

The [Myths](#), Lies and [Deceptions](#) Behind the Klamath Basin Agreements

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The Desired Implementation of the Klamath Basin Agreements

Klamath Basin groups claiming to represent the majority of Klamath Basin residents, such as the [Klamath Water Users Association](#) (“KWUA”) and the [Family Farm Alliance](#) (“FFA”), have long perpetuated the myth that the Klamath Basin Agreements will benefit ALL Basin residents. The evidence clearly shows that these groups will stop at nothing to keep this [fraudulent](#) narrative alive.

The Basin Agreements include: 1) the now-defunct Klamath Basin Restoration Agreement (“KBRA”), originally executed by these and other parties in 2010, but which expired on January 1, 2016 because Congress refused to ratify it; 2) the Klamath Hydroelectric Settlement Agreement (“KHSA”), originally executed by these and other parties in 2010, but which they renegotiated and subsequently amended pursuant to secret meetings on April 6, 2016 after Congress refused to ratify it by January 1, 2016; 3) the Upper Klamath Basin Comprehensive Agreement (“UKBCA”), originally executed by the tribes in 2014, which the parties are currently renegotiating; 4) the new Klamath Power and Facilities Agreement, executed by the parties pursuant to secret meetings on April 6, 2016 in an effort to resurrect portions of the now-defunct KBRA; and 5) the [Wyden-Merkley Amendment \(S.A. 3288\)](#) to the U.S. Senate Energy bill (S.2012) currently being evaluated by a U.S. House-Senate conference committee, which, if passed and enacted into law, would appropriate congressional monies to support certain activities in which local farmers would engage to fulfill the objectives of these agreements, as well as, specially designated irrigation-related monies (federal subsidies) to financially reward those supporting farmers.

The Wyden-Merkley Emperor Wears No Clothes

This false narrative was most recently repeated in the [July 7 issue](#) of the Capital Press (“CP”) by KWUA’s Executive Director, which discussed the benefits that Klamath Basin farmers would derive from the Wyden-Merkley Amendment. KWUA and some FFA members have long shamelessly misrepresented that passage of the U.S. Senate Energy bill’s Wyden-Merkley Amendment will bring *all* Klamath Basin farmers community respect and untold government welfare benefits. Many will recall how charlatan tailors had similarly persuaded the Emperor in Hans Christian Andersen’s [The Emperor’s New Clothes](#) to walk naked through his kingdom convinced he had been wearing the most magnificent invisible clothing money could buy that would earn him the respect and adulation of his loyal subjects.

As I explained in the [June 23 issue of the CP](#), Wyden-Merkley’s named authors and [sponsors](#), [Oregon’s largely invisible congressman](#) and California’s misguided [D.C. congressional liaison](#)

have continued to lie to their constituents about what S.A. 3288 will and will not deliver. Indeed, some of them have since claimed that the direct and express [language changes to Wyden-Merkley](#) I recommended to ensure after-the-fact congressional review and ratification of the non-transparently developed Amended KHSA and new KPFA are not necessary. They reasoned that [the bill's "savings" clause \(Para. 2, p. 3\)](#) would allegedly prevent the Secretary from "carry[ing] out activities that have not otherwise been authorized." Yet, readers, by now, should realize, following Congress' rejection of the KBRA this past January, that each of these agreements was carefully crafted [with the intent of being executed without congressional review and ratification!](#)

The "[Devil is in the Details](#)"

First, the [Wyden-Merkley paragraph \(Para. 1, p. 2\)](#) immediately preceding the paragraph containing the Amendment's savings clause will operate upon passage to *authorize* the congressional appropriations needed to implement the policy objectives of the UKBCA and the defunct KBRA, the latter of which have since been inserted into both the Amended KHSA and the new KPFA. Such authorization, in turn, will potentially funnel financial benefits through the Bureau of Reclamation to at least *some* supportive Klamath Basin farmers.

Second, the Amendment text elsewhere shows how its authors knew very well how to require Congress' authorization of Interior Secretary actions when it *wanted* to do so. For example, [on the same page \(p. 3\)](#), the Amendment's text clearly shows that its authors and sponsors had required express congressional authorization before the Interior Secretary could proceed to undertake other designated actions. To wit, "Nothing in subparagraph (A) or (B) of paragraph (1) authorizes the Secretary to (A) to develop or construct new facilities for the Klamath Project without appropriate approval from Congress under Section 9 of the Reclamation Projects Act of 1939 (43 U.S.c. 485h)[.]" Clearly, Wyden-Merkley's authors knew how, but chose not, to require congressional review and ratification following the execution of the Amended KHSA and new KPFA, and they continue to anguish over the disclosure of this fact.

The [Fantasy](#) of Wyden-Merkley's Untold Riches

My June 23 CP article, moreover, strongly suggested that the congressionally appropriated funding Wyden-Merkley allegedly sets aside for *all* supportive Klamath Basin farmers won't fully materialize because there simply is not enough guaranteed money to go round. In fact, most of the Interior Department monies budgeted for the Klamath Basin during [FYs 2012-2017](#) have been allocated to the Bureau of Reclamation ("BOR"), the Bureau of Indian Affairs ("BIA") and the Fish & Wildlife Service ("FWS") *for purposes of funding Klamath Basin restoration and tribal settlement* activities (vis-à-vis the now-defunct KBRA and the new KPFA and Amended KHSA), rather than for productive Klamath Project irrigation-related activities. Surely, reasonable persons must realize that the welfare benefits (write-offs of Reclamation debt) the BOR would seek, on Klamath Project irrigators' behalf, to build Interior's desired fish entrainment facilities will severely impair farmers' and ranchers' right to [economic freedom](#) and harm their economic interests - far more than they will help them!

My CP article also described how Wyden-Merkley's passage would provide substantially subsidized federal infrastructure funding exclusively to the Tulelake Irrigation District ("TID") as compensation for TID, KWUA and FFA patron support, aside from the federal funding that would be made available to TID thru Paragraph H of the Amended KHSA's [Appendix E](#), in amount equal to 10% of net wildlife refuge lease revenues. In addition, my article identified how other federal government monies (*personal* financial benefits) would be lavished upon *only those few remaining Klamath Basin farmers* who Interior Department [mandarins](#) (including key agency [lawyers](#)) and [contractors](#)) deem as having exceptionally supported these agreements.

Employing Personal [Animus](#) and Intimidation to Secure Illusory Personal Benefits

Based on my brief experience in the Klamath Basin, there are not many farmers and ranchers who would satisfy this standard. Presumably, they would include the same individual [TID](#), [KID](#), [KWUA](#) and [FFA leaders](#), patrons and/or contractors who have successfully managed, with apparent administration and local media assistance, to convert a high level Basin Agreement policy debate into a malicious personal fight that has repeatedly disrupted KID business and [tortiously interfered with my legal representation of the district](#). Sadly, by alienating members of their local communities to pursue this illusory financial bounty, these Klamath Basin residents have lost not only their grip on reality, but also their [traditional American](#) common sense [neighborly values](#). This is the greatest tragedy of all.

How the KPFA Actually Impairs Klamath Project Irrigator Water and Land Rights

The Interior Department's recently executed Klamath Power and Facilities Agreement ("[KPFA](#)") has little to nothing to do with electrical power. Yet the lofty language contained in its [recitals](#) reveals misrepresentations similar to those contained in the Wyden-Merkley Amendment discussed above. Interior has employed such language to cover up the impossibility of protecting Klamath Project irrigator water and land rights against the onslaught of Endangered Species Act ("ESA") regulatory impositions the new agreement anticipates, as well as, the unanticipated tribal water right challenges that have since come to light.

In particular, KPFA Section II.B.1 warns of the potentially severe and costly regulatory restrictions that will be imposed on Klamath Project irrigators as the result of the planned "introduction or reintroduction of species not currently present in the Upper Klamath Basin," and substantial related "habitat restoration activities or programs." The net effect of these impositions will be the diminishment, if not, the total elimination of many irrigators' "ability to divert or use or dispose of water or the ability to utilize land productively." Fortunately, KPFA Section II.B.2.c largely spares TID patrons from this horrible fate!

KPFA Section II.B.2.a pretends to assure non-TID Project water users and land owners that the federal FWS and National Marine Fisheries Service ("NMFS") and corresponding state agencies have made a binding commitment "to take every reasonable and legally permissible step to avoid or minimize any adverse impact" arising from regulations or other legal or funding obligations associated with the "introduction or reintroduction of" such species (*See* KPFA Section II.B.2.b). In furtherance of this end, the KPFA makes a half-hearted attempt to secure *some* financial relief for Project irrigators. It does so by requiring all non-Federal Parties to support Interior

Department requests for congressional appropriations that the BOR could then use to extend non-reimbursable loans to irrigation districts and their contractors for purposes of evaluating, designing, constructing, replacing, enlarging and maintaining entrainment reduction facilities at specified Klamath Project diversion points (*See* KPFA Section II.B.2.b.i). Since there is no guarantee that these monies can ever be secured, the KPFA declines to discuss the ratio of non-reimbursable to overall funding, and holds Interior harmless if it is unable to obtain such appropriations (*See* KPFA Section IV.A.3).

The KPFA imposes multiple conditions that Klamath Basin farmers must meet to obtain these putative pecuniary benefits. KPFA Section II.C requires allegiance to and support for the Wyden-Merkley Amendment or any comparable legislation containing similar authorizations and activities for implementation. KPFA Section III.C requires Klamath Basin farmers and ranchers to commit “to engage in good faith efforts *to develop and enter into a subsequent agreement or agreements* pertaining to other water, fisheries, land, agriculture, refuge and economic sustainability issues in the Klamath Basin with the goal to complete such agreement or agreements within the next year” (emphasis added). Furthermore, KPFA Section IV.A.2 requires Klamath Basin farmers to pledge their allegiance to the Amended Klamath Hydroelectric Settlement Agreement (“KHSA”) the primary purpose of which is to facilitate Klamath River dam removal (*See* Amended KHSA, 11th recital paragraph).

How the Amended KHSA Actually Impairs Klamath Project Irrigator Water and Land Rights

Amended KHSA Section 6.2.2 reserves to the FWS and NMFS the right to reassess, until dam decommissioning (anticipated to take place [by year-end 2016](#)), *PacifiCorp's* “Interim Conservation Plan measures” for protecting the coho salmon and sucker species identified in Amended KHSA Appendix C. This reassessment can take place incident to these Services voluntarily “reinitiating consultation [under ESA Section 7] on any final biological opinion pursuant to applicable implementing regulations.” Yet, it remains more than possible that third parties can *compel* FWS and NMFS to reinitiate such ESA interagency consultation. This could occur if third parties forcefully allege that the [2013 joint Biological Opinion](#) governing Upper Klamath Lake and Klamath River levels and flows, or the agencies’ implementation of it, has harmed such parties’ interests. Depending on the circumstances, therefore, the text of the Amended KHSA can reasonably be understood as rendering these federal agencies unwilling and/or unable to protect Klamath Project irrigator water and land rights.

A close examination of the Amended KHSA’s 10th recital paragraph reveals the latter scenario. It reaffirms the Obama administration’s view that the primary purpose of facilitating the Klamath dam removals partially fulfills the agreement’s secondary purpose of facilitating a tribal settlement that “advances the trust obligation of the United States *to protect Basin Tribes’ federally reserved fishing and water rights in the Klamath and Trinity River Basins*” (emphasis added).

The Tribal & Environmentalist Threat to Klamath Project Irrigator Water and Land Rights

Indeed, during the past 90 days, three California-based federally recognized tribes (the [Hoopa Valley](#) (5-17-16), [Yurok](#) and [Karuk](#) Tribes (6-24-16)) filed with BOR and NMFS 60-day notices

of intent-to-sue under the citizen suit provisions of the ESA. These notices, which challenge the BOR's implementation of the 2013 joint FWS-NMFS BiOps and invoke ESA Sections 7, 9 and 11, allege that greater than anticipated numbers of coho salmon are dying from *C Shasta* bacteria triggered by lower than required water levels in the Klamath River. Their ultimate aim is to amend the BiOps to curtail water diversions from Upper Klamath Lake to the Klamath Project. Environmental activist group [Earthjustice](#) has since (7-20-16) filed another 60-day notice of intent-to-sue alleging similar ESA violations on behalf of three California-based fisherman conservation organizations.

In addition to asserting violations of these ESA provisions, the Hoopa Valley and Yurok notices also allege that the U.S. government has failed to uphold its federal trust obligation to protect the tribes' off-reservation fishing and water rights. The off-reservation fishing and water rights these two federally recognized tribes have asserted are significant primarily because [their reservations](#) are located at least [240 miles southwest of Upper Klamath Lake](#).

Their significance also resides in their similarity to the June and July 2015 claims the Confederated Salish and Kootenai Tribes ("CSKT") of the [Flathead Reservation](#) filed with the Montana Water Court following the enactment of the CSKT Water Compact into state law. Viewed most positively, the CSKT's July 2015 claims reflect a potential water right comprising approximately [20% of Montana's instream flows](#). Viewed most negatively, the CSKT's June 2015 claims reflect a potential water right comprising [almost two-thirds of Montana's instream flows](#).

The three California tribes and the Oregon-based Klamath Tribe had previously resorted to a similar tactic bearing much less drastic consequences. They asserted extensive off-reservation federal and state water right claims that the Oregon Water Resources Department then approved and filed with the [Klamath County Circuit Court](#), which have since been placed in a state of suspended animation without a Court stay ever having been issued. The promoters of the Klamath Basin Agreements have worked during the past eight years to frighten Klamath Basin farmers into submission – i.e., into believing that if they did not sign these Agreements so they could be implemented, the Court's administration of these claims would proceed. The problem, all along, has been that the Agreements' implementation could be disrupted by nonparties such as the Hoopa Valley Tribe which, this past, week, [filed its threatened lawsuit](#) against Reclamation and the NMFS.

The Interior Secretary is Unwilling and Unable to Protect Klamath Project Irrigator Water and Land Rights

Finally, the Hoopa Valley and Yurok Tribe's federal claims are significant because the Hoopa Valley Tribe has long been an [articulate, outspoken](#) and [litigious](#) nonparty critic of the Klamath Basin Agreements, while the Yurok Tribe, a party signatory, has never been precluded by [Klamath Basin Restoration Agreement \("KBRA"\) Section 15.3.6](#) from tying tribal water right claims to ESA violation claims. Earthjustice, an adversarial and litigious environmental group, is also a nonparty to the agreements. Unfortunately, the Interior Department is loath to publicly admit it is without leverage to protect Klamath Project irrigator water and land rights against these threats of litigation.

Considering the KPFA and Amended KHSA texts discussed above, it should now be quite clear that the promised benefits of these agreements are far less than have been advertised, and may never materialize at all. Klamath Basin farmers and ranchers must, therefore, revisit their irrational fear of claims adjudication and dismiss the idea of an “easy” *political* settlement. They must quickly wise up and legally defend their water and associated land rights against such tribal and environmental group aggression before it is too late.

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