The Klamath Tribes

Written Testimony of Donald C. Gentry, Chairman of The Klamath Tribes
Before the House Committee on Natural Resources
Subcommittee on Water, Oceans, and Wildlife
Hearing of March 8, 2022
On Klamath River Basin Conditions and Opportunities

March 22, 2022

Chairman Huffman, Ranking Members Benz, and members of the House Natural Resources Subcommittee on Water, Oceans, and Wildlife, my name is Don Gentry, I am the Chairman of the Klamath Tribes, and I thank you for this opportunity to submit written testimony as part of the record of your hearing of March 8, 2022, on Klamath Basin Conditions and Opportunities. I would have liked the opportunity to provide oral testimony on behalf of the Tribes at the hearing as well, particularly since the Tribes' perspective in the Upper Basin differs from those of the witnesses you heard from. But I appreciate your attention to these comments now.

The Klamath Tribes are a federally recognized Indian tribe possessing governmental authority over our members and Indian lands and consist of three peoples who traditionally inhabited lands that now comprise parts of Southern Oregon and Northern California: the Klamath, the Modoc, and the Yahooskin Band of Snake Indians. The Tribes' headquarters are in Chiloquin, Oregon, in the heart of the Upper Klamath Basin. Since time immemorial, our people have occupied the Klamath Basin and relied on its bountiful natural resources for our material, cultural, and spiritual needs. Among these resources are the C'waam (Lost River sucker), Koptu (shortnose sucker), Ci'aals (salmon), and Woksam (wokas or yellow water lily), as well as game animals. The C'waam and Koptu play a central role in the Tribes' culture and spiritual practices, are essential to the subsistence and way of life of the Tribes' members, and the Tribes have a fundamental responsibility to protect them.

In the Treaty of 1864, the Klamath Tribes relinquished our right to occupy a vast territory of 20 million acres of what had been our traditional homeland. However, we reserved for ourselves 2.5 million acres of land, encompassing the entire Upper Klamath River Basin above Upper Klamath Lake. By 1954, fraudulent land surveys and disastrous and dishonorable federal Indian polices reduced the Klamath Indian Reservation to 1.2 million acres, of which 882,000 were Tribal trust lands. Over the course of those 90 years, vast tracts of wetlands and even lakes in the Klamath Basin were diked, drained, and transformed to farmland. Floodplains of our major river systems

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were developed for agricultural uses and hydropower dams were constructed on the Klamath River. The natural reef at the outlet of Upper Klamath Lake (UKL), the most important habitat supporting our C'waam and Koptu, was dredged and the Link River Dam was installed atop it to serve the needs of agriculture and hydropower.[1] These developments enabled robust non-tribal economies to develop and thrive utilizing the water resources of the Upper Basin but, exacerbated more recently by the mining of groundwater, have wrought havoc on the Basin's ecosystem.

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The last remnant of our homeland was stripped from us by the Termination Act of 1954, which ended our federally recognized Tribal status. Termination also brought the loss of our ancestral lands reserved through the Treaty, which now make up a significant portion of the Fremont-Winema National Forest. This abrupt loss of our forest-based Tribal economy was not only devastating to our people, but it also devastated the local Klamath Basin economy as well. At the time of termination, the Klamath Tribes were among the most prosperous Tribal Nations in the United States. Ironically and brutally, termination of the Klamath Tribes, which was allegedly based on our social and economic success, deprived us of the land base that was at the heart of that success. Predictably, termination precipitated severe economic and social devastation from which we are still struggling to recover.

The United States acknowledged the failure of the termination policy in the 1970s and our Tribal leaders led us through the maze of legal, political, and social challenges necessary to restore our federally recognized status in 1986. During this era, we also fought in the courts to protect our treaty rights to hunt, fish, trap, and gather. We were successful in these efforts, and secured rulings recognizing that those treaty-based rights were unaffected by the Termination Act and that the Tribes continue to retain those rights. Unfortunately, the restoration of our federally-recognized status in 1986 did not include the return of our ancestral lands that had been taken after 1954, despite the fact that the price paid for those lands by the United States had long since been recouped by the federal government's timber receipts from those lands. Nor did federal recognition re-start our forest-based economy or heal social ills wrought by termination. To date the Tribes have reacquired only about 3,700 acres in scattered parcels, though we remain committed to rebuilding our land base.

Moreover, while we celebrated our legal restoration in 1986, that same year brought the painful decision to close to all Tribal members the ability to fish for C'waam and Koptu. Once one of the most important food-fish in the Upper Klamath Basin, C'waam and Koptu were caught by the thousands as a mainstay of the Klamath Tribes' diet. By 1986, however, it was apparent that the species were facing a crisis, one formally recognized two years later by the US Fish and Wildlife Service (USFWS), when it listed both species as endangered under the Endangered Species Act (ESA), where they still remain. The Tribes are now limited to catching and releasing just two fish every year for ceremonial purposes, and we now have a second generation of tribal members growing up knowing C'waam and Koptu only through the annual ceremonies and stories told by

[1] It is important to understand that, while UKL is the primary source of supply for water for the Bureau of Reclamation's (Reclamation) Klamath Project (Project), it is not an artificial reservoir like that constructed by Reclamation for other irrigation projects in the west and it did not increase the amount of storage space in UKL. Rather, the dredging of the natural reef and the construction of Link River Dam allow Reclamation to drain UKL approximately three to five feet *lower* than it was capable of dropping naturally. Thus the water Reclamation releases from UKL for Project needs is water that would have been available to sustain fish, had the natural stability of lake levels not been unnaturally degraded by the Project.

their elders, not through their own experience of harvesting, preparing, sharing, and consuming these vital components of our cultural and spiritual existence.

And the condition of these species has only continued to worsen as the effects of climate change and the unsustainable mining of groundwater exacerbate the impacts of a century of agricultural development around their critical habitat in UKL. Where once they numbered in the hundreds of thousands, there are now perhaps 30,000 adult C'waam and fewer than 4,000 adult Koptu left on the face of the planet Most of the adult C'waam are estimated to be nearly 30 years old, past their average life span of 17-22 years, and nearing their maximum natural lifespan of 40 years. Most of the individual Koptu are estimated to be in their late 20s as well, perhaps more than double the Koptu's average lifespan of 12-14 years, and nearing the oldest age ever recorded for members of that species. Given the degraded conditions the C'waam and Koptu must face in UKL, no class of new adults has been "recruited" (that is, reached sexual maturity and become capable of spawning the next generation of fish) since the mid-1990s. If the current adverse recruitment conditions persist, the C'waam will likely be extirpated from their most important habitat of UKL and its tributaries in less than a decade and the Koptu within as few as the next two years. Both species are also at continual risk that a catastrophic single-year die-off could drive them toward extirpation even sooner, and extirpation from UKL is functionally a death sentence for both species. This is not an idle concern – a mass fish kill in 2017 reduced surviving populations by nearly two-thirds (cutting the C'waam census from an estimated 119,000 adults to barely 40,000 by 2019, and the Koptu census from an estimated19,000 adults to perhaps 7,000 by that same year). We simply cannot afford another such catastrophe.

Fifteen years ago, the Tribes felt that, while dire, the condition of the C'waam and Koptu was such that hoped we had sufficient time to engage in habitat restoration projects that could incrementally improve the ecosystem in the Klamath Basin to alter their trend toward extinction. We were therefore prepared to contemplate concessions regarding the quantification and exercise of our water rights claims in exchange for the promise of such ecosystem benefits, a balance of compromises that was embodied in the Klamath Basin Restoration Agreement (KBRA). At the time, we strongly supported that agreement and spent several years fighting hard for its approval. Others, however, had different views, and the KBRA ultimately failed when Congress refused to authorize it by the necessary deadline. Given the ever more precarious status of the C'waam and Koptu, and our overriding need to use every tool at our disposal to ensure that they do not go extinct while we explore strategies to overcome the recruitment bottleneck, we can no longer countenance the possibility of compromising our water rights, upon which these species very existence depend. I must therefore state plainly that there is no prospect of a viable Klamath Basin solution predicated on a compromise of the Tribes' water rights, which were affirmed in the Klamath Basin Adjudication. But nor is the current status quo sustainable.

Since 1989, Reclamation's operation of the Project has been subject to a series of biological opinions (BiOps) issued by USFWS evaluating the effects of its operations on the C'waam and Koptu, and (since 1999) by the US Department of Commerce's National Marine Fisheries Service (NMFS) evaluating those effects on the "evolutionarily significant unit" (ESU) of the Southern

Oregon/Northern California Coast (SONCC) coho salmon.[2] For the last seven years, parties in the Klamath Basin, including the Klamath Tribes, the Yurok Tribe, the Hoopa Valley Tribe, Project irrigators, and the United States, have been in near constant litigation over the development and implementation Reclamation's actions evaluated in these BiOps and the water allocation decisions they drive.

These conflicts become particularly acute over spring allocation decisions, when UKL water is necessary to support C'waam and Koptu spawning, when a large pulse of it is also desired to mobilize the bed of the Klamath River in California to disrupt the lifecycle of an annelid worm that hosts *Ceratonova shasta*, a disease that can be lethal to salmon, and when Project irrigators want to obtain water deliveries for their crops. In years with poor UKL inflows, which has very much been the trend for the past decade (indeed, 2022 has recently become the worst inflow year-to-date in the past 41 years, surpassing – or, more accurately, falling behind 2021 – which had previously had that distinction) and which the consequences of climate change and groundwater mining will continue to exacerbate, there is simply not enough water in the system to satisfy all of these needs and interests simultaneously. And even with Project deliveries delayed (as they were in 2020 and 2021) and significantly reduced (as also occurred in both those years),[3] the needs of the C'waam and Koptu and Reclamation's practice of using UKL releases to support salmon needs downstream come into direct conflict.

The Klamath Tribes both resent and detest this conflict, which is not a natural one – these species coexisted successfully for millennia, and we have long enjoyed close relations with the other Klamath Basin tribes – and only arose after federally-facilitated and federally-encouraged settler colonial development (predominantly agricultural) devastated the ecology of the Basin. We now find ourselves pitted against our sister tribes in the lower Klamath Basin, with the needs of ESA-listed species directly pitted against each other, and with the needs of USFWS National Wildlife Refuges – important waystations on the Pacific flyway – subordinated to all. The Klamath Tribes assert a treaty right to Ci'aals (salmon). We look forward to the return of Ci'aals to the Upper Klamath Basin after the removal of four lower Klamath River dams, a decommissioning process which we hope to see commence next year. We do not want to have to choose among these species. But given the dire condition of the C'waam and Koptu, we are left with no choice but to insist that in an inter-species conflict, the needs of the more critically endangered species must take precedence. And, tragically, those more critically endangered species are the C'waam and Koptu.

Yet that is not the priority choice Reclamation has made. Rather, Reclamation has proceeded for the last several years to do everything possible to deliver irrigation water within the terms of the NMFS BiOp, and has effectively treated many of the conditions USFWS imposed in its BiOp as merely advisory – and thus capable of being simply disregarded – when they might require Reclamation to reassess its choices for meeting its obligations under the NMFS BiOp. This has been

[2] Both sets of BiOps also evaluate the effects of Reclamation's Project operations on other species of concern under the ESA, including – in the case of the NMFS BiOp – Chinook salmon, who are not themselves an ESA-listed species but who are an important prey source for the listed Southern Resident Killer Whale.

[3] People in the Klamath Basin sometimes talk as though the Project's 2021 allocation was zero. But Reclamation in fact allocated 33,000 acre-feet of water for the Project in 2021, despite the historically poor inflows and while failing to comply with multiple conditions in the USFWS BiOp designed to protect the C'waam and Koptu. While 33,000 acre-feet of water is certainly a comparatively small allocation (a little more than 1/12 of what Reclamation considers full Project supply), it is not nothing.

acutely the case in the springs of 2020 and 2021, and we are extremely concerned Reclamation will make yet another such choice this year, which the C'waam and Koptu cannot afford.

While we are petrified every single day that the C'waam and Koptu will go extinct on our watch, we are encouraged by the recent boost of funding resources and attention being made available to the Klamath Basin. We are also heartened by the investments being made in both our and the USFWS' ability to expand our captive rearing operations,[4] a key strategy to artificially bridging the recruitment bottleneck to stave off extinction while necessary restoration work can be accomplished. We are also eager to see this funding enable wetland restoration and floodplain reconnection in the Upper Klamath Basin, including through the retirement of agricultural lands in order to return them to their natural function. These are important tools for improving both water quality and water quantity in the Basin, which is the only way the current cycle of conflict may be broken.

Funding should also be dedicated to projects that directly help reduce the water allocation strife that now comes to the Basin every spring. Measures to reduce pressure on UKL – such as work to restore and increase habitat and the wet water contributions to the Klamath River from important salmon tributaries in California like the Scott, Shasta, and Trinity Rivers – are efforts that all Basin stakeholders should be able to support. Facilitating the Project's transition to living within a water budget commensurate with current and projected hydrologic conditions, without incentivizing or relying on further groundwater mining, is another necessary step. Communities in the Klamath Basin also need support to ensure reliable access to clean water for human health and sanitation needs that do not rely on unsustainable and inefficient irrigation practices. We do not, however, believe that trying to address Klamath Basin water allocation issues through the Klamath River Compact between Oregon and California is an appropriate step, unless it is to *reduce* not increase the maximum amount of water that crosses the state line every year. An attempt to add to rather than reduce the competing demands UKL already faces would move the Basin in precisely the wrong direction.[5]

Improving forest management practices that minimize the damage to the Basin caused by wildfires is another critical priority. The Bootleg Fire last summer devastated fully a quarter of the Klamath Tribes' treaty territory, and its full effects on our members' ability to exercise our treaty right to hunt, trap, and gather remain uncertain and concerning. We know that the fire's toll on deer and elk populations was considerable, however. To reduce the risk of such catastrophes in the future, we would like to see some of these new funding resources dedicated to supporting tribal

[4] It bears emphasizing that what we and USFWS have are *not* hatcheries. There is not a reserve hatchery population to enable future reintroduction if we were to lose C'waam and Koptu in the wild. Rather, every spring the Klamath Tribes' Aquatics Program, as well as USFWS personnel, go out and collect naturally spawned eggs and larvae to raise in the rearing facilities until they are of sufficient size to be released into UKL with the hope of surviving to recruitment age. Neither facility has the size or the resources to rear fish until they actually reach recruitment age. And both programs are sufficiently young that it is not yet clear if these efforts will succeed in addressing the recruitment bottleneck. This is another reason prioritizing the preservation of the remaining adult C'waam and Koptu in UKL is essential. Maintaining adequate minimum elevations in UKL is a critical part of doing so.

[5] Under Reclamation's current Project operations plan, the maximum annual allocation Project irrigators may receive is 390,000 acre-feet of water. Under the terms of the NMFS BiOp evaluating that operations plan, the minimum amount of water Reclamation is to release annually from UKL to support Klamath River flows is 400,000 acre-feet of water.

management or co-management of forested lands in the Basin.[6] The Klamath Tribes, like our sister tribes in the lower Basin, have thousands of years of experience managing forest lands, using tools including but not limited to prescribed fire to ensure that forests remain in healthy balance. That this continues to be the case is nowhere more visible than in the Bootleg fire footprint itself, as illustrated by the picture attached to this written testimony as Exhibit 1. In the picture, you see the stark differences the Bootleg Fire had on lands fully treated by the Klamath Tribes (denoted with the legend "Thinning + Prescribed Fire"), and those that had only thinning treatment or had been untreated at the time of the fire. Improved forest management is necessary not just to protect human and animal life and health, but because of its potential beneficial effects on water quantity and quality in the Basin as well.

In conclusion, the Klamath Tribes' highest priority is to forestall the extinction of the C'waam and Koptu and to put these species on a path toward recovery so we can once again fully enjoy their central place in our existence as Klamath people. We are grateful that the recent and forthcoming infusions of federal funding and attention to the Basin support this work and offer important opportunities to move the Basin as a whole to a more sustainable and healthier future. We support the removal of the four lower Klamath River dams as an integral part of this process. And we look forward to working with our sister tribes, our neighbors in the irrigation community, and other Basin stakeholders to bring about a better future for us all.

[6] The Klamath Tribes also continue to seek the return of forested (and other) lands that were lost to us through Termination.

Klamath Tribes' testimony
March 22, 2022
Exhibit 1