



The Klamath Tribes

March 22, 2017

The Honorable Ken Helm, Chair
House Committee on Energy and Environment
900 Court St. NE, H-490
Salem, Oregon 97301

Re: Comments on HB 2705, HB 2706, and HB 2707.

Dear Representative Helm:

The Klamath Tribes make the following comments on House Bills 2705, 2706, and 2707:

HB 2705, relating to the measurement of appropriated water. The Klamath Tribes generally support this bill, which is necessary for management of the Klamath Tribes' and Oregon's water resources, aiding all water right holders by promoting accurate measurement and timely reporting of water usage that will lead to more effective monitoring and enforcement actions. The Tribes, however, need more information to determine the impact on the use of our treaty rights and resources. To the extent the bill results in fees or costs to the Klamath Tribes or Klamath Allottees, the Tribes object.

HB 2706, relating to management fees for water rights. The Tribes oppose this bill unless the Committee includes language to exempt Tribal treaty water rights from the bill's levying of management fees. The exemption should include all federally reserved Tribal water rights or claims to water rights, including Klamath Allottee water rights or claims, as follows:

The fees under section (2) shall not apply to any federally recognized Indian Tribe or tribal Allottee, or to the United States acting as trustee for such a tribe, for any water right permit, water right certificate, decree or groundwater registration for water



rights reserved by Treaty or Executive Order between the Indian Tribe and the United States and/or held in trust by the United States for the benefit of the tribe.

The United States Federal District Court ruling in *United States v. Oregon*, 774 F. Supp. 1568, 1581 (D. Or. 1991), rev'd in part on other grounds, 44 F.3d 758 (9th Cir. 1994), directly forecloses application to the Tribes of a management fee as contemplated in HR2706. Specifically the federal court ruled--in addressing the State of Oregon's requirement that the Klamath Tribes pay filing fees in the claim filing phase of the Klamath Basin Adjudication--that the Klamath Tribes "cannot be compelled to pay filing fees in conjunction with the adjudication of [their] water rights" in this state proceeding. *Id.* at 1581. The court's ruling that the Treaty of October 14, 1864, between the United States and the Klamath and Modoc Tribes, and the Yahooskin Band of Snake Indians, 16 Stat. 707 (1866) precluded the State from requiring filing fees from the Tribes was not appealed by the State. *United States v. Oregon*, 44 F.3d 758, 762 n.1 (9th Cir. 1994).

In *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court observed that rights reserved by the Indians in a treaty with the United States (in *Winans*, the right of access to fishing grounds) are

a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted.

Winans, 198 U.S. at 381. Subsequently, in *Tulee v. Washington*, 315 U.S. 681 (1942), the Court struck down Washington State's imposition of a license fee on an Indian exercising a treaty reserved fishing right, because the fee "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve" which "cannot be reconciled with a fair construction of the treaty." *Tulee*, 315 U.S. at 685.

Accordingly, in connection with the Klamath Basin Adjudication the *United States v. Oregon* court struck down the state's filing fee, saying,

[u]nder the reasoning of the United States Supreme Court in *Tulee*, to require the Tribe to pay filing fees would be to charge it for exercising rights which it reserved unto itself, and would therefore violate the Treaty of 1864 and federal law.

United States v. Oregon, 774 F. Supp. at 1581. There is no meaningful distinction between the filing fees at issue in *United States v. Oregon* and the fees contemplated in HR 2706; in each instance the fees functionally equate to a prerequisite or condition on the exercise of the Tribal treaty rights.

Letter to Representative Helm

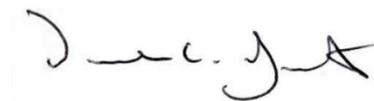
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HB 2707, which appropriates moneys from General Fund to Water Resources Department for ground water studies and investigations. The Klamath Tribes generally support this bill.

Thank you very much for your time and consideration. If any more information is needed, please contact me at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "D. C. Gentry". The signature is written in a cursive style with a long horizontal stroke at the end.

Donald C. Gentry, Chairman