Farmers, anglers, environmentalists and tribal leaders are looking at a future of insufficient water supplies, economic disruption, litigation and possibly the loss of everything they have worked to achieve.

by JEFFREY A. VOLBERG, *DIRECTOR OF WATER LAW AND POLICY*

Hope for the Lower Klamath National Wildlife Refuge expired on Dec. 31.

The refuge, largely deprived of water since 2012, had one real opportunity for a guaranteed water supply: an agreement forged by the federal government, the states of California and Oregon, farmers and ranchers, fishermen, environmentalists and Indian tribes. It was called the Klamath Basin Restoration Agreement.

All it needed was Congress' approval. When that didn't happen by the Dec. 31, 2015, deadline, the deal collapsed, and the Lower Klamath refuge was left with what it has now: no guarantee of any water for the hundreds of thousands of migrating birds that have long used it as a stopover in their migration.

The final kick in the teeth: The part of the agreement that was the deal-breaker for two key California Congressmen – removing four dams on the Klamath River – became a moot point on Feb. 2 when independent agreement was reached to remove the four dams anyway.

This story has deep roots.

FROM MARSH TO FARMS

The Klamath Basin is a vast complex of lakes and rivers that straddles the border between California and Oregon. Upper Klamath Lake is the largest lake in Oregon, and is the headwaters of the Klamath River. Downstream are the Lower Klamath Lake and Tule Lake, which were originally huge freshwater marshes.

The Klamath Basin is extremely important for waterfowl migrating on the Pacific Flyway into California. Approximately 80 percent of the migrating waterfowl pass through the area in fall and spring to rest, molt and feed as they migrate. Many of California's resident mallards use the area to nest and molt as well.

In 1906, the federal government began the Klamath Project, which "reclaimed" much of the marshland underlying the Lower Klamath Lake and Tule Lake for use as farmland. Land was given to veterans of World War I, who established farms and communities. The area produces hay, grain, potatoes, onions, horseradish and other crops. The Project now routes water from the Upper Klamath Lake and the Klamath River to 210,000 acres of highly productive farmland.

By reclaiming marshland, the Project lowered bird populations and increased grasshopper populations. To restore some of the bird populations and to bring grasshoppers under control, the government dedicated the Tule Lake and Lower Klamath national wildlife refuges.

The refuges, however, were at the bottom of the heap when it came to entitlements to water. The Project's stated purposes do not include refuges, and most of their water rights are agricultural rights that depend on the lease of refuge lands by tenant farmers.

ENDANGERED SPECIES EFFECT

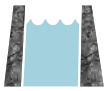
In the late 1990s, the federal government listed the coho salmon, the Lost River sucker and the shortnose sucker as endangered species. To protect the three species, the government determined that Upper Klamath Lake had to be maintained at a high water level. Furthermore, water had to be made available to maintain high flows in the main channel of the Klamath River at certain times of the year to protect migrating salmon.

During a drought in 2001, the Bureau of Reclamation curtailed water for the Basin's farms to maintain high water in Upper Klamath Lake for the benefit of the endangered species. This action precipitated a conflict between the farmers, environmentalists and the local Indian tribes. Farmers opened gates to irrigation canals, and an armed standoff ensued. Each group sought help from the federal government, but was told to work with the other groups to develop a consensus solution to the conflict.

So they did. The Klamath Water Users Association, the Klamath tribes, various environmental groups, and the state, local and federal governments began to negotiate a

settlement agreement. Although they began with a high level of mutual distrust, the groups began to work well together and to devise an agreement that would resolve the water supply issues for the benefit of them all.

THE DAM CONTROVERSY



A related issue was the relicensing of a series of four hydroelectric dams on the main stem of the Klamath River. These dams, now owned by Warren Buffet's PacifiCorp, prevent salmon from using the Upper Klamath River to spawn.

Under federal law, the dams must be periodically relicensed by the Federal Energy Regulatory Commission (FERC). When the existing licenses expired in March 2006, FERC required as a condition of relicensing that two of the dams be removed and that the other two be fitted with fish ladders and other enhancements to allow salmon to spawn in the upper reaches of the river. An alternative was to remove all four dams.

Cost estimates to meet FERC's conditions approached $1 billion, and PacifiCorp balked. Since then, it has operated the dams on year-to-year licenses while the company negotiates a deal with FERC.

Until 2006, the licenses required PacifiCorp to provide electricity at a very low fixed rate, and when they expired, power rates increased by several hundred percent after PacifiCorp received permission to include a portion of the costs of meeting FERC's conditions in the rates they charged to users of the electricity.

By February 2010, the two parallel negotiating processes, one to resolve the conflict among water users and one to resolve the issues surrounding the hydroelectric dams, produced two inter-related agreements.

The Klamath Hydroelectric Settlement Agreement established a framework for removing the four dams. Under the agreement, PacifiCorp's liability for the costs of removing the dams was limited to $200 million.

At the same time, the Klamath Basin Restoration Agreement, or KBRA, provided a settlement among the various water users in the Klamath Basin. But the KBRA would go into effect only if agreement was reached to remove the dams, and only if authorized by Congress by Dec. 31, 2015.

From the standpoint of California Waterfowl, the most important feature of the KBRA was a guaranteed water supply for the Lower Klamath National Wildlife Refuge.

The main obstacle to passage of a bill authorizing the KBRA came from Congressmen Tom McClintock, R-Elk Grove, and Doug LaMalfa, R-Richvale. Their districts include portions of the Klamath Basin, so any agreement needed their approval. Both adamantly oppose removal of the PacifiCorp's dams, arguing that the dams provide a cheap, clean source of power that does not rely on fossil fuels.

Without their support, Congressional efforts to authorize the KBRA died on the vine. Several parties to the agreement – including Indian tribes, certain fisheries and some environmental groups – decided not to continue supporting the KBRA if legislation was not passed in time. The agreement expired at the end of 2015, and that was it.

DAMS BECOME MOOT POINT

In 2014, California voters passed Proposition 1, a water bond that includes $475 million to meet certain state obligations under various water-related agreements, including the KBRA. The governor's office offered $250 million from the bond to encourage passage of a bill authorizing the Klamath Basin agreement.

Ironically, failure to pass a bill in Congress left PacifiCorp free to decide what to do with the dams, and it requested the promised $250 million to help it remove them. The dams provide only 2 percent of the electricity PacifiCorp generates, which it can easily make up from other sources.

On Feb. 2, the states of California and Oregon, PacifiCorp, and the Department of the Interior reached agreement in principle to remove the dams, and PacifiCorp will receive the $250 million in Prop. 1 money to do it.

So now the dams will be removed, despite the opposition of the local representatives, with much of the cost being borne by the ratepayers and taxpayers.

But the farmers, anglers, environmentalists and tribal leaders who worked together to ensure they all get a fair share of the water will not get anything. They are looking at a future of insufficient water supplies, economic disruption, litigation and possibly the loss of everything they have worked to achieve.

From California Waterfowl's perspective, the refuges remain vulnerable to the loss of water supplies. Waterfowl migrating into California will arrive in worse body condition from the lack of food at this most important stop-over point. Crowding on the available water will exacerbate outbreaks of avian diseases that have killed tens of thousands of birds during the recent drought years.

It's hard to see a way out of the problem at this point, but California Waterfowl will continue to actively participate in the search for solutions.