

CHARLES WILKINSONⁱ
Distinguished University Professor, Moses Lasky Professor of Law
UNIVERSITY OF COLORADO LAW SCHOOL
401 UCB
BOULDER, CO 80309
(303)545-9765 (OFFICE)
(303)447-9714 (FAX)

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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.B 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

ⁱ Prior to joining the faculty of CU 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."