A River Runs Through It

Old adversaries agree to remove dams in the Klamath River basin, hoping to save farms, fish, and tribal culture.

By Glen Martin

It's an unseasonably warm winter day at the mouth of the Klamath River, a few miles south of Crescent City near the northern edge of California. The jade-green waters surge into the Pacific, creating a chaotic zone of swells and wave trains. A pair of gray whales appear just beyond the surf line, their spouts framed in white filigree against the deep cerulean sky.

On a sandbar, two Yurok Indians—members of the tribe that holds this land and the fishing rights to the river—patrol the water's edge with gaffs: lengths of hooked steel rod fitted with an elegant, carved wooden handle. They are hunting lampreys, eel-like fish that enter the river each winter to spawn.

This same scene has played out for the past 10,000 years—roughly the period the Yurok have lived on the lower Klamath River. Almost nothing has changed but the men's clothes and the forged metal that now makes up the business end of their lamprey hooks.

It's precisely this point that Troy Fletcher makes at the Yurok nation's headquarters, a mile or so upriver. Fletcher says his people have been fishing this river, subsisting off its largesse, for a very long time. To the Yurok, the watershed of the lower Klamath is not only their homeland but also the focal point of their culture, religion, and identity. To a significant degree, Fletcher explains, the Yurok *are* the Klamath.

Hundreds of miles upriver, farmer Steve Kandra feels the same way about the Klamath's upper basin. For almost a century his family has been cultivating the rich peat bottomlands. The fields, in an area that once was marsh, are irrigated by water transported from Oregon's Upper Klamath Lake through an extensive system of dams and hundreds of miles of canals begun in 1906 by the U.S. Bureau of Reclamation. Today, the Klamath Reclamation Project irrigates more than 200,000 acres in the river's basin. Kandra raises alfalfa, wheat, onions, and potatoes on 600 acres near Tule Lake, California, and Merrill, Oregon.

"We don't go as far back as the Yurok, of course," says Kandra. "But we have the same attachments to the Klamath watershed and the seasonal manifestations we see on it. This land is very much who we are."

The region's farmers get electricity from the river as well. Between 1917 and 1962, the California Oregon Power Co. built four hydropower dams—three in California, one in Oregon—on the main stem of the river below the basin. Though modest in size, the dams produce roughly 170 megawatts of power, enough to light about 70,000 homes. But the dams wreaked havoc on the pristine ecosystem: They cut off salmon and steelhead from spawning in the upper Klamath, and the shallow reservoirs they created became brood sites for toxic algae and *Ceratomyxa shasta,* a minute aquatic parasite that preys on young salmon and trout.

By the 1970s it was obvious the four dams were harming the river's fish species—not only salmon and steelhead but also white and green sturgeon and Pacific lampreys. As the fish numbers declined, the Yurok, Hoopa, Karuk, and other Klamath tribes joined commercial fishermen, sports anglers, and environmentalists in an ad hoc coalition to preserve the river's habitat. That partnership also brought in lawyers—enough to match the formidable attorneys representing the river's farming communities.

For the next two decades suits and countersuits volleyed along the Klamath like artillery barrages. The skirmishing ramped up in 1997, when coho salmon and two species of suckerfish were listed under the federal Endangered Species Act (ESA). Then, in the midst of a drought in 2001, the skirmishing became all-out war. The Bureau of Reclamation terminated irrigation contracts to some 1,400 upper basin farmers to protect the endangered fish, on the basis of biological opinions issued under the ESA.

The farmers and their supporters staged street protests in Klamath Falls, Oregon, and some took control of the head gates on the project's canals. When local police refused to arrest them, federal agents had to patrol the canals to prevent further water seizures. Kandra—a board member of the Klamath Water Users Association—filed suit against the bureau,

challenging the scientific basis of the biological opinions (*Kandra v. United States,* 145 F. Supp. 2d 1192 (D. Or. 2001)).

Though the court denied injunctive relief to block the bureau's plan, the farmers found political support at the highest levels of the Bush administration. A year later, a controversial new biological opinion determined that water diversions were "not likely to adversely affect" coho salmon for a below-average water year. The bureau halved the amount of water it would release downriver, diverting the balance to farmers through the project's canals. In April 2002, Secretary of Agriculture Ann Veneman, Secretary of the Interior Gale Norton, and Sen. Gordon Smith of Oregon posed at a ceremonial opening of the Klamath head gates.

By September of that year the low flows, warm water temperatures, and an exploding population of parasites killed as many as 64,000 fish in the lower Klamath. It was one of the largest fish kills in the history of the Northwest. This time the bureau was sued by commercial fishermen, the Klamath tribes, and environmental groups. (*See Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation,* 426 F.3d 1082 (9th Cir. 2005).)

For the Yurok, the great salmon die-off was profoundly traumatic, tantamount to an assault on their very existence. Framed news clippings of the event are still posted on the walls of the tribal headquarters. "We went into mourning," Fletcher says. "It seemed like the world was dying."

But the disaster convinced the Yurok that they had to find another way to resolve the water conflict. "We had gone through decades of lawsuits. We'd get one decision that would seem to help us, and then another that moved us back," Fletcher says. "Meanwhile, things on the river kept getting worse. We just came to a point when we realized that litigation wasn't going to solve anything. We had to reach out."

So the Yurok began informal talks with the farmers, leading to creation of the Klamath Settlement Group in 2005. More than 20 stakeholders participated: the Klamath River tribes; farmers and irrigation districts; federal agencies within the Departments of Agriculture, Interior, and Commerce; state agencies in Oregon and California; county governments; environmental groups; the commercial fishing industry and sports anglers; and PacifiCorp, owner of the hydropower dams.

The goal, Fletcher says, wasn't simply to mitigate fish mortality or increase water flows downriver. It involved much more: reaching an agreement, once and for all, that would keep all the parties whole while guaranteeing a restored, ecologically stable, biologically rich river. And the hope was to achieve that outside the courts.

In 2008 the groups' talks produced a proposed settlement and, later in the year, an agreement to remove the hydropower dams from the river. But with years of work still ahead on cost-benefit studies, federal and state authorization, and funding for the dams' removal, the biggest question is whether there is enough time to save the river.

The Yurok feel their backs are against the wall. Everything they have—their whole way of being—is at stake. "It's not a matter of *wanting* to restore the river," Fletcher says. "We *have* to restore the river. We believe we are charged to protect the river, and to serve as its stewards. As a people, it's our primary responsibility."

Steve Kandra has known Troy Fletcher a long time, and though he says their relationship is marked by respect, he admits it hasn't always been harmonious. "There have been plenty of times Troy and I sat across a table, throwing spears at each other," Kandra recalls with a laugh. "So let me tell you, when he had his epiphany [after the fish kill], I saw it as a welcome alternative."

Scott W. Williams, attorney for the Yurok and a partner with Alexander, Berkey, Williams & Weathers in Berkeley, says Fletcher based his overture to the farmers on an offer to not oppose their bid for a new source of low-cost power. Williams says that, after negotiations between the lawyers, the farmers responded with a letter confirming a general, ambiguous statement of support for the tribe.

"We went through a period where we had to do some trust building, some testing to make sure we could really do this," Kandra says. "Sometimes it was easy, sometimes it was contentious. But it was always honest. Just that fact connected people, made us feel we were really on to something."

In fact, the Yurok feel a kinship with the farmers, says Fletcher. "Like us, they are people who are close to the land. Like

us, they are a spiritual people," he says. "And we both depend on the same river for our survival. There is more that brings us together than separates us."

For the many participants in what became the Klamath Settlement Group, the prospect of a definitive agreement was alluring, promising to resolve a conflict that had long seemed intractable. "It really resonated with us," says Jeff Mitchell, a council member of the Klamath Tribes—a coalition of the Klamath, Modoc, and Yahooskin that has fought nearly a century for the return of salmon and steelhead, absent from the upper river since completion of the first dam in 1917.

According to Mitchell, a series of federal court cases dating from the 1970s established the Klamath Tribes' senior water rights on the river. But those cases quantified neither the amount of water the tribes may claim nor the amount allocated to holders of subsidiary water rights. That has been left to the Oregon courts, and those state cases are still ongoing.

"State adjudication is time-consuming and incredibly costly," Mitchell says. "Meanwhile, people continue to take as much water as they can. So if we can get a comprehensive settlement that meets our criteria—protecting the fish, terrestrial fauna, and plant life in and along the river—we'll pursue it."

Commercial fishermen also participated in the settlement group. Glen Spain, Northwest regional director for the Pacific Coast Federation of Fishermen's Associations in Eugene, Oregon, says the salmon kill of 2002 brought them to the negotiating table. "Like the other stakeholders, it became obvious to us that the status quo wasn't sustainable," Spain says. And with operating licenses for the Klamath dams set to expire, "[w]e saw this as a chance to actually get something done."

Spain recalls the initial talks as difficult. "The first meetings were almost like encounter groups—people spent a lot of time talking about their feelings," he says. "Everybody who depends on the river—from the farmers to the tribes to the salmon trollers—had gone through a lot of trauma." But once the emotional aspects played out, he says, "we started to see that if we did this right, we could bring down the dams, restore the watershed, and keep the farmers whole."

Key to removing the dams, of course, is consent of the utility that owns them, PacifiCorp Energy of Portland, Oregon. At the time of the Klamath fish kill, PacifiCorp was a subsidiary of ScottishPower of Glasgow, Scotland, and it was planning to apply to the Federal Energy Regulatory Commission (FERC) for a 50-year renewal of its operating license, scheduled to expire in 2006. So a protest group from the Klamath Tribes traveled to Scotland in 2004 for the company's annual meeting, receiving favorable coverage in the local press and sympathy from Scottish citizens.

Chastened, ScottishPower agreed to negotiate with the tribes. But in 2006 PacifiCorp was acquired by MidAmerican Energy Holdings, owned by Warren Buffet's Berkshire Hathaway. The new owner indicated it wasn't interested in dam removal. But no new license could be issued without retrofitting the dams to meet federal wildlife protections enacted in the 1970s.

This time the Klamath Tribes traveled to Omaha, Nebraska, to protest at a Berkshire Hathaway meeting. Although the parent company didn't respond, eventually PacifiCorp participated in the Klamath Settlement Group talks, and it agreed in principle to removing the dams.

Dean S. Brockbank, vice president and general counsel of PacifiCorp, notes that the company continues to operate the Klamath dams under annual licenses that renew automatically—even though the settlement makes clear that Oregon, California, and the federal government all want the dams removed.

"As a utility, we don't make policy; we implement it," Brockbank says. "So at the point the preferred policy of the state and federal governments became clear, we shifted from an emphasis on relicensing to settlement."

Williams, the Yurok's attorney, says that under PacificCorp's former license, the utility had supplied power to upper basin farmers at below-market rates. In the settlement, the tribes propose that the farmers be provided with submarket rates on energy from alternative sources, possibly including the Bonneville Power Administration on the Columbia River.

Says Kandra, "We'd also be looking at renewable energy: biomass, solar, wind, and small hydro units on streams without fish-bearing capacity. This could be a real opportunity for promoting sustainable power."

In January 2008 the settlement group released the Klamath Basin Restoration Agreement, a 256-page document signed

by 28 parties—though not by PacifiCorp. The agreement proposes 50-year contractual commitments and estimates restoration costs at $1 billion over a 10-year period. Its significance is captured in a single sentence: "The Parties have negotiated this Agreement to achieve peace on the river and end conflict."

Last November the parties executed a separate Agreement in Principle—this one signed by PacifiCorp—documenting their intention to take out the four hydropower dams. About 25 percent less water would be allocated for irrigation. For each year, a firm cap would be placed on water diversions. Storage capacity would be increased in Upper Klamath Lake to create significant new tracts of wetlands that would benefit the lake's endangered suckerfish, as well as the millions of waterfowl that use the upper basin as a wintering ground. And restoration projects along the river's primary watershed would improve water quality, fisheries, and wildlife.

In exchange, the farmers would be guaranteed low-cost power, as well as protection from enforcement of the Endangered Species Act if coho and other listed fish return to the upper basin. The agreement also has provisions for the voluntary retirement of farmland, paying farmers who return irrigated land to wildlife habitat.

Greg Addington, executive director of the Klamath Water Users Association, says that reducing the demand for irrigation water was critical to making the settlement work. To avoid permanently idling land, the settlement proposes conservation easements. During drier years, farmers would be compensated—with either cash or water guarantees—for keeping land as wildlife habitat. In wetter years, the same pieces of land could be irrigated and farmed. Addington says such incentives could go a long way toward making more water available downriver without a court judgment.

Conservation easements have other benefits as well. According to Addington, temporary marshes, known as walking wetlands, would benefit waterfowl and fish and improve general water quality. "Marshes serve as filters, removing nutrients and pollutants from the water," he says. And fallowing land as marsh for a year or more fertilizes the soil with waterfowl waste and humus from aquatic plants. It also eliminates the disease spores that accumulate in regularly cultivated cropland.

Despite the many benefits of a comprehensive Klamath settlement, the devil remains in the details. PacifiCorp, for instance, is willing to go along only if a number of conditions are met. "First, there has to be a $200 million cap on costs [to the utility]," says Brockbank. "Second, the secretary of the Interior has to conduct a feasibility study to determine if it is generally advisable to remove the dams. Third, PacifiCorp would transfer ownership of the dams to a third party, and the company and its customers would be immune from any liability associated with removal. And finally, our customers would continue to get power at favorable rates."

Given those terms and others, Brockbank says, the dams probably couldn't be removed before 2020. In the meantime, PacifiCorp will continue to operate the facilities. "For some people, that timeline is a problem," he acknowledges. "But given the scope of this situation, taking out the dams and fully implementing watershed restoration is unlikely any time sooner."

A bigger roadblock is likely to be obtaining government approval and appropriations. Congress must authorize and fund first a cost-benefit study and then the deconstruction itself. The actual dam removal would be paid for with federal taxes, a $200 million customer surcharge assessed by the Oregon Public Utilities Commission, and $250 million in general obligation bonds that California voters must approve.

Those obstacles seem daunting, admits Pablo Arroyave, a technical-services manager for the Bureau of Reclamation in Sacramento. But he says the potential snags are fairly standard for water-project agreements of such size and complexity.

"Look at the San Joaquin River settlement," Arroyave says, referring to a pending deal to restore native salmon and provide continuous water flows to dry sections of the San Joaquin River. "It's taken a very long time, and enabling federal legislation has yet to be passed. But I would say that in the Klamath River basin, most stakeholders are generally pleased with the way things are going. When you have very complicated negotiations, you can't expect things to be simple."

Arroyave points out that the Obama administration has yet to address dam removal on the Klamath and the costs associated with it. But he seems confident of approval, even in the midst of a recession. "The federal government remains invested in the current process, and we're anticipating a determination [on the cost-benefit study] that is unbiased and looks at all the elements carefully."

Some environmentalists, however, are less sanguine. Oregon Wild, a Portland-based group dedicated to preserving the state's wild lands and waterways, at first participated in settlement negotiations but was later excluded when its staffers expressed deep unease at the direction of the talks. "People have been so blinded by the prospect of dam removal that they're willing to sacrifice other goals, such as overall water flows in the river," says Sean Stevens, a spokesperson for the group. "The target date for taking down the dams is the first problem—the fish may not have eleven years to wait. There's too much potential for side—stepping the Endangered Species Act and the Clean Water Act. Water allocations aren't specified clearly enough. And the agreement allows for continued farming in the Tule Lake and Lower Klamath National Wildlife refuges—the only federal refuges where large-scale commercial agriculture is permitted. It compromises the very rationale for establishing them."

Those positions, Oregon Wild's critics say, risk setting off another round of litigation. But Stevens doubts that will happen—and he says a bad settlement is worse than no settlement.

"We don't support lawsuits simply because we like them," Stevens says. "We worked with PacifiCorp for a settlement on decommissioning Link River Dam [on Upper Klamath Lake] to save endangered suckerfish. But we have to remember what got us to the point where settlement became feasible: It was people going to court. Rushing through a flawed process just to get a settlement today as opposed to five or six years from now is simply wrongheaded."

Another opponent of the settlement, the Hoopa Valley Tribe, has a large reservation at the juncture of the Klamath and its major tributary, the Trinity River. Tom Schlosser, an attorney for the tribe and a partner in the Seattle firm of Morisset, Schlosser & Jozwiak, says that removing the dams to save fisheries is a laudable goal, but he doubts the Agreement in Principle can achieve it. For one thing, downriver flows during many of the years between now and 2020 won't be enough to sustain coho salmon, Schlosser says. "By the time the dams come out, we could very well have lost the coho completely," he says. "For the Hoopa Valley Tribe, that is not acceptable."

Schlosser also questions the requirement for the Department of Interior to conduct a cost-benefit analysis of dam removal. "Under such an analysis, it's possible that Indian fisheries may not carry the same weight as hydropower," he says. "We have no way of knowing how existing standards to protect tribal fisheries will be applied."

Eric Garner, coauthor of a book on California water law, says Schlosser's concerns are understandable but may not reflect reality. "Cost-benefit analysis is significant, but the useful precedent is limited because each river system is unique," says Garner, managing partner of Best Best & Krieger in Riverside. "I think Interior would give a lot of weight to stakeholder consensus on whether dam removal is appropriate."

Spain of the Federation of Fishermen's Associations says he respectfully disagrees with critics of the settlement. As the agreement is shaping up, he says, an average of 130,000 acre-feet of additional water will be released downriver each year, except in the worst drought periods. Combined with dam removal and stipulated habitat and water-quality improvement projects, he contends, the river not only will have more water, but it will be colder and cleaner.

"Is it enough?" Spain asks rhetorically. "Well, it wouldn't be enough in a major drought, and the critics have hammered on that point. But there's a proviso in the Agreement in Principle calling for a separate drought plan. That will take some years and considerable funding to accomplish, but it's integral to the settlement. Ultimately, we'll have a drought plan."

Another concern is that silt lodged in the reservoirs behind the dams could irreparably harm the Klamath's fisheries when it is released. But Spain, noting scientific studies prepared for the California State Coastal Conservancy, responds that the negative effects are likely to be minimal and transitory. "The studies showed there was no significant contamination of sediments from upstream agricultural activity," Spain says. "And while there will be a sediment plume when the dams are removed, most of the silt will move through the river in a year or two."

Meanwhile, Spain notes, the increased water flows will carry gravel downstream. "Salmon need gravel and cobble for spawning," he says. "So once the dams are out, we'll actually see miles and miles of new spawning habitat."

For all the measured optimism of the parties in the Klamath Settlement Group, it's also true that the signed agreements have no legal force. If one party or another gets its hackles up or abruptly decides its interests are not being served, the legal battle could begin again.

Indeed, litigation brought by upper basin farmers never really ended. After the district court dismissed Steve Kandra's suit

in 2001, for instance, two irrigation districts refiled the complaint in the U.S. Court of Federal Claims. That suit raised two takings claims, and in 2003 a breach of contract count was added.

In 2005 the court of claims found no compensable property interests under the Fifth Amendment (*Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504 (2005) (*Klamath I*)). Two years later the same court also rejected the contracts claim, holding that the Endangered Species Act took precedence over the bureau's water-delivery agreements (*Klamath II*, 75 Fed. Cl. 677 (2007)).

The plaintiffs then appealed to the U.S. Court of Appeals for the Federal Circuit. "The threshold issue is whether the plaintiffs have any property interest in Klamath water," says John Echeverria, executive director of the Georgetown Environmental Law and Policy Institute in Washington, D.C. "In our view, based on long-standing Oregon law, they do not. Under the special development deal that allowed the Klamath Project to proceed, the water belongs to the federal government. The irrigators have a contractual right to it, and they may be able to make a case for breach of contract, but not for takings."

Echeverria, together with the Natural Resources Defense Council, filed an amicus brief in 2007 urging the appellate court to affirm the court of claims rulings. Instead, the Federal Circuit certified questions last July to the Oregon Supreme Court, asking the state court to rule on whether the irrigation districts had obtained a property interest in water rights conferred on them by the Klamath Reclamation Project (*Klamath III*, 532 F.3d 1376 (Fed. Cir. 2008)).

The Oregon Supreme Court wasn't required to respond. The state's Department of Water Resources and most environmentalists hoped it wouldn't, fearing that upper basin farmers might abandon the settlement process if the court found a property right inherent in Bureau of Reclamation contracts. But the Oregon Supreme Court did respond, agreeing to consider the certified property rights questions (*Klamath IV*, 2009 WL 197566 (Jan. 29, 2009)). It has scheduled oral arguments for the middle of this month in the Klamath Falls High School gymnasium.

Another pending takings case, this one in Southern California, also could complicate the Klamath settlement. It involves a dispute over irrigation diversions from the Ventura River that threaten endangered steelhead trout. The Casitas Municipal Water District—represented by the lead attorney for the Klamath irrigators, Roger Marzulla, cofounder of Marzulla & Marzulla in Washington, D.C.—claimed the ESA's requirement that it install a fish ladder and increase water flows for the steelhead's benefit amounted to a compensable taking of its property right in the use of river water. The court of claims found for the federal government, analyzing the case as a regulatory taking (*Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100 (2007) (*Casitas I*)). But last year the Federal Circuit reversed, holding in a 21 opinion that the claim must be evaluated as a physical taking rather than a regulatory taking (*Casitas II*, 543 F.3d 1276 (Fed. Cir. 2008)).

In February the appellate court declined to rehear the case en banc, despite amici support from Defenders of Wildlife, the Environmental Defense Fund, the Sierra Club, California Trout, and a phalanx of fisheries scientists (*Casitas III*, 2009 WL 367528 (Feb. 17, 2009)).

Though *Casitas II* could give cause for irrigators to abandon the Klamath settlement, Marzulla expresses a conciliatory tone. "No matter how these cases turn out, I don't think it will screw up the [Klamath] negotiations," he says. "The fact is that 2001 was a very unusual year on the Klamath River. The reservoirs were full, but the farmers basically got no water. Emotions were very high. At this point, people really want to work toward a solution. I would not expect favorable determinations for us [in the *Casitas* cases] to have a negative impact."

One thing missing from the Klamath settlement is the active support of the country's largest environmental groups. Most are waiting to see whether the final agreement conforms to the ESA and the Clean Water Act.

"With the Klamath, the ESA is really the big gun," says Kristen Boyles, a staff attorney in the Seattle office of Earth-justice, which specializes in environmental litigation. "When I look at the drafts of the Klamath settlement, I'm concentrating on whether there's any attempt to circumvent federal laws, including the ESA. So far there isn't. But that's the crucial metric we will apply throughout this process. Any final deal absolutely must conform to the ESA and the Clean Water Act, because that's where the science lies."

According to Fletcher, the settlement agreement explicitly guarantees compliance with federal laws. Asked to respond to settlement critics, a faint, pained look crosses his face, and his voice—usually deep and measured—tightens.

"The main thing I ask them," Fletcher says, "is what's the alternative? Unending litigation? Sure, the settlement involves

compromise. It doesn't treat the river as a zero-sum game. But that's not a bad thing. This is our first real chance to solve this problem, and we need to move on it."

Will it take too long to remove the dams? At this question, Fletcher acknowledges that the Yurok view time differently than the larger society does. "We have occupied the lands along this river for thousands of years," he says. "And we anticipate occupying them for thousands more. To us, ten years isn't a terribly long time—especially considering the payoff. We aren't doing this for us. We're doing it for our grandchildren, and our grandchildren's grandchildren. A restored river will be our legacy to them."

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