



The Klamath Tribes

Written Statement of Donald C. Gentry, Chairman of the Klamath Tribes of Oregon, Regarding Water-related Issues in the Klamath River Basin

Before the Committee on Energy and Natural Resources, United States Senate

June 20, 2013

Chairman Wyden, Ranking Member Murkowski, and members of the Committee, my name is Don Gentry and I am the Chairman of the Klamath Tribes. I want to thank the Committee and Chairman Wyden in particular, for holding this Hearing to better understand the serious water-related issues we are grappling with in the Klamath River Basin (Basin). As Chairman of the Klamath Tribes, it is my honor to convey to this Committee the views of the Klamath Tribes on these important matters. I am also joined today by Jeff Mitchell, a former Klamath Tribal Chairman, who has been the Tribes' lead negotiator on the Klamath Basin Restoration Agreement.

I represent the people of the Klamath Tribes who are comprised of the Klamath Tribe, the Modoc Tribe, and the Yahooskin Band of Snake Indians. In 1864 our respective leaders entered into a Treaty with the United States. In one section of the Treaty our ancestors reserved to us, with the complete agreement of the United States, water rights that we have held since time immemorial. While we ceded other lands and rights in the Treaty to the United States for the benefit of its citizens, we reserved our water rights for hunting, fishing, gathering, and trapping. The treaty resources are essential to the Klamath people and make us who we are. They allow us to live our tribal way of life. In addition to providing for our subsistence, the resources are central to our ability to exercise our cultural and religious practices, which is critical to providing for the physical and social health of our families and community. Without the treaty resources like the endangered c'waam (Lost River Sucker), we simply do not have the ability to live as Klamath People in the way Creator intended. That is why our people and the government of the Klamath Tribes have a deeply felt responsibility to steward our Treaty resources for our 3,700 members and our future generations.

Below I provide a brief summary of our history, which is essential to understanding how we have approached water-related issues. Then, some of the cyclic catastrophes that have plagued the Basin are described, with an emphasis on the Upper Basin. In addition, specific water-related issues are examined, followed by an explanation of how the two recent settlement agreements, the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHTSA) will resolve these issues and bring stability to the Basin.

What Came Before: Land Loss, Tribal Fishery Loss, Tribal Termination, and Tribal Restoration

In the Treaty of 1864, the Klamath Tribes relinquished claim to a vast territory of 20 million acres of what is now southern Oregon and northern California. However, we reserved to ourselves 2.5 million acres of land, encompassing the entire Upper Klamath River Basin above Upper Klamath Lake. By 1954, fraudulent surveys and various federal Indian policies reduced the Klamath Indian Reservation to 1.2 million acres, of which 882,000 were Tribal trust lands.

More was yet to come. The Termination Act of 1954 led to the loss of federally recognized Tribal status, the conversion of a major portion of our ancestral lands into the Winema and Fremont National Forests, and the abrupt loss of the forest-based foundation of our Tribal economy. At the time of termination, the Klamath Tribes was among the most prosperous Tribal Nations in the United States. Ironically and brutally, the federal Termination policy was based on the idea that because of our success, we could do without the land base that was the very source of that success. Predictably, Termination precipitated severe economic and social devastation from which we are still struggling to recover.

In 1986 the United States acknowledged the failure of the termination era policies by restoring our federally recognized Tribal status. While this step restored some capability and authority to influence resource management, it was not accompanied by the return of our ancestral lands. Federal recognition did not re-start our forest-based economy and the social devastation wrought by termination is still with us. To date the Tribes have reacquired only about 700 acres in scattered parcels.

Our aquatic resources, which are fundamental to Klamath tribal life, suffered too. Over the past century as the Klamath land base was eroded, development focused on putting water to beneficial use. Vast tracts of wetlands and even lakes were diked, drained, and transformed to farmland. Floodplains of our major river systems were developed for agricultural uses and hydropower dams were built on the Klamath River. Upper Klamath Lake was put to work as the primary reservoir serving the needs of hydropower and agriculture. These developments enabled robust non-tribal economies to develop around the water resources of the Upper Basin.

But these changes involved significant loss to the Klamath Tribes. Our salmon and steelhead runs were completely wiped out when the first Klamath Hydroelectric Project dam was built in 1917 without fish passage facilities, despite the Klamath Tribes' strong protests and written promises from the California Oregon Power Company that such passage would be built. In addition to obliterating the salmon and steelhead runs, the resulting changes in the hydrology of Upper Klamath Lake and its tributaries damaged other Treaty-protected fisheries. Loss of

wetlands and riparian ecosystems, along with other land use changes, increased the flow of nutrients into Upper Klamath Lake. This excessive nutrient enrichment causes enormous summertime cyanobacterial (blue-green algae) blooms, impairing water quality so severely that the two lake-dwelling sucker species - some of the toughest fish, and once among the most abundant fish in the Basin - have been pushed to the brink of extinction. Effects of this nutrient enrichment are felt by other fisheries and water users in the Klamath River far downstream of Upper Klamath Lake.

While a lot of focus is placed on the Tribes' fishery resources we must not forget that the Tribes treaty resources include other plant, wildlife, and water fowl. For example, the wokas, or woksam in Klamath, is the yellow "water lilly" that is one of the main nutritious food staples of our people. Wokas is used year round and the dried seed shells can be used as a dye for the tule reeds used in making baskets. In the 1800s, it was estimated that the Klamath Marsh contained thousands of acres of wokas. The same can be said of the Upper Klamath Lake, Lower Klamath Lake and Tule Lake. Today the wokas beds are dwindling and are only a mere fraction of what they used to be. It's difficult to depend on the wokas from year to year as the crops continue to shrink, yet the wokas is an integral part of Klamath culture and diet. Our collective memory always comes back to the wokas as the one thing that ties us together. It in part has, after all, helped us persevere through the millennia.

The Klamath Tribes have borne many severe costs associated with developing the Basin, but have received few of the benefits. Our salmon and steelhead are gone, while PacifiCorp shareholders and rate-payers have continuously benefited from the electricity produced by the dams that destroyed these fisheries. We have not fished for the endangered c'waam and koptu (Lost River and shortnose suckers) since 1986, while irrigated crops and livestock have been raised and sold each year from agricultural operations that take water from our rivers and lakes, and contribute to excessive nutrient loading that compromises ecosystem health. These fisheries sustained our people for millennia, but a mere century of development threatens their continued existence, and now, after centuries of harvesting tens of thousands of fish, we are restricted to two fish each year for ceremonial purposes. Many other examples exist. Make no mistake: the Klamath Tribes view these steep inequities as Treaty violations – a demonstrated failure of the United States to keep faith with our people. As may be imagined, deep, abiding anger and sadness about this situation has pervaded our people for many years.

After the Klamath Tribes' federal recognition was restored, we initially worked in an adversarial manner to turn these realities around, but eventually came to see that a collaborative approach was necessary to resolve the Basin's persistent conflicts. For the decade of the 1990s, we did what everyone else was doing: we sought only what we needed, without particular regard to the needs of others. We came to realize that when everyone acts in this manner, then conflict and division prevails. This began our earnest efforts to seek collaborative settlement of these issues. Despite several failed attempts, our interest in settlement remained and when the large settlement efforts around the KBRA/KHSA emerged, we committed ourselves to helping them succeed.

The Basin's Many Conflicts

Natural resource crises have plagued the Basin for decades, and while conflicts over water have taken center-stage, the fundamental issues driving these conflicts go beyond water. Recurring crises reflect the continued inability of various groups to attain or maintain social, cultural and economic sustainability, which inevitably causes strife as groups fight one another to ease their social and economic pain. Most who understand the issues have realized that the status quo simply dooms us all to the unabated continuation of these catastrophes and conflicts until precious things are lost forever.

Rotating Catastrophes

Due to continuing population declines, in 1986 the Klamath Tribes closed their fisheries for c'waam (Lost River sucker) and koptu (shortnose sucker). The United States' failure to preserve these treaty resources for the Tribes is a treaty violation as well as an economic and cultural bombshell for the Tribes. Two years later, the Lost River and shortnose suckers were listed as Endangered under Endangered Species Act and in 1997 coho salmon were listed as Threatened. While listing was important for protecting fish populations, a comprehensive management scheme has never been established. Accordingly, beginning in 1991, and continuing to the present, rather than being managed in a sustainable way, water has been managed via Biological Opinions and litigation in Upper Klamath Lake and the Klamath River.

Between 1995 and 1997, there were severe fish kills in Upper Klamath Lake. These kills were dominated by endangered suckers, further imperiling the existence of the fish the United States is responsible for protecting.

In 2001, as a result of Biological Opinions for Upper Klamath Lake and Klamath River flows, there was an almost complete cessation of water deliveries to the Klamath Irrigation Project. Irrigators who relied on the water occupied the head gates and protesters gained national attention. Eventually there was \$40 million in disaster relief funding for irrigators, but the crisis starkly demonstrated the results of decades of failed federal policy in the Basin.

In 2002, there was a severe fish kill in the lower Klamath River, dominated by adult salmon and steelhead. This was another economic and cultural blow, this time to lower river Tribes. By 2006, the perilous condition of Klamath Chinook salmon stocks precipitated severe restrictions on ocean salmon harvest along the Pacific coast. This was catastrophic for coastal communities and even more disaster relief funds had to be dispersed because there was no management plan in place for the Basin. Throughout 2008 there were recurring, severely restricted ocean salmon harvests due to low salmon returns along the West Coast, including the Klamath River.

In October, 2009, Upper Klamath Lake levels were very low, the result of river, irrigation, and refuge demands. The dry winter that followed, coupled with relatively high court-mandated winter flows in the Klamath River, prevented the Lake from filling, which caused severe water shortages in 2010. This was a test of key relationships formed in the KBRA/KHSA negotiations. Former adversaries worked together to successfully manage the problem. This situation demonstrated the value of the new relationships. However, while these relationships are strong,

they hinge on the common purpose of implementing the agreements. Therefore, Congress must act to implement the KBRA and KHSa if this cooperation is to endure.

That brings us to the present. Similar to 2009, in October 2012, Upper Klamath Lake was taken to very low levels by meeting demands from the Klamath River, irrigators, and refuges. Upper Klamath Lake then failed to fill during the dry winter that followed. Despite the fact that a new Biological Opinion has altered and improved water management strategies, beginning the irrigation season with so little water in the Lake severely complicates water management in 2013. Project irrigators face a large shortage, refuges will be nearly dry, and the Tribes' water right will not be met in the lake. Environmental groups and one lower river Tribe have filed lawsuits under the ESA over water management issues.

Conditions in 2013 clearly demonstrate that the crisis-generating stressors are still present and remain intractable. The KBRA and KHSa offer the Basin its best hope of breaking the cycle of catastrophes and conflict. The success of settlement efforts is largely due to a shared commitment of the parties to put these conflicts and catastrophes behind us. The only thing holding back success is the inaction of Congress.

While some complain that the KBRA's cost is too high, it is clear to those who thoroughly understand the issues that the cost of doing nothing and maintaining the status quo is unsustainable. The recurring calamities already cost the federal government significant sums. For example, all told, disaster relief funding in the Basin has averaged \$18 million per year since 2001. Disaster relief alone has cost \$110 million, of which \$60 million was a direct cost to the federal government. Therefore, the question before Congress is not whether to spend money, but whether to spend it on an endless series of band-aids or to spend it on a permanent remedy. Federal financial resources would be much better allocated to the long-term solutions conveyed by the KBRA and KHSa.

The status quo has been costly to local economies. For example, in 2006 the Chinook salmon fishery closure resulted in \$100 million in lost fishing revenues. Clearly, the status quo is costly to the federal government, states, local economies, tribes and families. The parties to the KBRA and KHSa are the only ones offering a solution.

Specific Water Issues and their Relation to Settlement Agreements

In 1975, the Klamath Basin Water Adjudication began in Oregon, which involves most of the Klamath River Basin in Oregon. The difficulties associated with the Adjudication process illustrate the necessity of the KBRA. Oregon's Adjudicator issued a Final Order of Determination in March, 2013, which in part determined that the Klamath Tribes possess the most senior (time immemorial) priority dates for water, and large and geographically extensive rights for water in streams, rivers, seeps, springs, marshes and lakes in the Upper Basin. Accordingly, the Klamath Tribes has an enforceable senior water right. Because water in the Basin has never been carefully measured or monitored, it is not possible to say precisely what impact the now-enforceable Tribal water rights will have on prior water management practices. But it is safe to predict that significant changes in that management will be required.

The Adjudication has moved from an administrative to judicial phase. Here, the conflict continues with parties other than our KBRA partners and is expensive, very adversarial, and antithetical to cooperative relationships. At least twice in the press, Klamath Country officials have speculated about the likelihood of violence in the wake of the adjudication decision favoring the Klamath Tribes.

The Basin's difficulties are driven by underlying problems like water availability, water quality, habitat degradation and extirpation of salmon and steelhead from the Upper Basin. The Adjudication is concerned solely with water availability and will therefore not address all of the Basin's problems. By contrast, successful implementation of the KBRA will largely resolve water issues among the Klamath Reclamation Project farmers, the Klamath Tribes, and others. The KBRA also outlines a process for reaching agreement with the Off-Project agricultural community, which is underway. If Congress fails to enact the KBRA, it guarantees descent into winner-take-all litigation.

The Endangered Species Act

Three listed fish species (coho salmon, c'waam (Lost River suckers), and koptu (shortnose suckers) are very important cultural and subsistence resources for Basin Tribes. The Klamath Reclamation Project, managed by the US Bureau of Reclamation, is subject to Biological Opinions from the US Fish and Wildlife Service (for effects on suckers) and the National Marine Fisheries Service (for effects on coho). Currently, there is competition and constant tension surrounding resources and water management decisions among water levels in Upper Klamath Lake for suckers, irrigation deliveries to Project farmers, flows in the Klamath River below Iron Gate Dam for coho, deliveries to the Tule Lake and Lower Klamath Wildlife Refuges, and off-Project agricultural and ranching. Under the status quo there is not enough water to fulfill all of these demands. Most water management decisions since the early 1990's have been dictated by an inconsistent series of Biological Opinions under the ESA, which have changed frequently, hurting or helping each of the interests at various times.

The KBRA shifts energy and resources from fighting over ESA jeopardy determinations and water allocations based in Biological Opinions and focuses instead on cooperatively managing for species recovery. The KBRA strongly emphasizes ecosystem restoration, reintroduction of salmon and steelhead above Iron Gate Dam, and equitable distribution of limited water resources. It also shifts regulatory focus to the use of Habitat Conservation Plans and related tools to harness the portions of the ESA best suited to fostering species recovery in cooperation with local communities.

Damaged Ecosystems

Recurring social, political, and economic crises are direct and predictable results of many decades of water and land use practices that have impaired critical ecosystem functions. If the present degraded ecosystem conditions are not acknowledged as a fundamental cause of difficulties in the Klamath Basin, and if comprehensive ecosystem rehabilitation measures are not implemented as a primary component of the solution to these difficulties, then the Basin's on-going, cyclic conflict will continue.

Klamath Hydroelectric Project dams owned by PacifiCorp extinguished salmon and steelhead runs to the Upper Basin in 1917 and continue to damage remaining runs. Tribes up and down the Klamath River, as well as many other groups and governments, have fought hard within the Federal Energy Regulatory Commission relicensing process to return salmon and steelhead to the Upper Basin. Removing the lower 4 dams under the KHSA, coupled with restoration actions delivered by the KBRA will resolve this conflict. However, if the agreements do not move forward, this conflict will re-ignite, and litigation will likely continue for decades while the damage to fisheries and water quality continues, and costs to electrical ratepayers mount.

Over-allocated water leaves too little for ecosystem needs and guarantees extreme conflict over who gets how much water. To date, there have been two avenues for determining water allocation: the Klamath Basin Adjudication and Biological Opinions. Neither of these avenues facilitates the collaboration and compromise required to move beyond conflict. However, the KBRA and KHSA have settled significant portions of these conflicts and offer promise to settle more through an Off-Project water settlement.

Non-point source loading of nutrients into rivers and Upper Klamath Lake causes serious water quality problems, leading to battles over Clean Water Act implementation (TMDLs, CWA certification for dams, etc.). The Klamath Hydroelectric Project is plagued by water quality problems that can only be resolved by dam removal. These problems include massive blooms of toxic cyanobacterial (blue-green algae) in reservoirs that pose a serious risk to human health, and changed temperature regimes of the Klamath River that damage salmon runs. Above Upper Klamath Lake, agricultural uses have damaged riparian ecosystems and increased nutrient loading.

The only existing solution is to implement the two agreements. The KBRA delivers an aquatic ecosystem restoration program that will accompany a reintroduction program for salmon and steelhead. Aquatic ecosystem restoration and the reintroduction programs are both large, but are necessary for success. The KHSA charts a course to removing the lower four dams on the Klamath River. Accompanied by an equitable distribution of water delivered through the KBRA, successfully implementing these collaborative programs will radically change the past reality of permanent conflict in the Klamath Basin. For the first time, energy and resources will flow to solutions of the foundational problems.

The Klamath Tribes Strongly Support the KBRA and KHSA

The Klamath Tribes' support of the KBRA and KHSA is unwavering. Twice now, the Klamath Tribes have held referendum votes on these agreements and each time the outcome has been positive. Such support reflects our tribal citizens' understanding that the agreements represent the best opportunity to find stability and a positive future for all communities, resources, and economies in the Klamath Basin. These agreements support recovery of fish populations to eliminate litigation and reinvigorate fishing economies, provide reliable water deliveries for farming and fish, and invest in environmental and economic stability for Tribal and agricultural communities.

Such outcomes were important enough to the Tribes to justify compromise with the Klamath Reclamation Project irrigators regarding some of our senior water rights. In addition, we agreed to certain performance-based relinquishment and release of breach of trust claims against the United States.

Economic & Land Recovery

Like the other settlement parties we seek economic stability, but it will be decades before the Klamath Tribes' will see the full benefit to our fisheries from dam removal. Therefore, one of our key bargained-for benefits in the KBRA was re-acquisition of former reservation lands, the 90,000 acre Mazama Forest. Tribal ownership of this tract will put Tribal and non-tribal members to work in forest products, one of the area's traditional economies. Klamath County needs forest products businesses and it needs jobs for its people. Currently, the Klamath Tribes contribute more than \$50 million per year to the Klamath County's economy in the form of payroll, direct expenses and goods and services. Furthermore, the Tribes employ approximately 450 people, approximately half of which are non-tribal members. With the recovery of the Mazama Forest the Tribes will put many more people to work in the community.

Loss of our land destroyed the Tribal economy and recovery of land is a key to economic recovery. Other parties to the KBRA will get economic benefits quite soon in the form of power benefits, reliability of water supply, and healthier runs of harvestable fish. By contrast, most benefits for the Klamath Tribes depend upon full, successful implementation of both the KBRA and the KHSA, and will therefore manifest gradually over many decades. We need short term, tangible benefits as well, and Mazama Forest allows recovery to begin soon by returning Tribal members to jobs in the woods, which was our main economic base before the United States terminated our reservation. Our development plans revolve around green energy production closely linked to improved forest health and reduced danger of catastrophic wildfire.

Woody materials removed from the forest pursuant to implementing forest management strategies designed to restore healthy stands will provide feedstock for a biomass energy facility and other businesses. The Tribes will use the guidelines of our rigorous, peer-reviewed Tribal Forest Management Plan (http://www.klamathtribes.org/background/documents/Klamath_Plan_Final_May_2008.pdf) to restore the forest to a healthy ecosystem that also provides for sustainable timber harvest and wildlife habitat.

Reacquisition by the Klamath Tribes of the Mazama Forest is an essential and appropriate ingredient of the KBRA. It offers economic opportunities in fields familiar to the Tribes and the surrounding community. Moreover, it acknowledges the Tribes' need to express the fullness of their connection to their homeland. Reacquisition creates acceptable parity among KBRA participants, establishing a balance enabling the Klamath Tribes to agree to other core elements of the KBRA. Without this balance, the KBRA would be unacceptable to the Klamath Tribes.

Conclusion

I once again extend my thanks for this opportunity to deliver this message from the Klamath people. We have put enormous effort into finding productive, collaborative ways to resolve

difficult issues that profoundly affect Klamath Tribal interests. After nearly a century of conflict in the Basin, we have an opportunity with the KBRA and KHSA to put an end to these persistent battles and move our communities and economy forward. The only thing standing between the present dysfunction in the Basin and the implementation of an already-negotiated agreement is the United States Congress. We ask the United States to honor its trust and treaty obligations and enact legislation implementing the KBRA and KHSA.

Thank you again for holding a hearing on this important topic. I am happy to answer any questions you may have.

For more information, contact Jeff Mitchell, Klamath Tribes Lead Negotiator at mohiswaqs@aol.com (541-891-5971) or Larry Dunsmoor, Klamath Tribes Water Management Liaison at lkdunsmoor@aol.com (541-783-2149 ext 21).