



# YUROK TRIBE

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Testimony of the Yurok Tribe  
Senate Committee on Energy and Natural Resources  
June 20, 2013

## Water Issues in the Klamath River Basin

The Yurok Tribe provides this written testimony regarding water issues in the Klamath River Basin.

The Yurok Reservation is located on the lower 44 miles of the Klamath River extending from the Pacific Ocean upstream to above the confluence of the Trinity and Klamath Rivers. Yurok people have lived in this area since time immemorial. Any activities within the Klamath River Basin that affect the health of the Klamath River and its fishery resources have a direct impact upon the Yurok Tribe. The Klamath River Basin includes the Trinity, Scott, Shasta, Salmon, Williamson, Wood and Sprague Rivers including all connected tributaries.

The following principles must be applied when the United States is involved in any issue that affects Klamath River Basin fish, water or other resources:

- 1) That the United States fully and properly protect and restore all trust resources of the Yurok Tribe. This principle includes the need to manage Klamath River Basin resources such that the Yurok Tribe can fully participate in the subsistence, commercial and ceremonial harvest of all species and races of anadromous and other fish;
- 2) That the United States abide by and honor the commitments made in the Cooperative Agreement between United States Department of the Interior and Yurok Tribe for the Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin of California [June 26, 2006];
- 3) That any activities which affect fish and/or water resources within the Klamath River Basin affect the Yurok Tribe Reservation and the Yurok Tribe whether such activities occur in California or Oregon;



- 4) That the United States, including the Department of the Interior, must provide the Yurok Tribe with any proposal, initiative or other concept that affects the interests and resources of the Yurok Tribe;
- 5) That the United States, including the Department of the Interior, pursuant to the cooperative management agreement mentioned above, principles of the government-to-government relationship, and in proper recognition of the dependence of the Yurok Tribe upon Klamath River Basin fish, water and other resources, will not take any action affecting Yurok interests without the full, timely, and meaningful participation of the Yurok Tribe in all decision and other processes;
- 6) That the United States and the Department of the Interior recognize that the Yurok Tribe harvests the vast majority of Klamath River Basin fish as demonstrated by the Tribe's past harvest;
- 7) That the United States recognize and respect the Yurok Tribe fishery interests as specifically recognized by the 1993 Opinion of the Solicitor, the 1988 Hoopa Yurok Settlement Act and its legislative history and other appropriate sources.

What follows is a description of the Yurok Tribe's dependence upon the Klamath River and its fisheries, including attached rights.

The Yurok Tribe's message is that there is a continuing and substantial impact to the Yurok Tribe's fisheries and other resources. That impact has dire social and economic consequences on the lives of Tribal members, their families and Tribal communities. Any process regarding the management of Klamath River Basin fish, water or other resources must include the Yurok Tribe. The United States, including the Department of the Interior, must properly share all relevant information in its possession. Any decisions regarding tribal resources must be based upon the Tribe's unique circumstances and strengthen Tribal culture and related priorities.

### **The Yurok Tribe Dependence on Klamath River Basin Fish**

Klamath River fish are irreplaceable to the Yurok Tribe's culture, religion and economy. From time immemorial, Yurok people have depended on the Klamath River and all of its streams and tributaries. The River is central to Yurok society by providing food, transportation, commercial trade, and numerous other activities essential to Yurok life. Throughout history and today, the identity of the Yurok people has been intricately woven into natural environment including the Klamath Basin watershed. Tribal religious and ceremonial practices focus on the health of the

world; the Klamath River and its fisheries are a priority. The Yurok Tribe's

obligation to protect the fishery has always been understood by Yurok people. The ancestral territory of the Yurok Tribe included coastal lagoons, marshes, ocean waters, tidal areas, redwood and other ancient forests, prairies and the Klamath River. The Preamble of the Constitution of the Yurok Tribe identifies:

Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, W'o'ge' made things ready for us and the Creator, Ko-non-no-ekc-on Ne ka-nup-ceo, placed us here. From the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty. In times past and now Yurok people bless the deep river, the tall redwood trees, the rocks, the mounds, and the trails. We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and forests through controlled burns that improve wildlife habitat and enhance the health and growth of the tan oak acorns, hazelnuts, pepperwood nuts, berries, grasses and bushes, all of which are used and provide materials for baskets, fabrics, and utensils.

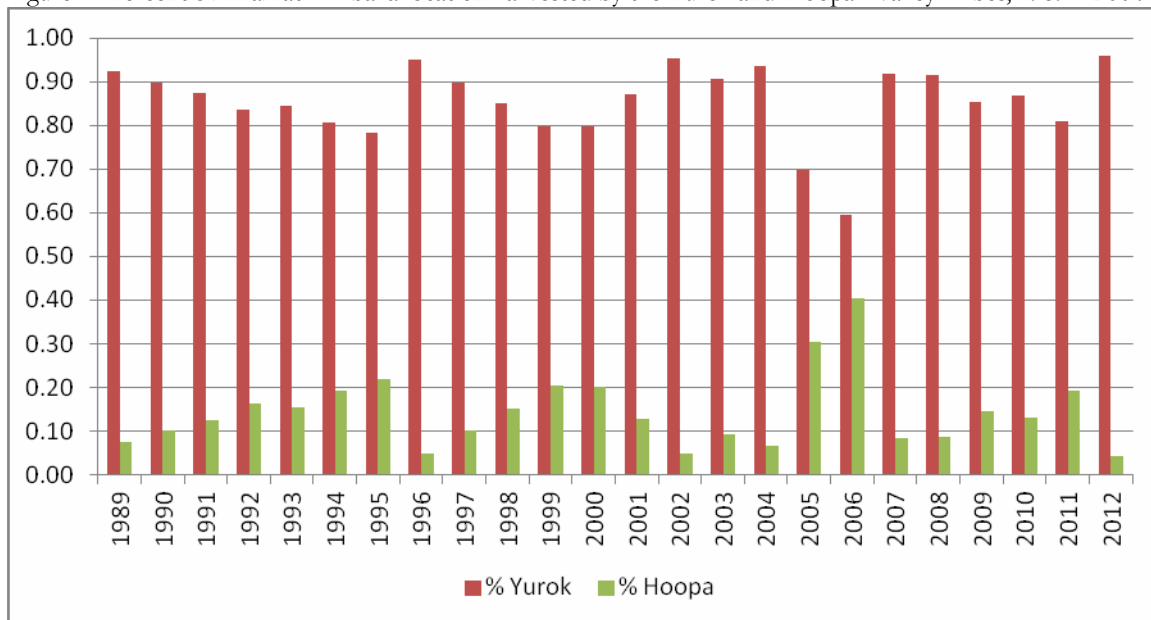
(Yurok Tribe Constitution 1993)

The Yurok Reservation extends for a mile on each side of the Klamath River from the Pacific Ocean to above the confluence of the Klamath and Trinity Rivers. The Reservation stretches for a distance of approximately 44 miles.

Because of the rivers' importance, one of the Tribe's highest priorities is to protect and preserve the resources of the rivers, and in particular, to restore the anadromous fish runs to levels that can sustain Yurok people. When the original Klamath Reservation was established in 1855, the rivers were filled with abundant stocks of salmon, steelhead, eulachon, lamprey, and green sturgeon. Today, the abundance of fish in the Klamath River and its tributaries are only a small fraction of their historic levels. Many species of fish have gone extinct, many other species, such as fall Chinook, are in serious trouble. Nonetheless, anadromous fish continue to form the core of the Yurok Tribal fishery. The Yurok Tribe is pursuing its fishery restoration goals through a fish management and regulatory program, participation in various forums to reach long term solutions to Basin problems and when necessary, litigation. The Tribe has devoted a large share of scarce funding resources to budgets for fishery management and regulation. The Tribe has enacted a fisheries ordinance to ensure that the fishery is managed responsibly and in a sustainable manner and has a longstanding record of resource protection. The Tribe's fisheries department is well respected and recognized as a knowledgeable and experienced fisheries entity in the Klamath Basin. The Yurok Tribal Council and the Tribal members they represent are well known for taking and supporting responsible actions to protect fisheries resources.

The Yurok Tribe's dependence upon Klamath River fish is supported by Tribal harvest data. Since the passage of the Hoopa Yurok Settlement Act in 1988, the Yurok Tribe harvest of Klamath River fall Chinook represents approximately 87% of the 50% Tribal allocation (see Figure 1.). In terms of the overall allocation of Klamath River fall Chinook, comprised of Tribal and non-Tribal fishing groups, the allocation of fall Chinook for the Yurok Tribe is the largest single allocation of any group, tribal or non-tribal, harvesting Klamath River fall Chinook. The Tribe's allocation is 80% of the Tribal allocation, or 40% of the total allocation of harvestable surplus of Klamath fish.

Figure 1. Percent of Klamath Tribal allocation harvested by the Yurok and Hoopa Valley Tribes, 1989 – 2004.



The Tribe's dependence on Klamath River fish and the expectation that the Tribe would have significant economic opportunities from the fishery was identified by Congress during passage of the 1988 Hoopa Yurok Settlement Act. Unfortunately, the lack of Klamath River fish has prevented the Yurok Tribe from realizing the benefits of the Klamath fishery as intended by Congress. The legislative history confirms that Congress intended to vest in the Tribe property rights to the fishery on the Klamath River. The Committee noted that the Act "will also establish and confirm the property interests of the Yurok Tribe in the Extension, including its interest in the fishery. Senate Report No. 564, 100 Cong, 2d sess. (1988).

**Legal Basis of Yurok Fishing Rights**

The fishing rights of the Yurok Tribe are well-established as a matter of federal law. The Yurok Reservation, created pursuant to an 1855 act of Congress, was established within the Yurok Tribe's aboriginal homeland primarily to provide a territory in which the Tribe's fishing-based culture and way of life could thrive and continue to exist. This fact has been recognized repeatedly since the Reservation was established -- by the Departments of the Interior and Commerce, the United States Supreme Court, the lower federal courts, and the California courts. *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 487 (1973); *Donnelly v. United States*, 228 U.S. 243, 259 (1913); *Parravano v. Masten*, 70 F.3d 539, 545-46 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996); *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). As Justice Blackmun observed in *Mattz v. Arnett*, the original Klamath River Reservation, the precursor to the current Yurok Reservation, "abounded in salmon and other fish" and was in all ways "ideally suited for the Yuroks." 412 U.S. at 487.

The Yurok Tribe's right to take fish on the Klamath River is protected and guaranteed by federal law. The Ninth Circuit Court of Appeals confirmed that the executive orders that created the Yurok Reservation vested the Yurok Tribe with "federally reserved fishing rights." *Parravano v. Masten*, 70 F.3d 539, 541 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The same court has aptly observed that the salmon fishery of the Yurok Tribe is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett, supra*, at 909. The Solicitor of the Department of the Interior has determined that the Yurok Tribe is entitled to a sufficient quantity of fish to support a moderate standard of living, or 50% of the Klamath fishery harvest in any given year, whichever is less. Memorandum from Solicitor to Secretary of the Interior, No. M-36979, October 4, 1993. The right includes fishing for subsistence, commercial and cultural purposes. As the court in *Parravano* noted, the purpose of the Yurok Reservation was to enable the Yurok people to continue their fishing way of life. The River and its fish are undeniably the cultural heart of the Yurok people.

### **The Klamath Agreements**

The Yurok Tribe has been involved in Klamath Basin conflict since the Tribe formally organized in the early 1990's. The Tribe's interest flows from the reliance and responsibilities Yurok people have on and to the Klamath River and its fish. The Tribe's social and economic structure has been decimated, in large part, due to the decimation of the Tribe's fisheries. The Yurok Tribe is the single largest harvester of Klamath River fish. No one single factor accounts for the loss of our fish; these factors have combined with each other to result in the poor situation we find today.

The Yurok Tribe has worked hard with environmental, agricultural, county, tribal, State and Federal interests to address many of the long standing issues that cause conflict in the Klamath Basin. The result of hard work by all the Parties was the historic signing of the Klamath Agreements in Salem Oregon in 2010 by these parties; the Klamath Hydropower Settlement Agreement and the Klamath Basin Restoration Agreement.

Combined, these agreements address the need to remove Klamath River dams, provide funding for fisheries restoration and provide more water for environmental purposes (fish, wildlife, refuges, etc.). These agreements in turn provide more reliable water for agriculture in the upper Klamath Basin and more certainty to the power company regarding the fate and operation of the Klamath hydropower project.

The Tribe urges the Congress to pass legislation that authorizes and implements the Klamath Agreements.

It is critical that the foundation of the Klamath Agreements remain intact through the legislative process. The Yurok and other Parties negotiated agreements to resolve a number of complex issues that have been the center of conflict in the Klamath Basin for many years. These agreements contain support for funding various activities necessary to address issues of conflict. If the budget or other obligations attached to these agreements change, then the Yurok support for these agreements change as well. It is important that any legislation to authorize and implement the Klamath Agreements not change the timing or other actions necessary to implement the agreements signed by the Yurok Tribe and other Parties.

The Klamath Agreements do not solve all the water and fisheries issues in the Klamath River Basin. They were never intended to do so. The Parties realized that it would not be possible to solve the issues on the Shasta, Scott and Trinity Rivers. What the agreements do is to begin to address some of the most immediate and serious issues in the Klamath Basin. The Yurok Tribe will continue to work with other interests to address outstanding issues on these rivers.

Some interests claim that the Klamath Agreements terminate tribal rights and the federal trust responsibility to Klamath Basin Tribes. As these positions are considered we ask that individuals appreciate that the Klamath Tribes with the most significant reliance on fish from the Klamath side of the Klamath River Basin support these agreements. The agreements are an expression of tribal sovereignty and self-determination. Attached to this testimony is a review of the Klamath Agreements as it pertains to tribal rights. A number of sections in the Klamath Restoration Agreement address tribal rights. Below is an important section for the Yurok Tribe:

### **2.2.11. No Determination of Water Rights by the Agreement**

No water rights or water rights claims of any Party are determined or quantified herein. No water rights or potential water rights claims of any non-party to the Agreement are determined herein. No provision of this Agreement shall be construed as a waiver or release of any tribal water or fishing rights in the Klamath River Basin in California, including claims to such water or fishing rights that have not yet been determined or quantified. The Secretary will not take any action in any proceeding within the adjudication of Klamath Basin water rights in the State of Oregon that eliminates the existence or quantifies the amount of any tribal water or fishing rights in California.

### **Trinity River Issues**

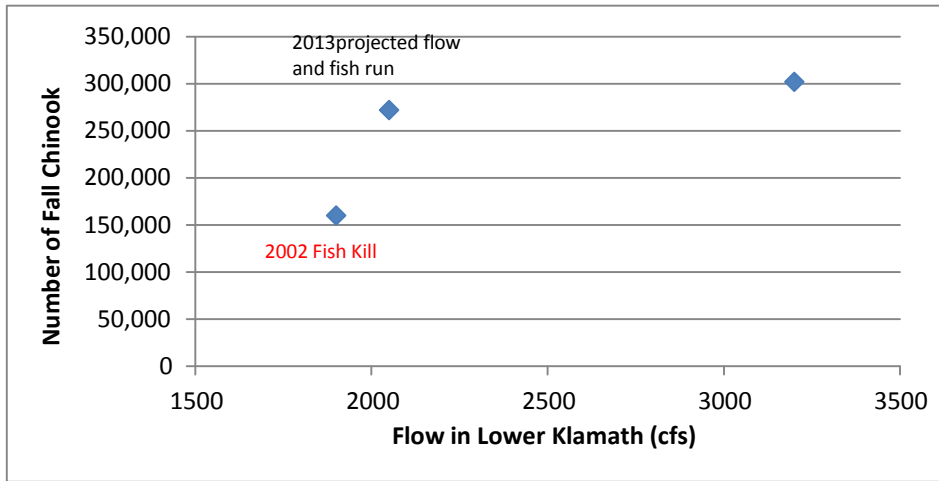
The Yurok Tribe depends upon the health of the Trinity River and its fisheries resources, as it is the largest Tributary to the Klamath River.

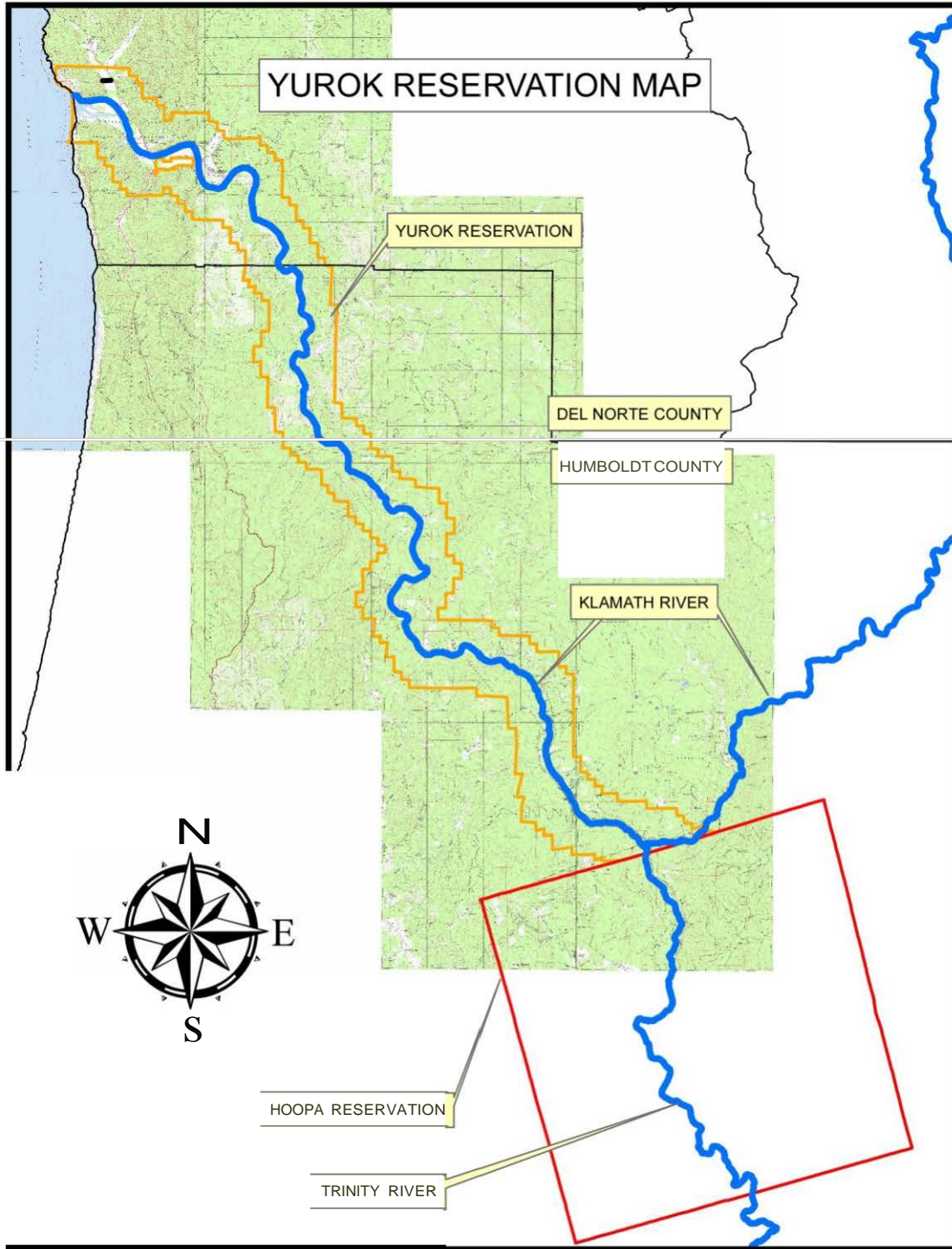
The Yurok Tribe supports that no less than 50,000 acre-feet shall be released annually from the Trinity and made available to Humboldt County and downstream users as was provided for in the 1955 Act regarding the Trinity River.

It is critical that water from the Trinity River be made available during dry water years when in-river run size of Fall Chinook is projected to be large. The Yurok Tribe and others have a serious concern that water from the Trinity River is necessary to protect ESA and other species of fish as they enter the Klamath River this fall. Projected Fall Chinook run size returning to the Klamath River will be the second largest. At the same time, the Klamath Basin is in a dry water year. This combination of factors is a concern to the Yurok Tribe, as there is a risk of another fish kill in the Klamath River similar to 2002. Everyone associated with the Klamath Basin should share that concern.



Klamath River run size and Lower Klamath Flows, 2002, 2012, and 2013





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Analysis of Certain Provisions of Proposed  
Klamath Basin Restoration Agreement

The Yurok Tribal Council asks one fundamental question:

Are the Tribe's proposed agreements in the KBRA not to assert water rights claims in specified circumstances, and to waive claims for past damages in specified circumstances, reasonable?

I necessarily make this judgment with certain limitations. Although I have known of the impacts of the Klamath River dams since the 1970s and have followed fisheries issues on the Klamath with great interest ever since because of my work in Indian law and water law, I have not been involved in these negotiations and generally have never done what I would consider specific, in-depth research on these Klamath River issues. At the same time, I have reviewed information which provides a sufficient foundation to respond with confidence to the Tribal Council's question.

In my judgment, yes, the Tribe's agreement to the two KBRA provisions is reasonable. I will discuss the two provisions and then place them in the larger context of the Tribe's participation in Klamath Basin Restoration.

Waiver of Claims Against the United States

Section 15.3.6.8 provides that the Tribe agrees to a "complete waiver and release" of all claims against the United States for damage to tribal water and fishing rights that resulted from actions above the California-Oregon border and that arose before the KBRA goes into effect.

The waiver is limited both as to place (it does not cover federal actions in California) and time (it is not future-looking and does not apply to any federal actions taking place after the KBRA is adopted). Nonetheless, past diversions by the Klamath Irrigation District have plainly impacted on tribal rights in the past and the waiver would prevent suits against the federal government for those actions.

The law on such claims for past damages, however, is against the Tribe in several respects. The Tribe litigated the major past event—the extraordinary fish kill in 2002—and the case was dismissed; that decision is final. For older claims, the United States could raise statutes of limitations and other procedural defenses. In general, courts have weakened the federal trust obligation in recent years. This was a main factor in your litigation over the 2002 fish kill. *See*, Curtis Berkey, "Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources," 83 *Denver U Law Review* 1069 (2006). I agree with the reasoning in that article, including the general conclusion that "with few exceptions . . . the efficacy of the trust doctrine has steadily weakened. . . ."

At least the Tribal Council can know that the waiver has little or no real-world effect and that it is being agreed to only because it is part of this ambitious restoration effort, which is aimed at preventing further wrongs to the watershed and tribal rights.

#### Assurance Relating to Assertion of Tribal Water Rights

The KBRA is not an adjudication or other definition of Yurok tribal water rights. Section 15.3.2.A expressly provides that "the water rights of . . . the Yurok Tribe, . . . whatever they may be, have not been quantified, resolved, or determined in any way by this Agreement or any related documents." If water rights were to be adjudicated or defined, the KBRA would have to be very specific about it. The congressional practice in Indian water rights settlements is for the legislation to explicitly identify the water quantities and priority dates of the rights and to declare that the settlements rights are "final" or established "forever." There are no such provisions here.

At the same time, while tribal water rights are not established in the agreement, the Tribe does agree not to assert tribal water rights that may be established in the future against project users so long as the project users stay within the limits set by the KBRA. Section 15.3.6.A of the KBRA provides that the Tribe and the United States "will not assert . . . Yurok tribal or trust water rights" as long as project users in the Klamath Reclamation District do not exceed the project's reduced diversions allowed by the KBRA.

In my judgment, this amounts to a limited waiver of one element of the water rights that the Tribe may attain in the future. This is absolutely not a waiver of all tribal water rights. Critically, the project users in the Klamath Reclamation District's are directly accountable to the Tribe if they violate the strict diversion requirements in the KBRA. Further, and significantly, the assurance by the Tribe expressly allows it to require compliance by the project users (and all other users in the watershed) with the Endangered Species Act and Clean Water Act.

The one element of this waiver— your willingness not to sue if the project users stay within the KBRA requirements— is tied directly to one of the major concessions in these negotiations, the reclamation district's agreement to the reduction in diversions. These reduced diversions, which are very substantial, go to the heart of the overall restoration of the Klamath watershed. For example, under the KBRA, in dry years the irrigation district will be allowed to divert 330,000 acre feet—approximately 100,000 acre feet less than the district has diverted historically.

In this context, the limited waiver is "routine" in the sense that water rights settlements almost always provide that negotiated rights are vested in order to provide certainty to users. Water rights holders in settlements may have to reduce their claims, as the district has done here, but the reduced amount is protected. The Tribe's limited waiver gives protection to the district's reduced right, and nothing more, and is consistent with the universal practice in water rights settlements. Given the large amount of the reductions, it is hard to imagine that project users would have participated in the agreement without being guaranteed some level of certainty for the reduced diversion amount.

In my opinion, this limited waiver is reasonable from the Tribe's point of view.

#### The Two Provisions in the Context of the Whole Agreement

The waivers relating to claims against the United States and water rights cannot be viewed in isolation. Instead, they should be seen as necessary and minor aspects of the comprehensive and powerful provisions of the KBRA, which is one of the most remarkable and promising efforts that I have witnessed in my thirty-eight years of work on natural resources and Indian law and policy.

Given the breadth of the KBRA, there is good reason to believe that these two provisions will have little or no impact on the Tribe's mission of establishing flows of sufficient quantity and quality so as to restore the salmon runs and achieve overall sustainability of the Klamath River watershed. In addition to the reduction of diversions by the reclamation district, implementation of the KBRA will make sweeping changes in the management of this watershed by, among other things, removing the four dams; reducing diversions above Klamath Lake; taking irrigated land out of production; restoring wetlands; increasing storage; and establishing a rigorous adaptive management regime in which tribal scientists will play a central role.

This undertaking is complex in the extreme, and no one can predict the future with exactitude. Nonetheless, the support of tribal, federal, and state scientists for the KBRA's ability to achieve restoration of the fishery to harvestable levels is as reliable an indicator of the value of the KBRA as a whole package that the Tribal Council could expect to find.

This is a truly historic agreement, and you deserve to take great pride in it and, as well, feel confident as you make decisions on matters of watershed restoration such as those addressed in this letter.

Thank you for your courtesy.

Very truly yours,



Charles F. Wilkinson

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i Prior to joining the faculty ofCU Law School, Charles Wilkinson practiced law with private firms in Phoenix and San Francisco and then with the Native American Rights Fund. In 1975, he became a law professor, teaching at the law schools of the University of Oregon, Michigan and Minnesota before moving to Colorado in 1987.

His primary specialties are federal public land law and Indian law. In addition to his many articles in law reviews, popular journals, and newspapers, his thirteen books include the standard law texts on public land law and on Indian law. He also served as managing editor of Felix S. Cohen's *Handbook of Federal Indian Law*, the leading treatise on Indian law. The books he has written in recent years, such as 1992's *The Eagle Bird*, are aimed for a general audience, and they discuss society, history, and land in the American West. He won the Colorado Book Award for *Messages From Frank's Landing*, a profile of Billy Frank, Jr. of the Nisqually Tribe of western Washington. In his latest book, *Blood Struggle: The Rise of Modern Indian Nations*, he poses what he calls "the most fundamental question of all: Can the Indian voice endure?"

Professor Wilkinson has received teaching awards from his students at all three law schools where he has taught, and the Universities of Colorado and Oregon have given him their highest awards for leadership, scholarship, and teaching. He has also won acclamation from non-academic organizations. The National Wildlife Federation presented him with its National Conservation Award, and in its 10-year anniversary issue, *Outside Magazine* named him one of 15 "People to Watch," calling him "the West's leading authority on natural resources law."



