CSG West Legislative Council on River Governance
Kalispell, Montana

August 24, 2015
Dan Keppen, Executive Director
Robert B. Tate – Western and Wildlife Artist, Commercial Pilot of 55 years, Retired Ph. D Paleontologist, and…. Kalispell Red Lion Airport Shuttle Driver
First Nations / Tribal Issues: The Klamath Settlement Agreements – Perspective of Federal Project Irrigators

Dan Keppen, P.E.
Executive Director
About the Alliance
Klamath Settlement Agreements (California / Oregon)

• History / Background of Klamath Water Conflict
• Summary of Settlement Agreements
• Challenges
• The Look Ahead
Non-federal irrigators

U.S. Forest Service

Karuk Tribe

Yurok Tribe

Commercial Fishermen

Klamath Tribes

Klamath Project Irrigators

Klamath River Basin
The Klamath Irrigation Project

Our Actions Affect Consumers!
One 400 lb. Drum of Mint Oil Produces:
400,000 Tubes of Toothpaste
5 Million Sticks of Gum
20 Million Mint Candies

THINK FOOD SAFETY!
No water for most farmers

Thousands of acres will go dry for benefit of fish

By JOHN BRADY

April 6, 2001—No. 19,729
Klamath Falls, Oregon

50 Cent

Federal officials today announced that no water will be available from Upper Klamath Lake to supply farmers of the Klamath Irrigation District.

The decision makes no provision for farmers in the Klamath and Vidette irrigation districts.

The Bureau of Reclamation said it could not meet the demands of farmers and that water and electricity would be available only for emergency use.

A federal study indicates that the water is needed for the irrigation of crops and livestock, but the study also indicates that the water is needed for the irrigation of crops and livestock.

The state of Oregon has asked the federal government for a temporary emergency allocation of water, but the federal government has refused to allocate water.

The decision to stop water deliveries to farmers in the Klamath Irrigation District was made in response to a request by the federal government to stop water deliveries to farmers in the Vidette Irrigation District.

The federal government has asked for this action because of a drought in California and Oregon, where water is needed for the irrigation of crops and livestock.

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The 2001 Klamath Water Crisis
Eugene Register-Guard

Why the salmon died: Pattern points to Bush administration policies

A Register-Guard Editorial
Expiration of Long-Term Power Contract with Pacific Power & FERC
Relicensing of Klamath Hydroelectric Project
The Path to Settlement

TRIBES & OTHERS

Agreement for Klamath Dams Out (4)
Reduced Ag Water Demand
Salmon Reintroduction Habitat Restoration

IRRIGATOR $

Continued Affordable Power
Increased Water Certainty
Regulatory Assurances
Tribes Get

Agreement for Klamath Dams Out (4)
- Tribes view as most important step for salmon restoration & improving/protecting runs
- Ongoing negotiations with PacifiCorp

Reduced Ag Water Demand
- BoR Project capped at 330 – 385 taf
- Drought Plan for really bad years
- 30 taf from Tributaries

Salmon Reintroduction Habitat Restoration
- Massive restoration/ reintroduction program
- More stakeholder influence in water management

Ag (and Others) Get

Continued Affordable Power
- Allocation of Federal Power (15 avg MgW)
- Renewable Development

Increased Water Certainty
- Adjudication Settlement with Klamath Tribes
- Limited “no-call”
- Drought Plan

Regulatory Assurances
- ESA compliance
- Habitat Conservation Plan
- Protects both fish and landowners
KBRA / KHSA Signed - 2010
Public Reaction – Political Ramifications

- Tribal Land Return
- Dam Removal
- Impacts to Taxpayers
- Political Consequences
The Klamath Adjudication

On March 7, 2013, OWRD submitted its FOD for the Klamath River Basin Adjudication to the Klamath County Circuit Court.

The FOD is the culmination of a 38-year administrative process, and provides the basis for water rights-based regulation in the Upper Klamath Basin until the Circuit Court has issued a judgment after its trial on exceptions to the FOD that parties may file.
The Klamath Adjudication

- The Klamath Adjudication is the most complex adjudication in Oregon’s history
Significant Findings:

- Substantial water rights with “time immemorial” priority for the Klamath Tribes to instream flows in tributaries of Upper Klamath Lake and to water levels in Upper Klamath Lake itself;

- Irrigation rights for diversion and consumptive use for persons owning property within the former Klamath Indian Reservation;
Significant Findings:

• The United States exclusively owns the storage right for the Klamath Project.

• Irrigation districts and users are holders of rights of use of natural flow and stored waters.
Refuge Water Rights

- The FOD recognizes federal reserved rights for Tule Lake and Lower Klamath National Wildlife Refuges, both of which receive water through Project or Project-related facilities.

- These two refuges had claimed the 1905 Project priority for wetland uses on the refuges, but those claims were not upheld because flooding of wetlands was determined not to be within the purpose of the Project or its water rights.

- There are recognized, however, federal reserved water rights that are junior to the Project’s state law rights.
Adjudication

• The submission of the FOD brought to an end the long administrative process for the Adjudication.

• While it only began the judicial process in the Oregon courts, it is highly significant because Klamath water rights in Oregon are now regulated according to the FOD.

• Once court proceedings end, the Circuit Court decree is conclusive as to all prior rights and all existing claimants.
A New Paradigm

- Instream water rights determined for the Klamath Tribes will not be met unless OWRD regulates (curtails) a significant amount of existing irrigation use upstream of Upper Klamath Lake.

- The FOD is significant from the perspective of the Project, which has in the past seen its use regulated based on the ESA.
A New Paradigm

- With the determination of rights in the Project, Project water users now have the ability to seek water rights regulation outside the Project based on the appropriation doctrine.

- These two developments have resulted in difficult circumstances in the Upper Klamath Basin due to the first-time enforcement of “first in time is first in right.”
Back to the Settlement Agreements...

- Klamath Basin Restoration Agreement ("KBRA"), approved by approximately 40 parties in 2010. Klamath Hydropower Settlement Agreement (focus on Pacific Power dams) also signed.

- Based on agreements reached in the KBRA, irrigation water users in the Project will not have their use curtailed as a result of senior tribal rights to water levels in Upper Klamath Lake, at minimum, not until after the court’s decree.

- Potential curtailment thereafter is a function of whether the KBRA is implemented as well as the outcome of the decree.
Increasing Tension

- Oregon drought emergency.
- Power rates for irrigators and refuges increased 1200% compared to 2006.
- Refuges went dry, disease outbreak killed 9,000 birds.
- Tribes and Project irrigators enforced newly-minted senior water rights.
Off-Project Agreement with Tribes

- The KBRA provides a framework for a resolution that would avoid and mitigate impacts of the tribal rights on irrigation areas upstream of Upper Klamath Lake.

- An agreement building on those terms was signed between off-Project irrigators and the Klamath Tribes in the spring of 2015.
Outlook

• The settlement agreements have not been authorized by Congress and thus cannot be fully implemented.

• Substantial challenges lie ahead.
Crisis Mode – The Window is Closing

• “Off-ramp” for agreement signatories triggers at the end of 2015
• Senate authorization legislation has been introduced by Senate Democrats Wyden and Merkley (OREGON) and Feinstein and Boxer (CALIFORNIA).
• Companion legislation in the House has not been introduced.

• 2016 is an election year
Key Challenges for Settlement Proponents

- Local elected officials do not fully support the agreements
  - Klamath County Board of Commissioners (Rep. Walden, OREGON)
  - Siskiyou County Board of Supervisors (Rep. LaMalfa, CALIFORNIA)
- Hoopa Valley Tribe (CALIFORNIA) does not support the agreements
- A handful of litigious environmental organizations do not support the agreements
- Dissension within the ranks of the Klamath Tribes
Risks if Settlement Legislation is not Enacted

- Collaborative relationships will be lost.
- The chances of developing another settlement will likely evaporate.
- Back to the “old way” of doing business:
  - Litigation
  - Dueling scientists
  - Media attacks
  - Uncoordinated, hostile legislation
- The beginning of serious agricultural decline in the Upper Klamath Basin
Positive Developments for Settlement Proponents

• Tremendous Focus on Drought and Water Challenges in Congress
  • Western Drought Bill Passed the House of Representatives
  • California Drought Bill Introduced in the Senate
  • Senate Western Drought Bill to be Introduced in September
Growing Support for Klamath Settlement Agreements

Sportsmen/Conservation groups

Trout Unlimited
California Trout
Ducks Unlimited
American Rivers
The Nature Conservancy
Salmon River Restoration Council
Sustainable Northwest
Federation of Fly Fishers, Northern California Council
Audubon California
Klamath Basin Rangeland Trust
Klamath Watershed Partnership
Cal-Ore Wetlands and Waterfowl Council
California Waterfowl Association
Delta Waterfowl
Bull Moose Sportsmen
Izaak Walton League, Oregon Division
Berkley Conservation Institute-Pure Fishing Company
Backcountry Hunters & Anglers
Association of Northwest Steelheaders
Central Oregon Flyfishers
Theodore Roosevelt Conservation Partnership

Commercial and Sport Fishing Industry

Pacific Coast Federation of Fishermen’s Associations
Institute for Fisheries Resources
Northwest Guides and Anglers Association
Northwest Sportfishing Industry Association
Yamsi Ranch Flyfishing
Shasta Trout guide service
Wild Waters Fly Fishing
Ted Fay Fly Shop

Newspapers

Klamath Falls Herald and News
The Oregonian
Eugene Register Guard
Salem Statesman Journal
The Sacramento Bee
The New York Times
The Eureka Times-Standard
The Chico Enterprise-Record
Growing Support for Klamath Settlement Agreements

Government
U.S. under the Obama and Bush administrations
California under Gov. Brown and Gov. Schwarzenegger

Business and Community
PacifiCorp
Associated Oregon Industries
Oregon State Chamber of Commerce
Klamath County Chamber of Commerce
City of Klamath Falls
Modoc County, California
Humboldt County

Tribes
Karuk Tribe
Klamath Tribes
Yurok Tribe

Agriculture
Family Farm Alliance
National Potato Council
Oregon Farm Bureau
Klamath/Lake County Farm Bureau
Modoc County (CA) Farm Bureau
Modoc County Cattlemen’s Association
Oregon Cattlemen’s Association
Klamath County Cattlemen’s Association
Klamath Water Users Association
Upper Klamath Water Users Association
Klamath Water and Power Agency
Oregon Potato Commission
Fort Klamath Critical Habitat Landowners
Upper Klamath Landowner Improvement District
Oregon Water Resources Congress
Resource Conservancy
Sprague River Water Resource Foundation
13 Klamath Project Irrigation Districts
### HOW MUCH WATER DID THE KLAMATH RECLAMATION PROJECT GET IN 2014?

<table>
<thead>
<tr>
<th>Source</th>
<th>Diversion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjudication Order:</td>
<td>560,000 ac/ft</td>
</tr>
<tr>
<td>Normal:</td>
<td>390,000 +- ac/ft</td>
</tr>
<tr>
<td>2013 – 2022 Biological Opinion</td>
<td>Diversion Cap: 208,000 ac/ft</td>
</tr>
<tr>
<td>KBRA (Settlement)</td>
<td>300,000 + ac/ft</td>
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</tbody>
</table>
Why the Family Farm Alliance Supports Klamath Settlement Legislation

• We support locally-driven collaborative solutions to water challenges
• Other Alliance members have successfully settled with Tribes (Nez Perce Agreement, Navajo / Apache, Ute Tribes)
• This is a creative way to address ESA-driven water conflicts
• It keeps farmers and ranchers in the business of providing food and fiber to the world
Questions?
Catch me later at the conference
Or e-mail me at dankeppen@charter.net