA"), that such alternatives exist. In fact, the EIR is a readily available resource from which those alternatives could be pulled. The EIR analyzed four (4) alternatives, not including a "no-action" alternative.[3]

> The 2012 KHSA EIS/EIR analyzed four action alternatives: (1) Dam Removal of Four Dams; (2) Partial Removal of Four Dams; (3) Fish Passage at Four Dams; and (4) Removal of Copco 1 and Iron Gate with Fish Passage at Copco 2 and J.C. Boyle. These were selected from the 17 action alternatives and the No Action/No Project Alternative in the initial alternatives screening process.

DEIR, Vol. I at 4-1–4-2. The DEIS only analyzes, essentially, a single alternative to inaction. The DEIS pays lip service to the word "alternative," by framing the "Proposed Action" and "Proposed Action with Staff Recommended Modifications" as separate and/or different. However, it is clear that FERC only gave actual consideration to the adoption of its preferred alternative, in violation of NEPA's mandate to consider a *range* of feasible alternatives.

FERC must revise the Statement, which will necessitate production of a broader range of alternatives, which FERC must then analyze with the actual purpose of the Project in mind.

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[2] The entirety of the KHSA can be found at Microsoft Word - 246812_26.DOC (oregon.gov), and the pagination cited herein is native to the document itself.

[3] Volume I of the DEIR can be found at &10: (ca.gov), and the pagination cited herein is native to the document itself.

2. The DEIS Fails to Adequately Analyze the Potential Cumulative Impacts of the Project

An "environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s)." 40 C.F.R. § 1502.15. Further, an EIS must "perform[a] cumulative impact analysis of 'reasonably foreseeable future actions' outside the [Project] Area that, in combination with the [Project], could constitute 'collectively significant actions ... over a period of time.'" *Kern v. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2002) (quoting 40 C.F.R. § 1508.7). A cumulative impacts analysis also requires consideration of *past actions*. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management,* 387 F.3d 989, 993 (9th Cir. 2004); *see also* 40 C.F.R. § 1508.7.

"A proper consideration of the cumulative impacts of a project requires '"some quantified or detailed information; ... [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.'" (Citation). The analysis 'must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.'" *Id*. (citing *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F. 3d 1108, 1128 (9th Cir. 200)). Failure to conduct such an analysis is grounds for holding an EIS inadequate. *Kern*, 284 F.3d at 1075. As part of this analysis, NEPA requires consideration of "growth inducing effects and other effects related to induced changes in the pattern of land use" resulting from the Project. 40 C.F.R. § 1502.16; *see also City of Carmel*, 123 F.3d at 1162 (explaining lack of growth-inducing impacts discussion can invalidate an EIS).

The DEIS's discussion of cumulative impacts appears to be in Section 2.5, discussing the "Reasonably Foreseeable Trends and Planned Actions" in the Project's area. Section 2.5 fails to analyze past actions that may contribute to the impacts of the Project. The CEQA EIR conducted for the Project analyzed the impacts of the Project when considered in conjunction with several other policies already in effect:

> We note that the existing conditions included consideration of the NMFS and USFWS 2013 Joint Biological Opinion (2013 BiOp) flow requirements for the USBR Klamath Irrigation Project (NMFS and USFWS 2013), but the cumulative effects analysis considers the additional winter-spring surface flushing flows and deep flushing flows, as well as emergency dilution flows, that became a requirement in 2017 (U.S. District Court 2017). Additionally, measures PacifiCorp has committed to undertake as part of the KHSA upon certain triggers related to implementation of the Proposed Project are considered in this cumulative effects' analysis.

DEIR, Vol. I at 3-1104. While the DEIS does mention some of these agency actions, it merely summarizes what they are and does not provide any analysis of their past impacts such that a cumulative impact determination could be made from data therein.

Additionally, the description of the Project, its components, the "alternatives" analyzed in the DEIS, and the "Affected Environment" components of each resource or type of impact reviewed all focus on the Klamath watershed and contiguous lands. However, the DEIS recognizes that the Project will result in the loss of two percent (2%) of PacificCorp's power generation capacity, all of which is renewable. DEIS at 3-547. The DEIS further recognizes the likelihood that renewable power will be replaced by non-renewables. *Id*. However, the DEIS only addresses the potential for a net-increase in GHG emissions, and does not consider the potential for increased production at existing infrastructure or the construction of new facilities to recoup those losses.

Thus, even if PacificCorp does develop new energy generation facilities in compliance with its obligations to increase the relative proportion of renewables in its portfolio, that does not mean that the *construction* of those facilities will not impact the human environment. That does not mean that the construction of those facilities will have no growth-inducing impacts due to job creation. That does not mean that those new facilities' impacts will fall below the "collectively significant" standard requiring review in the DEIS.

Because the DEIS fails to provide data on the impacts of past and ongoing agency actions, such as the flushing flows and BiOps for the Project's area, and because the construction of replacement energy generating infrastructure is a reasonably foreseeable consequence of the Project and may cause cumulatively considerable impacts outside the Project boundaries, the DEIS must be revised to include an analysis of the same or be subject to invalidation.

3. The DEIS Fails to Analyze the Reasonably Foreseeable Impacts to Klamath Project Irrigators

The "hard look" required for adequate NEPA analysis "entail[s] both a complete discussion of relevant issues as well as meaningful statements regarding the actual impact of proposed projects." *Earth Island Institute v. U.S. Forestry Service*, 442 F.3d 1147, 1172 (9th Cir. 2006) (abrogated on other grounds by *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)). An EIS's impacts discussion fails when there is "no objective or qualified assessment of the combined environmental impacts of the information presented." *Id*. This requires "meaningful explanation." *Id*. "Meaningful explanation" includes identification of methodology and reference to scientific and other sources. *Id*., at 1159–60; *see also Western Watersheds Project v. Bureau of Land Management*, 552 F.Supp.2d 1113, 1129 (D. Nev. 2008). "An agency has acted arbitrarily and capriciously when it fails to make a reasoned decision based on an evaluation of the evidence." *Id*. Thus, an agency cannot rely on conclusory statements without supporting data. *Id*.

In the water quantity impacts analysis, the DEIS states, "[t]he proposed action would permanently drain the project reservoirs and have temporary and permanent effects on

flows within and downstream of the hydroelectric reach in the Lower Klamath River." DEIS at 3-38. The DEIS also recognizes the potential for impacts to water right holders. DEIS at 3-43. But the discussion does not cite to a single data point supporting the numbers it uses for the discussion or the potential reduction in water supply.

There is also no mention in the DEIS of actual potential impacts to the lands irrigated by those waters, whether to the property values of those lands or to the businesses of the hundreds of irrigators that depend upon reliable irrigation supplies from stored water in UKL. This is despite the fact that the DEIS explicitly recognizes that commenters have already noted that "the proposed action would eliminate the ability of the Lower Klamath Project reservoirs to provide supplemental water during extreme dry periods." DEIS at 3-43. The DEIS recognizes that "the proposed action would potentially result in reduced supplemental deliveries of 10,000 to 20,000 acre-feet." DEIS at 3-44. But it does *not* discuss what impacts those losses would entail. Section 3.12, regarding Socioeconomic impacts, also does not discuss economic impacts to agriculture, despite recognizing the presence of a significant amount of agriculture in the Project area. DEIR at 3-485–3-487.

KID and its customers are stakeholders in the Project's area, and the Project has the potential to devastate the irrigators' lands and businesses. Such impacts must be discussed in order for the DEIS to survive judicial review. That discussion must include reference to hard data, and translation of that data into the practical impacts to water supplies and the effects that supply reduction would have on the land, physically as well as economically.

4. The DEIS Impermissibly Tiers to Other Documents That Have Not Been Subjected to NEPA Review

"***Tiering*** refers to the coverage of general matters in broader environmental impact statements or environmental assessments . . . [and] incorporating by reference" more specific policies prepared external to the NEPA document at issue. 40 C.F.R. § 1508.1, subd. (ff) (emphasis in original). "An agency is not permitted to tier to a document that has not been subject to NEPA review." *Western Watersheds Project*, 552 F.Supp.2d, at 1133. Further, a NEPA document cannot tier to a non-NEPA document. *Oregon Natural Resources Counsel v. Bureau of Land Management*, 470 F.3d 818, 823 (9th Cir. 2006).

The DEIS attempts to tier to non-NEPA documents throughout its analysis. The DEIS titles these documents "management plans," and, though they are not yet complete, purports to rely on those plans to "minimize adverse effects on environmental resources." DEIS at 2-3–2-4. Table 2.1–1 shows sixteen (16) ***proposed*** management plans, referencing them as attached in appendices. These plans also each have sub-plans. Staff recommends that all of the management plans be completed prior to breaking ground on the Project, but says nothing about ensuring the activities undertaken to complete those plans being subject to separate NEPA review. DEIS at 2-55.

The plans are not NEPA documents, and tiering to their subsequent preparation is improper. The plans themselves are *not* attached to the EIS available for public comment, and

thus the public is incapable of commenting on them in connection with the analysis in the DEIS. To the extent the plans contain data relevant to the activities comprising the Project, they should, at least, have been attached to the DEIS for public review.

C. Additionally, the DEIS Contains Several Fact and Data Errors, Leading to an Agency Conclusion Untethered to Actual Realities on the Ground

1. The DEIS Contains Misleading Historical Data

The Klamath River Hydrology section of the DEIS purports to describe conditions in the Klamath River prior to the construction of the Klamath Project. DEIS at 3-32. However, the information therein is misleading, in that it includes data from an extremely wet period, which was also *after* several flow augmentation projects, and which skews the data into suggesting greater natural flow conditions than actually existed prior to human intervention in the Klamath River's natural course.

Page 3-32 states:

> The available recorded hydrologic time period includes natural hydrology in the Klamath River prior to the development of Reclamation's Klamath Irrigation Project (also known as the Klamath Project) and private hydroelectric facilities (water years 1905 to 1912), the period which major irrigation and power peaking facilities were developed…Figure 3.2-1 presents the average daily flow in the Klamath River at Keno, Oregon, prior to the development of dams and includes three different water years, representing conditions that range from wet to dry.

These statements, and Figure 3.2-1, are misleading given the following facts:

a. The period between 1904 and 1912 was extremely wet, in the W-4 category for many years and in the W-1–W-3 categories for most of these years. (*See* **Figure 1**, below). Utilizing these years to calculate average precipitation and flows in the Klamath River significantly skews the analysis;

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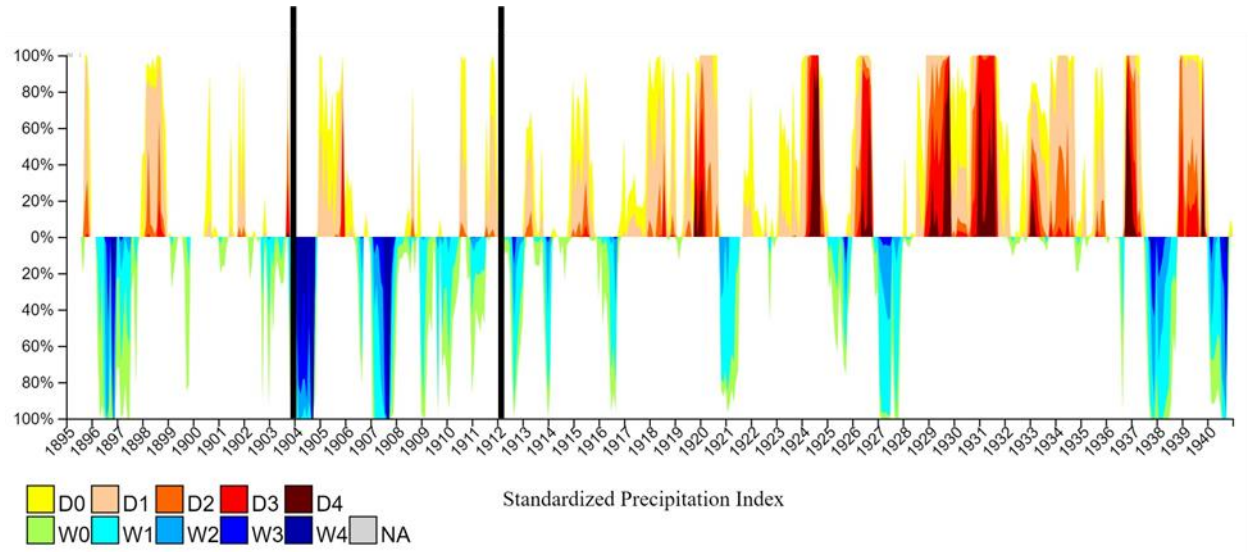

Figure 1. Klamath County Historical Precipitation 1895-1940. The period utilized by Hardy in modeling Klamath River flows focused on the wettest period in this 45-year period, an era where flows at Keno were artificially increased by flows from the River Diversion Canal, dykes preventing water from naturally flowing into the Lower Klamath Lake and into the Lost River Slough.[4]

b. Before 1890, the Lost River Slough naturally evacuated water away from the Klamath River below the Link River, sometimes flowing at 1,200 cubic feet per second (538,597 gallons per minute away from the Klamath River) for significant periods[5]. This slough was diked in 1890, preventing losses from the Klamath River to the Tule Lake sump;

c. In 1912, 47,000 acre-feet of water was added to the Klamath River from the Lost River Diversion Channel;[6]

d. Prior to 1919, the Link River would routinely quit flowing in late July. Historical records indicate the native Klamath name for the river was "Yulalona," meaning receding and returning water, which matches with photographic and written evidence demonstrating little to no flow of water from Upper Klamath Lake occurred in low-precipitation years.[7] Since 1919, water has continuously flowed through the Link River, augmenting the Klamath River below Keno when no water would be naturally available;

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[4] Drought.gov. Historical Conditions for Klamath County. Accessed 20 January 2022 at https://www.drought.gov/states/oregon/county/klamath

[5] Reclamation. November 2005. Natural Flow of the Upper Klamath River. P. 50

[6] Reclamation. November 2005. Natural Flow of the Upper Klamath River. Accessed at https://www.usbr.gov/mp/kbao/programs/docs/undepleted-klam-fnl-rpt.pdf on 10 June 2021. pg. 50

[7] Spindor, Jim. 1996. Yulalona. The Klamath Basin Historical Society. Trupeter. Accessed at https://klamathcountyhistoricalsociety.org/images/Trumpeters/1996JuneTrumpeter_44.pdf on 23 June 2021.

e. In 1906, the Keno Cut on the McCormick tract created a channel for the Klamath River at Keno to allow water to pass at 4,078 feet above sea level (6 feet lower than the natural reef), allowing the natural sludge of Lower Klamath Lake to pass through at a much higher than natural rate. Further, as early as 1909, centrifugal pumps were installed near various dikes to pump water from the Lower Klamath Lake marshlands, thus unnaturally increasing the flow over the Keno reef during the wet period between 1904 and 1912.

f. Both Reclamation's 2005 "Natural Flow of the Upper Klamath River" and Hardy et al (2006) ignore the impacts of modifications to the Keno Reef, redirection of the Lost River, pumping efforts to export water from Lower Klamath marshlands, and the installation of dikes across Lower Klamath Lake in 1907 and 1908, which directly resulted in increased flows, above natural conditions, since 1890;

g. Finally, the DEIS fails to analyze precipitation data, published by F.P. Keen, highlighting known extended dry periods in the Upper Klamath Basin. "In 1923 F.P. Keen began a study of tree rings in the Klamath Lakes Basin which was published in 1937…[Keen showed that,] from 1800 to 1838 precipitation was above average…the years 1823, 1829, 1830, 1831, and 1833 had below average precipitation. From 1839 to 1854 the climate was dry and there were few really wet years." Other historical data also reflects prolonged dry period in the Klamath basin, such as statements from immigrants passing through the area from 1846 through the 1850s.[8]

FERC should revise the analysis in the DEIS to include a more representative range of water years, *prior* to the various augmentation projects beginning in 1890, to establish an accurate baseline to support its analysis.

2. <u>The DEIS Also Contains Inaccurate Data Regarding UKL's Natural Elevation Range</u>

The DEIS claims that the natural elevation of UKL was 4,140 feet above mean sea level ("msl"), and that modifications were made to allow the lake to be drawn down below that level, to 4,137 feet above msl. DEIS at 3-32. However, data in the historical record shows these statements are incorrect:

a. Flow into the Link River was constrained by two basalt-lava reefs: (i) at the mouth of the Link River, *naturally* holding the waters of the lake around 4,137 feet above mean sea level ("msl"), utilizing the Reclamation Service elevation datum;[9] and (ii) just below the inlet to the Klamath Irrigation Project A Canal

[8] Dicken, Samuel N. Emily F. Dicken. 1985. The Legacy of Ancient Lake Modoc: A Historical Geography of the Klamath Lakes Basin Oregon and California. P. 2-12 & 3-1.
[9] Geological Survey – Water Supply. Compilation of Records of Surface Waters of the United States through 1950. Pages 825-833.

Headworks, with a shallow bay in between these two reefs. (*See* **Figure 2**, below.)

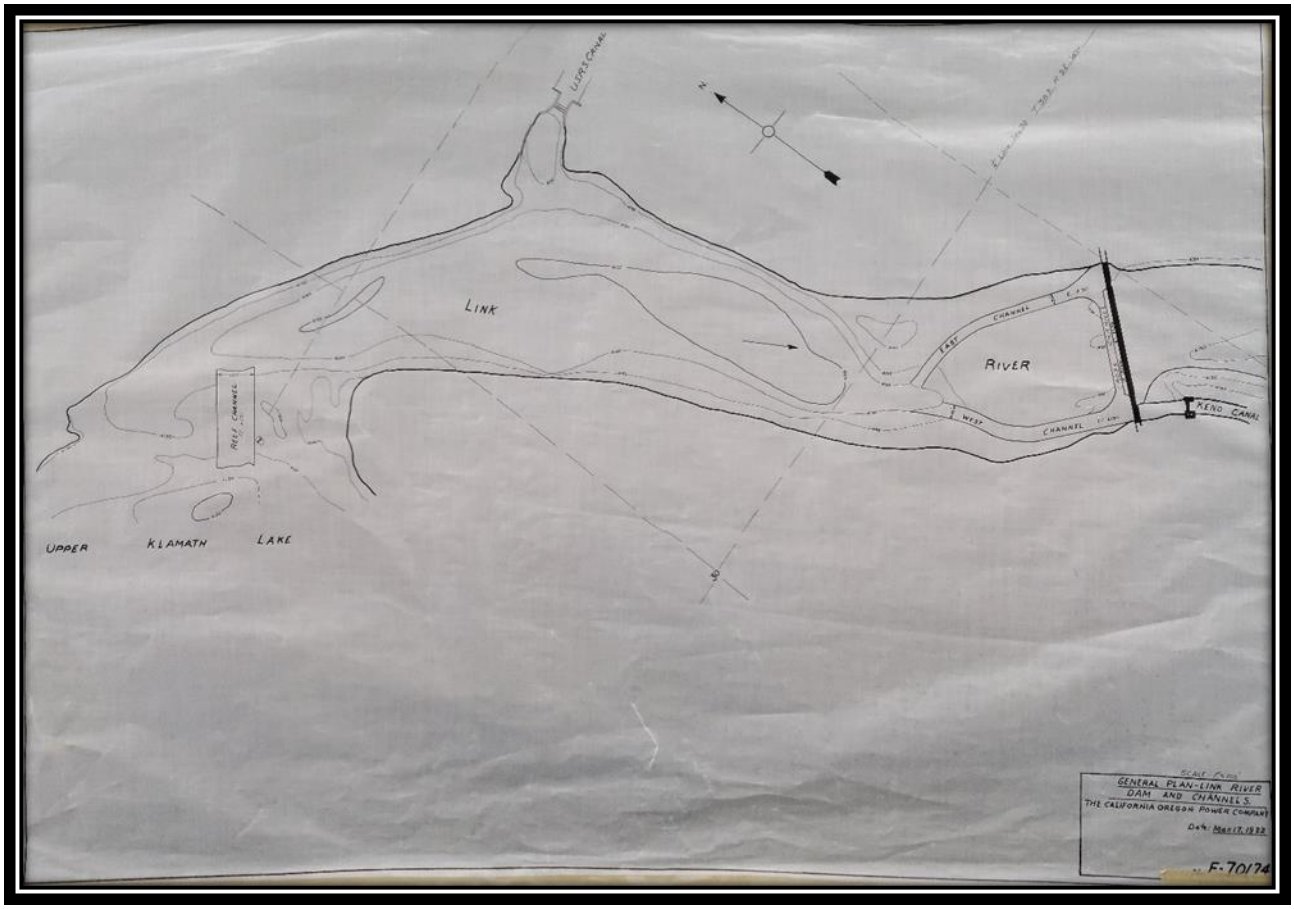


Figure 2. Link River Cut Showing Klamath Irrigation Project Improvements to Lower the Basalt Reef at the Lower End of Klamath Lake and Improved Channels to Facilitate Water over a Second Natural Basalt reef which Naturally Limited and Constrained the Flow of Water, preventing flows into the Link River and further limiting flows from Upper Klamath Lake to the Klamath River at the Keno reef.

b. Jim Spindor captures the history of the Link River routinely going dry in his article about Yulalona.[10] This fact is further supported by Reclamation's "Natural Flow of the Upper Klamath River" study (from 2005), which states the minimum discharge from UKL was recorded as 0.0 cubic feet per second on 18 July 1918. For 0.0 cfs to be achieved at the head of the Link River, the elevation of the Lake must be below the elevation of the natural reefs. (*See* **Figures 3 and 4**, below).

[10] Spindor, Jim. 1996. Yulalona. The Klamath Basin Historical Society. Trupeter. Accessed at https://klamathcountyhistoricalsociety.org/images/Trumpeters/1996JuneTrumpeter_44.pdf on 23 June 2021.

Figure 3. Link River Dry - Source Klamath County Museum. Estimated date 1903.

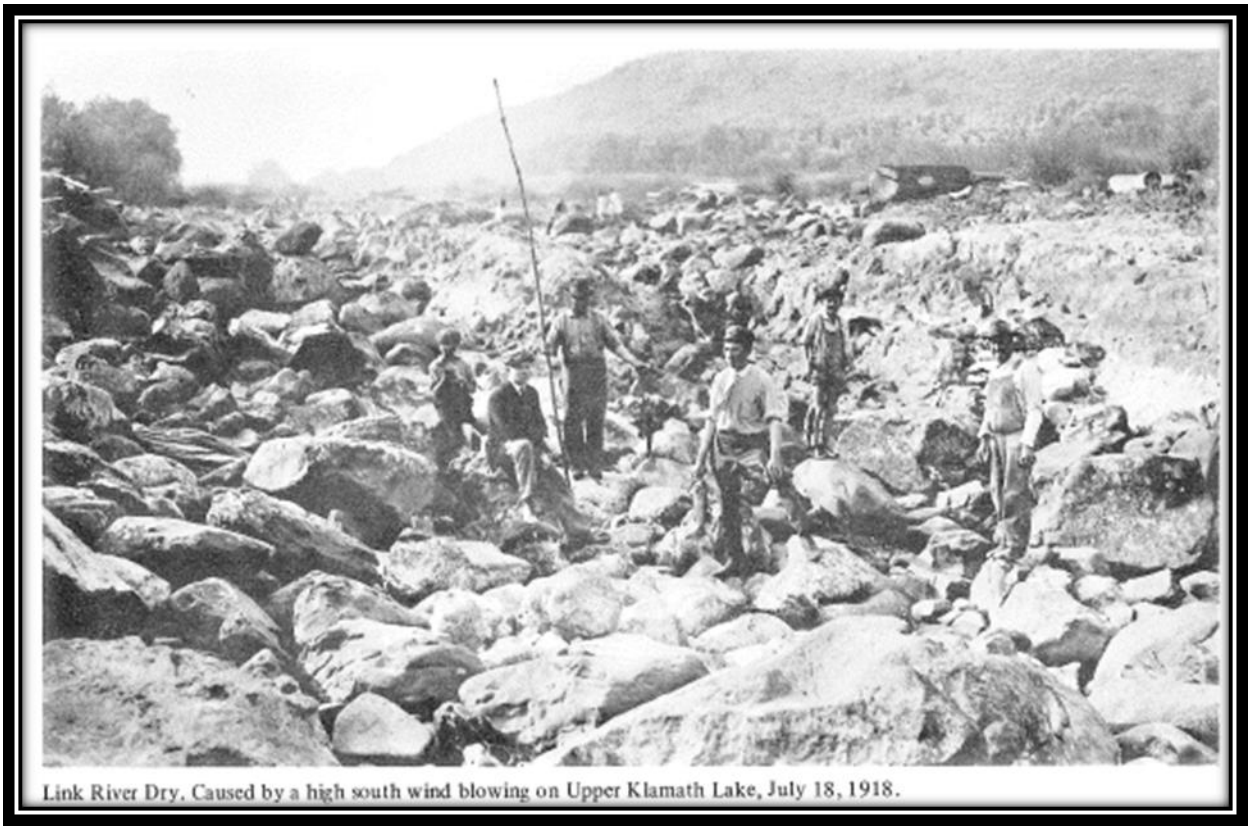
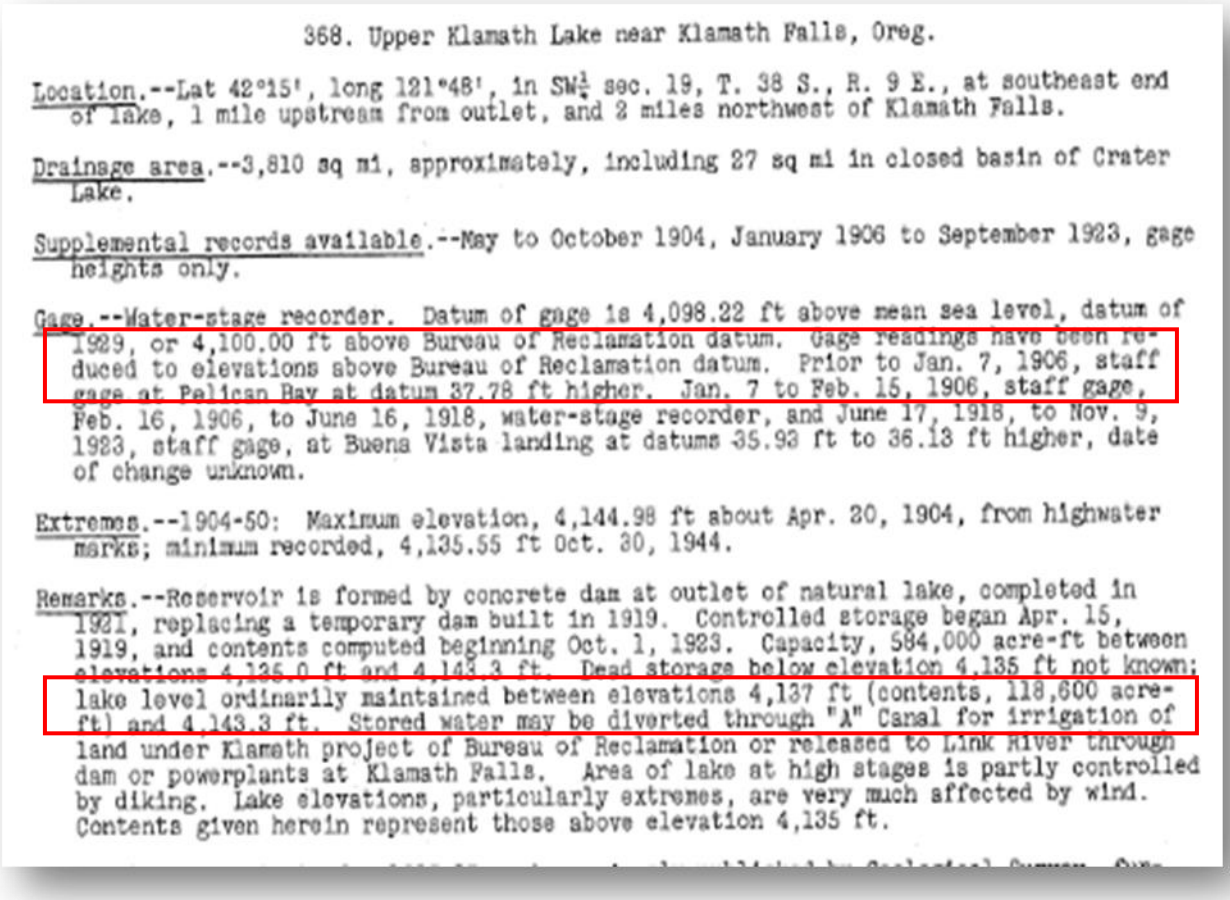


Figure 4. Caption in original.

c. The United States Geological Survey ("USGS") acknowledges Reclamation datum is distinct from USGS records in its "Geological Survey Water Supply Paper 1315-B 1904 through 1950," at page 826. (*See* **Figure 4**, below). When compared to the USGS data in **Figure 5**, it is clear the graphic depiction of UKL levels were not adjusted to match the Reclamation datum. This error contributes greatly to the misunderstanding of the natural conditions of UKL levels.



368. Upper Klamath Lake near Klamath Falls, Oreg.

Location.--Lat 42°15', long 121°48', in SW¼ sec. 19, T. 38 S., R. 9 E., at southeast end of lake, 1 mile upstream from outlet, and 2 miles northwest of Klamath Falls.

Drainage area.--3,810 sq mi, approximately, including 27 sq mi in closed basin of Crater Lake.

Supplemental records available.--May to October 1904, January 1906 to September 1923, gage heights only.

Gage.--Water-stage recorder. Datum of gage is 4,098.22 ft above mean sea level, datum of 1929, or 4,100.00 ft above Bureau of Reclamation datum. Gage readings have been reduced to elevations above Bureau of Reclamation datum. Prior to Jan. 7, 1906, staff gage at Pelican Bay at datum 37.78 ft higher. Jan. 7 to Feb. 15, 1906, staff gage, Feb. 16, 1906, to June 16, 1918, water-stage recorder, and June 17, 1918, to Nov. 9, 1923, staff gage, at Buena Vista landing at datums 35.93 ft to 36.13 ft higher, date of change unknown.

Extremes.--1904-50: Maximum elevation, 4,144.98 ft about Apr. 20, 1904, from highwater marks; minimum recorded, 4,135.55 ft Oct. 30, 1944.

Remarks.--Reservoir is formed by concrete dam at outlet of natural lake, completed in 1921, replacing a temporary dam built in 1919. Controlled storage began Apr. 15, 1919, and contents computed beginning Oct. 1, 1923. Capacity, 584,000 acre-ft between elevations 4,135.0 ft and 4,143.3 ft. Dead storage below elevation 4,135 ft not known; lake level ordinarily maintained between elevations 4,137 ft (contents, 118,600 acre-ft) and 4,143.3 ft. Stored water may be diverted through "A" Canal for irrigation of land under Klamath project of Bureau of Reclamation or released to Link River through dam or powerplants at Klamath Falls. Area of lake at high stages is partly controlled by diking. Lake elevations, particularly extremes, are very much affected by wind. Contents given herein represent those above elevation 4,135 ft.

Figure 4 USGS states, "Gage readings have been reduced to elevations above Bureau of Reclamation datum.

[CONTINUED ON THE FOLLOWING PAGE]

Figure 5. U.S.G.S. Recorded Upper Klamath Lake Elevations 1904-1940. Note UKL Elevations in alongside historical evidence of the Link River being Dry in 1908, 1911, and 1918.

Due to this failure to accurately capture historical UKL water elevation, the DEIS mischaracterizes the natural levels of UKL, which serves as a baseline to the analysis therein and should be revised to accurately reflect the available historical data.

D. The DEIS Also Fails to Comply with the APA Because It Assumes the Availability of Water That Only KID has the Authority to Release

"NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes." *North Carolina Wildlife Federation v. North Carolina Dept. of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012). "Accordingly, agencies violate NEPA when they fail to disclose that their analysis contains incomplete information." *Id.* Similarly, an agency violates NEPA when it "provide[s] the public with erroneous information." *Id*. ("[C]ourts not infrequently find NEPA violations when an agency . . . baseline assumes the existence of a proposed project.").

In several places, the DEIS appears to assume that Reclamation has authority to release flows from UKL. DEIS at, *inter alia*, §§ 2.1.2.1, 2.5.3, 3.1.3.1, 3.1.3.2. However, in 2014 the Oregon Water Resources Department ("OWRD") issued a determination regarding water rights in UKL, titled the Amended and Corrected Findings of Fact and Order of Determination (the "ACFFOD").[11] Among other things, the ACFFOD determined Reclamation possesses rights to *store* water in UKL, but not to use that stored water; KID and other irrigators were found to possess rights to *use* the stored water.

The DEIS makes numerous claims about utilizing flow volume to control the total concentration of sediment in the Klamath River and to effect reservoir drawdown, but offers no analysis of how it proposes to accomplish those objectives in the manner stated without invading KID's water rights. FERC has not entered into *any* agreement to use stored water in UKL, to which the irrigators hold rights. Thus, the DEIS fails to disclose to the public a significant—and erroneous—underlying assumption about the water at issue. As such, the DEIS fails as an informational document, and FERC must revise the document to fully inform the public of the true availability of water for the Project. **E. Conclusion**

Based on the DEIS, there is no way for the public to know whether removal of the dams, ultimately, can be completed with minimal impacts to KID and its customers. The DEIS's statement of purpose and need is too narrow, which causes the DEIS to have an inadequate range of feasible alternatives. The impacts to irrigators due to water supply reduction is almost entirely ignored. To the extent mitigation of those impacts are addressed in one of the cadre of management plans referenced, the public is largely kept in the dark and the acts comprising those plans are conducted without NEPA review. Finally, FERC bases its decision on factually inaccurate and/or disingenuous data regarding the natural conditions of the Klamath River and UKL, as well as on faulty and hidden assumptions regarding rights to the water in UKL.

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11 https://www.oregon.gov/owrd/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx

KID requests FERC decline to approve a Final EIS until the document reflects the "hard look" required by the law, based on accurate and complete historical data. KID also requests FERC consult with KID in order to ensure that impacts to the irrigators are adequately treated in the document so the public will know the full potential aftermath of dam removal.

Very truly yours,

Christopher A. Lisieski

CAL/jb