

The Wyden-Merkley Amendment: The Dog That ‘Don’t Hunt’

By Lawrence A. Kogan

[\(As Seen in the Capital Press on June 23, 2016\)](#)

During late April, the local Klamath press announced how a proposed Senate Energy Bill (S.2012) amendment (“the Wyden-Merkley amendment” or “[S.A. 3288](#)”) introduced into the U.S. Senate this past February by Oregon’s Democratic Senators Jeff Merkley and Ron Wyden would provide certain benefits to Klamath Basin irrigators.

The energy bill, including S.A. 3288, passed the U.S. Senate on April 20, 2016 and its fate now rests with a Senate-House conference committee. S.A. 3288 would add new Section 4 “Power and Water Management” to [The Klamath Basin Water Supply Enhancement Act of 2000](#) (Public Law 106-498, 114 Stat 2221).

The [Capital Press](#) reported that if S.A. 3288 were passed, it would “allow[] the U.S. Bureau of Reclamation (“BOR”) to help farmers in the basin deal with reduced water supplies as a result of future water-sharing agreements and to provide reduced-cost power for irrigation.” It even quoted local rancher Becky Hyde as emphasizing that the amendment would “put regulatory assurances for species back into place for agriculture [...and...] resurrect[] some of the power stuff (in the KBRA).”

Indeed, the [Herald and News](#) confirmed that, “[s]ince the expiration of some key components of the Klamath Settlement Agreements in December,” the Klamath Water Users Association (“KWUA”) has worked with the Senators to ensure, among other things, that “the amendment authorizes measures first proposed as part of the 2010 Klamath Basin Restoration Agreement.”

S.A. 3288, if adopted, would enable the Interior Secretary to enter into agreements and contracts for purposes of aligning water supply and demand, mitigating environmental effects of irrigation, restoring Klamath Basin habitats and tribal fishery resources held in trust, and reducing irrigation power costs (p.2). Although S.A. 3288 ostensibly precludes the Secretary from carrying out activities “that have not otherwise been authorized” (pp. 2-3), it does not address the Secretary’s failure to secure Congressional authorization or approval prior to entering into the Amended Klamath Hydroelectric Settlement Agreement and new Klamath Power and Facilities Agreement previously executed on April 6. It also fails to provide assurances that Congressional review and authorization will be required before the Secretary enters into any future interstate, intertribal and intergovernmental agreements.

Many Oregon and California Klamath Basin residents and Congressmen who objected to Interior Secretary Sally Jewel’s execution of the Amended KHSAs and new KPFA *in circumvention of Congress* believe that the Wyden-Merkley amendment could certainly benefit from additional language. We recently proposed [the inclusion of clear language](#) expressly requiring ALL such DOI-contemplated and previously executed agreements to be reviewed and ratified by Congress.

It has come to our attention, nevertheless, that the leadership of the KWUA and the Klamath Irrigation Project's Tulelake Irrigation District ("TID") ([represented by the same legal counsel](#)) are opposed to such proposed language. Apparently, KWUA and TID are concerned that this simple language change, if adopted, would prevent the DOI from executing the basin agreements (including the dam removal-focused Amended KHSA) and dispensing the welfare monies these groups have long counted on for politically supporting them.

Two additional S.A. 3288 provisions which have been *represented* as helping area farmers by "enabl[ing] the bureau to do certain upgrades of irrigation facilities" shed light on KWUA and TID thinking.

One such provision would authorize the Interior Secretary to enter into *one or more* agreements with TID to reimburse up to 69 percent of the operation and maintenance ("O&M") costs TID incurs to run Pumping Plant D that expunges excess Project waters TID receives from the Lost River and Klamath Irrigation District ("KID") (p. 4). Another such provision would authorize the BOR to designate the KID's \$10 million C Canal flume replacement contract as engendering emergency extraordinary operation and maintenance ("EXM") work (p. 5). [The clear implication](#) is that if S.A. 3288 is passed, the latter provision would render KID eligible to receive up to 35 percent BOR reimbursement of those costs.

This KID-focused S.A. 3288 provision, however, will not achieve this result because it curiously fails to designate the C Canal flume replacement as engendering "Qualified" EXM work. In other words, it does not designate KID as a *qualified* applicant for such treatment – i.e., as having corrected, during the past 10 years, all Category 1 O&M recommendations within 6 months of BOR identification, and all Category 2 O&M recommendations by the BOR's initial recommended date.

Recognizing this material omission, we recently proposed [the inclusion of clear language](#) expressly designating the KID C Canal flume replacement as a "Qualified EXM" work item. KWUA and TID are similarly opposed to this language change, because it would compel them to share their welfare monies with KID, which they are not inclined to do, especially if KID opposes dam removal. Although KID has not taken an official position on dam removal, it is [on record](#) for having strenuously objected to the [nontransparent and non-inclusive procedures](#) by which KHSA parties previously proceeded to execute the Amended KHSA and new KPFA. This distinction, however, did not prevent the BOR Mid-Pacific Regional Office Director from conveying the same concern to KID counsel during April and May's C Canal flume replacement contract negotiations, thereby interlinking the 35 percent write-off with dam removal.

In sum, a close reading of Wyden-Merkley reveals that, even if KID does not object to dam removal, KID would remain ineligible to receive the 35 percent write-off the amendment *pretends* to guarantee. S.A. 3288 is, thus, nothing more than a grand deception favoring government welfare payments for certain (KID) Klamath Basin farmers towing the lame duck Obama administration's policy line.

Consequently, KID's execution of the [BOR's one-sided C Canal flume replacement contract](#) under duress and false pretense will not buy it this administration's loyalty. Instead, it will

solidify BOR control over the Project, and bury the District, which is currently [free from both Project construction and O&M debt](#), in more than [\\$10 million of new debt](#). It also will severely complicate, if not undermine, KID's newly initiated bold effort to ensure greater irrigator freedom and independence by first exploring and then pursuing [title transfer](#) with the incoming administration.

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