

Myth: “The KBRA undercuts the California Endangered Species Act (CESA) and sanctions “take” of certain species in violation of CESA.

FALSE: Neither the Klamath Hydropower Settlement Agreement (KHSA), nor the parallel Klamath Basin Restoration Agreement (KBRA), “waive” or limit the California ESA to any degree. Critics on this point are simply confusing CESA with another *much older* (and now obsolete) provision of California law that is legally unrelated to the California ESA, but which needs to be waived in this *limited and specific instance* to allow dam removal and other habitat restoration measures which, in the long run, are intended to *benefit* these species far more than harm them.

At question is a possible very limited waiver of one obscure provision of California wildlife laws that defines a short list of certain “fully protected species” codified in Cal. Fish & Game Code Sections 3511 and 5515. *These sections predate the California Endangered Species Act (CESA), and were largely replaced by CESA (except for this remaining list of species in sections 5515 and 3511) because they are a “zero tolerance” or “no impacts” policy that is unworkably inflexible.* Those specific species from this statutory list which occur in the Klamath Basin include: Lost River sucker, shortnose sucker, bald eagle, American peregrine falcon and golden eagle.

In other words, it would currently be legally impossible to remove dams in the Klamath (or anywhere else in California), or do any other habitat restoration measures, that “might” even potentially adversely affect any of these specifically named, so-called “fully protected species.” Unfortunately, there simply is no CESA-like “incidental take” exemption available under Fish & Game Code Section 3511, even when the small (but short-term) harm is a necessary price for much greater long-term conservation benefits. CESA was adopted much later to remedy that inflexibility problem, but this remaining portion of the old statute was never actually repealed.

A placeholder statement therefore appears in the KBRA at Section 24.2 that memorializes the intent of the California Department of Fish and Game to introduce legislation, after the State of California as concurred with a Secretarial Determination in favor of dam removal (i.e., in May 2012), to provide a limited authorization for incidental take of these “fully protected species,” upon the fulfillment of appropriate conservation and mitigation conditions, to allow these important Klamath River habitat restoration measures (including dam removal) to go forward. The very similar parallel CESA requirements for mitigated “incidental take” would also remain, and would also have to be satisfied at that time, probably with the same mitigation measures.

Objecting to such a limited (and appropriately mitigated) waiver of the “fully protected species”

laws makes no sense. Such “incidental take” waivers already exist in CESA. Keeping California Fish and Game Code Secs. 3511 and 5515 as it is simply legally blocks the Department’s ability to do many forms of watershed restoration, not to mention dam removals, and not only in the Klamath but all over the state – i.e., wherever any of these so-called “fully protected” species are present.

Those who are concerned about this issue will have ample opportunity to debate the merits of any changes to these obsolete sections, including proposing species conservation conditions on such a waiver, in the California Legislature in 2012 and later.

Regardless of such limited changes, both the regular CESA (and the federal ESA) protections would still apply to regular agricultural practices and irrigation water diversions in the basin. No mere contract such as the KBRA can overturn, change or modify these state and federal laws.

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