

UPPER KLAMATH LAKE AND THE SECTION 106 PROCESS: UNDERTAKINGS, AREAS OF POTENTIAL EFFECT, AND FEDERAL RESPONSIBILITY

KELLY KRITZER*

I. INTRODUCTION

Upper Klamath Lake¹ has long sustained a population deeply intertwined with the natural rhythm of this rich resource. The lake and its surrounding environment provided food, raw materials, and spiritual sites for the people of the Klamath Tribes. Numerous villages, campsites, and burial areas once rimmed the shores of Upper Klamath Lake² prior to the removal of the Klamath Tribes from the majority of these locations by the Treaty of 1864.³ Today these sites lie unprotected and exposed to negative impacts.

Erosion from weather and wave action has subjected many of the historic properties to loss of vegetative ground cover and soil. Exposure of these sites has led to further negative impacts from vandals and looters, who canvas the lakeshore for artifacts. For example, exposure, primarily from a fluctuating lake level and wave action, of an important burial location along the eastern shore of Agency Lake resulted in serious degradation of that site.⁴ Site stabilization measures, such as the placement of soil-stabilizing riprap,⁵ has somewhat decreased the loss to this site.⁶ Yet the fluctuating lake level, one of the major factors that adversely affect historic properties along Upper Klamath Lake, continues to exacerbate erosion and exposure of this and other lakeshore sites.

Historically, Upper Klamath Lake naturally fluctuated with the seasons, yet presently the lake level varies more to meet modern needs. Currently, Upper Klamath Lake is a highly regulated water-storage reservoir for two major projects. The Klamath Reclamation Project, a massive system of canals and ditches, sends lake water for irrigation use to farmers farther south.⁷ In addition, the lake serves the needs of the Klamath River Hydroelectric Project, a series of dams and power-generating facilities that extend from Upper Klamath Lake southwestward along the Klamath River.⁸

Control of the lake level is maintained through the Link River Dam, a small dam near the entrance to the Link River at the southern end of Upper Klamath Lake.⁹ Owned by the

* B.A. Anthropology, University of Michigan, 1991; M.S. Archaeological Resources Management, Ball State University, 1995; J.D. Candidate, Willamette University College of Law, 2003.

1. For the purposes of this Note, the term "Upper Klamath Lake" also includes Agency Lake, a smaller body of water separated from Upper Klamath Lake by a short strait at Upper Klamath Lake's northern end.

2. The Klamath Tribes also established villages and campsites along the many other lakes, marshes, and rivers of the Klamath Basin. LESLIE SPIER, *KLAMATH ETHNOGRAPHY* 10-21 (1930).

3. Treaty with the Klamath Indians, Oct. 14, 1864, art. 1 et seq., 16 Stat. 707.

4. General Authorization for Erosion Control Permit from Oregon Division of State Lands to Perla Development Co., Inc. (Nov. 5, 1996) (on file with Willamette Law Review). The "erosive actions of waves and ice" receded the shoreline "approximately 15 to 20 feet from its historical location," which has exposed and adversely impacted sites of extreme cultural importance to the Klamath Tribes. "Unless treated, the shoreline [would] continue to recede and thus [would] continue to adversely impact cultural and environmental resources." *Id.* at 8.

5. *Id.* at 16. The project utilized a geotextile fabric installed along the shoreline, which was covered with three inches of sand and gravel. Rock riprap (dense and durable rock fragments) was then placed atop the project area.

6. Interestingly, Pacificorp facilitated protection of this burial area in a collaborative effort with the Klamath Tribes and the Bureau of Reclamation, among other parties.

7. See Eric A. Stene, *The Klamath Project* 18 (1994) (unpublished manuscript, on file with Willamette Law Review).

8. See Pacificorp, *Klamath Hydroelectric Project*, FERC No. 2082, First Stage Consultation Document 1-1, 2-18 (Dec. 2000) (unpublished manuscript, on file with Federal Energy Regulatory Commission).

9. *Id.* at 2-1, 2-18.

Bureau of Reclamation (BOR),¹⁰ the federal agency responsible for managing the Klamath Reclamation Project, Link River Dam is operated under contract by Pacificorp, a private corporation federally licensed to manage the Klamath River Hydroelectric Project.¹¹ Pursuant to a modification in its operation contract, Pacificorp's operation of the dam must provide water for both irrigation and power generation, as well as provide for flood control and habitat protection for fish.¹²

Presently, neither the BOR nor Pacificorp has formally considered the impacts of its actions and operations on the historic properties surrounding Upper Klamath Lake. In accordance with the National Historic Preservation Act of 1966, the BOR and Pacificorp, which operates under license from the Federal Energy Regulatory Commission, must consider the impact of their actions on historic properties.¹³

This Note discusses the responsibilities of the BOR and Pacificorp to address the negative impacts resulting from their actions that affect historic properties along Upper Klamath Lake. The Note provides a brief background of the history of Upper Klamath Lake, discusses the purpose and process of the National Historic Preservation Act of 1966,¹⁴ defines the meanings of "undertaking" and "area of potential effects" as pertaining to that Act, and determines whether the independent actions of the BOR and Pacificorp respectively fall within those definitions. Finally, this Note draws a conclusion as to whether either entity has met its responsibility.

10. In 1917, Pacificorp's predecessor, California and Oregon Power Company, constructed the dam "at its own expense" with the agreement that it would "operate it to serve" the BOR's Klamath Reclamation Project. Pacificorp, Klamath Hydroelectric Project, FERC Project No. 2082, Explanation of Facilities and Operational Issues Associated with Pacificorp's Klamath Hydroelectric Project 5 (May 2002) (unpublished manuscript, on file with Pacificorp). Ownership of the dam was transferred to the BOR under a subsequent agreement. *Id.*

11. Pacificorp, *supra* note 8, at 2-18.

12. *Id.*

13. 16 U.S.C. § 470 (2000).

14. *Id.*