

# Tribal Sovereignty, Water Rights, and the Klamath Agreements

*by John Corbett, and S. Craig Tucker  
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The United States, States and Indian Tribes are sovereign governmental entities. Among the aspects of sovereignty are the rights to self-governance, to make agreements on behalf of citizens, and not be sued without consent. All of these governmental entities have found it necessary to grant limited waivers of sovereign immunity to accomplish governmental purposes that are in the best interests of citizens. For example, the federal government waived its sovereign immunity against suit in the Endangered Species Act. Without this waiver, environmental suits against the Federal Government under the ESA would not be allowed. The State of California allows suits for inadequately prepared Environmental Impact Statements. The United States and California have waived their immunity and consented to be sued for “tort claims,” personal injury caused by a government agent.

Critics of the Klamath Basin Restoration and Hydroelectric Settlement Agreements have expressed several concerns about what they see as infringements upon tribal sovereignty and water rights. One of the most outspoken concerns is a complete falsehood: it is claimed, incorrectly, that the Department of Interior has waived tribal trust rights involuntarily against Tribes who don’t sign the agreement. This rumor appears to be based upon the fact that the draft agreements contain promises by the three settling tribes that, in return for benefits of fishery restoration, they will not sue the U.S. Government for breach of trust. It has been clarified many, many times that any Tribe which does not sign the agreements, is not subject to the promise not to sue. Neither the Yurok Tribe nor the Karuk Tribe will support an agreement that provides for an involuntary waiver of Tribal rights by the Department of Interior. It is these Tribes’ view that the Department of Interior has no such legal authority anyway. The rumor of an involuntary waiver of tribal rights for a non-settling Tribe is completely unfounded.

Another more relevant concern pertains to an agreement not to assert their senior Tribal water rights claims against a limited group of water users under specified conditions. As an example, Section 15.3.8 A of the KBRA describes the commitments by the Karuk Tribe and its trustee, the United States, to the Klamath Irrigation Project. This agreement is an exercise of sovereignty by the Tribes; it is essentially an agreement that if the Project irrigators reduce their diversions permanently, the Tribe will not enforce its senior water rights in order to reduce those diversions even further. It should be noted that both Tribes’ believe that seeking to enforce water rights claims through the courts is a risky proposition and would not likely provide river flows greater than has been negotiated in this agreement. This section of the agreement is identical to the assurances between the Yurok Tribe and the United States (and Hoopa *if* they choose to participate). ***This commitment would never come into existence if certain conditions, spelled out in the Agreement, are not realized.***

The conditions (set out in section 15.3.4) are:

- Implementation of the project water plan that limits diversions to the agreed upon water allocation rule
- Projects that increase the storage capacity of Upper Klamath Lake are completed
- Full funding is authorized to implement the water rights retirement program above Upper Klamath Lake

- Drought Plan adopted
- Reintroduction Plan finalized
- Dams are actually removed

**Thus, the settling Tribes' agreement to not assert a senior water rights claim against a sub-group of irrigators is contingent on decreased water diversions, increased funding for restoration, and dam removal.**

Another relevant concern pertains to a narrow waiver of potential claims against the United States for past water management decisions above the California/Oregon border. This provision is also described in section 15.3 of the agreement and is again contingent on specific restoration actions and water retirement. In this provision, the Tribes essentially state that, in return for the federal government's participation in the restoration of the Basin, the Tribes will not assert potential legal claims for past water management decisions in the Upper Basin which *arose before the Agreement*. (There is no agreement regarding claims against the U.S. which might arise *after* the Agreement.) This promise too, is not effective unless certain conditions are realized:

- the legislation needed to implement the agreement has been passed
- the terms of 15.3.4 have not been met (see above)
- funding for the following plans has been *appropriated*: Fisheries Restoration Plan, Fisheries Reintroduction Plan, Fisheries Monitoring Plan, Water Retirement Program, Interim Flow and Lake-level Program, and Regulatory Assurances Program
- the lower four dams are removed

A little background is important to understand how limited this waiver is. Both the Yurok Tribe and the Hoopa Tribe intervened in the Pacific Coast Fishermen's Association Court case under the Endangered Species Act stemming from the 2002 fish kill. In 2004 the Hoopa Tribe withdrew from the case in return for payment of \$1.5 million. The Yurok Tribe stayed in the case as the Yurok Tribe wanted the Court to issue a ruling on whether the water flows associated with the fish kill constituted a violation of the Tribal Trust and whether the Tribe was entitled to an order protecting the adequacy of flows for the future. The Court ruled that the United States did not breach any duty of trust to the Tribe with respect to flows in the Klamath River because there was no statutory duty specifically requiring Reclamation to protect fish. The Yurok Tribe appealed; while the appeal was pending, the Tribe and United States entered into an agreement providing for cooperative management of Tribal natural resources. The principles of that Cooperative Agreement found their way into these restoration and dam removal agreements. In short, from the Yurok Tribe's perspective, there are no significant legal claims against the U.S. which it is giving up with this waiver.

Given the lack of a federally recognized fishery, the Karuk Tribe's chances of similarly filing a claim over the fish kill are unlikely to result in outcome as beneficial as the Hoopa and Yurok suit despite these efforts yielding remarkably modest returns given the horrific nature of the event.

The limited scope and nature of the release of claims against the United States is important, and has been reviewed and approved by outside legal counsel. In addition the Yurok Tribe consulted with nationally renowned Colorado Law School Professor Charles Wilkinson. He compared the waivers in the KBRA to what other Indian Tribes have signed in water rights agreements around the country. Professor Wilkinson determined that the proposed waiver is reasonable and by comparison to other tribes extremely limited. According to Wilkerson,

*“The waiver is limited both as to place (it does not cover federal action in California) and time (it is not future looking and does not apply to any federal actions taking place after the KBRA is adopted).....the Tribal Council can know that the waiver has little or no real-world effect.”*

Finally, there is the unique waiver is by the Klamath Tribes. This is a binding and complete waiver without which no Tribe would ever be able to settle a water rights issue. The Oregon water adjudication started in 1975. The Klamath Tribes had to join the adjudication, or face the prospect of its water rights being decided without them. Some 34 years later, the Klamath Tribes have yet to have their rights quantified, nor have they received a drop of water. While it is difficult to predict, it appears they face many more years of litigation before the issue would be resolved by the courts. In other words, even though the Klamath Tribes are slowly adjudicating their Treaty water rights, the Tribe appears to be years of expensive litigation away from receiving the first drop of water for fish. Based upon decades of experience the Klamath Tribes believe they will get the same amount of water or more in the Klamath Basin Restoration Agreement as they would get in a final adjudication decision. These agreements represent a potential saving of hundreds of thousands of dollars in legal fees, the avoidance of risks that the litigation would produce less water than is required for fish, and certainty that they will increase water in the lake and the river. We believe it is their right as a sovereign Indian nation to enter into these agreements.

The Karuk, Yurok, and Klamath Tribes support the independent right of every Tribe to determine whether the limited release of claims against the United States, and the agreement not to assert senior water rights against Project farmers, are in their interest. To deny Tribes such a right would mean Tribes could never sue the State and Federal Government. Tribes would never have the right to settle law cases and would not have the right to make binding agreements. In effect it would completely cripple Tribal Governments and turn Tribes into passive victims unable to defend themselves.