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November 4, 2011

Senator Jeff Merkley  
313 Hart Senate Office Building  
Washington, D.C., 20510-3705

Re: Klamath Basin Community and Economic Recovery Act of 2011

Dear Senator Merkley,

The Resighini Rancheria is a federally recognized Tribe in Del Norte County, California with a Reservation located at the top of the Klamath River estuary approximately three miles upstream of the Pacific Ocean. We rely on the river for sustenance, and have since time immemorial, so we are following the legislation you are proposing with great interest. We believe that your bill essentially terminates the federal authority and responsibility to protect our treaty rights and the government's trust responsibility.

The premise in the introduction to your bill that the authorization of the Klamath Hydroelectric Settlement Agreement (KHSA) and Klamath Basin Restoration Agreement (KBRA) are "in the public interest and the interest of the United States" is unmet. The KHSA and KBRA will not stop water pollution or guarantee sufficient flows to prevent future fish kills such as we experienced in September 2002 of 70,000 adult salmon. Annual juvenile salmon mortality in the hundreds of thousands is also not sustainable and yet problems that cause it go unaddressed in the KBRA. The Resighini Rancheria strongly favors removal of Klamath Hydroelectric Project (KHP) dams but rejects the implementation of the KBRA. Without substantial changes, we will oppose your legislation.

*Legitimacy and Legality of the Klamath Settlement*

Legitimate stakeholders such as the Resighini Rancheria, Quartz Valley Indian Community and Del Norte County were excluded from the talks, in part because the Upper Basin water interests did not want to be out-voted. We believe that the entire Klamath Settlement process is illegal under the Federal Advisory Committee Act (FACA) because federal agency staff has served private parties while federally recognized Indian tribes and the public were excluded.





### *Flawed Klamath Settlement Process Leads to Ecologically Insufficient Outcome*

During the Settlement discussions from which we were excluded, the water users demanded that they be able to farm in the Tule Lake and Lower Klamath National Wildlife Refuge Lease Lands for the duration of the agreement, which is until the year 2062. In April 2007, Water Watch of Oregon and Oregon Wild were expelled from the Settlement because they would not consent to these conditions. This led to an ecologically unsound and economically infeasible outcome within the KBRA that plans huge subsidies to allow farming of marginal land in the high desert in the face of climate change for the next 50 years. The Chinook Expert Panel (Goodman et al. 2011) convened under the KBRA process found that at least 40,000 acres needed to be converted back to marsh and lakes to reduce nutrient inputs sufficiently to control pollution. They state that the likelihood of re-establishment of Chinook salmon to the Upper Klamath Basin is highly unlikely even if dams are removed. Both the Chinook panel and the Coho Salmon/Steelhead Expert Panel (Dunne et al. 2011) agreed that the Keno Reservoir will remain extremely polluted due to the lack of measures prescribed under the KBRA to resolve water quality problems.

### *Economic Sustainability and the KBRA*

To call this act the “Klamath Basin Community and Economic Recovery Act of 2011” is truly ironic. The community of the lower Klamath River, including the Resighini Rancheria, will suffer from continuing water pollution, fish diseases that decimate our life blood - the salmon, and toxic algae from KHP reservoirs until at least 2020. It will not lead to our economic recovery, and in fact we fear it may lead to our demise along with the salmon.

The huge power subsidy embedded in the KBRA would prop up marginally economic agricultural operations in the Upper Klamath Basin that might otherwise lose viability (Jaeger 2004). The Klamath Project irrigators have enjoyed extremely low power costs since 1917, but the Oregon Public Utilities Commission (PUC) phased out the cheap agricultural power requirements of the 1956 KHP license. Therefore, the KBRA \$92 million would be allocated to keep power at artificially low rates, which serves to keep agriculture at an otherwise unsustainably high level. This is the opposite of what is needed, which is to shrink the footprint of agriculture to reduce water demand and decrease nutrient pollution that is killing the lower Klamath River.

If the \$500 million that has been largely wasted in the name of restoration and on payments to irrigators through water banks since 2001 had been strategically directed at land retirement and easement acquisitions, then the Klamath Basin ecosystem could have been put back into balance. If key locations are restored, then natural water storage and filtration capacity will provide the ecosystem service of clean water. Ecological restoration (SER 2004) is the only valid scientific approach to Klamath River pollution reduction yet it is not considered by the KBRA.





The proposed actions under the KBRA constitute a huge waste of tax payer dollars and there is little prospect of success according to the Expert Panels (Dunne et al. 2011, Goodman et al. 2011), which are comprised of National Academy of Science caliber scientists.

To revitalize the Upper Klamath Basin economy in Oregon and California, the National Wildlife Refuges and strategic areas of marsh and lakes of the region need to be restored and the economic base diversified to include increased ecotourism. Any credible bill that addresses Klamath River restoration must plan for and fund substantial land retirement, particularly in the National Wildlife Refuges. These refuges are currently bottlenecks on the Pacific Flyway and to dedicate them back to their original purpose would not only increase populations of ducks and geese, it would also provide the nutrient stripping capacity and water storage mechanism to allow for the ecological restoration of the Klamath River. This would allow the lower Klamath River community and coastal areas reliant on ocean salmon fisheries to thrive as well. The restored reaches of formerly submerged Klamath River have the potential to become an international tourist attraction.

*Indian Treaty Rights and U.S. Government Trust Responsibilities*

One of the Resighini Rancheria's greatest concerns is the loss of our tribal rights that your legislation would bring about. Section 15.3.9 of the KBRA effectively terminates the water rights of the Resighini Rancheria, Hoopa Valley Tribe and other non-Party Tribes without their consent:

“The United States, acting in its capacity as trustee for the Federally-recognized tribes of the Klamath Basin, hereby provides interim Assurances as stated in Section 15.3.8.B, and conditional permanent Assurances that it will not assert: (i) tribal water or fishing right theories or tribal trust theories in a manner, or (ii) tribal water or trust rights, whatever they may be, in a manner that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is not precluded by the limitation on diversions of water as provided in Appendix E-1 in any administrative context or proceeding, or judicial proceeding, or otherwise.”

We agree with the Hoopa Valley Tribe (2011) in their correspondence to you of October 3 that your legislation is huge step backwards for Congress in terms of enlightened U.S. Indian policy. We also agree that this shifts the responsibility of the U.S. Department of Interior from protecting our water rights and protecting our trust assets to instead holding water delivery to Upper Basin irrigators as a priority.





The National Congress of American Indians (NCAI 2009) and Affiliated Tribes of Northwest Indians (ATNI 2009) passed resolutions with common language that oppose any federal legislation that takes away a tribe’s water rights without the consent of the affected tribe. Their resolutions make the following points:

- “Federally-reserved rights to water for instream flows and for tribal use are among the most precious rights held by Indian tribes under Treaties, statutes, and executive orders establishing Indian reservations, and
- Water rights of a tribe that has not approved a settlement agreement or waiver of tribal water rights should not be impaired by actions of the U.S.”

Both resolutions conclude with opposition to “any policy of the U.S. to terminate the rights of, or impose adverse consequences upon, a tribe that chooses to retain its water rights instead of settling on terms desired by the federal government.” In sum, your legislation will generate opposition from Indian tribes across the Nation to the taking of our rights. In contrast, the Klamath Project irrigators maintain all rights and even those with low priority rights may get subsidy even in extreme drought when there won’t be enough water for salmon and sucker fish.

We are saddened and disappointed in the federal government, as embodied in your legislation, and its outright rejection of its trust obligation to Indian tribes and its seeming eagerness to destroy tribal sovereignty for the sake of special hydroelectric and agricultural interests. The Resighini Rancheria will be educating citizens throughout our region as to why your legislation should be opposed. We look forward to working with you on future alternatives that include ecological restoration principals (SERES 2011) and that do not result in social injustice and loss of Indian treaty rights.

Sincerely,

Rick Dowd  
Chairman, Resighini Rancheria Tribal Council

CC: U.S. Senator Diane Feinstein  
U.S. Senator Barbara Boxer  
U.S. Senator Ron Wyden





## References

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