

2016

# Contextualizing and Evaluating the Klamath Basin Restoration Agreement

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## Recommended Citation

Wilson, Jackman, "Contextualizing and Evaluating the Klamath Basin Restoration Agreement" (2016). *CMC Senior Theses*. Paper 1327.  
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Claremont McKenna College

**Contextualizing and Evaluating the Klamath Basin Restoration Agreement**

Submitted to

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by

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for

Senior Thesis

Fall/Spring 2016

April 25, 2016



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## Introduction

On April 6, 2016, United States Interior Secretary Sally Jewell, alongside Oregon Governor Kate Brown and California Governor Jerry Brown, signed the Klamath Hydroelectric Settlement Agreement (KHSA). Together, they announced they would be moving forward with a plan to remove four hydroelectric dams from the Klamath River, allowing several species of endangered fish to swim freely to their former spawning habitats. The decision was met with widespread enthusiasm. ““We’re starting to get it right after so many years of getting it wrong... What a beautiful day””<sup>1</sup>, remarked Brown. The Interior Department’s decision to approve dam removal without approval from Congress was seen as a saving grace for the Klamath Basin Restoration Agreement.

The Klamath Basin Restoration Agreement (KBRA), released in 2010, is a 250 page water use agreement signed by the State of Oregon, the State of California, three Indian tribes, four county governments, seven non-governmental organizations and 26 private individuals, companies and local irrigation districts. The purpose of the agreement was to settle a decade-long conflict between local farmers, irrigators, fishermen, Indian tribes, the United States Bureau of Reclamation, federal wildlife agencies and environmental organizations.

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<sup>1</sup> Lacey Jarrell, “Future of the Klamath,” *Herald and News*, April 7, 2016, accessed April 23, 2016, [http://www.heraldandnews.com/news/local\\_news/future-of-the-klamath/article\\_ae6c2c5f-4cb4-5686-8cee-af50422a1ccf.html](http://www.heraldandnews.com/news/local_news/future-of-the-klamath/article_ae6c2c5f-4cb4-5686-8cee-af50422a1ccf.html).

Negotiations for the KBRA began following the dramatic summer of 2001, when the Bureau of Reclamation shut off the main water source for the Klamath Project, an irrigation system that provides water to farmers in the Klamath Basin. The Bureau believed it had no choice, because it felt obligated by the Endangered Species Act to maintain a sufficient water level in Upper Klamath Lake to protect the local population of Lost River and shortnose sucker fish.

This thesis seeks to contextualize the Klamath Basin Restoration Agreement, and explore the confluence of Western water rights, Indian law, the Endangered Species Act, and the plight of arid farming. It will evaluate the KBRA's contents and then evaluate the way forward for the agreement to become law. It will also explore whether an agreement like this is the best way of resolving such disputes as opposed to litigation or directly through the legislative process. While the KBRA is not perfect, and its future remains uncertain, it nonetheless provides clarity to a patchwork of conflicting laws, norms and court decisions. Although the KBRA was officially terminated at the beginning of 2016 due to a lack of congressional authorization for the agreement, the Interior Department's recent decision to allow dam removal has revived the KBRA's chances of becoming a law. Although it has yet to be enacted and its effects yet to be known, the KBRA represents the best way to provide clarity and stability to the Klamath Basin.

## Chapter I

### The Klamath Basin: A Background

The roots of the Klamath Basin Restoration Agreement stretch back to white settlement of the Klamath Basin. Additionally, one could argue that its origins go even further back to the basin's geological formation millions of years ago. Therefore, before exploring the agreement, one must first understand its subject. The Klamath Basin has a long and complex history, with each piece of history manifesting itself in a different way. It also has several unique geographical, geological and topographical features that make the area, and thus the agreement, unlike any other.

The Klamath Basin is centered on the Klamath River in southern Oregon and northern California. The Klamath River is one of only two rivers (the other being the Columbia River) that cross both the Coast Range and the Cascades. The 263-mile river originates in Upper Klamath Lake, near Klamath Falls, Oregon. The river flows south into northern California, where it picks up flows from the Scott, Shasta, Salmon and Trinity Rivers, before emptying into the Pacific Ocean near the aptly named town of Klamath, California.<sup>2</sup> The size of the Klamath Basin adds to its complexity, as well as its difficulty to regulate. Overall, the Klamath River watershed “covers some 12,000 square miles, an area roughly the size of Maryland and bigger than eight other U.S. states”.<sup>3</sup> A water crisis in such a large area will prove to be difficult to handle.

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<sup>2</sup> Doremus, Holly, and Dan Tarlock. *Water War in the Klamath Basin Macho Law, Combat Biology, and Dirty Politics*. Washington, DC: Island Press, 2008, 23.

<sup>3</sup> Doremus, 23.



The population of the Klamath Basin is as sparse as the basin is large. Klamath Falls, Oregon, the largest town in the basin, has a population of only 20,000. The Lower Klamath Basin has a population of only 15 people per square mile.<sup>5</sup> The region's remoteness and low population often make it an afterthought for its state governments. The legislatures of California and Oregon focus predominantly on the more populated metropolitan areas of Los Angeles, San Francisco, San Diego, Portland and Eugene. For

<sup>4</sup> Image source: <http://or.water.usgs.gov/klamath/>

<sup>5</sup> *Ibid*, 30.



this reason, in the 1940s several residents of the area proposed that counties in southern Oregon and northern California secede from their respective states and form the State of Jefferson, with its capital located in Medford. Just as the movement was gaining momentum in late 1941, the Japanese bombed Pearl Harbor, focusing national attention on the ensuing war.<sup>6</sup> Although the State of Jefferson proposal never gained serious consideration, the sentiment of abandonment by state officials persists throughout the Klamath Basin.

The Klamath Basin is an atypical watershed: “The typical watershed is steepest and wettest in its upper reaches, near the source of the river, and flattest and driest near its mouth. The Klamath reverses that pattern.”<sup>7</sup> The Klamath River originates in the high desert, and the landscape becomes more lush as it approaches the ocean. The Klamath “flows through high sagebrush plateaus, then cuts through mountains into the sea. The Lower Basin is a rugged, inaccessible jumble of steep peaks and small valleys.”<sup>8</sup> This has proven to be difficult for farmers, because most agricultural lands are on the northern end of the basin. “Most of the runoff in the Klamath watershed occurs in this lower region, far downstream from the primary agricultural lands.”<sup>9</sup> Herein lies a fundamental flaw in the Klamath Basin: instead of farming in the downstream areas with plenty of water, the farmers are instead farming where water is scarce. This requires a substantial amount of irrigation. “An irrigation economy developed in the driest, least watered portion of the

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<sup>6</sup> Christopher Hall, “Jefferson County: The State That Almost Seceded,” *Via*, September/October 2003, 1, accessed April 20, 2016, <http://www.viamagazine.com/destinations/jefferson-county-state-almost-seceded>.

<sup>7</sup> Doremus, 25.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

basin and a commercial and recreational fishing economy in the wettest. That unusual combination has proven difficult to sustain.”<sup>10</sup>

Another irregular feature of the Klamath Basin is the lakes that feed the Klamath River. Upper Klamath, Lower Klamath and Tule Lakes used to be conjoined in one large lake measuring 1,000 square miles, covering much of the modern day Klamath Basin. Climate and geological changes caused the waters to recede and the three lakes to separate. Now, the Klamath River drains mostly from Upper Klamath Lake. Upper Klamath Lake is the largest lake in Oregon, when measured by surface area. However, its water supply is very limited due to its shallowness. The lake is, on average, only eight feet deep. During dry years, the depth of Upper Klamath Lake can sink as low as three feet. In some senses, Upper Klamath Lake more closely resembles a marsh or wetlands than a lake. This can be problematic for farmers, because the water source for irrigation is often dry and can be unreliable. Due to its shallowness, Upper Klamath Lake “is not capable of storing surplus water during wet years to buffer the system in critically dry years.”<sup>11</sup> During dry years, there is no existing water supply from previous wet years to fall back on. During these dry years, the water supply can be cut significantly short: “Unlike many reclamation projects, the Klamath Project is at the mercy of the weather every year; a single dry year can put water supplies at risk.”<sup>12</sup>

The Klamath Basin can be divided into two distinct regions: The Upper Klamath Basin, located primarily in Oregon, and the Lower Klamath Basin in California. As mentioned previously, the Upper Klamath Basin is a dry area, and a difficult place to

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<sup>10</sup> *Ibid*, 23.

<sup>11</sup> *Ibid*, 54.

<sup>12</sup> *Ibid*.

farm. Despite its aridity, the Upper Basin contains a large amount of fertile volcanic soil. However, “because of severe climatic conditions, none of the lands in the region fall in the U.S. Department of Agriculture’s highest productivity class.”<sup>13</sup> Due to the Klamath Irrigation Project, the agricultural lands in the Klamath Basin have thrived over the past century. The region is used primarily to grow hay, alfalfa and potatoes. Overall, the Upper Basin is home to 2,239 farms, of which 1,744 are irrigated by the Klamath Project.<sup>14</sup> Any change in irrigation levels affects over three-quarters of the region’s farms. Therefore any reduction in water levels, whether through drought or bureaucratic action, would have a significant impact on the region’s economy.

Although the ancient Klamath lake has since dried up and divided into three, wetlands and marshes still exist where the old lake stood. These marshes are critical habitats for many species of waterfowl, including geese, ducks and swans. The Klamath Basin is an important stop along their migratory route, and for this reason several national wildlife refuges exist in the Upper Basin. “The cluster of national wildlife refuges in the Upper Basin supports the greatest concentration of waterfowl in North America, providing ‘a migratory stopover for about three-quarters of the Pacific Flyway waterfowl, with peak fall concentrations of over 1 million birds.’”<sup>15</sup> Additionally, the refuges host the United States’ largest population of bald eagles from December through February, making the Klamath Basin a popular destination for ecotourism.<sup>16</sup> Hundreds of thousands of visitors are drawn to the wildlife refuges every year.

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<sup>13</sup> *Ibid*, 26.

<sup>14</sup> *Ibid*, 29.

<sup>15</sup> *Ibid*, 27.

<sup>16</sup> *Ibid*.

The Lower Klamath Basin is quite different from its counterpart to the north. Located entirely in northern California, the Lower Basin is where the Klamath River picks up the flows of the Scott, Salmon, Shasta and Trinity Rivers. Consequently, the region is much more lush and forested. “Geologically, the Lower Basin is an area of rapid tectonic uplift, which accounts for the steep, forested terrain through which the Klamath [runs].”<sup>17</sup> The Lower Klamath Basin is labeled as an “area of biotic significance” by the World Wildlife Fund due to its location within the Klamath-Siskiyou bioregion.<sup>18</sup> The steep hills of the Lower Klamath Basin make the region less suitable to farming. Instead, timber harvests are the area’s main economic export. However, timber sales are declining in the Lower Basin, following a nationwide trend. Unlike the Upper Klamath Basin, “a high proportion of the land in the Lower Basin is owned by the federal government.”<sup>19</sup> The Lower Basin is very empty, and is even more sparsely populated than the Upper Basin. The largest towns in the Lower Basin are Yreka and Weaverville, towns with populations of 7,000 and 3,500, respectively.<sup>20</sup>

The stark differences between the Upper and Lower Basins also manifest themselves in their fish populations — although these differences are not fully natural. Coho and chinook salmon, steelhead, green sturgeon and Pacific lamprey are all abundant in the Lower Basin. Before the damming of the Klamath River, these fish were free to swim all the way upstream to Upper Klamath Lake. The species have sharply declined

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<sup>17</sup> *Ibid*, 29.

<sup>18</sup> *Ibid*, 30.

<sup>19</sup> *Ibid*, 29.

<sup>20</sup> *Ibid*, 30.

over the years, but are bolstered by fisheries at Iron Gate Dam and at Trinity Reservoir.<sup>21</sup> The fish populations in the Klamath River are especially important to coastal communities. Commercial fishers catch salmon that swim to and from the mouth of the Klamath River, and depend upon these salmon runs to earn revenue. Commercial fisheries along the Klamath River existed until the 1920s, until they were abandoned. However, ocean fisheries continue to depend on Klamath River salmon. Compared to the farms in the Upper Klamath Basin, the ocean fisheries of the Lower Basin have a much larger economic impact. “Even with ocean fishing restrictions imposed to protect Klamath fish, chinook salmon landings in northern California in 2006 were valued at roughly \$5.25 million... According to an environmental group, each salmon caught brought \$86 to the local economy, each steelhead \$172.”<sup>22</sup> Ocean fishermen depend on abundant salmon runs to earn a living and can feel the direct economic impact of declining salmon populations. They also feel the impact through tougher regulations on the amount of fish they can catch: “According to a fishing advocacy group, regulatory limitations on ocean salmon fishing have cost the coastal economy some four thousand jobs and \$78 million annually for the last decade.”<sup>23</sup>

The stark contrast between the Upper and Lower Klamath Basins is apparent, and it shows the diversity of interests at stake in the Klamath Basin. It is important to keep the geography and topography of the Klamath Basin in mind, as they will play a large part in the various crises and agreements.

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<sup>21</sup> *Ibid*, 31.

<sup>22</sup> *Ibid*, 32-33.

<sup>23</sup> *Ibid*, 33.

## Chapter II

### Water Rights: Riparian Rights vs. Prior Appropriation

The doctrine of prior appropriation, a system of allocating water rights adopted throughout much of the American West, follows one rule: “*Qui prior est in tempore, potior est in jure* — he who is first in time is first in right.”<sup>24</sup> Essentially, prior appropriation states that the first person to come upon a river or a stream has the right to use it with almost zero limitations. The water, at that point, becomes personal property. Under prior appropriation, “it mattered not at all how far from the river [one] lived or how far [one] diverted the water from its natural course, mattered not at all if [one] drained the river bone-dry.”<sup>25</sup> Whoever first discovered a water source could make as much use of it as they wished, regardless of who arrived afterward.

This doctrine is in sharp contrast to the riparian principle, which was developed under English common law. The riparian doctrine “held that only those people living on the banks of a river could lay claim to its flow.”<sup>26</sup> Under riparian law, one could not divert a river or stream elsewhere, and one could only consume the water for a reasonable use, such as drinking or bathing. “The riparian doctrine was less a method of ascertaining individual property rights and more the expression of an attitude of noninterference with nature. Under the oldest form of the principle a river was to be regarded as no one’s

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<sup>24</sup> Donald Worster, *Rivers of Empire*, 2nd ed. (Oxford: Oxford University Press, 1985), 88.

<sup>25</sup> Worster, 88.

<sup>26</sup> *Ibid.*

private property.”<sup>27</sup> The doctrine of riparian rights rested upon the idea that natural features such as streams and rivers belonged to God, and could not be privately owned. However, it is important to note that the riparian doctrine was developed in England, whose rivers and streams thrive in a climate much less prone to drought, unlike the arid rivers of the American West. The riparian doctrine proved to be unsuited for the settlers of the American West, including those in the Klamath Basin. “Riparianism depended on there being a dependable abundance of rainfall, broadly distributed, but just as important, it rested on a popular acceptance of the idea that nature should be left free to take its course.”<sup>28</sup> Indeed, the riparian doctrine seemed out of place in the Western United States, and it conflicted with the entrepreneurial spirit of many early settlers: “The men and women who settled the American West did not belong to that older world, did not share its views about nature, and consequently rejected the traditional riparianism.”<sup>29</sup>

The doctrine of prior appropriation was first developed in mining communities in the mid-19<sup>th</sup> Century. Under prior appropriation, the first person that uses water or diverts a stream for a beneficial use “is guaranteed the right to continue to take the same amount of water from the source without interference by any later appropriator.”<sup>30</sup> Under a riparian system, during a drought or a water shortage, “the right of each riparian owner is diminished proportionally.”<sup>31</sup> With prior appropriation, in case of a drought, “the entire share of the latest appropriator is lost before the share of the next latest begins to

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, 89.

<sup>30</sup> William Canby, *American Indian Law in a Nut Shell*, 4th ed. (St. Paul, MN: Thomson West, 2004), 426.

<sup>31</sup> Canby, 426.

diminish.”<sup>32</sup> Many proponents of prior appropriation believed it was absolutely necessary for settlement of the American West. American historian Walter Prescott Webb believed the riparian doctrine “was clearly out of place in a more arid climate, for it would not have allowed the practice of irrigation and thus would have made agricultural settlement impossible.”<sup>33</sup> The Western United States is a much different place from England, or even the Eastern United States. Thus, a new system was needed to allocate water rights.

This is not to say that the United States universally adopted prior appropriation. In fact, the federal government has never fully endorsed the idea, and many western states operate under a strange blend of riparianism and prior appropriation. Holly Doremus calls the statutory adoption of prior appropriation a “historical accident.”<sup>34</sup> The appropriative system “is a creature of local custom rather than federal law.”<sup>35</sup> Prior to settlement of the West, the federal government only recognized riparian water claims. Because almost all land on the shores of western rivers, including the Klamath, was initially owned by the federal government, anyone wishing to receive a water claim would have had to consult the federal government, rather than the relevant state government. However, white settlers began to settle in the West, including the Klamath Basin, long before the federal government was able to effectively assert its control over the area. “It was not until the progressive conservation era that the federal government began to assert its rights, and by

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<sup>32</sup> Canby, 427.

<sup>33</sup> Worster, 89.

<sup>34</sup> Doremus, 38.

<sup>35</sup> Canby, 428.



that time it was too late.”<sup>36</sup> Western settlers essentially forced prior appropriation on the federal government, which it begrudgingly accepted.

In 1877, Congress passed the Desert Land Act to encourage the development and irrigation of arid public lands in the west, such as the Upper Klamath Basin. The Act states that “all surplus water... shall remain to be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes.”<sup>37</sup> Many western states, including California and Oregon, interpreted this clause to mean that the federal government was tacitly adopting the doctrine of prior appropriation. They argued that “Congress had severed all water from the public domain... Put differently, the states argued that Congress had promised never to assert federal water rights.”<sup>38</sup> While not explicitly embracing prior appropriation, the statute leaves it up to the states to choose their own system of water rights, whether riparian or through prior appropriation.

California and Oregon both made their own systems for allocating water rights. Both states employed a certain mix of riparian and prior appropriation systems, but they differed in many important ways. Unlike other western states, California and Oregon did not reject the federal government’s superior claim to water titles. Both states “reasoned that [they] acquired sovereignty when they entered the union but that the federal government retained proprietary rights to the public domain.”<sup>39</sup> Using this logic, California created a dual riparian-prior appropriation system. Using the Desert Land Act of 1877’s tacit approval of prior appropriation, they limited the doctrine to federal lands.

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<sup>36</sup> Doremus, 38.

<sup>37</sup> Desert Land Act, 43 U.S.C. § 321.

<sup>38</sup> Doremus, 39.

<sup>39</sup> *Ibid*, 40.

Any private and non-federal lands still observed the riparian rights system. If a piece of federal land was privatized, it would no longer observe prior appropriation. In places like the Klamath Basin, where a large amount of land is controlled by the federal government, prior appropriation still prevails. In 1909, California adopted a permit system for prior appropriation, and “continues to recognize preexisting riparian rights.”<sup>40</sup>

Oregon, on the other hand, rejected such a dual riparian-appropriative system. The state also passed a prior appropriation system in 1909. However, unlike California, which recognized preexisting riparian rights, Oregon terminated its riparian rights altogether, and, “in effect... turned many riparian rights into appropriative rights.”<sup>41</sup> Anyone who claimed a riparian right that existed before the law’s passage in 1909 needed to reapply for the right to be recognized: “To claim a pre-1909 riparian right, the user had to show either that the water was put to a beneficial use before 1909 or that the necessary diversion works were completed within a reasonable time after 1909.”<sup>42</sup> The law states, “the right to the water shall be limited to the quantity actually applied to a beneficial use,”<sup>43</sup> echoing appropriative terminology.

In 1909, the Oregon Supreme Court handed down *Hough v. Porter*, in which it upheld the state’s right to enforce prior appropriation. Like many western states, the Court used the Desert Land Act of 1877 to justify its reasoning. The Court wrote, “the Desert Land Act by the language used appears to reserve therefrom to the entire public the right of any citizen, after March 3, 1877, to divert, use, and acquire a right in and to

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> ORS 539.110.

the unappropriated waters flowing through, or adjacent to, any lands thereafter patented, such right to be determined by priority.”<sup>44</sup> (*Hough v. Porter*, 51 OR 318). The decision seemed to settle the question in Oregon, but the federal government would not acquiesce until several decades later. The question of the legitimacy of state prior appropriation laws remained up in the air due to two state courts issuing rulings opposite of that in *Hough v. Porter*. In 1911, the Washington Supreme Court handed down a decision that did not accept Oregon’s reasoning, and “held that the Desert Land Act related to the reclamation of desert lands only.”<sup>45</sup> In 1921, the South Dakota Supreme Court followed Oregon’s lead, but one year later the California Supreme Court followed Washington’s line of reasoning. With California and Oregon having different interpretations of the federal government’s role, water claims in the Klamath Basin became especially complicated.

The issue was partially settled several years later in 1935, in the U.S. Supreme Court decision *California Oregon Power Company v. Beaver Portland Cement Company*. Writing for the Court, Justice George Sutherland affirmed the Oregon Court’s reasoning in *Hough v. Porter*. He reasoned that if surplus water is indeed intended to be used for public irrigation and mining, “if this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all public waters from the public domain, not theretofore appropriated, from the land itself.”<sup>46</sup> Here Sutherland is using the exact same reasoning as the states did following the passage of the Desert

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<sup>44</sup> *Hough v. Porter*, 51 OR 318, 387 (Or. 1909).

<sup>45</sup> Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* (n.p.: The Lawbook Exchange, 2004), 174.

<sup>46</sup> *California Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 142 (1935).

Lands Act. Sutherland goes on, “From that premise, it follows that a patent issued thereafter for lands in a desert land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law water right to the water flowing through or bordering upon the lands conveyed.”<sup>47</sup> The Court accepted the reasoning that the Desert Land Act applied to land laws beyond simply deserts. It argued that following the enactment of the Desert Land Act, “all nonnavigable waters then a part of the public domain *publici juris*, subject to the plenary control of the desert land states and territories.”<sup>48</sup> *California Oregon Power Company* was an important turning point in the development of water regulation, especially for the Klamath Basin. It essentially established a precedent that the federal government must defer to the states in the area of water law: “Despite the conservation era, revivals of Indian sovereignty, and the modern environmental movement, deference to state water allocation decisions remains a bedrock principle of western water law.”<sup>49</sup> But how binding is this precedent? Is it even a precedent at all? Is it constitutionally sound? After all, both Oregon and California continue to recognize the supremacy of the federal government, at least statutorily. Federal deference to state water law has a “constitutionally erroneous history, [with] the power of a cultural bedrock myth. It explains today why the idea that the Endangered Species Act, or any other environmental law, can displace appropriative rights strikes many western water users as both heretical and shocking.”<sup>50</sup> The Endangered Species Act

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<sup>47</sup> *California Oregon Power Company*.

<sup>48</sup> Hutchins, 492.

<sup>49</sup> Doremus, 40.

<sup>50</sup> *Ibid.*

will be discussed later, but it is important to note that recent conservation legislation can be seen as not only a violation of tradition, but of legal precedent.

Due to these complexities, the distribution of water rights in the Klamath Basin has proven to be difficult. The next chapter, which focuses on the Klamath Irrigation Project, will assess these difficulties.

### Chapter III

#### The Reclamation Act and the Klamath Project

Perhaps the most important legislation to consider when contextualizing the Klamath Basin Restoration Agreement is the United States Reclamation Act, passed in 1902 during Theodore Roosevelt's presidency. Historian Robert F. Gorman has gone so far as to say that "no single law has had a greater effect on the western United States than the Reclamation Act of 1902."<sup>51</sup> The Reclamation Act established federal funding for irrigation projects throughout the American West, including the Klamath Project.

In the late nineteenth century, the irrigation of arid western lands was a slow process. Funding for irrigation was scarce, and private irrigators were often unwilling to take the risk to fund large-scale irrigation projects. State-funded irrigation efforts proved to be unsuccessful due to low finances. A more stable form of irrigation funding was needed. The Reclamation Act established the United States Reclamation Service, an agency of the Department of the Interior. The agency was later renamed the United States Bureau of Reclamation, as it is known today. The act empowered the Secretary of the Interior to "locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters."<sup>52</sup> The act established a financing mechanism for these irrigation projects. It set aside a reclamation fund financed by the sale of federal lands. "Homesteaders would repay the fund for project construction costs (without interest) within ten years of the time that water became available to them, and the

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<sup>51</sup> Robert Gorman, *Great Events from History*, 1st ed., s.v. "Reclamation Act Promotes Western Agriculture." 166.

<sup>52</sup> Newlands Reclamation Act, P.L. 57-161.

repayments would then allow new projects.”<sup>53</sup> The fourth section of the Reclamation Act authorizes the Secretary of the Interior to make contracts for the construction of the irrigation projects. Interestingly, a caveat determining labor requirements mandates that “in all construction work eight hours shall constitute a day’s work, and no Mongolian labor shall be employed thereon.”<sup>54</sup> Such an artifact in the legislation serves as a reminder that much of the West was developed at the expense of Asian immigrants, as well as Native Americans and other minorities.

The Reclamation Act was indeed an integral part of the development of the Western United States. The Bureau of Reclamation initiated many of the projects that transformed the West from a remote frontier to a thriving, modern economy. Through authorization from the Reclamation Act, the Bureau has not only built irrigation canals, but also hydroelectric dams and power plants in seventeen states throughout the West, from Oklahoma to Washington. Perhaps the most famous Bureau of Reclamation project is the Hoover Dam on the Colorado River. Several western cities, such as “El Paso, Denver, Tucson, Phoenix, Los Angeles and Salt Lake City could not have grown into great metropolises without the massive water development projects and associated hydroelectricity made possible by the act.”<sup>55</sup> Although cities such as Klamath Falls and Yreka are far from “great metropolises,” the Reclamation Act has been equally important for the development of the Klamath Basin.

The Klamath Irrigation Project, or Klamath Project, was initiated under the Reclamation Act in 1905, three years after its passage. It was the twelfth project

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<sup>53</sup> Gorman, 148.

<sup>54</sup> Reclamation Act.

<sup>55</sup> Gorman, 167.

undertaken by the newly created Bureau of Reclamation (then called the Reclamation Service). It was the Bureau's largest project yet. In authorizing the Klamath Project, the Bureau gave three conditions. First, the states of Oregon and California had to cede their titles to the beds of Lower Klamath and Tule Lakes. Second, all riparian rights claimed on the waters of these lakes had to be surrendered. The states quickly complied with these demands. However, the third condition, a requirement that all vested water rights in the Klamath Basin be adjudicated, has still not been met.<sup>56</sup> Finally, Congress authorized Interior Secretary Ethan Allen Hitchcock "to destroy navigability of the two lakes."<sup>57</sup>

Construction of the Klamath Project began in 1906 with the digging of the main canal. This canal is also commonly referred to as the 'A' Canal. The project's first dam, the Lost River Dam, was constructed in 1912. A detailed description of several aspects of the Klamath Project is necessary:

The Klamath Project incorporated several privately built canals and, Reclamation initially constructed Clear Lake Dam and Reservoir, Lost River Diversion Dam, and the A (Main), B (East Branch), and C (South Branch) Canals on the Project. Clear Lake Dam and Reservoir stored water on the Lost River. Water releases from Clear Lake traveled downstream the diversion facilities at Lost River Diversion Dam which then transferred the water into the canals, including D (Adams) and G (Griffith) Canals. In the 1920s, Reclamation increased the irrigable lands of the Klamath Project. To this end, Reclamation

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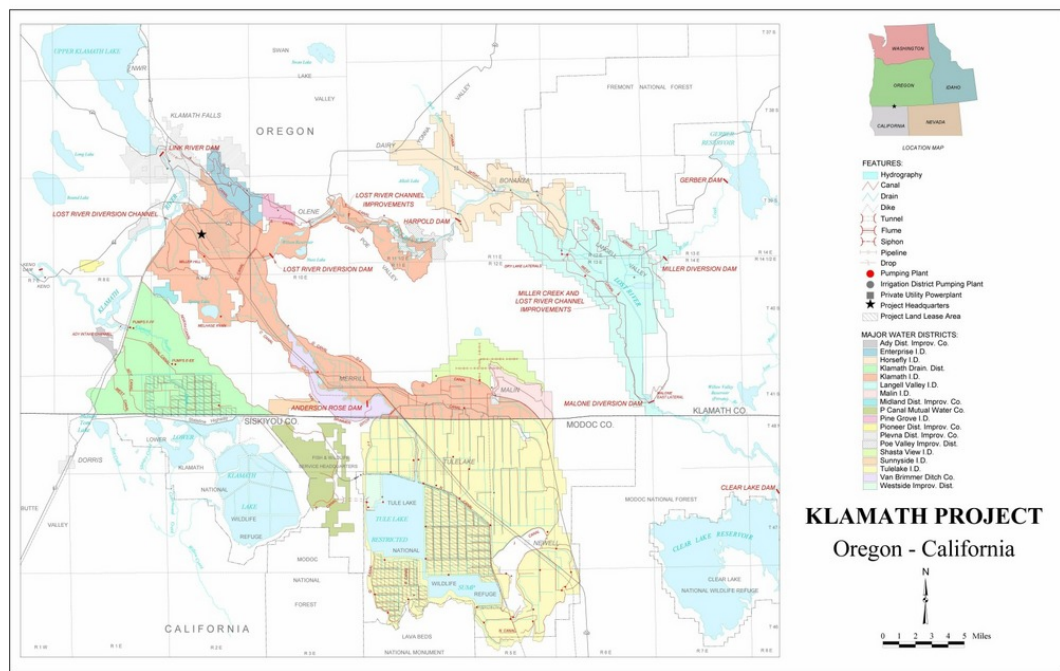
<sup>56</sup> Doremus, 48.

<sup>57</sup> Eric A. Stene, "Klamath Project." Bureau of Reclamation, 1994, 5.



constructed Gerber Dam and Miller Diversion Dam on Miller Creek, and Malone Diversion Dam, on Lost River, to irrigate lands northwest of the original Klamath Project lands through the North and West Canals. The Lower Lost River (Anderson-Rose) Diversion Dam increased irrigable acreage in the California lands of the Klamath Project. Reclamation added E (North Poe) and F (South Poe) Canals northeast of the original Project lands, and J Canal in the southeast. Following World War II, Reclamation started reclaiming land around Tule Lake for agriculture. Reclamation drained the marsh lands and constructed irrigation facilities necessary for future farms, including M, N, P, Q, and R Canals.<sup>58</sup>

To further understand the scope of the Klamath Project, a map is included:



<sup>58</sup> Stene, 7.

The Klamath Project was finally completed in the 1960s. As of 2008, the Klamath Project “diverts about 1,345,000 acre-feet to irrigate approximately 240,000 acres in Oregon and California. An additional 175,000 acres in the Upper Klamath Basin are irrigated by private irrigation works upstream of the project.”<sup>60</sup> While the project does provide much-needed irrigation to the surrounding basin, it is remarkably inefficient: “2 acre-feet are lost to evaporation for every acre-foot actually consumed by the crops.”<sup>61</sup>

In the 1950s, shortly before the completion of the Klamath Project, questions arose about how all the water would be used, and which uses would be prioritized. This culminated in the Klamath River Basin Compact. The Compact was precipitated by the California Oregon Power Company (COPCO)’s proposal to build a hydroelectric facility on the Klamath River. The new plant would be located “in the Klamath River Canyon below Keno, midway between Klamath Falls and the California border. COPCO claimed that unappropriated water was available, and that the use of water to generate power should take priority over future irrigation in the Upper Basin.”<sup>62</sup> However, irrigators in the Upper Basin pushed back, and argued that irrigation should be prioritized over power generation. What resulted was an interstate compact that was negotiated by both California and Oregon, and presented to Congress. Since both Oregon and California “were beneficiaries of the same project, they pulled together to make sure that water

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<sup>59</sup> Image source:  
[http://www.oregonencyclopedia.org/articles/klamath\\_basin\\_project\\_1906 / -  
\\_VyC8GqODGko](http://www.oregonencyclopedia.org/articles/klamath_basin_project_1906/-_VyC8GqODGko)

<sup>60</sup> Doremus, 50.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid*, 42.

[stayed] in the Upper Basin.”<sup>63</sup> The Klamath River Basin Compact passed Congress in September 1957. The Compact “established the following order of use for water: (1) domestic use, (2) irrigation use, (3) recreational use, including use for fish and wildlife, (4) industrial use, (5) generation of hydroelectric power, and (6) such other uses as are recognized under laws of the state involved.”<sup>64</sup> The Compact was a major victory for irrigators in the Upper Klamath Basin. In addition to prioritizing irrigation over hydroelectric power generation, it also prohibited any water from the Klamath Project to be diverted outside of the Klamath Basin.<sup>65</sup>

Nonetheless power companies still play an important role in the Klamath Basin. Since the Klamath River Basin Compact was ratified, COPCO was purchased by PacifiCorp. PacifiCorp currently owns six hydroelectric dams on the Klamath River: Iron Gate Dam, COPCO 1, COPCO 2, John C. Boyle Dam, Link River Dam, and Keno Dam. Iron Gate Dam, COPCO 1 and COPCO 2 dams are located just south of the California-Oregon border, while the John C. Boyle, Link River and Keno dams are further north in Oregon. These dams were developed between 1903 and 1962 as part of the Klamath River Hydroelectric Project. The hydroelectric dams provide incredibly cheap power for Klamath Project irrigators. This cheap power is the product of an agreement dating back to 1917, when irrigators and the Bureau of Reclamation allowed COPCO, who operated the dams at the time, to construct Link River dam. “In return for the ability to regulate the

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<sup>63</sup> *Ibid.*

<sup>64</sup> Ron Hathaway and Teresa Welch, “Setting the Stage,” *Oregon State University Special Report 1037* (April 2004): 1, accessed April 22, 2016, <http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/7132/SR%20no.%201037.pdf>.

<sup>65</sup> Doremus, 42.

outflow of Upper Klamath Lake, subject to existing irrigation rights, and construct the Link River dam, the company agreed to furnish cheap power to protect irrigators.”<sup>66</sup> In return for allowing construction of dams on the Klamath River, irrigators received heavily subsidized power rates. “The original 1917 agreement between COPCO and the Bureau of Reclamation called for the utility to furnish power at 0.6¢ per kilowatt hour. The contract was renegotiated in 1956, but the irrigators have not faced a rate increase since 1917.”<sup>67</sup> This has proved to be extremely beneficial to the local farmers and irrigators. “Power costs are crucial to the economics of irrigation, since they determine the amount of land that can be profitably planted.”<sup>68</sup> Therefore cheaper power not only means lower costs, but also more farming and more revenues. It is no wonder why some people are uneasy about the removal of the dams from the Klamath River, because they could potentially see electricity prices increase well beyond their current rates.

The obscenely low rates paid by the irrigators proved to be unsustainable for PacifiCorp in the mid 2000s. In 2004, PacifiCorp petitioned the Oregon Public Utility Commission to raise their rates in the Klamath Basin by a factor of ten. Klamath irrigators were justifiably upset by this proposal and pushed back. This was seen as a violation of the original agreement allowed PacifiCorp to construct its dams in the first place. Nonetheless, a tenfold increase in electricity rates is not as harsh as it initially seems. Electricity rates in the Klamath Basin remained unchanged since 1917 — 87 years of constant prices despite rising costs and inflation. The rates were so low that multiplying them by ten would still be slightly below the rate paid by the average Oregon

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<sup>66</sup> *Ibid*, 55.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*.

customer.<sup>69</sup> While most agreed that keeping rates at 1917 levels was unsustainable, any sudden increase in power rates, however minimal, poses a risk of seriously disrupting many irrigators. As a compromise, the Oregon legislature passed a law in 2005 “that limited any increase in electric fees for Klamath irrigators to no more than 50 percent in any one year.”<sup>70</sup> In 2006, the Oregon Public Utility Commission moved forward with a plan to bring power rates in the Klamath Basin back to near the state average over eight years. Klamath irrigators promptly challenged the plan at the Federal Energy Regulatory Commission, arguing that “the federal license governing PacifiCorp’s Klamath hydroelectric project forbade any rate increase before a new license was agreed upon.”<sup>71</sup> The FERC rejected that argument and allowed the rate increase to move forward. Under PacifiCorp’s plan, the first year of the transition would see a 36 percent rate increase. A prolonged period of incremental rate increases allows irrigators to adjust somewhat easily. Irrigators in the Upper Klamath Basin “will still enjoy a substantial subsidy for the short term, [but] that is enough of an increase to impose a financial jolt. As farmers in the High Plains know, increased energy costs can force hard decisions, such as decisions to retire the land or invest in more efficient irrigation technology.”<sup>72</sup> With dam removal on the horizon, there was a possibility that irrigators’ power rates could jump.

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

## Chapter IV

### The Klamath Indian Tribes

The Klamath Basin is home to five Indian tribes: the Modoc, Klamath, Yurok, Karuk and Hoopa. The Modoc and Klamath live in the Upper Basin, while the Yurok, Karuk and Hoopa reside in the Lower Basin. Indian tribes have a special status under the law and occupy a unique place in the Klamath Basin agreements. Each tribe has its own interests and history, which will be explained briefly.

The Klamath Basin went largely unexplored during the first half of the nineteenth century. The first white people to explore the Klamath Basin were fur trappers in the 1820s. The fur trappers described the abundance of the Klamath Basin, which prompted John C. Frémont to explore Upper Klamath Lake in 1843.<sup>73</sup> However it was not until 1867 that white Americans permanently settled in the area. The supplier of Fort Klamath, a military outpost in Klamath County, set up a store on the Link River. The settlement grew into a town called Linkville, whose name was officially changed to Klamath Falls in 1891.<sup>74</sup>

The Klamath Basin was the site of the dramatic and bloody Modoc Wars in the 1870s. One of the last wars of its kind, the Modoc War was largely a response to the federal government's grouping of the Modoc and Klamath Indians into a single tribe.<sup>75</sup> Although the Modoc and Klamath tribes share a common language, their customs and

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<sup>73</sup> *Ibid*, 46.

<sup>74</sup> *Ibid*.

<sup>75</sup> Keith A. Murray, *The Modocs and their War*. 2nd ed. Norman, OK: University of Oklahoma Press , 1959. Print, 59.

lifestyles differed, and some animosity existed between the tribes. “The Klamaths regarded the Modocs, who subdued tribes further south for slaves, as a historic oppressor and enemy.”<sup>76</sup> The Modocs did not like having to live on the same reservation as the Klamaths, and some accused the Klamaths of mistreatment. In 1873 the Modocs, led by Kintpuash, commonly known as Captain Jack, left the Klamath reservation and demanded their own reservation in their ancestral home. A battle ensued in the lava beds near Tule Lake, where Captain Jack and 50 Modocs somehow managed to fight off 400 U.S. soldiers. Following months of peace negotiations, the Modocs grew frustrated and killed General Edward Canby. Captain Jack and several other Modocs were subsequently hanged at Fort Klamath, and the Modoc tribe was promptly relocated to Oklahoma. Today, most Modocs still live on their reservation in Oklahoma. Those who stayed in Oregon have been absorbed by the Klamath tribe.<sup>77</sup> Therefore, the Modoc tribe is not an official party to the Klamath Basin Restoration Agreement.

The Klamath, along with the Modoc, belong to the larger Snake Paiute Tribe. Prior to white settlement, the Klamath occupied 22 million acres of the Klamath Basin. Their control over land was greatly diminished once white settlers arrived and they were forced onto a reservation. “The 1864 Treaty of Council Grove, which settled many Indian land claims, gave the two groups 2.2 million acres, about one-tenth of the Klamath’s historic territory. Later, the reservation was shrunk to about 1 million acres.”<sup>78</sup> White Americans attempted to assimilate the Klamath into their society by converting them to Christianity and forcing them to abandon their nomadic ways by becoming irrigators. The

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<sup>76</sup> Doremus, 61.

<sup>77</sup> Murray, 59.

<sup>78</sup> Doremus, 61.

Klamaths proved to be surprisingly well-suited to the change, and proved to be skilled farmers: “By the 1950s, they had created a sustainable timber and grazing economy on the million-acre reservation; their incomes were almost the same as those of non-Indians in the region.”<sup>79</sup>

Unfortunately, things did not turn out well for the Klamath. The first step in the wrong direction was the General Allotment Act of 1877. The Act could be described as an attempt “to transform Indians into yeoman farmers in the mold of their white neighbors and to stamp out all vestiges of tribalism”<sup>80</sup> Judge William C. Canby, Jr. called the Allotment Act “the most disastrous piece of Indian legislation in United States history.”<sup>81</sup> Before passage of the Allotment Act, congressional approval was required for the transfer of Indian reservation lands. The Allotment Act provided each tribal member with 160 acres per household, and surplus lands were then auctioned off to white settlers without congressional authorization. Many owners of the allotted lands were forced to sell their property due to high state property taxes.<sup>82</sup> The proceeds from the sales of the land went toward Indian schools. Ultimately, the General Allotment Act accounted for the sale of over one quarter of the Klamath reservation.<sup>83</sup> The nationwide result of the Allotment Act was even more profound: from 1887 to 1934, the total amount of Indian-held land in the United States decreased from 138 million acres to 48 million — a decrease of over 65 percent<sup>84</sup>.

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<sup>79</sup> *Ibid*, 63.

<sup>80</sup> *Ibid*, 64.

<sup>81</sup> Canby, 21.

<sup>82</sup> *Ibid*, 22.

<sup>83</sup> Doremus, 64.

<sup>84</sup> Canby, 22.



This would not be the last time the Klamath tribe would lose its land. In the 1950s the Klamaths fell victim to a movement to terminate their tribal status. Following World War II, the United States “decided to solve the ‘Indian problem’ once and for all by eliminating reservations and forcing Indians to become plain old Americans. In modern terms, the federal government wanted to make the Indians ‘white.’”<sup>85</sup> The movement for termination was not necessarily undertaken maliciously. It was a naïve attempt to achieve equality by removing the Indians’ special status of “otherness.” After all, in the 1950s whites enjoyed the most privileges of any racial group — so why not extend those privileges to the Indians by stripping them of their tribal status? Several proponents of termination believed they were setting the Indians free — or at least used this belief as a rhetorical device to advance their goals of reclaiming Indian land. Such rhetoric “contained an element of the arrogant condescension of those who see themselves as conferring a superior way of life on the less fortunate.”<sup>86</sup> This reasoning was not altogether unpopular or unpersuasive — in the 1950s a substantial proportion of Klamath Indians supported termination. Therefore, Congress passed the Klamath Termination Act in 1954. The law states, “Individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and... all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to members of the tribe.”<sup>87</sup> Once the Klamath Termination Act was passed, “the Klamaths would essentially become non-Indians for

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<sup>85</sup> Doremus, 63.

<sup>86</sup> *Ibid.*

<sup>87</sup> Klamath Termination Act, 68 Stat. 718

legal purposes, ineligible for federal Indian benefits, and fully subject to state law.”<sup>88</sup>

Along with the Klamaths’ status as Indians, the Klamath reservation was also disestablished. The Termination Act precipitated the sale of the vast majority of the Klamath Reservation Forest. “Tribal members had the choice of immediately selling their interests, which terminated tribal membership, or holding onto them... With no other viable option, more than three-fourths of the Indians elected to cash out for \$43,000 each.”<sup>89</sup> Following their termination, some Klamaths attempted to join other tribes, but were rejected by the Interior Department, which held that the Termination Act banned them from doing so.<sup>90</sup> The buyouts from the Termination Act proved to be short lived, and the Klamath tribe suffered greatly. Deprived of their reservation and the institutional framework of a federally recognized tribe, many Klamaths fell victim to alcoholism, gambling and crime. Poverty increased. The Klamaths soon realized they had been cheated by the Termination Act, and engendered an “enduring bitterness... between the tribe and the white community.”<sup>91</sup>

The Klamath tribe’s situation finally improved in 1986, when Congress passed the Klamath Indian Tribe Restoration Act. The law reinstated the tribal status of the Klamaths, but unfortunately did not return any land to the tribe. The Klamath reservation is now confined to 372 acres, a tiny fraction of the 2.2 million acres they were granted in the Treaty of Council Grove in 1864, and less still than the 22 million acres they once occupied prior to white settlement. The Klamath tribe’s land situation is important in the

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<sup>88</sup> Doremus, 64.

<sup>89</sup> *Ibid*, 64-65.

<sup>90</sup> *Ibid*, 65.

<sup>91</sup> *Ibid*.

context of the Klamath Basin Restoration Agreement. Due to the tribe's superior water title (which will be discussed later), the tribe is able to use its water rights as a bargaining chip to regain some of their lost land. The Klamaths "proposed to trade land for control of water, offering to subordinate its water rights to those of the irrigators in return for 695,000 acres of national forest."<sup>92</sup>

Downstream in the Lower Klamath Basin are the Yurok, Karuk and Hoopa tribes. Prior to white settlement of the Lower Klamath Basin, the Yurok tribe lived further down the Klamath River, near its confluence with the Trinity River. The Karuk lived further up the Klamath, and the Hoopa lived in the Hoopa Valley on the Trinity River. In 1855, President Franklin Pierce, under authority granted by Congress, signed an executive order establishing the Klamath River Reservation, which consisted of one mile of land on both sides of the Klamath, extending 20 miles from the river's mouth.<sup>93</sup> The reservation was not intended for a sole tribe. Rather, like the merging of the Klamath and Modoc tribes, it was intended to accommodate multiple tribes in the area. Some tribes were more open to this idea than others: "The Yurok did not need much convincing to settle on this reservation, which was within their traditional lands and straddled their river with its abundant salmon."<sup>94</sup> On the other hand, the Hoopa tribe refused to relocate. In 1877 President Grant finally acquiesced and issued an executive order establishing the Hoopa Valley Reservation on the Trinity River.<sup>95</sup> There was much confusion about the status of these reservations due to an 1864 law that only permitted the President to establish a

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<sup>92</sup> *Ibid*, 66.

<sup>93</sup> *Ibid*, 67.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*.

maximum of four Indian reservations per state. Because more than four such reservations existed in California, the legitimacy of the Yurok and Hoopa reservations was cast into doubt. Fortunately, President Benjamin Harrison found a way to sidestep the statute and combined the two reservations by extending the Hoopa Valley Reservation all the way to the Pacific Ocean, encompassing the Yuroks' Klamath River Reservation.<sup>96</sup> However, the legal complications did not end there. The union of the two reservations gave rise to a dispute between the Yurok and Hoopa tribes over the distribution of timber income on the reservation. Some Yuroks claimed they were entitled to a share of the timber revenues from the Hoopa reservation, and the courts agreed.<sup>97</sup> In response to these decisions, Congress passed the Hoopa-Yurok Settlement Act in 1988. The Act once again partitioned the joint reservation into two reservations belonging to the Hoopa and Yurok tribes. The Hoopa retained their rights to their original reservation, while the Yurok retained their reservation as well as the passage that connected the two reservations mandated in Harrison's 1891 executive order.<sup>98</sup> Although the repartition of the Hoopa and Yurok reservations managed to settle most of the tensions between the tribes, some property disputes still persist.

The Karuk Indians, on the other hand, do not have their own reservation. When the Hoopa and Yurok reservations were joined in 1891, it was expected that the Karuk were also to live on this newfound reservation.<sup>99</sup> Like the Hoopa who refused to live on the Yurok reservation, most Karuk abandoned the joint reservation and returned to their

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, 68.

<sup>98</sup> Hoopa-Yurok Settlement Act, P.L. 100-580 (1988).

<sup>99</sup> Doremus, 67.

original homelands. While the Karuk are officially recognized by the federal government, instead of living on their own reservation, the Karuk “now occupy scattered ‘trust lands,’ parcels held in trust for the tribe or individual Karuk by the United States. The Karuk trust lands total roughly 750 acres.”<sup>100</sup> The Karuk’s lack of a reservation has proven to be a disadvantage, both economically and legally, because land ownership is a central principle of American Indian law: “The distinctive legal feature of Indians in the United States is that their identity is tied to a specific land base. All Indian law flows from that characteristic.”<sup>101</sup> With less of a firm hold on their land, their sovereign rights are limited.

A bedrock principle of American Indian law is the recognition of tribal sovereignty. The idea was first developed in the early days of the Supreme Court by Chief Justice John Marshall. In the 1823 case *Johnson v. McIntosh*, Marshall ruled that, unlike other sovereign nations, Indian tribes could only grant their lands to the federal government.<sup>102</sup> Marshall argued that when Europeans settled in America, the rights of the Indian tribes “as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”<sup>103</sup> Eight years later, in *Cherokee Nation v. Georgia*, Marshall put further limits on tribal sovereignty. Marshall claimed that although Indian tribes qualify as sovereign states, they should not be treated the same way as foreign states. He coined the term

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<sup>100</sup> *Ibid*, 67.

<sup>101</sup> *Ibid*, 60.

<sup>102</sup> Canby, 73.

<sup>103</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

“domestic dependent nations” to describe the status of Indian tribes.<sup>104</sup> A year later, in the 1832 decision *Worcester v. Georgia*, Marshall further outlined their sovereign status:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.<sup>105</sup>

Here Marshall is placing another limit on the tribes’ sovereign power — unlike other sovereign nations, the Indian tribes could not conduct business with foreign governments. The federal government is the only government with which they may interact. Thus, the federal government holds sole authority to regulate Indian tribes — the power to regulate commerce with the Indian tribes is vested in Congress in Article I, Section 8 of the U.S. Constitution. Following from this, “Marshall, then, left a view of the tribes as nations whose independence had been limited in only two essentials — the conveyance of land and the ability to deal with foreign powers.”<sup>106</sup> Without these powers what exactly does tribal sovereignty entail? A tribe’s sovereignty puts it at an advantage vis-à-vis cities, counties, and other local entities. Unlike such governments, tribes do not rely upon the principle of delegation: “When a question arises as to the power of a city to enact a particular regulation, there must be some showing that the state has conferred such power on the city; the state, not the city is the sovereign body from which power must flow. A

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<sup>104</sup> Canby, 74.

<sup>105</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

<sup>106</sup> Canby, 74.

tribe, on the other hand, is its own source of power.”<sup>107</sup> Do tribes, then, exercise the same sovereignty as states? In some ways, they can exhibit more sovereign power: “A tribe’s right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government.”<sup>108</sup> Therefore tribal sovereignty can be construed as a negative right against the federal government: “The relevant inquiry is whether any limitation exists to *prevent* the tribe from acting within the sphere of its sovereignty, not whether any authority exists to *permit* the tribe to act.”<sup>109</sup> This slightly resembles the constitutional contrast between the legislative and executive branches. Whereas the legislative branch can only exercise its enumerated powers, the executive can usually get away with anything that is not expressly forbidden. This is one reason why, for example, many Indian tribes have casinos on their reservations.

The most important sector of Indian law when considering the Klamath Basin Restoration Agreement is, of course, water rights. Indian water rights are unique, and do not align entirely with the riparian doctrine or prior appropriation. Indian water rights can be traced to the 1908 Supreme Court case *Winters v. United States*. The case involved a dispute between Indians and white settlers in Montana. The settlers diverted the flow of the Milk River away from the Fort Belknap Reservation located on the river. This interfered with the tribe’s irrigation system, and the Indians brought suit. The treaty establishing the reservation did not mention any water rights. Therefore the settlers

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<sup>107</sup> *Ibid.*, 75.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

believed they could make a prior appropriation claim on the river.<sup>110</sup> The Supreme Court rejected this argument. In the majority opinion, Justice Joseph McKenna argued that the treaty contained an implicit guarantee of water rights. He posited that “without a guarantee of water Indians would not have agreed to abandon their nomadic ways to become pastoralists and farmers.”<sup>111</sup> Indians would not occupy agricultural lands without an implicit guarantee of water. This was a major victory for the Indian tribes. They were given another victory in the 1963 case *Arizona v. California*, which debated the difference between water rights on Indian reservations established by statute and those established by executive order. Justice Hugo Black, in the majority opinion, found no difference between the two: “The Court viewed the question as one of the intention of Congress or the President, and held that neither one could have meant to establish the reservations without reserving for the use of the Indians the water necessary to make the land habitable and productive.”<sup>112</sup> The Court also held that water rights on Indian reservations begin at the time of the reservation’s establishment. Several Indian water rights have been extrapolated from these two court decisions. Known as “*Winters* rights,” they are summarized as follows:

- (1) *Winters* rights are creatures of federal law, which defines their extent.
- (2) Establishment of a reservation by treaty, statute or executive order includes an implied reservation of water rights in sources within or bordering the reservation.
- (3) The water rights are reserved as of the date of creation of the applicable portion of the reservation. Competing

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<sup>110</sup> *Ibid*, 429.

<sup>111</sup> Doremus, 70.

<sup>112</sup> Canby, 430.



users with prior appropriation dates under state law take precedence over the Indian rights, but those with later dates are subordinate. (4) The quantity of water reserved for Indian use is that amount sufficient to irrigate all the practicably irrigable acreage of the reservation...

(5) *Winters* rights to water are not lost by non-use.<sup>113</sup>

The first *Winters* right is arguably the most important for the Klamath Basin. Indian reservations have a federal right to water, as opposed to other claimants in the region who have only a vested state right. Therefore Indian claims to water on the Klamath are arguably superior to the claims of irrigators. In principle, Oregon and California both recognize the supremacy of the federal water rights. Remember, however, that both states interpreted the Desert Lands Act to mean that the federal government relinquished control of the public domain and that Congress would never assert any federal water claims. Unfortunately for the Klamath Basin tribes, their *Winters* rights have been largely ignored by Oregon and California, although more attention has been given to them in recent years.<sup>114</sup> Nonetheless, the tribes can still make a claim to a superior water right, which can also be used as a bargaining chip in negotiations.

Because *Winters* rights are contingent on established reservations, the Klamath Indians had problems asserting their water rights following the tribe's termination in 1954. Without a reservation, it was unclear if the now terminated tribe retained any of their preexisting water rights. In 1983, the Klamath tribe took this question to court. In *United States v. Adair*, the United States District Court of Appeals for the Ninth Circuit

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<sup>113</sup> *Ibid*, 431-432.

<sup>114</sup> *Ibid*, 429.

ruled in their favor. Consistent with the tribe's *Winters* rights, the Court held that the 1864 Treaty of Council Grove "granted the Indians an implied right to as much water on the reservation as was necessary to fulfill these purposes."<sup>115</sup> Next, the Court delivered a major victory for the Klamath:

"The termination of the reservation did not abrogate the Indians' water rights. The Indians are still entitled to as much water on the reservation lands as they need to protect their hunting and fishing rights. If the preservation of these rights requires that the marsh be maintained as wetlands and the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessary to achieve those results."<sup>116</sup>

The Court seemed to be endorsing the idea that Indian tribes held a superior appropriative claim. The Court went even further, holding that "by the Treaty of 1864, the Indians reserved hunting and fishing rights which they had exercised for more than a thousand years. The priority date of these rights, and of the Indians' water rights which are necessary to preserve their hunting and fishing rights, is time immemorial."<sup>117</sup> Therefore, Indians had priority over all other water users due to their longstanding presence in the region, which predates white settlement. While *United States v. Adair* was a victory for the Klamath, it did not specifically quantify any of the tribe's water rights. The Oregon Water Resources Department interpreted *United States v. Adair* as limiting "Indian water use to that sufficient to provide for a moderate living, capped by the level of hunting,

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<sup>115</sup> *United States v. Adair*, No. 75-914 (D. Or. September 27, 1979).

<sup>116</sup> *United States v. Adair*

<sup>117</sup> *Ibid.*

fishing, and gathering activity in 1979.”<sup>118</sup> Thus, the state governments continue to find their way around the court-mandated superiority of Indian water rights.

It is important to note that *United States v. Adair* focused particularly on the Klamath’s fishing and hunting needs. Indeed, the Indian tribes in the Klamath Basin seek water claims not for irrigation but for fishing purposes. “Neither Upper nor Lower Basin tribes seek water for irrigation. Both do seek water for fish, and the courts have confirmed that both have rights to water needed to support those fish.”<sup>119</sup> This leads to another important sector of Indian law: fishing and hunting rights.

Fishing has cultural and economic significance to the Indians in the Klamath Basin. The tribes consume fish as food, and also generate income from fishing. The Klamaths believe salmon (known as c’iyaal’s in the Klamath native tongue) are sacred creatures, sent up the river by the creator to sustain their people.<sup>120</sup> Echoing the implicit adoption of water rights of *Winters*, all Indians have an implied right to freely hunt and fish on their reservations, regardless of state laws and regulations. This implied right can be traced back to the treaty, statute, agreement or executive order that established their reservation. “Indeed, the treaty right to hunt and fish free from state law has been held to survive a congressional termination of the trust relationship between the tribe and the federal government.”<sup>121</sup> While states cannot regulate hunting and fishing on Indian reservations, the federal government may do so through its plenary power over Indian

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<sup>118</sup> Doremus, 72.

<sup>119</sup> *Ibid.*

<sup>120</sup> Jonathan Cooper, “Pact Will Cement Removal of 4 Dams,” *Register-Guard*, April 7, 2016, accessed April 21, 2016, <http://registerguard.com/rg/news/local/34239773-75/pact-will-cement-removalof-4-dams.html.csp>.

<sup>121</sup> Canby, 450.

affairs. An Indian may not, for example, kill a wild panda bear if one somehow managed to squanch its way onto an Indian reservation — that would be a violation of the Endangered Species Act, a federal law. However, “the federal government has [generally] been very sparing in the exercise of its power to regulate Indian hunting and fishing. The matter has accordingly been left largely for tribal regulation.”<sup>122</sup> Many pieces of conservation legislation contain language exempting Indian tribes from certain statutes. Some moderate state regulation of fishing has also been found acceptable by the courts, such as Washington state’s requirement for a maximum percentage of a salmon run a tribe may catch.<sup>123</sup>

As described earlier, the Klamath tribe’s fishing rights were affirmed in *United States v. Adair*. The fishing rights of the Yurok and Hoopa tribes are both federally recognized under treaty fishing rights, while also enjoying water rights to support fisheries.<sup>124</sup> The Karuk, however, are not so lucky. Due to their lack of a reservation, they do not have a federally recognized fishing treaty, although they continue to seek one. “History has left the Karuk in a kind of legal limbo, with minimal land and uncertain hunting and fishing rights.”<sup>125</sup> The Karuk’s lack of fishing rights has had a very negative effect on members of the tribe. It has caused Karuk salmon consumption to drastically decline and practically disappear from the Karuk diet. A 2004 study linked the decreased salmon consumption to increased rates of diabetes and heart disease among the Karuk.<sup>126</sup>

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<sup>122</sup> *Ibid*, 457.

<sup>123</sup> *Ibid*, 464.

<sup>124</sup> Doremus, 74.

<sup>125</sup> *Ibid*, 75.

<sup>126</sup> *Ibid*.

Indians occupy a unique place in American law, and thus they occupy a unique place in the Klamath Basin. Their special water and fishing rights will come into play in the negotiations leading up to the Klamath Basin Restoration Agreement.

## Chapter V

### The Endangered Species Act and the Eruption of a Water Crisis

The Klamath Project, along with the Klamath River Hydroelectric Project, proved to be less than ideal for local fish populations. It is no surprise that a project that diverts rivers, constructs several dams, and changes water levels would have an adverse effect on wildlife and their habitats. There are two ways in which fish are primarily harmed by the water project: water depletion and entrainment. Water depletion is naturally bad for fish. Fish need water to survive, and some species need greater amounts of water than others. Fish also respond to acute changes in water temperature, as well as other water characteristics such as salinity and pH level. Entrainment, the other way in which fish are harmed by water projects, is defined as “the trapping of fish in project facilities, such as irrigation canals or hydropower turbines.”<sup>127</sup> Entrainment can kill fish directly or indirectly through diversion into unsuitable or dangerous habitats.

From its inception, the Klamath Project paid little attention to, but did not altogether ignore, the needs of local fish populations. When the first COPCO dam was built in 1918, the California Oregon Power Company considered adding a fish ladder to the dam, but concluded that “a fishway would not be effective, given the height of the dam, and in any case that young fish moving seaward would be destroyed by the turbines.”<sup>128</sup> Without a way to cross the dam, many species would be cut off from the upper reaches of the Klamath River, where many of their spawning grounds are located.

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<sup>127</sup> *Ibid*, 95.

<sup>128</sup> *Ibid*, 78.

Aware of this fact, the California Fish and Game Commission required COPCO to establish a hatchery below the dam to account for the lost spawning grounds above the dam.<sup>129</sup> To this day, salmon swimming upstream from the ocean are still blocked from hundreds of miles of the Klamath River. This has proven to be problematic for the Klamath tribe. The remnants of the Klamath reservation are upstream of the dams, rendering the Klamath unable to catch the downstream species of fish. Recall that salmon, or c'iyaaal's, are perceived to be sacred and an integral part of Klamath culture. Don Gentry, the Chairman of the Klamath Tribes, said, ““We won't be whole, and we won't be complete as a people until we can once again fish for our c'iyaaal's.””<sup>130</sup>

Salmon and steelhead populations predictably declined following the construction of the COPCO dam. The dam's daily operations caused major disturbances in water levels: “Demand for hydropower is high during the day and low at night. Operating COPCO Dam in response to that fluctuating demand produced dramatic fluctuations in river levels below the dam, drying out the river for miles daily and then inundating it.”<sup>131</sup> Obviously a dry river cannot be conducive to a healthy fish population. The dry patches disrupted migration patterns, stranded fish, and destroyed spawning beds. Commercial fishermen also felt a disruption in their salmon flows. The hatchery at COPCO dam could not possibly correct this. Making matters worse, the hatchery was closed in 1948.<sup>132</sup> This continued until 1959, when COPCO constructed Iron Gate Dam to moderate the previously extreme water fluctuations. Under intense public pressure and in response to a

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<sup>129</sup> *Ibid*, 78-79.

<sup>130</sup> Cooper.

<sup>131</sup> Doremus, 79.

<sup>132</sup> *Ibid*, 78.

lawsuit from the state of California, COPCO also agreed to construct a new hatchery to replace the COPCO dam hatchery that had closed eleven years earlier.<sup>133</sup> Although water levels on the Klamath River were more constant following the construction of Iron Gate Dam, concerns still existed over temperature fluctuations and water pollution caused by the dams. However, advocates for temperature adjustment “did not find a sympathetic audience. The [California] Fish and Game Commission refused to seek temperature improvements because the costs would be very high and it would be difficult to prove that the changes would measurably increase spawning success.”<sup>134</sup> This makes sense from a cost efficiency standpoint: while it is very possible that temperature fluctuations are harmful to salmon and steelhead, it may be one of many factors affecting fish populations. If the state undertook expensive temperature improvements and fish continued to die, the money would be wasted. This is why some people argue for complete dam removal — the dams are the cause of much of the fish decline in the Klamath River, and any policy short of dam removal would be treating the symptoms rather than the underlying cause.

Public sentiment against dam construction is not a recent phenomenon — indeed, it dates back nearly a century. In the 1920s, following construction of the first COPCO dam, the California Oregon Power Company proposed an additional two dams to be built in the Lower Klamath Basin, one near the confluence of the Klamath and Shasta rivers and another closer to the mouth of the Klamath River. These dams would be much further downstream, further cutting off salmon populations from their habitats. These dam

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<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, 79.



proposals proved to be incredibly controversial. Many believed that construction of these dams would eradicate salmon from the Klamath River entirely.<sup>135</sup> A public initiative campaign was launched to prevent the construction of these dams. A statewide ballot measure was adopted, and “in 1924, the people of California voted to forbid the construction or maintenance of any dam or obstruction on the Klamath River below its confluence with the Shasta River near Yreka.”<sup>136</sup> It is somewhat surprising to see the public show such sympathy for conservation measures, especially during the “roaring 20s” era when economic development was often given priority. Although no county-by-county election results for the 1924 ballot measure are available, it would be interesting to see if the counties of the Lower Klamath Basin voted differently than the rest of California. If they did, it would give credence to the idea that the Klamath Basin is ignored by the rest of California — the main reason behind the movement to establish the State of Jefferson.

The hydroelectric dams were not the only entities disrupting fish. The Klamath Project “has been closely linked with declines of the Lost River and shortnose suckers, as well as other Upper Basin fish species.”<sup>137</sup> Draining of Lower Klamath and Tule Lakes eliminated their sucker populations. While the hydroelectric dams are arguably the most damaging to fish populations, other dams used for irrigation purposes have also damaged fish habitats. Agricultural activity in the Upper Klamath Basin can also pose a threat: “Tributary channelization, accumulation of sediment, and high nutrient loads, from agricultural runoff and the decomposition of drained wetland soils, are among the

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

agriculture-related threats to the remaining sucker populations.”<sup>138</sup> Even when hydroelectric dams are removed from the Klamath River, these problems may continue to exist. It is important to keep in mind that while the situation of fish in the Klamath Basin can be improved, it is impossible for every problem to be solved.

Although less well known than the salmon and steelhead in the Lower Klamath Basin, but equally if not more important, the Lost River and shortnose suckers were the first species in the Klamath Basin to be listed under the Endangered Species Act. This would be the first domino to fall in the events leading up to the negotiation of the Klamath Basin Restoration Agreement.

The Endangered Species Act (ESA) was passed into law in 1973 under President Nixon. The purpose of the ESA was to give the federal government ample enforcement power to protect endangered species and their habitats. The ESA empowered two different agencies to enforce the legislation: the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS or NOAA Fisheries). Both agencies operate under different cabinet departments and have unique jurisdictions, both of which are relevant to the Klamath Basin. The Fish and Wildlife Service, an agency of the Department of the Interior, takes care of land species and freshwater fish, such as the Lost River and shortnose suckers of the Upper Klamath Basin. The National Marine Fisheries Service, an agency of the Department of Commerce, “is responsible for marine species and anadromous fish such as the Lower Basin’s coho salmon.”<sup>139</sup> Because the

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<sup>138</sup> *Ibid*, 80.

<sup>139</sup> *Ibid*, 90.

salmon and steelhead in the Lower Basin spend a part of their lifetimes in the Pacific Ocean, they fall under NOAA Fisheries jurisdiction.

The ESA empowers the agencies to list species as either “endangered” or “threatened.” A species is deemed to be “endangered” if it is in danger of extinction and “threatened” if it is likely to become endangered.<sup>140</sup> The classification of species as endangered or threatened is contingent upon scientifically accurate findings — the agencies may not simply decide to list a species under the ESA simply out of a desire to do so. Conversely, the agencies may not ignore scientific findings and decide not to list an otherwise endangered species. Nonetheless, scientific data on animal populations can be interpreted in different ways, leading many to suspect “that political factors strongly influence listing decisions.”<sup>141</sup> The ESA “protects endangered and threatened species and their habitats by prohibiting the ‘take’ of listed animals and the interstate or international trade in listed plants and animals, including their parts and permits, except under federal permit.”<sup>142</sup> The term “take” is defined broadly, “so that prohibited activities include not only capturing or killing a protected animal but also altering its habitat in any way that causes injury.”<sup>143</sup> The term “species” is also defined broadly under the ESA. Straying from the traditional biological definition of the word, the ESA considers subspecies and even populations of species to fall under the definition of “species.” This is important in the context of the Klamath Basin, because many of the local fish species listed under the ESA are actually populations of fish. Overall, the coho salmon species is not in

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<sup>140</sup> “ESA Basics,” U.S. Fish & Wildlife Service, 2013.

[http://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf)

<sup>141</sup> Doremus, 90.

<sup>142</sup> ESA Basics.

<sup>143</sup> Doremus, 91.

immediate danger of vanishing off the face of the earth, but the population of coho salmon in the Klamath Basin could very well die off.

When a species is listed under the ESA, the FWS and NMFS are obligated to designate “critical habitat” for the species, or special geographic areas that are essential for the survival of the species that must be protected.<sup>144</sup> However, both agencies have often ignored or refused to designate critical habitat for endangered species because such a “designation tends to incite local political opposition, and the federal services regard it as providing little in the way of conservation benefits.”<sup>145</sup> Critical habitat can also be difficult or impossible to identify, prompting the relevant agencies to avoid giving such a designation in some cases. The agencies also publish “recovery plans,” which outline the necessary action to revitalize species and to “restore [them] to ecological health.”<sup>146</sup>

In 1988, when the FWS listed the Lost River and shortnosed suckers as endangered under the ESA, the decision was met with little opposition. The FWS did not designate a critical habitat for the suckers, partly because such habitat was unidentifiable. “FWS concluded that critical habitat would be difficult to identify because the vast majority of the species’ historic spawning grounds were already blocked by dams.”<sup>147</sup> In other words, the FWS admitted that there were no critical habitats because they had already been destroyed — all remaining habitats were artificial. The FWS attempted to outline a recovery plan for the suckers in 1993, but “sucker populations were so low... and the reasons for their decline so uncertain, that FWS acknowledged that it could not

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<sup>144</sup> ESA Basics.

<sup>145</sup> Doremus, 90-91.

<sup>146</sup> ESA Basics.

<sup>147</sup> Doremus, 105.

describe the steps necessary to achieve recovery. The best it could do was to call for the establishment of a secure population of at least five hundred fish for each sucker stock within twenty years.”<sup>148</sup> With no real recovery plan and no designated critical habitat, it is no surprise that the listing of the suckers went largely unnoticed. The agencies would be much more aggressive in the future.

In 1997, the NMFS listed the coho salmon populations in southern Oregon and northern California as threatened under the ESA. Unlike the FWS with the suckers, the NMFS was aggressive with its designation of critical habitat. Nearly all of the Klamath River and its tributaries were designated as a critical habitat for coho salmon. Many irrigators and farmers on the Klamath were alarmed by this announcement, and feared more government regulations were incoming. However, no regulation of the flow of the Klamath River came directly from its classification as critical habitat. “The critical habitat designation identifies water quality, quantity, temperature, and velocity, all of which can be effected by diversions, as essential features of critical habitat. It does not, however, identify specific required values for those features.”<sup>149</sup> In other words, the NMFS knows that the coho salmon’s habitat is in danger, but they are not sure what an ideal habitat would look like or how to achieve it.

It was well-known that water levels of the Klamath River affected salmon and sucker populations, and it was only a matter of time before minimum water levels would be mandated. In April 2001, NMFS and FWS released a biological assessment of coho salmon and the endangered suckers, and concluded that irrigation from the Klamath

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<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, 107.

Project was lowering the water levels to an amount unsuitable for their survival. The agencies recommended minimal flows to be sent through Iron Gate Dam to protect coho salmon, as well as a minimum water level for Upper Klamath Lake to protect the endangered suckers.<sup>150</sup> A minimum water level requirement for Upper Klamath Lake would be especially concerning to farmers and irrigators, due to its role as the main water storage source for the Klamath Project. Recall that Upper Klamath Lake is already very shallow, and the yearly amount of water in the lake is at the mercy of the weather. During dry years, the water levels in Upper Klamath Lake could be close to the recommended minimum water level, leaving little or no water available for irrigation of the Klamath Project.

The Bureau of Reclamation, the agency responsible for regulating irrigation flows on the Klamath Project, felt legally pressured to acquiesce to NMFS and FWS' demands. Earlier in 2001, in *Pacific Coast Federation of Fishermen's Association v. Bureau of Reclamation*, the Ninth Circuit ruled that the Bureau must ensure that their operating plans "would not jeopardize listed species or adversely affect their critical habitat."<sup>151</sup> This could not have come at a worse time. Since the listing of coho salmon as endangered under the ESA in 1997, the Klamath Basin had enjoyed a few relatively abundant years in terms of rainfall. The winter of 2001, however, was significantly more dry. The water levels in Upper Klamath Lake were already low. On April 6, 2001, the Bureau released its operations plan for the Klamath Project. Believing it had no choice, "the 2001 plan allotted no water at all from Upper Klamath Lake for irrigation. That meant much of the

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<sup>150</sup> *Ibid.*, 110.

<sup>151</sup> *Ibid.*

acreage within the project would be left dry.”<sup>152</sup> The Bureau still allowed irrigation water to be taken from Gerber Lake and Clear Lake at normal levels. However, there was no way to make up for the water lost from Upper Klamath Lake, and the water supply would still be stretched critically thin — overall irrigation deliveries in the Klamath Basin would be reduced by 90 percent.<sup>153</sup>

Klamath irrigators were understandably upset by this announcement. Their crops depended on irrigation from the Klamath Project for survival. They also believed their riparian and appropriative water rights were being violated. However, the Endangered Species Act is a federal law, and therefore takes precedence over state water laws and riparian rights. Oregon and California in theory both recognized the supremacy of the federal government, but this belief had never been tested in the Klamath Basin. This was the first time the federal government asserted its water rights in the region, trumping all other state-invested rights that had been observed for the past century. Accusations of bureaucratic overreach and federal tyranny were very common.

That summer, the floodgates of the Klamath Project were closed, cutting off irrigators’ water supply and inciting mass public protests. In May 2001, “thousands of area residents formed a bucket brigade to bring water from Lake Ewauna, where the Upper Klamath Lake reservoir spills into the Klamath River, to an irrigation canal near the local high school.”<sup>154</sup> The protestors carried 50 buckets of water, each bucket

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<sup>152</sup> *Ibid*, 111.

<sup>153</sup> *Ibid*, 2.

<sup>154</sup> *Ibid*.

representing a state, through downtown Klamath Falls.<sup>155</sup> This was a symbolic protest against federal overreach, with the 50 buckets emphasizing the importance of states' rights. Some activists tried to take matters into their own hands: "The headgates [of the Klamath Project] were illegally forced open several times in early July, and later a pipe was run from Upper Klamath Lake around the headgates to an irrigation canal."<sup>156</sup> Local authorities, many of whom were sympathetic to the irrigators, chose to ignore these offenses and refused to do anything about them. Thus the federal government dispatched federal marshals and FBI agents to protect the floodgates from being forced open. This further added to local perceptions of distant federal authorities ignoring the will of the people. Over the summer of 2001, Klamath Falls became a Mecca for anti-government activists throughout the United States, much like Ammon Bundy's recent armed occupation of the Malheur National Wildlife Refuge. The people who flocked to Klamath Falls considered themselves patriots and revolutionaries, pushing back against the excesses of a tyrannical federal government. The protests may have continued indefinitely if not for the terrorist attacks of September 11, 2001. The attacks generated sympathy for federal officials and turned national attention elsewhere.<sup>157</sup>

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<sup>155</sup> "Klamath Falls Bucket Brigade Protests Water Shutoff," *Heartlander*, July 1, 2001. <http://news.heartland.org/newspaper-article/2001/07/01/klamath-falls-bucket-brigade-protests-water-shutoff>

<sup>156</sup> Doremus, 3.

<sup>157</sup> *Ibid.*



## Chapter VI

### The Klamath Agreements

Fortunately, the summer of 2001 was a relative anomaly in the Klamath Basin. The next few years saw more rainfall and snowmelt, allowing Upper Klamath Lake to reach sufficient levels to allow for irrigation of the Klamath Project while observing the minimum levels needed for sucker protection.<sup>158</sup> Tensions in the Klamath Basin have decreased since 2001, but they could surely boil over at any time. With the advent of climate change and increasingly hot summers and dry winters, the prospect for a repeat of the 2001 crisis is very real. Worse yet, it could become a regular occurrence. Recognizing this, stakeholders in the Klamath Basin began negotiations on an agreement for the basin's water use. The patchwork of federal and state laws, regulations and court decisions governing water use proved to be insufficient and often contradictory. A single agreement would bring clarity and security. The negotiators, known as the Klamath Settlement Group, spent several years working on the agreement. The Klamath Settlement Group consisted of the four local Indian tribes, the relevant Oregon and California county governments, seven non-governmental organizations and 26 private individuals, companies and local irrigation districts.

Negotiators of the agreement generally fell into two different camps: those who wanted to preserve the status quo of the Klamath Basin, and those who sought lasting change. The first camp is primarily made up of irrigators and irrigation districts. They

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<sup>158</sup> *Ibid*, 113.

would like to continue to receive substantial amounts of water from the Klamath Project regardless of its impact on endangered species and their habitats. In a perfect world, irrigators “would be happy to see the ESA go away. Failing that, they want it implemented with minimal impact on irrigation deliveries.”<sup>159</sup> On the opposite end are the Indian tribes, fishermen and environmental groups. Although their specific goals vary, these groups would generally like “to revive a degraded ecosystem and redesign the human footprint on it with a reduced agricultural base.”<sup>160</sup> The state and county governments played more of a mediating role in the negotiations, and had less of a clear interest at stake. Their prerogative was to do what they perceived to be in the best interest of their residents.

On February 18, 2010, after over eight years of negotiations, the Klamath Settlement Group released the final draft of the Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities. The agreement is often referred to simply as the Klamath Basin Restoration Agreement or the KBRA. Alongside the KBRA, they concurrently released the Klamath Hydroelectric Settlement Agreement (KHSA), which outlined the processes for the removal of four hydroelectric dams from the Klamath River. Although they are separate, the two agreements are complementary. Every signatory of the KBRA agreed to support the KHSA. Section II of the KBRA mandates that all parties support the hydroelectric settlement. The KHSA could have been included as a subsection of the KBRA and there would not have been any real difference. The reason the KHSA is separate from the

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<sup>159</sup> *Ibid.*, 146.

<sup>160</sup> *Ibid.*

KBRA is because PacifiCorp and other power companies are signatories. These power companies did not play a role in the negotiations of the KBRA. Together, the KBRA and KHSA are often referred to as the Klamath Agreements.

The 250 page agreement serves three main purposes: to determine water rights and river usage among the various parties, to build a sustainable water supply for the Klamath Basin that would not jeopardize wildlife, and to remove four hydroelectric dams — Iron Gate Dam, COPCO 1, COPCO 2, and the John C. Boyle Dam. The agreement is intended to be a long-term solution for the Klamath Basin. The agreement states, “the term of the agreement as to contractual obligations shall be 50 years from the effective date”<sup>161</sup> Many actions and decisions taken on behalf of the Klamath Basin have only had a short-term focus, and the agreement aims to provide a long-term solution for the region’s sustainability going into the future. Hopefully this means that under the KBRA, conflicts such as those of the summer of 2001 will not happen again.

An important characteristic of the KBRA is that it does not carry the full force of law. It is simply an *agreement* between members of the Klamath Settlement Group. However, the agreement does have the potential to become a law through congressional authorization: “The parties acknowledge that implementation of certain obligations under this agreement will require additional authorizations and appropriations by the United States Congress, the California legislature, and the Oregon legislature.”<sup>162</sup> Upon passage of authorizing legislation, six federal agencies would become parties to the agreement:

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<sup>161</sup> Klamath Basin Restoration Agreement. February 18, 2010. <http://klamathrestoration.gov/sites/klamathrestoration.gov/files/Klamath-Agreements/Klamath-Basin-Restoration-Agreement-2-18-10signed.pdf>, 5.

<sup>162</sup> KBRA, 17.

the NMFS, the FWS, the Bureau of Reclamation, the Bureau of Land Management, the U.S. Forest Service, and the Bureau of Indian Affairs. Although the agencies played a part in the negotiation of the Klamath Agreements, they could not legally sign onto them. After the agreements' release, the signatories of the agreement agreed to abide by its terms until authorizing legislation was enacted. But some aspects of the agreement, such as dam removal, (supposedly) needed congressional authorization before being implemented. Therefore, in the interim period between the signing of the agreement and congressional authorization, signatories would only be following a partial agreement. This could prove to be problematic, which is why the agreement states it will only be temporary if it never receives congressional authorization: "This agreement shall terminate... if... by December 31, 2012, federal authorizing legislation has not been enacted."<sup>163</sup> The agreement was later amended to expire on January 1, 2016. When the deadline for congressional authorization passed in early 2016, it sent the agreement into a tailspin, which will be discussed later.

Although the KBRA is multifaceted and complex, its water usage agreements can be broken down into simple terms. Essentially, irrigators and others claiming water rights from the Klamath Project, agreed to reduce the amount of water allocated to them in exchange for a minimum guarantee of supply. While the irrigators would be getting less water annually, they would avoid a repeat of the summer of 2001 when many irrigators received little or no water from the Klamath Project. No party to the agreement wants another crisis like that of 2001, so the agreement takes steps to guarantee more water to irrigators in dry years while simultaneously keeping enough water in Upper Klamath

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<sup>163</sup> *Ibid*, 32.

Lake to protect the endangered suckers. The simple solution is to add water to Upper Klamath Lake by increasing water storage. Dam removal would be the first step in increasing water levels. The hydroelectric dams require a vast amount of water to operate, and their removal would allow the Klamath River to flow more freely, putting less demand on water from Upper Klamath Lake. The agreement also provides for additional water storage by “breaching levees in the Williamson River Delta to add approximately 28,800 acre feet of storage; reconnecting Barnes Ranch and Agency Lake Ranch to add approximately 63,700 acre feet of storage; and reconnecting Wood River Wetlands to Agency Lake to provide approximately 16,000 acre feet of storage.”<sup>164</sup> The KBRA also establishes a Water Use Retirement Program (WURP) in the Upper Klamath Basin. WURP is a voluntary program through which irrigators claiming water rights on the Wood, Sycan, Sprague and Williamson Rivers can retire their water rights. Irrigators on these rivers can sell their water rights or lease them for a short term to the Bureau of Reclamation.<sup>165</sup> The four rivers all flow into Upper Klamath Lake, meaning that that with decreased demands on upstream water, the water levels of Upper Klamath Lake would naturally rise. The WURP is estimated to increase storage levels on Upper Klamath Lake by 30,000 acre feet.<sup>166</sup> The agreement assures that all the extra water received from these projects would not be used for irrigation purposes, but rather to protect fish.<sup>167</sup>

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<sup>164</sup> “Summary of the Klamath Basin Restoration Agreement,” U.S. Fish & Wildlife Service, 2007. <https://www.fws.gov/arcata/fisheries/reports/tamwg/2008/March10-11/Attachment5.pdf>

<sup>165</sup> KBRA, 109.

<sup>166</sup> KBRA Summary, 3-4.

<sup>167</sup> *Ibid*, 4.

With more water flowing into Upper Klamath Lake — the main source of water for the Klamath Project — the Bureau of Reclamation can more confidently enforce limits on the amount of water used for irrigation. The additional water decreases the likelihood the flow would have to be additionally curtailed during dry years. The agreement limits irrigation diversions from Upper Klamath Lake to a total of 330,000 acre feet of water from March through October. Following the removal of dams and the completion of other water storage facilities, this amount would increase to 385,000 acre feet.<sup>168</sup> This amount is about 100,000 acre feet less than the current demand for water during a dry year. During wet years, the difference is lower.<sup>169</sup> In the event of a water shortage, which, due to the increased water levels in Upper Klamath Lake, would likely only occur in an extreme drought, the agreement falls back on a Drought Plan, which aims to seek alternative ways to provide water to irrigators. The agreement states, “the parties intend that water and resource management actions be taken such that no Klamath Basin interest shall bear an unreasonable portion of burdens imposed”<sup>170</sup> during a drought. The agreement hopes to avoid a crisis similar to that of 2001, when irrigators bore the majority of the burden during the drought. While irrigators might not receive much water from the Upper Klamath Basin during a drought, they could instead receive water from designated groundwater sources and other water storage areas. The Drought Plan also relies upon “voluntary water conservation measures... [and] leasing water on a willing-seller basis.”<sup>171</sup> The KBRA’s Drought Plan lacks some details, such as a specific

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<sup>168</sup> KBRA, 54.

<sup>169</sup> KBRA Summary, 4.

<sup>170</sup> KBRA, 123.

<sup>171</sup> KBRA Summary, 7.

guaranteed amount of water during dry years. Instead, the KBRA opts to address these questions later, following congressional authorization. The agreement mandates that stakeholders form a “Lead Entity” to provide a finalized drought plan.<sup>172</sup> The solution for water provision to irrigators during extreme drought seems slightly suspect. Relying upon voluntary water conservation to provide water to thirsty crops seems like an unrealistic expectation. Hopefully, the finalized drought plan will have more concrete solutions, but it is possible that negotiations for the drought plan could take several years, or worse, go on indefinitely.

It is strange that irrigators would agree to such a reduction in their water supply, but irrigators do not occupy the same position of power they enjoyed in the past. With the federal government increasingly flexing its muscles in its enforcement of the ESA, irrigators felt they had no choice, and would rather see their water supply be reduced than have none at all during dry years.

As mentioned earlier, the Indian tribes in the Klamath Basin could use their superior water rights, as detailed in *Winters v. United States* and *United States v. Adair*, to use as a bargaining chip to extract benefits. The tribes did exactly that. The tribes fiercely advocated for dam removal, as it would likely increase fish populations in the Klamath Basin, thus increasing fishing revenues. Additionally, dam removal would allow salmon to swim north of Iron Gate Dam, allowing the Klamath tribe to be reunited with their c’iyaal’s. Needless to say, the tribes got what they wanted. Additionally, the agreement establishes a fisheries program that helps aggressively reintroduce fish to their

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<sup>172</sup> KBRA, 125.

old habitats.<sup>173</sup> The Klamath Basin tribes are given a large degree of involvement in the reintroduction process. In return, the Klamath, Yurok and Karuk tribes agreed to cede some of their water rights. They also agreed to relinquish several claims and lawsuits against the United States. These included:

All claims resulting from (a) water management decisions, including the failure to act, or (b) the failure to protect, or to prevent interference with, the Tribes' water or water rights, that relate to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering rights or other activities, due to loss of water or water rights); ... [and] all claims relating to the negotiation, execution, or adoption of this Agreement and the Hydroelectric Settlement.<sup>174</sup>

Essentially, the Indians agreed to drop current water use lawsuits against the United States and promised not to sue for a superior water claim — a suit they could very well win due to their *Winters* and *Adair* rights. The Klamath tribe's concession of its water rights would free up more water to be distributed to irrigators in the Upper Klamath Basin.

The agreement also gives the Klamath, Yurok and Karuk Indians access to an interim fishing site near Iron Gate Dam.<sup>175</sup> Most importantly the Klamath Indians got their most prized possession: land. Upon congressional authorization of the KBRA, the Klamath tribe would receive \$21 million in appropriations. With these funds, the

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<sup>173</sup> *Ibid*, 38.

<sup>174</sup> *Ibid*, 94.

<sup>175</sup> *Ibid*, 171.



Klamath tribe will purchase the Mazama Forest Project, a 90,000 acre forest near Chiloquin, Oregon that was formerly part of the Klamath Indian reservation.<sup>176</sup>

Technically, this land will be shared by the Klamath, Yurok and Karuk tribes, but due to its geographical proximity to the Klamath reservation, it will most likely be primarily used by the Klamath tribe. In return, the tribes agreed “that nothing in the development of the Mazama Forest Project, including but not limited to the Klamath Tribes' purchase of property, or the United States' designation of property as having federal trust status, will alter existing law regarding the applicability of state water law.”<sup>177</sup> In other words, the tribes were swearing not to assert their *Winters* and *Adair* rights resulting from their new land acquisition.

Interestingly, the Hoopa tribe did not sign on to the agreement, and in fact vigorously opposes it. The Hoopa claim, “the agreements serve to ‘terminate’ tribal water and fishing rights and provide irrigators a superior water right that does not currently exist.”<sup>178</sup> The truth of these allegations is doubtful. The true reason for the Hoopa’s opposition to the agreement may be that litigation is their preferred method to find a solution to their problems.<sup>179</sup> The tribe “may also be concerned that the cost of implementing the Klamath Agreements, nearly \$500 million in new federal spending over 15 years, could affect funding for their restoration efforts on the Trinity [River].”<sup>180</sup>

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<sup>176</sup> *Ibid.*, 170.

<sup>177</sup> *Ibid.*

<sup>178</sup> Josh Saxon, “Klamath River Tribes Support Klamath Basin Restoration Agreement,” *Indian Country Today Media Network*, June 18, 2014, accessed April 23, 2016, <http://indiancountrytodaymedianetwork.com/2014/06/18/klamath-river-tribes-support-klamath-basin-restoration-agreement>.

<sup>179</sup> Saxon.

<sup>180</sup> *Ibid.*

The Hoopa's opposition to the agreement is a critical illustration of the fact that the KBRA is not universally supported. Although it enjoys broad support from the signatories, it has been met with deep suspicion from some members of the general public. Several candidates in local elections, particularly in the northern California counties, have included opposition to the Klamath Agreements in their candidate platforms, and many have been successful.<sup>181</sup> As will be discussed in the next chapter, opposition to the agreement also runs deep in the United States Congress.

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<sup>181</sup> Jeff Mapes, "Oregon Congressional Delegation at Odds Over Klamath Basin Bill," *Oregonian*, December 3, 2015, accessed April 20, 2016, [http://www.oregonlive.com/mapes/index.ssf/2015/12/oregon\\_congressional\\_delegatio\\_1.html](http://www.oregonlive.com/mapes/index.ssf/2015/12/oregon_congressional_delegatio_1.html).

## Chapter VII

### Moving Forward

As of April 2016, no authorizing legislation for the Klamath Agreements has yet been enacted. In January 2015, Oregon Senator Ron Wyden introduced S. 133, the Klamath Basin Water Recovery and Economic Restoration Act. Fellow Oregon Senator Jeff Merkley cosponsored the bill, along with California Senators Dianne Feinstein and Barbara Boxer. All four Senators are Democrats. The bill “authorizes, ratifies, and confirms”<sup>182</sup> the Klamath Agreements. Unfortunately, the bill has not seen any progress. Senator Wyden had also introduced an authorization bill in the previous Congress, but that too had gone nowhere. In a Republican-controlled Congress, it is difficult for Democratic-sponsored legislation to gain traction without bipartisan support. Many Republicans oppose dam removal because they fear it would set a precedent for hydroelectric dams to be removed nationwide.<sup>183</sup> Additionally, implementation of the Klamath Agreements is estimated to require \$96 million of annual federal

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<sup>182</sup> S.133 - Klamath Basin Water Recovery and Economic Restoration Act of 2015, 114<sup>th</sup> Congress. <https://www.congress.gov/bill/114th-congress/senate-bill/133>.

<sup>183</sup> Paige Blankenbuehler, “Hope Fades for Klamath River Accords,” *High Country News*, February 2, 2016, accessed April 21, 2016, [http://www.hcn.org/issues/48.2/hope-fades-for-klamath-riveraccords/standard\\_article\\_view?original\\_url=http%3A%2F%2Fwww.hcn.org%2Fissues%2F48.2%2Fhope-fades-for-klamath-riveraccords%2Fstandard\\_article\\_view&form.button.confirm=Conf](http://www.hcn.org/issues/48.2/hope-fades-for-klamath-riveraccords/standard_article_view?original_url=http%3A%2F%2Fwww.hcn.org%2Fissues%2F48.2%2Fhope-fades-for-klamath-riveraccords%2Fstandard_article_view&form.button.confirm=Conf).

appropriations.<sup>184</sup> Republicans are generally opposed to increases in government spending unless they are absolutely necessary.

As discussed previously, the KBRA would be terminated if a congressional authorization was not enacted by January 1, 2016. As 2015 drew to a close, it looked increasingly likely that an authorization would not get passed. In December 2015, Representative Greg Walden, an Oregon Republican whose district encompasses the Klamath Basin, introduced a draft bill that would authorize the Klamath Agreements, with one important difference: the bill did not include the agreements' dam removal provisions. With dam removal being a central provision of the agreements, Senators Wyden and Merkley quickly rejected Walden's bill. Walden insisted that excluding dam removal from the authorization bill would be the only way it could get through a Republican Congress. He also predicted (correctly) that perhaps dam removal would not need congressional authorization. Walden "suggested that the dams could potentially be taken out through the regulatory process, said he was trying to figure out a creative way to build support for the agreement among his fellow Republicans."<sup>185</sup> Additionally, the bill contained a provision that would cede 200,000 acres of National Forest land to Klamath County in Oregon and Siskiyou County in California. Walden and Merkley said "the idea of turning federal forests over to the counties was a nonstarter in the Senate."<sup>186</sup> Walden's proposal quickly lost steam.

As December ticked by, it seemed that the only possibility for saving the Klamath Agreements would be to introduce the authorization as an amendment in the year-end

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<sup>184</sup> KBRA Summary, 10.

<sup>185</sup> Mapes.

<sup>186</sup> *Ibid.*

omnibus appropriations bill for the 2016 fiscal year.<sup>187</sup> Unfortunately, the omnibus bill was passed without any such amendment, and Congress recessed until the New Year. When the deadline passed, the future of the Klamath Agreements seemed bleak. The Yurok tribe withdrew its support for the agreements, and some irrigation districts followed suit.<sup>188</sup> It appeared as if all the years of hard work spent negotiating the agreements had been for nothing. Once the agreement was terminated, the signatories were no longer obligated to agree to its provisions. A crisis similar to that of the summer of 2001 seemed imminent.

Fortunately, this bleakness only lasted for about a month. On February 2, 2016, the Department of the Interior announced that it would approve removal of the four Klamath River dams (Iron Gate Dam, COPCO 1, COPCO 2 and the John C. Boyle Dam) without congressional authorization. PacifiCorp agreed to transfer the four dams to a newly-created California nonprofit company, which would then petition the Federal Energy Regulatory Commission for permission to tear down the dams in 2020.<sup>189</sup> Two other hydroelectric dams, the Keno and Link River dams, would continue to operate but would be transferred to the Bureau of Reclamation. The Bureau agreed to continue operating the dams “without raising [electricity] prices for farmers and ranchers who irrigate their fields.”<sup>190</sup> Although this provision was included in the original KHSA, it helped further assuage fears that dam removal would facilitate higher electricity rates for irrigators.

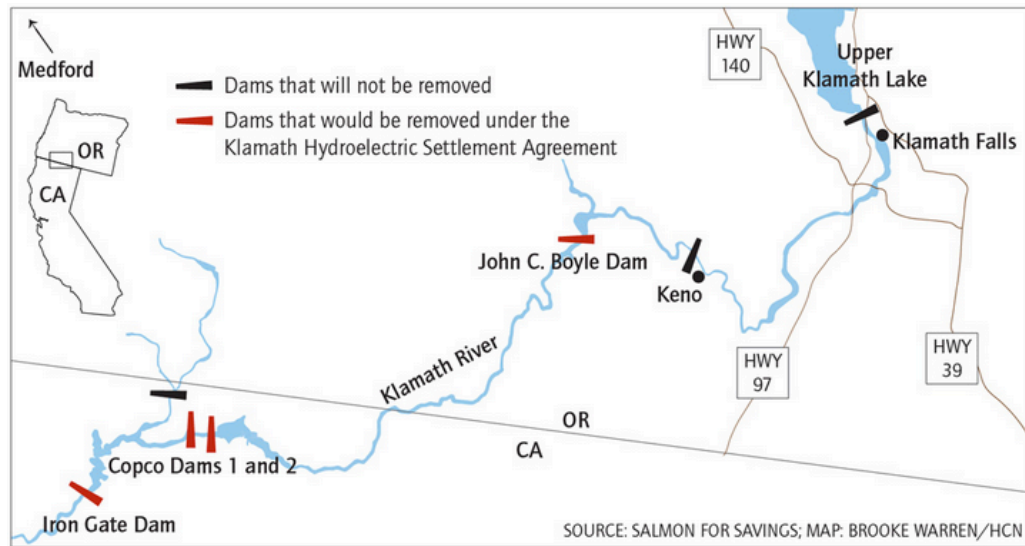
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<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> Cooper.

<sup>190</sup> *Ibid.*



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In the past, PacifiCorp signed on to the KHSA because it offered the company liability protections.<sup>192</sup> PacifiCorp’s decision to cede control of the dams was ultimately an economic decision — removing the dams would actually save them money. PacifiCorp’s FERC license to operate its Klamath dams will be up for renewal in 2020. When applying for relicensing, PacifiCorp would have to demonstrate that their dams live up to modern environmental standards — which would be difficult to do, considering a few of the dams are almost a century old. As a condition of relicensing, PacifiCorp would likely have to retrofit the dams and build several fish ladders. Retrofitting the dams would actually cost more money than completely removing them. Thus, when PacifiCorp was “presented with an opportunity to shed liability for damages related to

<sup>191</sup> Image source: <http://www.hcn.org/articles/how-conservatives-handed-environmentalists-what-they-wanted-klamath-dam-removal-without-concessions>

<sup>192</sup> Cooper.

removal of the dams, letting go of the Klamath River dams looks like a prudent financial decision.”<sup>193</sup>

Ironically for opponents of dam removal, the removal of dams from the Klamath River may end up being the only aspect of the Klamath Agreements that ends up becoming a reality. While dam removal has been given the green light by the Interior Department, the future of the remainder of the KBRA remains uncertain. Fortunately, its future today is brighter than it was a few months ago. Granted, the old KBRA has been terminated, but it could easily be revived and modified. With the Interior Department’s approval of the removal of the four dams on the Klamath River, the KBRA’s dam removal provisions can be struck from the agreement. This would face a much easier path through Congress, given that the main reason for Republican opposition to Senator Wyden’s bill is now gone. However, it is never prudent to put too much faith in the United States Congress. It is also uncertain if all of the original signatories of the KBRA will support a new agreement, considering that dam removal, a major priority of many of the signatories, is now underway. For now, the signatories of the Klamath Agreements must move forward with a new agreement. Although its future remains uncertain, there is now more optimism than ever that the Klamath Basin Restoration Agreement will ultimately become law.

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<sup>193</sup> “A Free-Flowing Klamath,” *Register Guard*, April 6, 2016, accessed April 6, 2016, <http://registerguard.com/rg/opinion/34235287-78/a-free-flowing-klamath.html.csp>.

## **Conclusion**

Because the Klamath Basin Restoration Agreement has not been authorized or implemented, it is too early to tell if any party is a “winner” or a “loser” of the agreement. The KBRA is, of course, a compromise, meaning that every party had to make a certain amount of concessions. However, if any party thought they were a “loser” of the agreement, or thought they were being treated unfairly, they would not have signed on to the agreement in the first place. One thing is for sure: if the agreement is never passed and the Klamath Basin continues to see incidents like those in the summer of 2001, everyone is a loser. Water crises are never good for anybody. As the situation currently stands, however, opponents of dam removal are the big losers. The dams are ready to be torn down, but none of the other aspects of the Klamath Agreements have been put in place.

Fortunately, the Klamath Agreements now have an easier path forward through Congress. If a new agreement similar to the first KBRA is reached, but this time without any dam removal provisions, the authorizing legislation would draw much less opposition from Republicans. The Department of the Interior’s decision to decommission the Klamath River dams may have been the breakthrough moment to finally bring stability and clarity to the Klamath Basin.

The impact of the Klamath Agreements, once implemented, is not easy to foresee. They might end up being a rousing success, or they could very well prove to be a disaster. Fortunately, enough parties to the agreement have expressed their support so that



one can say with confidence that the Klamath Agreements will make a positive impact on the Klamath Basin. If the KBRA fails to advance, the Indian tribes, irrigators, fishermen and all other parties will once again have to sift their way through a maze of litigation to determine their water rights. If it becomes law, which it should, the Klamath Basin Restoration Agreement will provide a clear and sustainable vision for the future of the Klamath Basin.

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