

Water Review

A Perspective On Western Water Issues Prepared By The Family Farm Alliance And Its Members

OREGON, CALIFORNIA

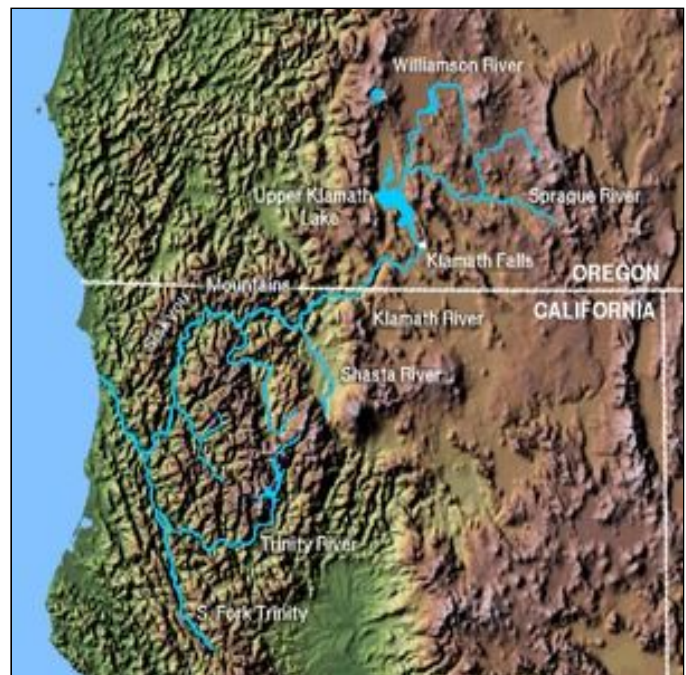
The Klamath Settlement Pact Includes Key Elements Between Basin Tribes And Reclamation Project

OVERVIEW

Earlier this month, negotiators representing the diverse communities of the Klamath Basin (OREGON, CALIFORNIA), along with federal, state, and county governments, released a proposed agreement to rebuild fisheries, sustain agricultural communities, and resolve other longstanding disputes related to allocation of basin water resources. The proposed agreement would have a 50-year term and identifies a purpose as establishing “peace on the river”. The Klamath Settlement Group has developed this proposed agreement in two years of negotiations.

On the January 15 agreement release date, Greg Addington of the Klamath Water Users Association said, “The result is a series of compromises and commitments between farmers, tribes, conservationists, counties and state and federal agencies aimed at keeping all of the Klam-

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Wikimedia

The Klamath River watershed.

Klamath: Tribal Claims Are Key Settlement Element

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ath's rural communities economically and ecologically viable."

Of interest to many – and an issue of considerable controversy – are provisions in the proposed Klamath Basin Restoration Agreement (KBRA) that are structured to settle tribal water rights claims between tribes in the Klamath Basin and the Klamath Irrigation Project. This edition of the *Family Farm Water Review* has been prepared with the assistance of the Klamath Water Users Association, one of the parties that has helped develop the proposed agreement over the course of two years of negotiations.

WATER RIGHTS SUMMARY

Under the proposed agreement, water users in the Klamath Project would essentially agree to limit the quantity of water diverted from Upper Klamath Lake and the Klamath River from the Project's points of diversion to a specified amount. The KBRA also provides for funding of a program so that project water users will be able to "live within" the agreed quantity.

The settling Tribes, and the United States as their trustee, would agree not to assert tribal rights so as to interfere with diversion and use of this agreed Project use of water, making it guaranteed as far as tribal water rights and trust obligations of the Bureau of Reclamation ("Reclamation") are concerned; this aspect of the agreement would have permanent effect. In the Klamath Basin Water Rights Adjudication, where claims of the Klamath Tribes are scheduled to be litigated in the next few years, the KBRA terms would be implemented through documents filed with the state.

The agreement would not result in granting any tribal water rights to any tribe or affect the ability of any opponent of tribal claims other than Project water users to contest any tribal claims. The agreement only deals with:

- Whether or to what extent the Klamath Tribes can make a call against, or

Summary of Other Agreement Provisions

Other key provisions of the Klamath River Basin Restoration Agreement include:

- A reliable and certain allocation of water sufficient for a sustainable agricultural community and national wildlife refuges.
- A program to stabilize power costs for the Upper Klamath Basin's family farms, ranches and the national wildlife refuges.
- A program for counties that may be impacted by the removal of the hydroelectric facilities.
- A program to rebuild fish populations sufficient for sustainable tribal, recreational, and commercial fisheries. Elements include actions to restore fish populations, including a program to reintroduce anadromous species in currently-blocked parts of the basin; actions to improve fish survival by enhancing the amount of water available for fish, particularly in drier years; and other efforts to support tribes in fisheries reintroduction and restoration efforts.

The Klamath Settlement Group is still working to refine some details in the agreement. The group is also negotiating with PacifiCorp to reach agreement on the removal of the utility's four lower dams in the Klamath Basin. That eventual hydropower settlement agreement will become part of the overall restoration effort.

demand water from, the Klamath Project based on the Klamath Tribes rights in Upper Klamath Lake and the Klamath River, whatever those rights may be.

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Klamath:

State Of Oregon Water Rights Adjudication

Wocus Bay on
Upper Klamath Lake.

Oregon Historical County Records Guide

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- Whether tribes on the lower river can demand the Project use less water than what would be agreed upon.

In both cases, the answer is “no”, says KWUA attorney Paul Simmons (CALIFORNIA). “No one else is affected in any way.”

There are, in the meantime, various interim protections for the Project. Until the water users have implemented their on-project plan, the Tribes would not be able to assert a demand based on tribal water rights against any water use in the Klamath Project. There are also various provisions that ensure that, if the agreement is not implemented, Klamath Project irrigators and the tribes will simply return to their positions that exist today and be able to assert their arguments against one another, just as they can today.

BACKGROUND

The State of Oregon is currently conducting an adjudication of water rights that is to determine the nature and extent of water rights of the Klamath Tribes to have water remain in streams and lakes. This proceeding is in an administrative phase.

Following the issuance of the “Findings of Fact and Order of Determination” (FFOD) by the Water Resources Department, parties have the opportu-

ity to file exceptions in Klamath County Circuit Court, where further litigation would occur before the issuance of a decree. In the meantime, however, the state will regulate water rights based on the FFOD unless that order has been stayed.

In 1983, the United States Court of Appeals for the Ninth Circuit, in the Adair case, ruled that the Klamath Tribes have water rights for fisheries purposes on the Tribes’ former reservation with the priority of “time immemorial.”. The federal court further stated that the actual scope and quantification of the Klamath Tribes rights would be decided in the state adjudication.

In the adjudication, the Klamath Tribes, and United States as trustee, have filed various claims for instream flows including for:

- Tributaries of Upper Klamath Lake.
- Water to maintain Upper Klamath Lake elevations.
- Flows in the Klamath River from Link River Dam to the Oregon-California border.

Irrigation interests are contesting these claims because approval of the claims could have major adverse consequences for irrigators. Klamath Project irrigators are contesting only the claims for Upper Klamath Lake and the Klamath River because these are the only claims that could adver-

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Klamath: Water Settlements Within The Agreement

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sely affect the Project.

Irrigators in the Upper Klamath Lake watershed are contesting those same claims, as well as the claims for water in the tributaries of Upper Klamath Lake.

These claims are all currently scheduled to go to hearing within the next few years.

“The costs of opposing these claims would be very significant, and the outcomes are uncertain for all involved,” says Mr. Addington.

There is no adjudication process in progress related to water rights of Tribes on the lower Klamath River.

Federal courts have held that the Yurok and Hoopa Valley Tribes have federal reserved fishing rights on the Klamath River.

The tribes assert water rights for those fisheries as well as trust obligations of Reclamation to provide flows.

The Solicitor of the Department of the Interior has issued opinions that conclude that the tribes in fact hold water rights for Klamath River flows, with 19th-century priority. The scope of any such rights is of course a matter of debate.



U.S. Bureau of Reclamation

The Klamath River

WATER SETTLEMENTS

The proposed KBRA deals with tribal water rights issues in several areas. One provision that is central to permanent resolution of the water rights issues involving tribes, provides interim assurances that the tribes will not demand water from the Klamath Project that interferes with diversion of the agreed water use for the Project. This specific assurance becomes permanent if certain conditions occur

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Klamath: ‘Common Approach’ In Such Cases

before December 31, 2012. The Secretary of the Interior would be obliged to publish a finding if those conditions occur.

“This is an approach used in other recent Indian water rights settlements, including one just concluded in Arizona where the requisite finding of the Secretary of the Interior was made in December of 2007,” said Mr. Simmons.

With respect to the Klamath Tribes, the mechanics of the proposed KBRA are as follows:

- Project water users “provisionally” agree to withdraw contests of the Klamath Tribes claims for water in Upper Klamath Lake and the Klamath River.
- The Klamath Tribes provisionally agree not to assert rights against the Project that would interfere with the agreed water use for the Project.
- Both of these commitments will become permanent if specified conditions are met.

In the meantime, there are also additional assurances by the Klamath Tribes that apply whether or not the permanent commitments occur:

- Beginning on the effective date of the KBRA, the Klamath Tribes would agree not to assert any tribal demands against ANY use of water in the Klamath Project. This commitment would remain in effect until the water users

Water Rights Elements Dividing Ag Community

As with any intensely-debated and agreed upon settlement between divergent interests, the Klamath settlement doesn’t make everyone happy.

The massive settlement document – over 250 pages in length – has completely satisfied no one, and has ignited some real brush fires in other Klamath Basin camps. A group that calls itself the Klamath Off-Project Water Users (those who are not within the Klamath Project and generally ranch upstream of Upper Klamath Lake) is campaigning against the settlement.

Off-Project interests believe the agreement does not resolve adjudication, and have run newspaper ads and created websites to broadcast their concerns. They are concerned that the agreement recognizes the Tribal water rights at the claimed amounts and with the priority date of time immemorial. One website claims that if the full Tribal claims are drafted as proposed, those claims would “eliminate virtually all water use outside the Klamath Project.” The site goes on to claim that if the Tribes find a “loophole” in the agreement not to enforce these claims against the Klamath project, the Klamath Project will be shut down as well.

KWUA ATTORNEYS disagree. “This settlement provision simply reflects that the Project water users are not going to contest the Tribes’ claims further,” said KWUA attorney Paul Simmons (CALIFORNIA). “In other words, Project water users will effectively acquiesce to those claims, but subject to all the other conditions.” Simmons and others at KWUA also believe that the terms of the KBRA will not and legally could not, affect the rights of any other party who is currently contesting the tribal claims in the adjudication.

“Those parties will have the ability to present evidence and argument of any kind against those claims, and the Water Resources Department, and later the court, will decide what the Klamath Tribes’ water rights are,” said Mr. Simmons.

The Project water users would not, however, be participating in this process.

THE SETTLEMENT WITH other settling tribes is similar, while recognizing that there is no pending adjudication to determine the water rights of tribes on the lower river. Project water users would be agreeing that the rights of downstream tribe have not been determined or quantified. But also, the tribes on the lower river would agree not to assert whatever water rights they have against the Klamath Project, with the interim and permanent commitments structured similarly to those of the Klamath Tribes.

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Klamath: Federal Legislation Will Be Required

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have completed the steps to implement the “on-project plan” which is to be developed to live with the agreed water quantity for diversion.

- There are terms that address what happens if certain conditions are not met by 2012. In this circumstance, the Klamath Tribes could not make a water right call against the Klamath Project until after the Project water users have had the opportunity to litigate their contests against the Klamath Tribes claims in Klamath County Circuit Court.

The specific legal mechanics for implementing these terms are to be provided in documents that will be filed in the Adjudication.

NEXT STEPS

A final piece of the settlement in this regard would be that each tribe agrees to waive any claims it has against the United States associated with the Klamath Project.

“These waivers also are contingent on the realization of certain events,” says Mr. Simmons.

As with the majority of tribal water rights settlements, federal legislation would be required to ensure all of these commitments are effective.

“Legislation will be prepared to address that issue as well as implementation of other aspects of the settlement,” said Mr. Addington.

Finally, the Hoopa Valley Tribe has indicated that it does not support the KBRA. If the Hoopa Valley Tribe is not a party to the final KBRA, the described commitments presumably would not apply as related to that tribe although it is not certain what other modifications may occur.

For now, the state of Oregon has suspended the water adjudication process to provide time for those affected by the agreement to consider their

Parties Identified in Draft Klamath Agreement

- U.S. Department of Agriculture
- U.S. Department of Commerce
- U.S. Department of the Interior
- California Department of Fish and Game
- Oregon Department of Environmental Quality
- Oregon Department of Fish and Wildlife
- Oregon Water Resources Department
- Karuk Tribe
- Klamath Tribes
- Yurok Tribe
- Humboldt County, California
- Klamath County, Oregon
- Siskiyou County, California
- Klamath Water Users Association and multiple USBR contractors
- American Rivers
- California Trout
- Friends of the River
- Klamath Forest Alliance
- National Center for Conservation Science and Policy
- North Coast Environmental Center
- Northern California/Nevada Council Federation of Fly Fishers
- Pacific Coast Federation of Fishermen’s Associations
- Salmon River Restoration Council
- Trout Unlimited

options: settle – or begin water adjudication legal proceedings in a state where that process can continue for half a century.

FOR MORE INFORMATION on the KBRA, including the full agreement and summary documents, visit either of these websites: <http://www.edsheets.com/Klamathdocs.html> or www.kwua.org. In addition, you can contact Greg Addington, KWUA Executive Director, at (541)-883-6100 or greg@kwua.org.

The Klamath Water Users Association helped prepare this edition of the “Water Review”, which is intended for general informational purposes. It is not a legal analysis or legal advice. The views in this Family Farm Water Review reflect those of KWUA and do not reflect any position of the Family Farm Alliance.

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