

DISPUTE INITIATION NOTICE

INTRODUCTION

1. This is a Dispute Initiation Notice provided to Oregon Water Resources Department (“OWRD”) by the Yurok Tribe pursuant to the Klamath Basin Restoration Agreement (“Agreement”) Section 6.5. Any term not specifically defined in this Notice is as defined in the Agreement.

2. OWRD has indicated to certain Parties that Oregon law does not recognize ESA flows for coho salmon as an authorized use of Klamath Reclamation Project water by Reclamation. As a result of such a discretionary determination, OWRD would require Reclamation to cease all ESA flow releases from the Klamath Reclamation Project before OWRD will implement a call on Off-Project Irrigators’ junior water rights by Reclamation to satisfy Reclamation’s water rights in Upper Klamath Lake storage.

3. OWRD has not engaged the Yurok Tribe in the management of Klamath River flows for ESA purposes, despite on-going discussions with Reclamation and other Parties.

4. OWRD’s actions are not consistent with the Agreement and denies a bargained for benefit of the Agreement.

AGREEMENT TERMS

5. The Parties entered into the Agreement with a goal of “effective and durable solutions [] which restore and sustain natural production and provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin. . . .” Section 1.3. All Parties represented that the Agreement was consistent with their legal obligations for “conservation, use, or management of affected resources of the Klamath River Basin.” Section

2.1. Public Agency Parties agreed to comply with applicable legal authorities, including the federal Endangered Species Act (“ESA”), 16 U.S. C. § 1531 *et seq.* Section 2.1.

6. Agreement Section 1.5.2 requires that all Parties to the agreement “perform obligations which are performable under their existing authorities.” Under Agreement Section 3.2.1, each Party must implement its obligations under the Agreement “in good faith and with Due Diligence.” The Parties further agreed in Section 3.2.2 to “cooperate in the implementation of this Agreement” and “not act in a manner that results in an action or requirement that is inconsistent with the Agreement unless necessary to comply with statutory, regulatory, or other legal responsibilities; in which event, the Party shall provide Timely Notice to other Parties to permit Dispute Resolution Procedures pursuant to Section 6.5.”

7. The Agreement includes specific Contractual Obligations with regard to Environmental Water. The Parties agreed to engage in open, transparent, and real-time processes for determining whether to store or not store Managed Environmental Water for Fish Species conservation and recovery. Section 20.3.3. The Parties must manage Managed Environmental Water consistent with “(i) Applicable Law, including obligations of Reclamation and other Parties under the ESA; (ii) any related secondary rights to use the stored water, as well as consistent with senior water rights; and (iii) [the] Agreement.” Section 20.3.1. Under the Agreement, the “Parties shall support requests to regulatory agencies to protect Environmental Water to the maximum extent permitted by Applicable Law.” Section 20.5.1.

8. Interim Assurances of noninterference by the Tribes under Section 15.3.8 do not include rights under the ESA. The Parties reserved the right to pursue an action to enforce Applicable Law upon providing a Dispute Initiation Notice and following Dispute Resolution Procedures to the extent practicable. Section 6.4.

FIRST MATTER IN DISPUTE

[Failure To Recognize ESA Flows as an Authorized Use under Oregon Law]

9. OWRD agreed to meet obligations performable under its existing authority and not to act inconsistent with the Agreement. Section 1.5.2. A basic understanding in the negotiation of the Agreement was that OWRD would act in good faith and cooperate to implement the Agreement. Sections 3.2.1, 3.2.2.

10. In-stream use is consistent with Oregon law, which recognizes such use of water rights in certain instances. ORS § 536.310(7) requires the Oregon Water Resources Commission to formulate water resource policy to maintain "minimum perennial streamflows sufficient to support aquatic life . . . if existing rights and priorities under existing laws will permit." ORS § 537.348 recognizes in-stream use of a leased water right as a beneficial use under Oregon law.

11. Recognition of ESA flows by OWRD would not violate OWRD's legal obligations or applicable law and would advance the Agreement's goal of conservation and management of Klamath River Basin resources.

12. OWRD's failure to recognize ESA flows as an authorized use by Reclamation runs counter to the Agreement's basic goal of sustaining anadromous Fish Species and Tribal harvest of such Fish Species and denies the Yurok Tribe a bargained for benefit of the Agreement. The Yurok Tribe knows of no case or Oregon statutory provision that prohibits OWRD from recognizing ESA flows for coho salmon as an authorized use of Klamath River water. A discretionary interpretation of Oregon law that is inconsistent with the Agreement is prohibited when OWRD can make an interpretation consistent with the Agreement.

13. OWRD has the ability to recognize ESA flows as an authorized use under its existing authority and Oregon law. OWRD's failure to do so runs counter to its commitments in the Agreement.

SECOND MATTER IN DISPUTE

[Failure to Manage Managed Environmental Water Consistent with the Obligations of Reclamation under the ESA]

14. OWRD's failure to recognize ESA flows under Oregon law runs counter to Reclamation's current obligations. *See Kandra v. United States*, 145 F.Supp.2d 1192 (D.Or. 2001) (recognizing Reclamation's obligation to comply with the ESA, regardless of federal authorizing legislation establishing the Klamath Reclamation Project for irrigation purposes and existing contracts with irrigators).

15. OWRD violated its commitment under the Agreement Section 20.3.1 to manage Managed Environmental Water consistent with the obligations of Reclamation under the ESA.

THIRD MATTER IN DISPUTE

[Failure to Cooperate with the Yurok Tribe in Implementation of the Agreement]

16. Prior to filing this Dispute Initiation Notice in an attempt to engage with the State of Oregon, the Yurok Tribe sent a letter on May 6, 2013, to Richard Whitman, Natural Resources Policy Director for the Oregon Governor's Natural Resources Office, seeking clarification no later than noon Pacific time May 10, 2013, regarding whether the State of Oregon considers releases by Reclamation from the Klamath Reclamation Project to meet ESA purposes to be an authorized use under Oregon law.

17. The Yurok Tribe received a response from Mr. Whitman after that deadline on May 10, 2013, indicating that OWRD is undertaking an ongoing evaluation of how Klamath Reclamation Project water rights relate to ESA releases.

18. Despite ESA flows as a bargained for benefit of the Agreement and OWRD's commitment to cooperate in implementing the Agreement, OWRD has not engaged the Yurok Tribe in any substantive discussions regarding Klamath River management for ESA flows.

FOURTH MATTER IN DISPUTE

[Failure To Provide Timely Notice of Intent Not to Act Consistent with the Agreement]

19. OWRD has failed to provide Timely Notice under Section 3.2 of its intent not to act consistent with the Agreement regarding recognition of in-stream flows for ESA purposes, management of Managed Environmental Water consistent with the obligations of Reclamation, or cooperation in the implementation of the Agreement.

RELIEF SOUGHT

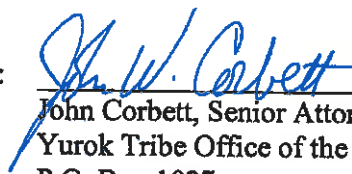
WHEREFORE, the Yurok Tribe, pursuant to each of the matters in dispute, seeks the following relief:

1. Actions not inconsistent with the Agreement and Contractual Obligations to restore and sustain natural production and provide for Full Participation in Harvest Opportunities of Fish Species throughout the Klamath Basin.
2. Recognition of ESA flow releases of Klamath Reclamation Project water for coho salmon by Reclamation as an authorized use under Oregon law.
3. Management of Managed Environmental Water consistent with Reclamation's obligation to comply with the ESA.

4. Cooperation with the Yurok Tribe in implementing the Agreement, including the quantification of ESA flow releases by Reclamation.

5. Assurance of in-stream water at the Oregon border sufficient to prevent jeopardy of coho salmon and to protect Chinook salmon runs.

Dated this 14th day of May, 2013.

By: 
John Corbett, Senior Attorney
Yurok Tribe Office of the Tribal Attorney
P.O. Box 1027
Klamath, California 95548
707-48-1350

YUROK TRIBE
OFFICE OF THE TRIBAL ATTORNEY

190 Klamath Boulevard • Post Office Box 1027 • Klamath, CA 95548

Phone: 707-482-1350 • Fax: 707-482-1377

Via Email

May 14, 2013

Ed Sheets, Facilitator
Klamath Basin Settlement Agreements
3055 NW Cumberland Road
Portland OR 97210
(503) 222-1700
ed@edsheets.com

RE: Dispute Initiation Notice under the Klamath Basin Restoration Agreement

Dear Mr. Sheets:

The Yurok Tribe is providing a Dispute Initiation Notice to the Oregon Water Resources Department pursuant to the Klamath Basin Restoration Agreement section 6.5. As described in the Notice, the Yurok Tribe is greatly concerned that the Oregon Water Resources Department is acting inconsistent with the Klamath Basin Restoration Agreement, denying the Yurok Tribe the bargained for benefits of the agreement. The Yurok Tribe seeks active participation in Klamath River water management and assurances as to in-stream water to meet Endangered Species Act requirements and to protect anadromous fish species.

Please distribute the Dispute Initiation Notice to all parties to the Klamath Basin Restoration Agreement.

Should you have any questions, please contact me at 707-482-1350 ext. 1397 or email JohnC@yuroktribe.nsn.us. You can also contact Executive Director Troy Fletcher at 707-482-1350 ext. 1305 or email tfletcher@yuroktribe.nsn.us, or Staff Attorney Nathan Voegeli at 707-482-1350 ext. 1408 or email nvoegeli@yuroktribe.nsn.us.

Sincerely,



John Corbett
Senior Attorney, Yurok Tribe