

**William Kennedy  
Chairman of the Board  
Family Farm Alliance**

**Testimony Before the Task Force  
On  
Improving the National Environmental Policy Act**

**Field Hearing  
Spokane, Washington  
April 23, 2005**

Chairwoman McMorris and Members of the Task Force:

My name is Bill Kennedy, and I traveled here today from Klamath Falls, Oregon on behalf of the Family Farm Alliance. The Alliance advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. The Alliance is focused on one mission – To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

The ranch that I operate is one of 1,400 family farms and ranches that depend on water supplies from the Klamath Irrigation Project (“Project”). I sit on the board of directors for several irrigation districts, and I’m also a board member of the Klamath Water Users Association.

I am encouraged that the Task Force on Improving the National Environmental Policy Act (NEPA) has been formed to address the current state of this important environmental law. While the Task Force will likely hear many stories of how agency interpretation of NEPA compliance has slowed or even stopped development of projects throughout the West, I would like to give you a slightly different perspective today. The members of the Family Farm Alliance have many examples of how onerous and expensive processes associated with NEPA compliance contributed to slowing and complicating the development of otherwise feasible water supply enhancement projects in Western states. In fact, the president of the Alliance – Patrick O’Toole of Savery, Wyoming – recently provided two detailed case studies relative to this matter to the House Subcommittee on Water and Power at an oversight hearing last week in Washington, D.C.

However, today I want to provide another, even more serious example that demonstrates the apparent double-standard agencies sometimes exhibit when it comes to NEPA compliance. While NEPA can sometimes be employed by agency staff in a manner that makes development very difficult and expensive, in my situation, compliance with NEPA by federal agencies was bypassed, to the detriment of my entire community. I am talking, of course, about the 2001 curtailment of Upper Klamath Lake water to the landowners in the Klamath Irrigation Project. We believe that a proper treatment of NEPA in 2001 would have served to protect our rights and livelihoods, prevent destruction of the human environment and their communities, and avoid outright catastrophe. Ultimately, however, the federal government chose to operate Project facilities in a way that eliminated any and all deliveries of water for Klamath Project irrigation on 170,000 acres of land. In addition, two national wildlife refuges went dry.

The heart of this matter is a change in the operating criteria or rules for the Klamath Project announced on April 6, 2001, well into the normal irrigation season. Instead of operating to serve irrigation water needs, the Klamath Project that year was to be operated to cause water shortage and devastate water users, ignoring all other water use and activities in the Klamath Basin.

### **Klamath Project Farming**

Thousands of people — family farmers and ranchers, their employees, and agriculture-related businesses — make their living directly from farming and ranching in the Klamath Project. In turn, their activities support the communities of Malin, Merrill, Bonanza, Tulelake, Newell, and Klamath Falls.

The irrigated farm land of the Klamath Project includes about 230,000 acres. Of this, the great majority is served from diversions from Upper Klamath Lake and points immediately below on the Klamath River. Another area is served via Lost River and the two smaller reservoirs on the Lost River System – Clear Lake and Gerber Reservoirs. Farmland in the Klamath Project produces well over \$100 million annually in direct revenue, and generates roughly \$300 million in economic activity, supporting the farm families, farm workers, businesses and local communities. In addition, there are two national wildlife refuges in the Klamath Project area: Lower Klamath National Wildlife Refuge and Tulelake National Wildlife Refuge. The refuges have rights inferior to irrigation for water, but rely on the same delivery system for water as irrigation. The refuges are heavily dependent on “return flows” from irrigated agriculture in the Klamath Project.

Klamath Project irrigation and refuges are, of course, only some of the many uses of water in the much-larger Klamath Basin. Upstream of Upper Klamath Lake, there is an estimated 200,000 acres of irrigated land and other uses that divert water. Downstream, on tributaries to the Klamath River in California, there are large areas of irrigated lands, particularly in the Shasta and Scott River Valleys, and an out-of-basin export to the Central Valley of California from the Trinity River that, in the recent past, amounted to one million acre-feet of water per year. Nevertheless, in the long history of the Klamath Project up to 2001, the water supply has ordinarily been sufficient to meet these uses, and there have been only a few years when water shortage occurred to either Klamath Project irrigation or refuges. These shortages occurred late in the irrigation season when forecasted supplies did not fully materialize.

### **Historic Operations**

For 90 years, Klamath Project reservoirs and diversion facilities were operated to serve the authorized irrigation purpose of the Klamath Project. There were no downstream Klamath River flow requirements or minimum Upper Klamath Lake reservoir elevations binding on Klamath Project irrigation users. The focus of Project operations was to optimize irrigation diversions. Upper Klamath Lake reservoir elevations were the result of releases for power generation, judged against irrigation. Clear Lake and Gerber Reservoirs have also been operated historically to conserve water for, and provide water to, the irrigation districts on the east side of the Klamath Project.

### **Demand for Change in Purposes of Operation**

Starting in the 1990’s, political and regulatory demands have affected activities at the Klamath Project. For example, in 1988, the short nose sucker and the Lost River sucker, two species that live in Upper Klamath Lake, were designated as endangered under the Endangered Species Act (ESA). Biological opinions issued by the U.S. Fish and Wildlife Service in 1992 and 1994 concerning operation of the Klamath Project identified Reasonable and Prudent Alternatives (RPAs) to avoid jeopardy to suckers. When the suckers were listed, there had been no mention whatsoever of reservoir elevations as a factor affecting sucker populations. Nonetheless, these biological opinions included minimum reservoir elevations to protect the suckers. These operating elevations were adopted by the Bureau of Reclamation (Reclamation). The reservoir elevations pertaining to Upper Klamath Lake generally allowed the Project to operate for its intended purposes. During the mid-1990’s, a court found the reservoir elevations pertaining to sucker populations in Clear Lake and Gerber Reservoirs to be arbitrary and capricious, and they were invalidated in a succession of decisions.

In late 1994, demands were made by various parties that Reclamation reprioritize and reallocate water. In particular, demands were made that Reclamation take steps to increase both Klamath River flows (as measured at Iron Gate in California) and Upper Klamath Lake reservoir elevations above and beyond the adopted ESA lake levels. The demand was that new flow requirements and lake elevations be set with Klamath Project irrigation and refuges eligible for only the amount of water left over.

In 1995, Reclamation announced that it would develop a plan for the long-term operation of the Klamath Project. The Klamath Project Operations Plan (“KPOP”) was to define water allocation scenarios in various year types. Reclamation also stated that it would prepare an analysis of environmental impacts under NEPA prior to adopting a KPOP. The KPOP was to be adopted before the 1996 irrigation season. A draft long-term KPOP was prepared but not released. Instead, a water “advisory” was released for 1996, and Reclamation stated that it would prepare a long-term KPOP and Environmental Impact Statement (EIS) by 1998.

### **Changes to Klamath Project Operations**

In 1997, Reclamation made a fundamental change in the operation of the Klamath Irrigation Project. Prior to that time, Project reservoirs and other facilities were operated to ensure irrigation deliveries; the authorized purpose of the Project. In 1997, priorities were reversed, such that the Project was operated to increase flows in the Klamath River and to maintain high lake levels in the Upper Klamath Lake reservoir, with only the water left over being available for irrigation and wildlife refuges that the Project had previously served for nearly a century. In more blunt terms, the Project was operated in a manner to promote the potential for water shortages.

The change in operations led to a lawsuit under NEPA. Water users in 1997 contended that the change in operating criteria required an EIS under NEPA. The matter did not come before the court until July of 1997, by which time the court concluded that there would not be any injury (i.e., there turned out to be enough water to meet irrigation and wildlife refuge needs during the irrigation season in 1997). The court admonished Reclamation, however, to comply with NEPA with respect to any such future plans regarding Project operations.

Reclamation, at that time, represented that it would conduct NEPA review in the future and, in particular, that it would complete an EIS for long-term (multi-year) operations of the Klamath Project by 1999. The NEPA claim was ultimately dismissed as moot. In the stipulation for dismissal, Reclamation represented that it would comply with NEPA for its future operations plans. The stipulation also recognizes that for purposes of the NEPA analysis, the “baseline” for determining impacts would be full agricultural water deliveries.

### **2001 Operations Plan**

By 2001, four years had elapsed since Reclamation’s commitment to comply with NEPA and two years had passed since Reclamation represented to the court that it would complete an EIS for long-term operation of the Project. However, that year the federal agencies sought to bypass both their legal duties to the water users and NEPA, based on provisions of the ESA. The resulting action was based, in part, on the amazing conclusion that such shortages are a “reasonable and prudent” alternative that fulfills the purposes of the Project.

On April 6, 2001, Reclamation announced another one-year change in the historic operation of the Project. That change ultimately had dire repercussions for our community. On that day, USFWS and NMFS each issued new biological opinions (for suckers and newly-listed coho salmon, respectively) for Klamath Project operations. To achieve the Klamath River flows at Iron Gate in California and the Upper Klamath Lake elevations specified as “reasonable and prudent alternatives” in these opinions would result in no water whatever for 170,000 acres in 2001. The same date, Reclamation issued a plan adopting these standards, literally triggering disaster.

NEPA requires federal agencies to prepare an EIS before the implementation of “major Federal actions significantly affecting the quality of the human environment.” The federal government in 2001 did not fulfill their NEPA obligations. Instead, they merely adopted an Operating Plan in 2001 that ultimately harmed our family farms and rural communities.

### **Impacts to the Community**

The types of economic, human, and environmental suffering threatened by the 2001 Plan were catastrophic. Hundreds of farm and ranch families without income experienced hardship trying to support themselves. Their ability to pay bills and service debt was impaired. Collateral (land, equipment) was forfeited. Bankruptcy occurred. Similar types of impacts occurred for farm employees, and for the owners and employees of the agriculture related businesses. Long-term supply arrangements were lost because of nonperformance. The demand for social services increased. Some people simply moved out.

City parks, schoolyards, and cemeteries went without water. Farm fields became fields of weeds and dust. Tremendous wind-borne soil erosion occurred, impairing land productivity and causing air pollution.

Irrigated farmland provides food and habitat for the abundant waterfowl, deer, antelope, and other species. This value was also lost. Tragically, two of the nation’s premier national wildlife refuges were left without water for wetlands and waterfowl habitat.

Increased chemical use needed to control weeds and pests has occurred in the years since 2001. Fields left fallow in 2001 showed decreased production in subsequent years.

The harm to the Upper Klamath Basin was overwhelming, and we are to this day feeling its effects.

### **NEPA Disregarded**

As previously noted, NEPA requires the preparation of an EIS before the implementation of actions significantly affecting the quality of the human environment. One of NEPA’s goals is to facilitate widespread discussion and consideration of the environmental risks and remedies associated with a project, thereby augmenting an informed decision-making process. NEPA is a deliberate command that the consideration of environmental factors not be shunted aside in the bureaucratic shuffle. The requirement for pre-decision environmental review applies both to new projects and changes to an ongoing project.

In addition to the discussion of impacts of an action, core elements of an EIS are the identification of alternatives and mitigation measures. If an agency is uncertain whether an EIS is required, before making any decision to go forward with a federal action, the agency must prepare an environmental assessment (EA). If the agency determines, based on the EA, that a proposed action has the potential to “significantly affect the quality of the human environment,” then the agency must prepare an EIS. But the agency must prepare at least an EA and “convincing” findings in the record before concluding that impacts will not be significant. Otherwise, the failure to prepare an EIS is inconsistent with the law.

In the 2001 Klamath Project case, there was no EIS and no EA, and, it would appear, no NEPA compliance.

### **The 2001 Plan Represented “changes in the programmed operation of an existing Project.”**

The 2001 Operating Plan was a revision to the ongoing management of the Klamath Project. In addition to revising the water allocation scheme, the authorized purposes of the Project were subordinated to guaranteeing Klamath Lake reservoir elevations and flows at a specific location in the Klamath River. Regardless of the purpose of the change, the reallocation was a dramatic change from historic operation of the Klamath Project, and NEPA should have applied.

In 1996, Reclamation committed to NEPA compliance for both annual and long-term plans. The federal government took no action to comply with NEPA before deciding to adopt the 2001 Plan. Four years had elapsed since the court admonished the federal government to comply with NEPA for its changes from historic operations. The completion of an EIS slipped and slipped again, and, in 2001, the agencies proposed to devastate farm families, Klamath Project communities, and the environment without any meaningful or public consideration of impacts or alternatives.

### **The 2001 Plan Was a Major Federal Action**

The decision to adopt the 2001 Plan was a major federal action. It had the potential to dramatically affect the environment. Proper timing of environmental review is one of NEPA’s central themes. The purpose of such early review, of course, is to prevent the proposal from gaining such momentum that the government loses the ability to avoid or minimize significant environmental effects, and so that delayed environmental review becomes a post-hoc rationalization for the project.

On April 6, the day of issuance of the 2001 Operations Plan, Reclamation did not release any NEPA documentation. Reclamation first produced an Environmental Assessment (“EA”) only after water users filed a lawsuit.

Unfortunately, the preparation of an EA does not necessarily constitute NEPA compliance. For actions that cause significant adverse effects, an EIS must be prepared, analyzing impacts, mitigation, and alternatives. If the agency concludes there are no significant impacts, it must prepare a Finding of No Significant Impacts (“FONSI”). In 2001, there was no doubt whatever that the impacts from change in operation of the Project would be monumentally significant.

The federal government admitted that they failed to complete the required NEPA review before issuing the 2001 Plan. They further claimed that the 2001 Plan represented an annual operations plan for a continuously operating reclamation project, and so they should not have to *complete* NEPA review for the Plan. The 2001 Plan represented a complete abandonment of the authorized purpose of the Project and a major change in historical operations as recognized by the court previously. Thus, the 2001 Plan was a “major federal action” requiring an EIS under NEPA.

Reclamation’s concession that the issuance of the 2001 Plan was subject to NEPA appears to suggest that Project operations may be subject to NEPA... but only a little bit of NEPA.

### **Finding of the Court**

The committee should be aware that when a lawsuit was filed by water users claiming violations of NEPA and seeking immediate water deliveries, the court in its preliminary injunction ruling found there was likely not a violation of NEPA because the ESA would trump NEPA. That preliminary ruling was effectively the end of that case because it was our only hope for obtaining historic water deliveries in 2001.

In effect, the multi-year delay in evaluating potential impacts to agricultural communities and wildlife led to a situation where such impacts did not have to be evaluated at all. We were told that impacts to our environment, our communities, our wildlife, do not count.

The further irony, of course, is that the National Academy of Sciences later confirmed that the water allocations to ESA-listed fish in the Klamath River and Upper Klamath Lake were not scientifically justified, meaning the severe impacts to our community which did not count and were not considered, were not necessary.

### **Summary**

In summary, the issuance of the Biological Opinions and the adoption of the 2001 Klamath Project Operations Plan were subject to full NEPA compliance, which Reclamation admitted it did not undertake, much less complete. Even though the EA prepared by Reclamation “disclosed potential environmental effects from Project operations . . . that could prove significant,” Reclamation did not issue a FONSI. Additionally, Reclamation admitted that it “did not prepare an EIS prior to the issuance of the 2001 Plan either.”

Federal agencies cannot pick and choose when they will comply with NEPA, and do so in a way that will destroy family farms, social structures, communities, and the environment. A massive change in historical operations requires NEPA compliance.

Klamath water users believe Reclamation had an obligation to consider and protect the contractual rights of water users. Indeed, Reclamation admitted that in its aborted NEPA process, it intended to look at its contractual obligations to water users, and would have evaluated, as potential alternatives, means by which those rights could have been protected. However, when it abandoned NEPA, it also abandoned even a superficial effort to consider its contractual obligation and the rights of Project water users. And it did this without any analysis or justification whatsoever.

## **Recommendations**

It is difficult for me to come away from the events of 2001 and offer up meaningful lessons learned. For the purposes of today's hearing, I believe the example I have just laid out demonstrates that NEPA –like so many federal laws and regulations – can be applied to any situation in a manner that is largely dependent on the demeanor of the agency staff that has jurisdiction in the manner. It is clear that NEPA can be applied in an arbitrary fashion. On the one hand, an advocacy group points out that NEPA has not been adequately addressed and the court shuts down intended actions. In another case, a judge agrees with a plaintiff that NEPA has not been implemented, and still allows for the action in question to continue.

So, the best advice we have to offer in these situations is to stress the importance of developing sound, working relationships with the federal agencies in your neighborhood.

While the 2001 Klamath NEPA issue is personally frustrating, I can tell you that the Family Farm Alliance is very concerned with this issue from a broader policy standpoint, especially as it relates to the development of new water supply enhancement proposals. We have a few specific recommendations that we hope the Task Force will consider as it deliberates this matter:

1. **NEPA analyses should require that value be assigned to continued agricultural production in a project area.**
2. **Impacts of drought and continuing water demands must be assessed and built into the NEPA process.**
3. **Anything that can be done to streamline the overall permitting process (NEPA, ESA, Clean Water Act, etc.) should be encouraged.** The federal government should consider developing a binding “pre-application” meeting, where the project proponents and all applicable federal agency representatives are present to provide a realistic, initial assessment of whether or not “stopper” issues or other regulatory-related fatal flaws will make permitting a prolonged and expensive endeavor.
4. **Agency work on biological opinions should be required to keep pace with development of NEPA compliance documents.** This could lead to improved regulatory streamlining and minimization of big surprises at the “end” of long and expensive regulatory processes.
5. **Congress should consider legislation** that would allow the state's legislative and planning process to be considered in establishing purpose and need for construction of dam and reservoir projects.
6. **If Congress is unwilling to expand the state's role in establishing the purpose or need for a project, the project sponsor and the state must work within existing guidelines to maximize opportunities.** Working within either existing or expanded

federal guidelines would facilitate the NEPA analysis, from which all other permitting processes will tier. The challenge will be to convince regulators, during the permitting process, that the benefits of constructing a proposed future project outweigh the adversities; consequently, there is a justifiable “purpose and need” for the project.

7. **Developing a reasonable range of alternatives is also very important in project planning and the NEPA process.** Alternatives must meet the need and purpose for the project and must be capable of being implemented. It is important to use the NEPA process to help determine the most appropriate alternative from the set of reasonable alternatives.
8. **Cooperative efforts are important for moving projects through the NEPA and permitting processes.** State and local sponsors should become cooperating agencies in the NEPA process if possible and if not, should be allowed to serve on the project EIS interdisciplinary team.

Dam and reservoir projects are complex and often controversial. A dedicated local sponsor or project proponent and a documented “purpose and need” are minimum requirements for success.

### **Conclusions**

I do not expect that the events of 2001 in the Klamath Basin will be resurrected. I believe that the 2001 crisis opened the eyes of many policy makers and agency managers. We are seeing improved coordination and cooperation in the Klamath Basin, particularly from local officials employed by the Bureau of Reclamation and the U.S. Fish and Wildlife Service. Cooperative efforts are important for moving projects through NEPA and permitting processes. Establishing working relationships with the agencies involved in the NEPA process and permitting is critical. Good cooperation and communications between agencies and groups, with an understanding of each participant’s expectations, will help in future problem resolution.

Thank you.