



The Klamath Tribes

HB 4016 Work Session

Testimony of the Klamath Tribes of Oregon Submitted to the House Energy and Environment Committee

February 14, 2018

This testimony supplements and includes by reference the testimony presented by the Klamath Tribes' Tribal Council Vice Chair Gail Hatcher and Tribal Water Rights Specialist Bradley Parrish to this Committee on February 9, 2018.

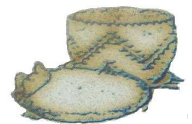
THE KLAMATH TRIBES OPPOSE HB 4016 AND THE -1 THROUGH -4 AMENDMENTS

IMPACTS OF HB 4016 COULD BE SEVERE AND IRREVERSIBLE

In the hearing on February 9, 2018, the Committee asked what impact would occur if the total amount of currently unused water that HB 4016 would allow to be transferred and used for irrigation was limited to approximately 5000 acre feet. At 70,000 AF per foot of lake level, (the volume representing the top one foot of Upper Klamath Lake), 5,000 AF equates to 0.9 inches of lake elevation. This is substantial, given that the Eastside gravel is barely inundated at the moment. The timing of the withdrawal is also critical. Depending on when it occurs, it could have negative impacts on C'waam and Koptu, listed as Endangered under the Endangered Species Act, by reducing the amount of habitat available for all life stages in Upper Klamath Lake. The amount and depth of C'waam shoreline spawning habitat, the amount of diverse shallow-water habitat for juvenile C'waam and Koptu, access to and the amount of water quality refuge habitat in Pelican Bay for juvenile and adults could all be reduce by this amount of additional use. Also, any additional withdrawal could increase the number of larval and juvenile C'waam and Koptu entrained into the Klamath Project.

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If the 5000 acre foot estimate does not represent the total amount of currently unused water that HB 4016 will allow to be transferred and placed into use, or is only an estimate from one of the 14 irrigation districts impacted by HB 4016, the impacts of the bill will be much more severe. For example, a 20,000 acre foot transfer would have a significant impact to juvenile fish that use shoreline habitat throughout the irrigation season. Over the season with a 20,000 AF diversion, Upper Klamath Lake will drop an additional 0.3 feet which equates to about a 10% reduction in emergent wetland habitat.

HB 4016 INCORRECTLY ASSUMES KLAMATH PROJECT OPERATIONS WOULD PROTECT AGAINST UNQUANTIFIED IMPACTS FROM TRANSFERRING UNUSED WATER

As the Klamath Tribes previously testified, the U.S. Bureau of Reclamation is failing to operate Upper Klamath Lake at lake levels protective of the endangered species that live in the lake. Data provided by the Bureau of Reclamation in the following table shows end-of-month elevations for 2013-2017. Throughout this entire five-year period, Upper Klamath Lake elevations were at or below minimum thresholds and below critical elevations identified in the 2013 Biological Opinion.

Date End of Mo.	Bi-Op Negative Effects	2013	2014	2015	2016	2017
January		40.44	40.31	41.05	41.06	40.88
Feb.		41.27	41.50	42.32	42.04	42.38
March	4142.2	<u>41.91</u>	<u>42.17</u>	42.92	42.87	42.69
April	4142.2	42.41	42.22 *	42.57 ^	43.07 ^	42.88 *
May	4142.2	<u>42.01</u>	<u>41.58</u> *	42.21	42.61 *	42.33 *
June	4142.0	<u>41.12</u> *	<u>40.44</u> *	<u>41.35</u>	<u>41.62</u>	<u>41.67</u>
July	4140.0	<u>39.91</u> ^	<u>39.26</u> *	40.39	40.28	40.36
August	4139.0	39.14	<u>38.60</u> *	39.36	<u>38.73</u> ^	39.44
Sept.	4138.2	38.80	<u>38.20</u>	38.78	<u>38.13</u>	38.80
Oct.	4138.2	38.94	38.27	38.30	38.66	38.89
Nov.		39.20	38.90	38.34 *	39.19	39.58
Dec.		39.61	40.41	39.71	40.00	40.19

Underlined numbers – Below levels determined to have significant negative effects on the C’waam and Koptu in 2013 Biological Opinion.



*Below 2013 Biological Opinion minimum thresholds.

^Equal 2013 Biological Opinion minimum thresholds.

Due to poor water conditions coming into the 2018 irrigation season, the Klamath Project will likely see an increase in the number of months where lake levels fall below the levels determined to have significant negative effects on the endangered species. Any transfers – above or below 5000 acre feet - of unused water from the Klamath Project under these conditions could result in further damage to critical habitat and increased mortality of C’waam and Koptu.

CONCLUSION: THE KLAMATH TRIBES OPPOSE HB 4016 INCLUDING THE -1 THROUGH 14 AMENDMENTS

- HB 4016 is unnecessary and puts the Tribes water rights and interests at risk, as well as the interests of the public in protecting listed endangered species.
- HB 4016 directly contradicts the balance of interests the Legislature struck in SB 206 in 2015. In SB 206, now codified at ORS 539.170, SB 206 authorized the holders of determined claims in the Klamath Basin (which includes the Klamath Project) to make temporary transfers of water rights, subject to OWRD’s determination that the transfer will not cause injury to other water users.
- The process described in HB 4016 (contrary to both the SB 206 process and **all** other water transfer processes under Oregon law), allows for the Klamath irrigation districts to move water to new lands within their boundaries without any threshold assessment of the possible impacts of the transfer on other water right holders. Instead, HB 4016 allows (but does **not** require) OWRD to order the cessation of a transferred use if it makes an injury determination sometime after the fact. (Compare HB 4013 § 3(b); ORS 540.520 §7 (the permanent transfer statute); ORS 540.523 § 2 (the current temporary transfer statutes); ORS 540.570 §2 (the current irrigation district pilot program transfer statute).)
- This transfer-first-and-ask-questions-later approach subverts the prior appropriation doctrine in general and is especially harmful to the interests of the Klamath Tribes in particular because it essentially allows the irrigation districts to exercise their transferred rights as though they were senior to the Tribes.
- HB 4016 allows (but does **not** require) OWRD to order the cessation of a transferred use if it makes an injury determination sometime after the fact. (Compare HB 4013 § 3(b); ORS 540.520 §7 (the permanent transfer statute); ORS 540.523 § 2 (the current temporary transfer statutes); ORS 540.570 §2 (the current irrigation district pilot program transfer statute).)

For these reasons, the Klamath Tribes oppose HB 4016. Please do not hesitate to direct any questions to Chairman Don Gentry at Don.Gentry@klamathtribes.com or Douglas MacCourt at dmaccourt@rosettelaw.com. Thank you.

