

CHARLES F. WILKINSON  
DISTINGUISHED PROFESSOR  
MOSES LASKY PROFESSOR OF LAW  
2237 SIXTH STREET  
BOULDER, CO 80302  
PHONE: (303)545-9765

May 23, 2014

Don Gentry, Chairman  
Klamath Tribes  
P O Box 436  
501 Chiloquin BLVD  
Chiloquin, OR 97624

Dear Chairman Gentry:

You have requested, on behalf of the Tribal Council, my independent opinion on aspects of the Upper Klamath Basin Comprehensive Agreement, dated April 18, 2014 (the Upper Basin Agreement). In particular, you have asked me to respond to these questions:

- (1) whether the Agreement is reasonable given the fact that the Klamath Tribes are a sovereign water rights holder, and
- (2) how the Agreement is likely to affect future generations of tribal members and Treaty resources.

By way of brief summary, these are my answers to the questions.

- (1) Yes, the Agreement is reasonable, indeed, excellent, given the Tribes' status as a sovereign water rights holder.
- (2) Sovereigns, tribes or otherwise, rarely have the opportunity to take sweeping actions that will bring an array of significant benefits to sovereignty, culture, and economic and social well-being that will affect its citizens for many generations to come. For the Klamath Tribes, this Agreement is such an opportunity.

---

At the outset, I want to acknowledge limitations on my ability to fulfill this important assignment. This Agreement is complex and it is tied directly to two other highly complex agreements, the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSAs). I was not directly involved in the long and elaborate negotiations of any of these agreements, and so I lack the kind of detailed information that can only come from in-depth knowledge of the negotiations.

At the same time, I have spent my career since the early 1970s working on land and water issues in the American West. Developments in the Klamath Basin involving the Klamath Tribes have long been a special interest of mine as an attorney at the Native American Rights Fund

representing tribal members trying to lessen the effects of termination; representing the Tribes, when I was on the law faculty at the University of Oregon, in drafting the Tribes' first fish & wildlife code; and working with the Tribes during restoration. As for the KBRA, KHSA, and Upper Basin Agreement, I have been following those developments closely since the early 1990s since it was apparent that they were becoming leading issues in water policy in the West and Indian Country. In all, I believe that, as a result of my professional background and personal experience, I am well positioned to respond to your questions.

### 1. The Agreement's Water Use Provisions

The key parties to the Upper Basin Agreement are the Klamath Tribes, who have the broad objectives of watershed restoration and economic development, and the Off-Project Irrigators, who have the broad objective of receiving sufficient water to continue raising crops. The irrigators had opposed the KBRA and KHSA and refused to negotiate on any matters that involved any changes to their irrigation practices. The matter came to a head in March 2013 when the Oregon Water Resources Department issued its Final Order of Determination in which the Tribes were determined to hold the number one priority date of "Time Immemorial" and that many of the tribal rights called for instream flows. In the Spring of 2013, the Tribes, as the senior rights holder, and the Klamath Reclamation Project made calls on the river. The State enforced the calls, which shut down most irrigation by the Off-Project Irrigators. This action by the Tribes brought the irrigators to the bargaining table. The Tribes had an incentive to negotiate since the support of the KBRA and KHSA by the Off-Project Irrigators would greatly increase the chances of congressional passage of the KBRA and KHSA.

As a starting point, by settling with the major source of opposition to the Tribes' adjudicated right, the Agreement goes a long way toward assuring that the tribal water rights determined in the adjudication will not be weakened in court. (Although the state agency ruling is described as a "final order," it is only final for the agency and can still be challenged in state court.) I have reviewed the Final Order of Determination, including the partial orders of determination, and believe that the Tribes' legal position is well-founded. However, one can never predict results in litigation with certainty. Some other parties have filed exceptions in the Circuit Court, but settling with the irrigators in this fashion resolves a large part of the concern over having tribal rights limited by the courts.

The Upper Basin Agreement has several unique provisions involving water use and protection, and the Agreement as a whole reflects the Tribes' significant leverage resulting from the successful call. In a most unusual provision, the Off-Project Irrigators agreed to retire 18,000 acres of irrigated farmland, which will return 30,000 acre feet of water to the river. The irrigators also will be bound by Riparian Management Agreements, which will require robust ecological farming practices rarely seen in western irrigation operations. These agreements will be in force on approximately 224 stream miles, about 80% of the stream miles on agricultural lands. Under the Agreement, therefore, non-project irrigation will be substantially reduced and managed under a rigorous, ecologically-conscious regime.

In terms of regulating water withdrawals by Off-Project Irrigators, the Agreement establishes a complicated system based on Specified Instream Flows (SIF), which will apply throughout the off-project area, for fish, wildlife, and other ecological concerns. These SIF are science-based and substantial—this system is considerably stronger than most, and perhaps all, instream flow programs we see elsewhere in the West. If the SIF are violated by irrigation withdrawals, they can be enforced by the Tribes through making calls.

The SIF depart in some respects from the adjudicated tribal rights and in some years, the SIF may fall below the adjudicated rights. Nonetheless, the SIF are rigorous and there is no question that the Agreement ensures dramatic advances in the ecological condition and restoration of the Upper Klamath Basin. The program has been peer-reviewed for its effectiveness. The Agreement itself provides, in addition to the SIF, impressive benefits in terms of the retirement of irrigation land and RMAs discussed above. Further, this Agreement, in addition to resolving significant legal concerns as to tribal water rights, paves the way for the congressional approval of the KBRA and KHSAs, which provide extraordinary basin restoration benefits. And, as discussed next, the Agreement includes benefits to the Tribes beyond measures specifically involving water.

## 2. Additional Benefits to the Tribes

In negotiating the Upper Basin Agreement, the Tribes succeeded in obtaining several favorable provisions that go well beyond the water issues. The Off-Project Irrigators agreed to support the Tribes' purchase of the 90,000-acre Mazama Forest, which was negotiated within and delivered by the KBRA, and the taking into trust of that land. This aspect of the Agreement eliminates a significant political obstacle to the land return, which is the bold first step in realizing the dreams for a land base that tribal members have held ever since termination.

The Tribes succeeded in obtaining other provisions to strengthen the Tribes' economic future. The Agreement calls for a Tribal Economic Development Fund of \$40 million and \$1 million per year for five years for purposes such as additional land acquisition, jobs in forest management, and other economic development initiatives. Further, in addition to the jobs and tribal income resulting from tribal management of the Mazama Forest, the Agreement establishes a federally-funded program with state participation that will create 10-20 jobs for tribal members in water and fisheries management and, as well, in developing skills in sustainable ranch management.

## 3. The Relationship of the Agreement to the KBRA and KHSAs

While the Upper Basin Agreement, standing alone, is a significant step forward for the Tribes, it also has the critical purpose of activating passage of the KBRA and KHSAs.

The KBRA mandates a whole range of recovery initiatives, unprecedented in scope, for restoring the Upper Basin. By every analysis, this ambitious program will bring great benefits to the salmon, wildlife, vegetation, rivers, marshes, economy, and people of the Upper Basin, especially the Tribes. The main feature of the KHSAs is the removal of the four main Klamath River

dams. This project, when completed, will be the largest dam-removal effort in world history. I remember, as an attorney with the Native American Rights Fund in the early 1970s, hearing the recollections of Klamath elders who, as young boys, witnessed large salmon runs, especially the big Chinook salmon, and how—before the dams—the runs were so thick that they took as many fish as they needed with pitchforks. No one can say for sure how expansive the runs will be when the dams are removed but, if the early returns on the Elwha River after that dam removal are any indicator, there is good reason for optimism on the Klamath. In both the KBRA and KHSA, the Tribes, through their policy leaders, scientists, and attorneys, took a leadership role in building the coalition of some 45 entities that led to the final signing of the two documents in 2010.

In a normal time, the KBRA and KHSA would have sailed through Congress based on the broad support evidenced by the coalition. But Congress has been in gridlock and the initiatives have stalled. The Upper Basin Agreement has changed that: Under the terms of the Agreement, the Off-Project Irrigators—once the most vocal opposition—now support the initiatives. This gives life to the KBRA and KHSA, and the benefits in the Agreement make the package even more attractive. On May 21st, the package was introduced in the Senate by all four Oregon and California Senators. When, and if, passage of the legislation will occur is unknown, but prospects have been enhanced by the historic settlement as set forth in the Agreement.

#### 4. Conclusion

I understand, from the media and tribal members, that there has been opposition to the Upper Basin Agreement from within the Tribes. This is understandable. So much damage has come to the Klamath Tribes over the long course of history. The original 1.9 million-acre reservation came at the cost of being forced to cede more than 18 million acres of tribal homeland. Government surveying errors and various takings of land reduced the reservation. Allotment imposed the loss of one-quarter of the reservation. Termination, also forced upon the Klamaths, was a disaster. All of those events burn in the memories of tribal members yet. The Klamath people do not want to repeat that past.

But it is important to pause and appreciate how different these circumstances are from that tragic history. All of those past events were decided upon by outsiders and imposed upon the Tribes. In the case of the KBRA, KHSA, and the Upper Basin Agreement, the Tribes were a driving force in the coalition that included the States of Oregon and California, the Department of the Interior, Forest Service, National Marine Fisheries Service, several environmental groups, commercial fishing organizations, and the Klamath Reclamation Project. The Klamath Tribes—and the Yurok Tribe as well—were widely recognized as front-line leaders in that effort and much of the complex strategy came from them. The tribal lawyers were deeply knowledgeable, definitely among the most able of the many attorneys representing all the organizations working on the project.

Tribal scientists—I can remember a time when tribes didn't even *have* scientists—were especially influential because so many of the issues depended upon identifying the environmental problems and devising the best scientific strategies for addressing them. I remember a discussion

with a top official on one of the major national environmental organizations, which I knew had little or no scientific capacity. I asked him how his organization, which strongly supported the agreements, made sure the best science was being used—did he call upon university scientists? Speaking of the Klamaths and Yuroks, he replied, “I always checked first with the tribal scientists. I always wanted to know what they thought.”

During this effort for Klamath basin restoration, contrary to the past events that so debilitated the Tribes, the Klamaths have been on the offensive the entire time. Rather than responding to outside directives cooked up by outside interests, the Tribes successfully developed their own positions and convinced all manner of groups, including several federal agencies and PacifiCorp, the operator of the Klamath River dams, to accept them. The Klamath doggedly pursued their water rights for nearly 40 years in the Klamath adjudication and emerged with an order recognizing “time immemorial” rights that has become the envy of Indian Country. The Klamath put that order to use in the Spring of 2013, when the Tribes so courageously and wisely made the call on the Off-Project Irrigators. The Klamath then proceeded to use the leverage from that call to achieve the remarkable Upper Basin Agreement with the irrigators, which almost everyone thought impossible.

What the Tribes have done is the exact opposite of termination. It is full-scale self-determination. The accomplishments at Klamath epitomize what tribes across the country are working toward. Assuming that the Upper Basin Agreement, KBRA, and KHSA are approved by Congress, the Tribes will have installed their priorities as the priorities of several federal and state agencies; taken the lead in restoring a major natural system; established meaningful water rights; established a cutting-edge scientific staff and program for healing the land; brought a large parcel of lost tribal land back into tribal ownership; created a substantial fund for tribal economic development; created jobs for tribal members; and acted in full accordance with the Tribes’ traditional cultural values. If that isn’t an example of full-blown modern Indian tribal sovereignty, what is?

Thank you again for asking me to take on this assignment. I very much enjoyed doing it and hope that it is useful you, the Tribal Council, and the Klamath Tribes.

My best regards,



Charles Wilkinson  
Distinguished Professor  
Moses Lasky Professor of Law