

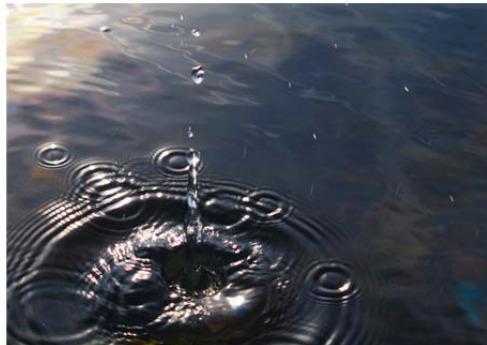
ESSAY

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The Ovidian Water Drop: Negotiations in the Klamath Basin

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“Gutta cavat lapidem non vi sed saepe cadendo.”
(A water drop hollows the stone, not by force, but by constant
dripping.)¹



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¹ A NEW DICTIONARY OF QUOTATIONS FROM THE GREEK, LATIN, AND MODERN LANGUAGES 184 (1869) (attributing Latin proverb to Ovid).

Fed by Cascadian snowmelt, the Klamath River starts its 263-mile journey at Upper Klamath Lake—a deceptively shallow expanse with an average depth of eight feet.² Meandering through its hourglass-shaped watershed, the river wanders through the aridity of Central Oregon and its agricultural plateaus.³ After spilling across the border, the river rushes through the steep canyons and valleys of Northern California—strengthened by Scott, Shasta, Salmon, and Trinity flows—before releasing its waters to the Pacific Ocean.⁴



Figure 2. The Klamath River as it flows across the Oregon/California border.

The River has flowed through summers of drought, unseasonably dry winters, the “reclamation” of hydrologically-connected wetlands, fish die-offs, and unquenchable conflict. And despite this, the River still flows, supporting a struggling agricultural economy, endangered species, declining fisheries, impoverished native tribes, and hope for another wet winter. In the Klamath Basin, both the power of water and the perseverance of its stakeholders came together to create one of the most complex, conflict-driven water management scenarios in American history. Yet those same forces helped to generate a

² HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS 23 (2008) [hereinafter DOREMUS & TARLOCK, WATER WAR]; KYNA POWERS ET AL., CONG. RESEARCH SERV., RL33098, KLAMATH RIVER BASIN ISSUES AND ACTIVITIES: AN OVERVIEW 1 (2005), available at http://www.energy.ca.gov/klamath/documents/CRS_REPORT_RL33098.PDF; Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L.J. 197, 201 (2002).

³ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 23, 26.

⁴ *Id.* at 23–25.

profound model for comprehensive, multi-party negotiation amidst divergent interests and a century-long cultural clash.

I

DIVERGENT INTERESTS IN AND VARIED USES OF THE BASIN

*“Confronted by the desert, the first thing Americans want to do is change it.”*⁵

Indians were the Basin’s first inhabitants. Since “time immemorial,”⁶ they have fished, hunted, and gathered the bounty of the Basin.⁷ Upper Basin tribes relied on the historically robust populations of Lost River and shortnose suckers while the downstream Lower Basin tribes enjoyed the river’s ample runs of coho and Chinook salmon.⁸ However, with white settlement came dislocation, marginalization, and declining fisheries.⁹ Despite mid-nineteenth century treaty rights as well as legal opinions promising enough water to support the tribes’ hunting and fishing rights,¹⁰ widespread over-appropriation and non-enforcement of tribal water rights contributed to extensive declines within fisheries.¹¹ The once teeming populations of Chinook salmon declined by eighty percent by the turn of the twenty-first century,¹² the suckers of the Upper Klamath were listed as endangered in 1988,¹³ and the coho were listed

⁵ MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 3* (Penguin Books rev. & updated 1993).

⁶ *United States v. Adair*, 478 F. Supp. 336, 345 (D. Or. 1979).

⁷ Benson, *supra* note 2, at 202.

⁸ DOREMUS & TARLOCK, *WATER WAR*, *supra* note 2, at 27; POWERS ET AL., *supra* note 2, at 7, 14; Benson, *supra* note 2, at 202; Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 289 (2003) [hereinafter Doremus & Tarlock, *Clash of Cultures*].

⁹ DOREMUS & TARLOCK, *WATER WAR*, *supra* note 2, at 59; Benson, *supra* note 3, at 202; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 297; Hannah Gosnell & Erin Clover Kelly, *Peace on the River? Social-Ecological Restoration and Large Dam Removal in the Klamath Basin, USA*, 3 *WATER ALTERNATIVES*, June 2010, at 362, 376–77.

¹⁰ *E.g.*, *Adair*, 478 F. Supp. at 345.

¹¹ *See* DOREMUS & TARLOCK, *WATER WAR*, *supra* note 2, 59–86; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 297.

¹² Benson, *supra* note 2, at 202.

¹³ Determination of Endangered Status for the Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27130 (July 18, 1988) (codified at 50 C.F.R. § 17.11).

shortly thereafter in 1997.¹⁴ Today, tribal members comprise one of the most impoverished populations in the Basin.¹⁵



Figure 3. Alfalfa field with a center-pivot sprinkler.

In 1868, four years after the Klamath tribes entered into a treaty with the United States,¹⁶ determined white settlers dug the first irrigation ditch in the Basin.¹⁷ By the first part of the twentieth century, the marshes and wetlands were “reclaimed,” hundreds of miles of canals and drains were constructed, and the upriver stretches of the Klamath were dammed, obstructing fish passage to historically productive spawning ground for Chinook and coho salmon.¹⁸ Agriculture, such as cattle grazing and alfalfa production, soon became the identity of the Upper Basin, and a strong attachment to the industry still exists despite its economic vulnerability.¹⁹ Today, the struggling agricultural community remains dependent on its water

¹⁴ Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24588 (May 6, 1997) (codified at 50 C.F.R. pt. 227).

¹⁵ Benson, *supra* note 2, at 203; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 297.

¹⁶ 2 INDIAN AFFAIRS: LAWS AND TREATIES 864–68 (Charles J. Kappler ed., 1904); Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 297.

¹⁷ Benson, *supra* note 2, at 204.

¹⁸ *Id.*; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 298.

¹⁹ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 50; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 295–96.

withdrawals, however uncertain, and the continued strength of the Basin's farming tradition.²⁰



Figure 4. Cattle grazing in the Upper Klamath.



Figure 5. Mallards in flight in the Lower Klamath Refuge.

²⁰ Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 296.

The Basin's first wildlife refuges emerged in 1908 through an executive order by President Theodore Roosevelt.²¹ Influenced by scenic photographs of the area,²² the order created the Lower Klamath National Refuge, the nation's first wildlife refuge reserved exclusively for waterfowl.²³ At times supporting one of the greatest concentrations of waterfowl in North America,²⁴ the Basin provides habitat to about eighty percent of all waterfowl migrating on the Pacific Flyway.²⁵ Despite early reservations of water rights, the refuges—forced to compete with agricultural actors—are affected by an insufficient supply and poor quality of water, both of which negatively impact wetland habitat.²⁶ Further, agricultural leasing on a portion of the refuges, authorized by federal legislation,²⁷ has become an increasing point of contention with local environmental groups.²⁸

Power production is just one more competitor in the fight for water resources in the Basin. PacifiCorp's first hydropower dam emerged in 1918.²⁹ A cheap source of power for Klamath irrigators,³⁰ the Lower Basin's dams—the most downstream of which lacks any fish passage facilities—effectively block salmon and other anadromous fish from

²¹ 9 SUPERINTENDENT OF DOCUMENTS, GOV'T PRINTING OFFICE, CATALOGUE OF THE PUBLIC DOCUMENTS OF THE SIXTIETH CONGRESS: JULY 1, 1907, TO JUNE 30, 1909, p. 1359 (1912) (Executive Order No. 924).

²² DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 81.

²³ *Federal Duck Stamp Program: Lower Klamath National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/duckstamps/Conservation/states/California/Profiles/LowerKlamathNWR.htm> (last visited Nov. 6, 2013).

²⁴ Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 292.

²⁵ Benson, *supra* note 2, at 205. The Pacific Flyway, stretching from Alaska to South America, is a "great avian highway" over which millions of migratory birds travel each year. *Follow the Pacific Flyway in California State Parks*, CALI. STATE PARKS, <http://www.parks.ca.gov/pages/24317/files/followthepacificflyway.pdf> (last visited Nov. 6, 2013). Habitat loss, diminished food and water supply, and climate change threaten migratory birds along the Pacific Flyway, with the overall population of birds severely diminished from that of a century ago. *Pacific Flyway*, NAT'L AUDUBON SOC'Y, <http://conservation.audubon.org/pacific-flyway> (last visited Nov. 6, 2013).

²⁶ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 81–83; Benson, *supra* note 2, at 206.

²⁷ 16 U.S.C.A. § 695n (West, Westlaw through P.L. 112-207) (authorizing continued agricultural leasing on Lower Klamath refuges "consistent with proper waterfowl management").

²⁸ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 82–83; Benson, *supra* note 2, at 206.

²⁹ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 54.

³⁰ *Id.* at 54–55.

their historically productive habitat in the Upper Basin.³¹ Further, the dams' effect on water temperature and oxygen levels has led to further eutrophication of a naturally nutrient-rich ecosystem.³² In 2000, PacifiCorp initiated the relicensing process for its Klamath River Project,³³ which includes four major hydroelectric dams.³⁴ In 2006, PacifiCorp's license for its Klamath River Project—originally issued in 1956—expired,³⁵ and the project has been operating on interim annual licenses ever since.³⁶ Any new long-term license issued by the Federal Energy Regulatory Commission would likely require, pursuant to various federal regulations, installation of fish passage facilities and other conditions for fish protection—financially prohibitive modifications.³⁷

In addition, the Basin serves as a recreational and tourism mecca, with trout fishing and sailing on Upper Klamath Lake, bird watching and waterfowl hunting in the Lower Basin's refuges, sightseeing at Crater Lake, and whitewater rafting on the Klamath River and its tributaries.³⁸

³¹ *Id.* at 29–33; Benson, *supra* note 2, at 206; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 300; John B. Hamilton et al., *Distribution of Anadromous Fishes in the Upper Klamath River Watershed Prior to Hydropower Dams: A Synthesis of the Historical Evidence*, 30 FISHERIES MAG. 10 (2005), available at <http://www.klamathriver.org/Documents/Distribution-of-Anadromous-Fishes.pdf> (determining that runs of Chinook salmon, steelhead, coho salmon, green sturgeon, eulachon, coastal cutthroat trout, and Pacific lamprey were historically present in the upper reaches of the Klamath River prior to installation of the Basin's first dams).

³² See PACIFICORP, CAUSES AND EFFECTS OF NUTRIENT CONDITIONS IN THE UPPER KLAMATH RIVER: KLAMATH HYDROELECTRIC PROJECT 7 (2006), available at http://www.pacificcorp.com/content/dam/pacificcorp/doc/Energy_Sources/Hydro/Hydro_Licensing/Klamath_River/Causes_and_Effects_of_Nutrient_Conditions_in_the_Upper_Klamath_River_Dec_2006.pdf; David N. Allen, Recent Development, *The Klamath Hydroelectric Settlement Agreement: Federal Law, Local Compromise, and the Largest Dam Removal Project in History*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 427, 445 (2010).

³³ *Klamath River: Project Overview*, PACIFICORP, <http://www.pacificcorp.com/es/hydro/hl/kr.html> (last visited Nov. 6, 2013).

³⁴ Allen, *supra* note 32, at 431.

³⁵ PACIFICORP, EXECUTIVE SUMMARY APPLICATION FOR NEW LICENSE FOR MAJOR PROJECT: KLAMATH HYDROELECTRIC PROJECT 1-1 (2004), available at http://www.pacificcorp.com/content/dam/pacificcorp/doc/Energy_Sources/Hydro/Hydro_Licensing/Klamath_River/Executive_Summary.pdf.

³⁶ Allen, *supra* note 32, at 465.

³⁷ *Id.* at 447–50.

³⁸ POWERS ET AL., *supra* note 2, at 7; Benson, *supra* note 2, at 206.



Figure 6. Hayfield along Falls Highway in Upper Klamath.



Figure 7. A new perspective on Crater Lake.

II
CONFLICT IN THE BASIN

*“To appropriate presupposes that the thing taken is without
ownership,
like a wild beast of the forest or of the plain . . . to be shot down
and dragged out
by the first brute that came in sight of it.”³⁹*



Figure 8. A setting sun over Upper Klamath Lake.

Conflict in the Basin, although only reaching its peak in the last decade, has been intensifying for over a century. The root of the contention is seemingly simple yet realistically complex: there is not enough water for the status quo demands placed upon the watershed. From unending litigation to highly contested environmental law enforcement, the Basin has been beset with “rotating crises” in which water shortages were imposed upon the irrigators, then the tribes, then the fishermen.⁴⁰ Ultimately, the only certainty was that there was no certainty for anyone involved.⁴¹

³⁹ Donald J. Pisani, *Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century*, 18 W. HIST. Q. 15, 24 (1987) (quoting correspondence between William Hammond Hall and Elwood Mead on October 4, 1889) (alteration in original).

⁴⁰ Gosnell & Kelly, *supra* note 9, at 370.

⁴¹ See DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 12–13.



Figure 9. Lower Klamath Refuge and its waterfowl.

After decades of litigation and conflict over water rights—characterized as “macho law, combat biology, and dirty politics”⁴²—and still no concrete water management solutions, 2001 marked one of the driest years in the Klamath Basin’s history.⁴³ With the Klamath suckers endangered upstream and the coho salmon endangered downstream, there was insufficient water to satisfy the needs of both irrigators and wildlife refuges without compromising the minimum lake and river levels needed to sustain the endangered species’ habitat.⁴⁴

The Bureau of Reclamation, which has contracts to deliver water—subject to certain limitations⁴⁵—to the Upper Basin irrigation districts, announced on April 6, 2001, that no water would be available for Upper Klamath Lake farmers and Lower Basin wildlife refuges.⁴⁶ For the first time in its history, the Bureau closed the headgates to the Project’s “A” canal, one of the major irrigation canals on the Upper Klamath, and kept them closed throughout the summer.⁴⁷ Protests ensued with irrigators making national news when a group of farmers cut and opened the chain-link fence surrounding the headgates, all while local enforcement looked on, unwilling to intervene.⁴⁸ Irrigators suffered millions in crop losses,⁴⁹ and local

⁴² *Id.* at xvii.

⁴³ Benson, *supra* note 2, at 222.

⁴⁴ POWERS ET AL., *supra* note 2, at 10; Benson, *supra* note 2, at 224–26.

⁴⁵ See, e.g., *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 529, 535 (2005).

⁴⁶ POWERS ET AL., *supra* note 2, at 10; *The Klamath Project*, U.S. DEP’T OF INTERIOR, BUREAU OF RECLAMATION, http://www.usbr.gov/mp/kbao/klamath_project.html (last updated Aug. 28, 2009).

⁴⁷ POWERS ET AL., *supra* note 2, at 10; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 283.

⁴⁸ DOREMUS & TARLOCK, *WATER WAR*, *supra* note 3, at 3; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 321; *Farmers Force Open Canal in Fight with U.S. Over*

rhetoric framed the issue as an attack on rural livelihoods and irrigated agriculture, with government favoring fish over farmers.⁵⁰ More lawsuits were filed and social conflicts reached their peak with a strong anti-Indian, anti-environmentalist sentiment building in the farming community.⁵¹



Figure 10. The A-Canal Headgates.

The following irrigation season proved no less contentious with parties challenging the science behind minimum flow levels and endangered species' habitat.⁵² In response, the Secretary of Interior commissioned the National Research Council, an independent research agency, to review the science underlying the 2001 decision to close the "A" Canal headgates.⁵³ The Council, issuing its report with uncharacteristic expediency,⁵⁴ found no "substantial scientific

Water, N.Y. TIMES, July 6, 2001, <http://www.nytimes.com/2001/07/06/us/farmers-force-open-canal-in-fight-with-us-over-water.html>.

⁴⁹ POWERS ET AL., *supra* note 3, at 10-11; Gosnell & Kelly, *supra* note 9, at 369.

⁵⁰ See DOREMUS & TARLOCK, *WATER WAR*, *supra* note 3, at 9-10; Gosnell & Kelly, *supra* note 9, at 369.

⁵¹ Doremus & Tarlock, *Clash of Cultures*, *supra* note 9, at 323.

⁵² *Id.* at 327.

⁵³ DOREMUS & TARLOCK, *WATER WAR*, *supra* note 2, at 121.

⁵⁴ *Id.* at 121-22. The National Research Council typically issues its reports after eighteen months to two years; in the case of the Klamath review, the Council issued its report to the public only three months after its initial meeting. *Id.*

foundation . . . to maintain higher water levels in Upper Klamath Lake for the endangered sucker populations or higher minimum flows in the Klamath River main stem for the threatened coho population.”⁵⁵ As a result, the “A” Canal headgates were reopened in March 2002 with assurances that there seemed to be enough water to meet the needs of both fish and farmers for the upcoming irrigation season.⁵⁶ By September 2002, the Basin had seen yet another dry summer and one of the worst fish kills in history, with between 30,000 and 79,000 salmon dying in the lower forty miles of the Klamath River.⁵⁷ Although the direct cause of death was disease, atypically low flows and corresponding increases in water temperature were significant contributing factors.⁵⁸

By the winter of 2002, crisis in the Basin made it clear to local stakeholders that the status quo was unsustainable.⁵⁹ Although the Bureau was able to maintain normal water deliveries in the years following 2002, the underlying issues remained unsolved.⁶⁰ The system was broken, and as a result, a myriad of social, economic, and cultural dysfunctions were left to fester below the surface.

⁵⁵ NAT'L RES. COUNCIL, SCIENTIFIC EVALUATION OF BIOLOGICAL OPINIONS ON ENDANGERED AND THREATENED FISHES IN THE KLAMATH RIVER BASIN: INTERM REPORT 4 (2002), available at http://www.nap.edu/openbook.php?record_id=10296&page=4.

⁵⁶ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 138.

⁵⁷ POWERS ET AL., *supra* note 2, at 18; Allen, *supra* note 32, at 430; Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 335; Gosnell & Kelly, *supra* note 9, at 370; Glen Spain, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. ENVTL. L. & LITIG. 49, 91 (2007); Timothy Egan, *As Thousands of Salmon Die, Fight for River Erupts Again*, N.Y. TIMES (Sept. 28, 2002), <http://www.nytimes.com/2002/09/28/us/as-thousands-of-salmon-die-fight-for-river-erupts-again.html>.

⁵⁸ CAL. DEPT. OF FISH & GAME, SEPTEMBER 2002 KLAMATH RIVER FISH-KILL: FINAL ANALYSIS OF CONTRIBUTING FACTS AND IMPACTS 12 (2004), available at <http://www.pcffa.org/KlamFishKillFactorsDFGReport.pdf>; POWERS ET AL., *supra* note 2, at 18.

⁵⁹ Doremus & Tarlock, *Clash of Cultures*, *supra* note 8, at 336.

⁶⁰ DOREMUS & TARLOCK, WATER WAR, *supra* note 2, at 15.

III A SOLUTION IN SIGHT

*“Hope smiles from the threshold of the year to come, whispering
‘it will be happier’”*⁶¹



Figure 11. A Pelican Bay sunrise.

After decades of litigation, legal opinions, and law enforcement had left the Klamath Basin in disarray, stakeholders were left searching for a different solution to the Basin’s perpetual water problems. The legal framework served as a catalyst for what became one of the only remaining solutions: compromise. In February 2010, an “unlikely alliance”⁶² of tribal parties, environmental groups, irrigators, commercial fishermen, and government officials concurrently signed the Klamath Basin Restoration Agreement (KBRA) and Klamath Hydroelectric Settlement Agreement (KHSA).⁶³

⁶¹ ALFRED LORD TENNYSON, *THE FORESTERS: ROBIN HOOD AND MAID MARIAN*, act 1, sc. 3, available at <http://www.lib.rochester.edu/camelot/rh/forest.htm>.

⁶² William Yardley, *Tea Party Blocks Pact to Restore a West Coast River*, N.Y. TIMES (July 18, 2012), http://www.nytimes.com/2012/07/19/us/two-years-after-pact-to-restore-river-no-changes.html?pagewanted=all&_r=0.

⁶³ Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (Feb. 18, 2010) [hereinafter KBRA], available at <http://klamathrestoration.gov/sites/klamathrestoration.gov/files/Klamath-Agreements/Klamath-Basin-Restoration-Agreement-2-18-10signed.pdf>; Klamath Hydroelectric

The Klamath Settlement Group—comprised of twenty-six stakeholder groups—produced the original settlement framework for the KBRA in 2007.⁶⁴ Although the drafts did not receive complete support by all affected parties, the Klamath Settlement Group represented a broad coalition of interested stakeholders in the Basin.⁶⁵ The KHSA—originally called the Agreement in Principle—was initially negotiated by the federal government and state governments of Oregon and California; however, the final agreement, released in September 2009, represented input from the KBRA stakeholder coalition and the new administration under President Obama.⁶⁶ The Agreements were concurrently adopted on February 18, 2010.⁶⁷



Figure 12. Sunlight through the woods.

The KBRA, spanning over 300 pages, sets forth goals to “restore and sustain” the Klamath fish populations, “establish reliable water

Settlement Agreement (Feb. 18, 2010), *available at* <http://klamathrestoration.gov/sites/klamathrestoration.gov/files/Klamath-Agreements/Klamath-Hydroelectric-Settlement-Agreement-2-18-10signed.pdf>.

⁶⁴ Gosnell & Kelly, *supra* note 9, at 374.

⁶⁵ *Id.* at 375.

⁶⁶ *Id.*

⁶⁷ *Agreement Reached on Klamath River Restoration*, DOI NEWS (Feb. 18, 2010), http://www.doi.gov/news/doinews/2010_02_18_news.cfm; Kristina Shevory, *Agreement Reached on Klamath River*, N.Y. TIMES GREEN BLOG (Feb. 19, 2010, 9:02 AM), <http://green.blogs.nytimes.com/2010/02/19/agreement-reached-on-klamath-river/>.

and power supplies” for both agriculture and the wildlife refuges, and “contribute to the public welfare and the sustainability” of the Basin.⁶⁸ In order to trigger implementation, the KBRA requires congressional appropriations just short of one billion dollars over the next ten years, primarily for fisheries restoration and water allocation.⁶⁹



Figure 13. The John C. Boyle Dam, just downstream of Keno, Oregon.

The KHSA, to be implemented alongside the KBRA, sets forth guidance for removal of the four major hydroelectric dams on the Klamath River. The KHSA calls for further studies and environmental review, after which the Secretary of the Department of the Interior can proceed with dam removal if he or she finds that it will benefit salmon and be in the public’s best interest.⁷⁰ A recent report, its purpose to provide guidance for the Secretary’s determination concerning dam removal, has predicted benefits of dam removal—the “dams out” scenario—to outweigh any adverse, quantifiable effects by as much as 47.6 to one.⁷¹ Pursuant to the

⁶⁸ KBRA, *supra* note 63, at 4.

⁶⁹ Allen, *supra* note 32, at 453–54.

⁷⁰ *Id.* at 457–58.

⁷¹ U.S. DEP’T OF INTERIOR, U.S. DEP’T OF COMMERCE, & NAT’L MARINE FISHERIES SERV., KLAMATH DAM REMOVAL OVERVIEW REPORT FOR THE SECRETARY OF THE INTERIOR: AN ASSESSMENT OF SCIENCE AND TECHNICAL INFORMATION 51–53, 233

agreement, PacifiCorp will be absolved of all liability associated with dam removal, and funding for dam removal will come from surcharges on PacifiCorp's customers as well as the sale of general obligation bonds in California.⁷²



Figure 14. View from the shores of John C. Boyle Reservoir.

Most signatories concur that the agreements provide a version of stability; even if the water allocation is not ideal, stakeholders could depend on a non-ideal yet consistently appropriated supply.⁷³

(2012), available at <http://klamathrestoration.gov/sites/klamathrestoration.gov/files/2013%20Updates/Final%20SDOR%200.Final%20Accessible%20SDOR%2011.8.2012.pdf>; Associated Press, *Federal Report Says Removing 4 dams on Klamath River Will Boost Salmon*, OR. LIVE (Feb. 4, 2013), http://www.oregonlive.com/environment/index.ssf/2013/02/federal_report_says_removing_4.html.

⁷² Allen, *supra* note 32, at 459; Shevory, *supra* note 67.

⁷³ Samantha Tipler, *A Hard Sell: Dam Removal and the Klamath Basin Restoration Agreement*, HERALD & NEWS (Mar. 18, 2012, 2:30 PM), http://www.heraldandnews.com/news/local_news/article_5be404d0-70c4-11e1-9f12-001871e3ce6c.html; Yardley, *supra* note 62; Press Release, Karuk Tribe, Klamath Communities Renew Commitment to Restoring River, Protecting Family Farmers: All 42 Parties to the KBRA Vote to Extend Agreement, Seek Congressional Action (Dec. 31, 2013), <http://yournec.org/content/press-release-klamath-communities-renew-commitment-restoring-river-protectiong-family-farmer>.

IV

REMAINING OPPOSITION AND THE FRAGILE CONTINGENCY

*“For how can one know color with perpetual green,
and what good is warmth without cold to give it sweetness?”⁷⁴*



Figure 15. Opposition to dam removal, as voiced by one farmer near Keno.

Despite more than forty parties signing on to the agreements, opposition remains. A month after the agreements were announced, a group of local opponents—primarily farmers—formed the Klamath County Tea Party Patriots in opposition to the negotiated settlement.⁷⁵ The Tea Party unseated local politicians, becoming a strong political force within the community and sending a message to Congress that any legislation would not be met with complete grassroots support from the local farming community.⁷⁶ Just recently, a newly elected Klamath County Board of Commissioners, with a 3-0 vote, decided to withdraw from the agreements, referencing the public’s overwhelming voice at the polls.⁷⁷

⁷⁴ JOHN STEINBECK, *TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA* 29 (Penguin Books 1997) (1962).

⁷⁵ Yadley, *supra* note 62.

⁷⁶ *Id.*

⁷⁷ Lyle Ahrens, *Commissioners Say ‘No’ to KBRA*, KOB-TV NBBS / KOTI-TV NBC2 (Feb. 26, 2013), <http://www.kobi5.com/component/zoo/item/commissioners-say-no-to-kbra.html>. One Commissioner surmised that retaining the Klamath River Dams would

The agreements also met divided support from environmental groups who wanted greater wildlife refuge and instream flow protection,⁷⁸ dam removal advocates who worried the expense and contentiousness of habitat restoration and water reallocation would derail expeditious dam removal,⁷⁹ and tribes who wanted to better protect their rights as well as the fish and wildlife of the Basin.⁸⁰ Others objected to PacifiCorp's absolution of liability,⁸¹ worried that agricultural actors were prioritized over fish,⁸² and maintained that the cost of dam removal was understated.⁸³ With so many groups opting out of—or being involuntarily excluded from—the negotiated agreements, the possibility of anti-settlement parties challenging future legislation and filing more lawsuits remains a reality.⁸⁴

The final determination as to whether the KHSA and KBRA will fully come to fruition rests with Congress since both agreements depend upon federal legislation and the wherewithal of Congress. It is this dependency that has created a fragile contingency. As KBRA's self-imposed deadline crept nearer this past fall, proponents became increasingly aware of congressional inaction and the potential for failure.⁸⁵ While Congress was crippled by partisan gridlock, dire budget issues, and the impending fiscal cliff, the agreements were left

result in “more resources for fish, for farmers, for agriculture, for fisheries”—that is, “[t]here would simply be more of this precious resource” with dam retention. *Id.*; see *Klamath County to Withdraw from KBRA*, HERALD & NEWS (Feb. 26, 2013), http://www.heraldandnews.com/breaking/article_46b9b8ce-8055-11e2-b7b5-0019bb2963f4.html.

⁷⁸ *Summary of Klamath Settlement Agreement*, WATERWATCH OF OREGON, <http://www.oregonwild.org/waters/klamath/a-vision-for-the-klamath-basin/the-klamath-basin-restoration-agreement/WaterWatch%20Summary%20of%20Klamath%20Settlement%20Agreement.pdf> (last visited Nov. 6, 2013).

⁷⁹ Allen, *supra* note 32, at 456.

⁸⁰ Grant Scott-Goforth, *Klamath Restoration Agreement Deadline Looms; Opponents Call for End to Settlement*, TIMES-STANDARD (Nov. 18, 2012), http://www.times-standard.com/localnews/ci_22021402/klamath-restoration-agreement-deadline-looms-opponents-call-end; Tipler, *supra* note 73.

⁸¹ Allen, *supra* note 32, at 461; Brett Cole, *The KHSA's Fatal Flaw: Will a Little Discussed Provision Frustrate Dam Removal?*, KLAMBLOG (Feb. 5, 2013), http://klamblog.blogspot.com/2013_02_01_archive.html.

⁸² Scott-Goforth, *supra* note 80.

⁸³ Tipler, *supra* note 73.

⁸⁴ Allen, *supra* note 32, at 457; Gosnell & Kelly, *supra* note 9, at 376.

⁸⁵ Amelia Templeton, *Klamath Tribes and Farmers Consider Extending Water Agreement*, NW. PUB. RADIO (Nov. 19, 2012, 6:13 AM), <http://www.nwpr.org/post/klamath-tribes-and-farmers-consider-extending-water-agreement>.

to gather dust.⁸⁶ However, the end of 2012 was met with all original signatories agreeing upon a two-year extension and the hope of a new Congress enacting legislation by December 31, 2014.⁸⁷



Figure 16. Morning dewdrops by Lake of the Woods.

V

NATURE OF THE NEGOTIATIONS

*“The difference itself exists because it exists in their thinking.”*⁸⁸

Despite remaining opposition and congressional inaction, the agreements present a real solution to decades of unrelenting conflict in the Klamath Basin. Although litigation served as a necessary impetus to negotiation, it also proved to be disappointingly ineffective in resolving such complex, multi-party water issues.⁸⁹ For example, the Endangered Species Act, for all its regulatory teeth, only had the capacity to address “one symptom of a larger problem.”⁹⁰ Not only

⁸⁶ *Id.*; Tipler, *supra* note 73.

⁸⁷ Amelia Templeton, *Farmers and Tribes Extend Klamath Restoration Deal for Two More Years*, NW. PUB. RADIO (Dec. 31, 2012, 5:31 PM), <http://nwpr.org/post/farmers-and-tribes-extend-klamath-restoration-deal-two-more-years>.

⁸⁸ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 24 (Bruce Patton ed., Penguin Books 3d ed. 2011) (1981).

⁸⁹ Gosnell & Kelly, *supra* note 9, at 364.

⁹⁰ *Id.* at 370; *see* LAITOS ET AL., *NATURAL RESOURCES LAW* 81 (2d ed. 2012).

did decades of litigation fail to develop long-term solutions, it also exacerbated already tense social relationships between various stakeholders.⁹¹



Figure 17. Autumnal coloring in the Klamath Basin.



Figure 18. A meadow of Shoalwater Bay in Upper Klamath Lake.

⁹¹ Gosnell & Kelly, *supra* note 9, at 371.

Negotiations on the other hand—negotiations which developed after years of building relationships and coalitions, sharing values, understanding perspectives, and increasing communication between the stakeholders—were able to provide a more comprehensive, integrated approach to conflict resolution.⁹² Further, the negotiations provided a forum, quite apart from the courtroom or federally mandated regulations, in which local stakeholders could find a “bottom-up, locally led” solution to the rampant ecological, economic, and social issues in the basin.⁹³ Given a voice in the outcome of the Basin through the negotiation process, local stakeholders were more likely to approve the final product than if it had been forced upon them.⁹⁴



Figure 19. From the perspective of a pinecone.

By engaging in informal “living room” dialogues, which helped facilitate mutual understanding, stakeholders were able to set aside decades of animosity and distrust and identify common values, establish trusting relationships, and develop a shared vision with the

⁹² *Id.* at 364, 371–72. Gosnell and Kelly’s paper depicts the Klamath negotiations as revealed in over thirty interviews conducted over four years with key negotiation participants. *Id.* at 365. See also FISHER & URY, *supra* note 88, at 24–25, 27, 35.

⁹³ Gosnell & Kelly, *supra* note 9, at 365.

⁹⁴ See FISHER & URY, *supra* note 88, at 29–30.

integration of local ideas.⁹⁵ The stakeholders' ability to connect with parties previously across the "v." in a setting outside of the courtroom led to "an expansion of the perceived community of concern, and a greater ability to conceive basin-wide solutions and compromises."⁹⁶ By improving communication as well as making differing perceptions among the parties explicit, discussion promoted understanding and a greater likelihood of finding a solution.⁹⁷

VI MOVING FORWARD

*"If we do not change our direction, we are likely to end up where we are headed."*⁹⁸

The Klamath Basin agreements represent an imperfect, yet workable, framework for water management in the Upper and Lower Klamath Basin. After decades of conflict, the collaborative nature of the agreements provides a vision of stability for stakeholders and a potentially useful model for future water resource conflicts. With dozens of parties involved—including local, state, and federal actors—the agreements represent not only an integrative vision but also a profoundly symbolic redirection for a conflict-ridden basin. Like the water drop hollowing the stone, the ultimate solution in the basin did not spring from force or conflict but emerged, over time, from the perseverance and continual resolve of the parties involved: parties jaded by the status quo and determined to find some version of a sustainable solution.

⁹⁵ Gosnell & Kelly, *supra* note 9, at 372. Self-selected leaders of the various subsets of the Klamath community engaged in "informal side meetings," traveling between each other's communities to facilitate discussion outside of the courtroom. *Id.* at 371–72.

⁹⁶ *Id.* at 371.

⁹⁷ See FISHER & URY, *supra* note 88, at 27.

⁹⁸ Jean Sadako King, *Exploration of Right Livelihood as One Path to Peace and Justice*, in BUDDHIST EXPLORATION OF PEACE AND JUSTICE 27, 34 (Chanju Mun & Ronald S. Green eds., 2006) (recounting the Chinese proverb).



Figure 20. Upper Klamath Lake at dusk.

