Klamath Justice for All

An alternative vision to the proposed Klamath Basin Restoration Agreement (KBRA)

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The Klamath Basin Restoration Agreement (KBRA) is long, complex and multi-faceted. When the complexity and legal language is penetrated, however, the agreement is revealed as quite direct: it seeks to advance and benefit certain interests at the expense of other interests. Chief among the "winners" the KBRA seeks to create are irrigators and non-irrigation water users obtaining water via the U.S. Bureau of Reclamation's Klamath Irrigation Project. The KBRA advances the interests of federal water users at the expense of irrigators in the Upper Basin, Shasta and Scott.

In similar fashion, the KBRA seeks to advance certain environmental interests and the interests of certain tribal governments over other environmental interests and the interests of other tribal governments. Any Agreement which advances some irrigation, environmental and tribal interests over other irrigation, environmental and tribal interests will be unstable and cannot end conflict over water.

There is a better way; a way which provides balance, equity and justice for all Klamath River Basin water users, tribes and environmental values. Below key aspects of the KBRA are described, compared and contrasted with the Justice for All alternative.

Water Allocation

KBRA:

Klamath River flows and water for endangered suckers is limited to the minimum which will prevent "jeopardy" for ESA listed species. First "call" for Klamath water is guaranteed for the Bureau of Reclamation (BOR) and the water users which is serves ahead of fish, wildlife and other irrigators throughout the Basin including irrigators located above Upper Klamath Lake and in the Shasta and Scott Valleys. The BOR and federal irrigation interests get first call to the average amount of water they have used in recent years.

Water demand reduction through purchase and retirement of water rights is prohibited within the BOR's Klamath Irrigation Project and must all take place above Upper Klamath Lake. Any "new water" created through demand reduction and new storage, whether in wetlands, underground or in reservoirs, goes first to federal irrigation interests and second to environmental purposes.

Justice for All:

A best-science, full-basin flow assessment as recommended by the National Research Council will determine flows, lake levels and other conditions needed to recover Klamath Salmon and other ESA-listed species to abundance. Government restoration funds will then be directed to meet those needs. Restoration to abundance fulfils tribal treaty and reserved rights to fish and wildlife and will make it possible to remove salmon and sucker species from endangered species protection.

Water is allocated in accordance with applicable water law and court adjudication decisions. First "call" on Klamath Water is to fulfill treaty, reserved and public trust needs. Newly available water

resulting from government funded demand reduction and/or new storage goes first to meet species recovery needs. New water beyond recovery needs is shared equitably among all water users.

Federal & State Endangered Species Law

KBRA:

Salmon are reintroduced to the Upper Basin via a complex and expensive process using hatcheries and active manipulation of fish (egg taking and propagation, moving juvenile fish, etc). Introduced salmon are an "experimental population" and can be removed if the US government decides that the cost is too high, the experiment is not working, or that the regulatory burden is too high.

The Bureau of Reclamation and the irrigation and non-irrigation interests it serves (e.g. Reames Golf and Country Club, Collins Pine, etc.) are provided with a "conservation plan" and changes in state law which satisfies requirements of the federal Endangered Species Act and California fully-protected species law.

Federal and state agencies work to relieve regulatory requirements ("burdens") related to species protection under applicable law from irrigation interests within the federal Klamath Irrigation Project. For example, the US FWS has removed most of Lost River Basin from critical habitat for Lost River and Shortnose Suckers. The Lost River Basin – the heart of the Klamath Irrigation Project - is rendered an environmental sacrifice zone.

Justice for All:

Dams come down or volitional fish passage around them is provided. Salmon, Steelhead and other aquatic species reinhabit the Upper Basin on their own time-frame and as conditions permit. ESA and other protected species retain protection until recovery is achieved; all water users are provided equal assistance with meeting their species protection obligations.

National Wildlife Refuges

KBRA:

Refuges become an official purpose of the Klamath Irrigation Project but remain under the heel of the BOR and the Irrigation Districts. The Refuges are dewatered or ordered to store and release water to meet BOR objectives even when those objectives are not in the interest of refuge wildlife.

Bird disease epidemics related to refuge dewatering continue. Upper Klamath National Wildlife Refuge (NWR) and other marshes are dewatered every year resulting in additional phosphorus pollution in Upper Klamath Lake and in the Klamath and Lost Rivers.

Commercial farming is locked-in on Lower Klamath and Tule Lake Refuges for another 50 years.

Justice for All:

Refuges become an official purpose of the Klamath Irrigation Project. The BOR supplies water to refuges in accordance with the Oregon Adjudication. Interior fights for 2008 water rights for Lower Klamath NWR. The refuges are allowed to develop an independent water supply.

A new management plan is completed for Tule Lake and Lower Klamath Refuges which utilizes the best available scientific information to evaluate whether commercial farming on those refuges is net benefit to wildlife when compared with alternative management – including restoration to marshland. Federal law already requires that commercial agriculture on these refuges must be compatible with their primary wildlife purposes. If commercial agriculture is found to be incompatible with refuge purposes it is phased out.

Water and Restoration Governance

KBRA:

Water allocation and management decisions are made by the Bureau of Reclamation in the back room and out of public view with input only from KBRA signatories.

Restoration funding is pre-allocated via the KBRA (see Appendix C-2) so that the places restoration occurs and the entities receiving restoration funding are not determined by the best restoration bang for the buck but rather based on political criteria. KBRA signatories get the bulk of restoration funding; non-signatories get little or nothing.

Justice for All:

Federal legislation establishes a new Klamath Basin Compact to coordinate water management and restoration basin-wide based on the best available science and in accordance with existing state, federal and local authorities. The new Klamath Basin Compact Commission has seats for all 6 of the Basin's federal tribes and all 6 counties with lands within the Basin. It also has seats for California, Oregon and the federal government. The Commission does its work in public with full citizen participation.

Federal legislation mandates and prioritizes completing the basin-wide flow assessment recommended by the National Research Council in order to determine flow needs and direct restoration funding and action toward meeting those needs.

Restoration funding is allocated via a transparent, public process which allocates funds using the best available restoration science in order to maximize positive restoration impact and achieve the best outcomes.

Land Management

Ultimately, our ability to recover tribal treaty, tribal trust and public trust resources – and our rivers – will depend on how we, as a society, manage upland watersheds.

KBRA:

In exchange for not exercising tribal water rights in a manner which reduces water delivery within the BOR’s Klamath Irrigation Project, the Klamath Tribes get money to purchase the Mazama Tree Farm which is cut-over and degraded industrial forest land.

The Basin’s five other federal tribes also lose the ability to require the federal government to assert and support tribal water rights in a manner which reduces water delivery within the BOR’s Klamath

Irrigation Project. By signing the KBRA, two of the five tribes have agreed to give up these rights; three tribes would have their trust rights with respect to the Klamath Project involuntarily terminated.

The Basin's six federal tribes would not gain any new authority to manage or co-manage federal lands.

Justice for All:

The Klamath Tribes is provided co-management authority for federal lands within the boundary of the former Klamath Reservation. The Klamath Reservation was terminated by the federal government in the 1960s and became the Winema National Forest.

The Basin's five other federal tribes – the Yurok, Karuk, Hoopa, Quartz Valley and Resighini Tribes – are provided co-management authority for all national forest and national park land located within their respective ancestral territories.

Co-management provisions include the funding, jobs and responsibilities necessary to effectively and equitably co-manage these lands with the Forest Service or Park Service.

Conclusion

While it undoubtedly contains some beneficial provisions, the Klamath Basin Restoration Agreement (KBRA) is, at its heart, bad policy and bad politics. The worst aspects of the deal require federal legislation; other detrimental aspects are already being implemented.

As we have seen in the three years since the KBRA was signed, the return to *irrigation first* management under the control of the US Bureau of Reclamation has already resulted in additional cuts to minimum Klamath River flows and to dewatering the Klamath Wildlife Refuges resulting in a massive bird die-off and significantly increased water pollution. KBRA funding for federal irrigation interests has been front loaded while benefits to tribes and the environment await federal legislation.

If Congress endorses and funds the KBRA, the Klamath Tribes will lose the ability to use tribal water rights to recover treaty-based fishing and hunting rights. All Klamath River Basin's federal tribes will lose the ability to require the federal government to protect their right to river and stream flows and lake levels needed to recover salmon, sucker species and other tribal trust resources. Recovery of Klamath Salmon, Shortnose and Lost River Suckers will be foregone; only those flows and lake levels necessary for bare survival will be provided.

Because it favors some tribes over other tribes, some irrigators over other irrigators and some environmental interests over other environmental interests, the Klamath Basin Restoration Agreement cannot end major conflicts over Klamath water. As we have seen in three years under the KBRA, choosing winners and losers and a return to *irrigation first* water management can only render those conflicts more bitter and intractable. The KBRA cannot deliver the "Peace on the River" which its creators and promoters promised.

Only fairness and equity for all under the rule of law can resolve outstanding conflicts over water and move us toward real "Peace on the River".