The Klamath Tribes
Tribal Council

Testimony of the Klamath Tribes
Before the Senate Judiciary Committee
In Support of Amendments to SB 977

April 3, 2019

This written testimony is being submitted by Donald C. Gentry, Chairman of the Klamath Tribes ("Tribes"). On behalf of the Tribes, I would like to thank Chairman Prozanski and the Committee for the opportunity to provide testimony in favor of Representative Sanchez's proposed amendments to SB 977, which would amend ORS 539.075. I would also like to thank Representative Sanchez for taking the lead on this issue of great importance to the Klamath Tribes. These amendments are necessary to remove an outdated procedural loophole that has resulted in the continued perpetration of an injustice against the Tribes.

Like many tribes across the United States, the Klamath Tribes were forced to give up vast tracts of our aboriginal land in exchange for a much smaller reservation that would serve as our permanent homeland. Part of the agreement for tribes in this situation, the United States Supreme Court has agreed, is that water rights associated with reservation land were also reserved. Despite possessing these water rights under the law, the Tribes spent over 40 years quantifying them through adjudication so we could exercise them. In 2013, and only after we had invested significant resources into the fight, the Tribes finally obtained a ruling quantifying our water rights. This meant, for the first time, the Oregon Water Resources Department ("OWRD") would enforce the Tribes' water rights against junior water rights holders. For the first time, the Tribes had the tools to protect the water rights we had long possessed.

Yet, since then, opponents of the Tribes' rights have used a rare automatic stay provision in a State of Oregon ("State") statute to deny the Tribes our hard fought power to exercise our legal rights to the resources we have always owned. ORS 536.075 allows a petition for judicial review ("PJR") to be filed against an OWRD enforcement order. What this means for the Tribes is that, by merely filing a PJR, a junior water rights holder is able to secure an automatic stay of the Tribes' attempt to protect our water rights, enabling junior water rights holders to continue taking water that belongs to the Tribes. As the Tribes use our water rights to ensure sufficient water remains to support the plants, wildlife, fish,

501 Chiloquin Blvd. – P.O. Box 436 – Chiloquin, Oregon 97624
(541) 783-2219

and habitat the Tribes rely upon for subsistence, the Tribes' inability to protect our water rights harms our ability to exercise our other treaty rights as well.

The Tribes support the proposed amendments to SB 977 because they would remove the outmoded and unjustly applied automatic stay provision found in ORS 536.075(5).

I. Klamath Tribes' Historic Water Use

The Klamath Tribes are now federally recognized as one Indian tribe whose constituent tribes, the Klamath, the Modoc, and the Yahooskin Band of Snake Indians, have resided in South-Central Oregon since time beyond memory.

Our people have always relied upon the resources of the Klamath Basin, including its water and water-dependent resources, to sustain our livelihood and our culture.[1] In the old times, we believed everything we needed to live was provided for us by our Creator in this rich land east of the Cascades. We still believe this. Our legends and oral history tell about when the world and the animals were created, when the animals and gmok'am'c—the Creator—sat together and discussed the creation of man.

For thousands upon countless thousands of years, we survived by our industriousness in utilizing the natural resources the Creator gave us. When the months of long winter nights were upon us, we survived on our prudent reserves from the abundant seasons. Toward the end of March, when supplies dwindled, large fish runs surged up the Williamson, Sprague, and Lost River. At the place on the Sprague River where gmok'am'c first instituted the tradition, we still celebrate the Return of c'waam[2] Ceremony.

Our presence here and the presence of our Treaty resources has been, and always will be, essential to the economic, cultural and spiritual well-being of our homeland and our people.

II. Klamath Tribes' Water Rights

In our 1864 Treaty with the United States ("Treaty"),[3] we ceded over 22 million acres of aboriginal lands in exchange for the exclusive rights to live on a smaller plot of land, called the Klamath Indian Reservation ("Reservation"), located within our aboriginal territory. In the Treaty, we reserved the rights to hunt, fish, trap, and gather on the lands of the Reservation. The Treaty also reserved our aboriginal, time-immemorial rights to water to support the wildlife, fish, and plants that are protected by our Treaty harvest rights—for without sufficient water we could not exercise our harvest rights.[4] For nearly

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[1] *See United States v. Adair,* 723 F.2d 1394 (9th Cir. 1984) (*Adair II*).
[2] Also known as the "Lost River Sucker."
[3] Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707, *reprinted in* 2 Charles J. Kappler, INDIAN AFFAIRS: LAWS AND TREATIES 865 (1904) (1864 Treaty).
[4] *Adair II,* 723 F.2d at 1410, 1414.

100 years, our people resided on the Reservation, during which time we maintained a self-sufficient economy and subsisted on the rich and diverse resources of the Reservation, all of which were supported by and dependent on our water resources.

In the 1950s, however, the Tribes were subjected to Congress's ill-considered policy of "termination," through which Congress unilaterally deemed that certain tribes would no longer be recognized as Indian tribes by the federal government and set in motion a process for the dismantling of reservation land. Termination was disastrous for the Tribes. Tribal lands were transferred to private parties and to the U.S. Forest Service. The State, taking its cue from the federal termination of the Tribes' recognition, began to restrict the Tribes' members exercise of their ancient hunting, fishing, trapping, and gathering ways. The Tribes were thus stripped of our land, our economy, our means of subsistence, and our cultural traditions by the ill-considered actions of the Federal and State governments.

Yet our people continued to assert our Treaty-reserved rights, which are so central to our subsistence and our culture. We sued in the federal courts for the ability to exercise those rights unmolested. In 1974, the Ninth Circuit Court of Appeals ultimately affirmed that, despite termination, the Tribes' Treaty-reserved harvest rights remained intact.[5]

The Tribes also filed suit to protect the instream water flows that are essential for the continued exercise of our Treaty harvest rights. The existence, scope, and nature of the Tribes' reserved water rights were thus ultimately determined by the United States District Court of Oregon and affirmed by the Ninth Circuit.[6]

The courts said the Tribes' water rights are time-immemorial rights to sufficient instream flows and lake levels to support the fish, wildlife, and plants upon which the Tribes' Treaty harvest rights depend.[7] As described by the Ninth Circuit, rather than a right to withdraw water from a stream, the water rights for the protection of the Tribes' Treaty harvest rights consist "of the right to prevent other appropriators from depleting the streams [sic] waters below a protected level in any area where the non-consumptive right applies."[8] Put simply, the Tribes' water rights are rights to maintain instream flows and lake levels, meaning that junior water rights holders can be prevented from diverting water if such diversions would result in flow or lake levels that would harm the Tribes' Treaty harvest rights.

The Ninth Circuit's determination that the Tribes' water rights carry a time-immemorial priority make these the senior water rights in the upper Klamath Basin.[9] The "time-immemorial" priority date (the most senior priority date there is) is based on the recognition that these water rights have belonged to the Tribes for as long as the Tribes

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[5] *Kimball v. Callahan*, 493 F. 2d 564 (9th Circuit 1974); *Kimball v. Callahan*, 590 F. 2d 768 (9th Cir. 1979).
[6] *Adair II*; *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979) (*Adair I*).
[7] *Adair I*; affirmed by the Ninth Circuit in *Adair II*.
[8] *Adair II* at 1411.
[9] *Id.* at 1414.

have inhabited these lands—which was long before the establishment of the Reservation, and long before there was an Oregon territory or a United States of America.

III. Quantification of Klamath Tribes' Water Rights Through Klamath Basin Adjudication (KBA)

While the federal courts recognized and affirmed the nature and scope of the Tribes' instream water rights, they left quantification of those rights to the State's basin-wide water rights adjudication ("Klamath Basin Adjudication" or "KBA").[10] At the conclusion of the 38-year-long administrative phase of the KBA, which ended in March 2013, OWRD issued the Findings of Fact and Orders of Determination ("FFOD") determining all water-rights claims at issue in the KBA, including those of the Tribes. On February 28, 2014, OWRD issued the Amended Findings of Fact and Orders of Determination ("ACFFOD") to address certain technical errors in the FFOD.

Over the last several decades, both the Tribes and the United States, as the Tribes' trustee, have litigated in the KBA to protect and quantify the Tribes' federally-reserved Treaty water rights. The ACFFOD quantifies the Tribes' time-immemorial instream rights, and provides a mechanism by which the Tribes finally became able to enforce those rights against junior water rights holders.

The enforcement mechanism is triggered by the Tribes making a "call" to the OWRD watermaster—informing him or her that, in the Tribes' assessment, there may not be sufficient water in the stream to meet the Tribes' rights and that junior water rights holders should thus be regulated off the system. OWRD responds to a "call" by investigating whether there is sufficient water, and, if it confirms there is not, OWRD determines which junior water rights holders must stop diverting water from the stream to protect the Tribes' senior water rights and notifies the junior water rights holders that they are to cease diversions until the senior Tribal rights are fulfilled.

As per the process outlined under ORS chapter 539, the State's general-stream-adjudication statute, the ACFFOD is now undergoing judicial review in the Klamath County Circuit Court. Many of the parties to the KBA, including most of the water rights holders junior to the Tribes, filed "exceptions" to the OWRD determinations, which are challenges to the determinations and are ultimately decided by the courts.

Meanwhile, pursuant to the statute governing the KBA, water rights determined in the ACFFOD must be enforced by OWRD while judicial review is pending.[11] That same statute provides a mechanism for seeking a stay of enforcement of the KBA-determined rights, but this option—among other things—requires posting a bond with the KBA court.[12] Shortly after the initial administrative KBA determinations were made, a number of parties requested the Klamath County Circuit Court issue a stay against enforcement of the Tribes' water rights, but they were ultimately rejected, in part because they did not

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[10] *Id.* at 1399.
[11] ORS 539.130(4); ORS 539.170.
[12] ORS 539.180.

file the required bond.

IV. Unjust Effects of 536.075(5) "Automatic Stay"

Upon obtaining the ability to enforce our water rights, the Tribes began to make "calls" for enforcement by OWRD. Yet, almost immediately, junior water rights holders began to challenge OWRD's enforcement of those calls in separate lawsuits filed under a different water law statute than the one governing the KBA: ORS 536.075, which authorizes filing Petitions for Judicial Review (PJR) to challenge OWRD's actions. The water rights holder whose call is being challenged is not even a party to the PJR case unless the holder specifically requests and is allowed to intervene by the court.

The Tribes strongly disagree that a PJR under ORS 536.075 challenging enforcement of the Tribes' water rights is a legally valid tool while the KBA general stream adjudication is still proceeding under the statute governing the KBA. The Tribes also disagree that such an action can proceed in our absence. And the Tribes have filed these kinds of challenges in some of these cases. Many of these cases, however, are voluntarily dismissed at the end of the irrigation season, taking advantage of the stay without ever fully litigating the substantive issues on the merits.

However, the most disruptive and ultimately devastating consequence to the Tribes of a PJR under ORS 536.075 is that, as soon as the petitioner files the PJR with the court, an automatic stay of OWRD's enforcement order goes immediately into effect—thereby prohibiting OWRD from enforcing the Tribes' water rights. There is no ruling by the court required, nor even notice to OWRD. Rather, under ORS 536.075(5), the mere act of submitting a piece of paper and filing fee to the court stops the water rights enforcement process cold—for the duration of the lawsuit. Since these lawsuits often drag out for many months or even years, the automatic stay remains in effect for the entire irrigation season before any of the substantive issues of the litigation are addressed—leading to ongoing depletion of the water and damage to the Treaty resources, despite every federal and state determination on the matter to date having confirmed the Tribal rights.

While there is a process for OWRD to lift the stay by making a determination that the stay will result in substantial public harm, such actions take time (often a month or more), during which time the stay remains in effect and precious instream flows are diverted by junior water rights holders. Moreover, an OWRD decision to lift an automatic stay may itself be subject to a PJR (and thus another automatic stay), an absurd, endlessly looping scenario that simply demonstrates how wrong-headed this statutory provision is.

While a PJR can be used anywhere in the State, the majority of cases invoking this provision have been filed since 2013 against enforcement actions taken to protect the Tribes' water rights. These PJRs are tantamount to collateral attacks on the KBA itself.

The automatic stay provision has become a weapon used each year by an increasing number of junior water rights holders. As soon as OWRD issues an enforcement order in response to a call by the Tribes (usually at the beginning of the irrigation season when

junior water rights holders' water usage spikes), junior water rights holders file PJRs and get automatic stays. The cases will then drag on through the season, and once the season is over (and the stay is no longer necessary), the junior water rights holders will voluntarily dismiss their cases—only to file again at the beginning on the next irrigation season. With the automatic stay provision in effect, these junior water rights holders have very little incentive to litigate their cases on the merits, instead relying on this outdated and outmoded procedural technicality to get the results they want year-after-year, and depriving the Tribes of the opportunity both to have our water rights enforced and our objections to this abuse of the PJR process addressed by the courts once and for all.

The Tribes are thus left with water rights whose enforcement can be easily frustrated. The result is an attempt at "termination" of the Tribes' water rights whenever a PJR is filed, since a water right that cannot be enforced loses its meaning as a water right.

V. SB 977 Amendments are Technical Fix That Would Prevent Perpetration of Great Injustice Upon Klamath Tribes

The amendments to SB 977 proposed by Representative Sanchez would prevent this injustice by removing the automatic stay provision—deleting ORS 539.075(5). They leave the remainder of the statute intact, allowing anyone who has the right to file a PJR the ability to do so. They also leave the standard administrative and judicial mechanisms for obtaining a stay of enforcement intact as well. The amendments simply remove an outmoded procedural loophole that has been used repeatedly to undercut the enforcement of the Tribes' water rights—and which has also been used in the past and could be used in the future to undercut the rights of other senior water rights holders in the Klamath Basin and elsewhere in the State.

The Tribes strongly support the proposed amendments to SB 977 and urge the Oregon legislature to amend ORS 536.075 to remove subsection (5) (the automatic stay provision). Doing so would do much to mitigate the unfair impacts, as it would remove the most easily abused part of the legislation. Petitioners who feel they are entitled to a stay have other options for requesting one, where they would have to meet the same requirements and have the same burdens as other parties who seek a stay or injunction.