

# MEMORANDUM

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**To:** Klamath Water Users Association  
**From:** William M. Ganong  
**Date:** December 23, 2009  
**Subject:** Response to Questions about Oregon Water Law and BOR's Drought Plan and Legislation in the context of the Klamath Basin Restoration Agreement

Some members of the water user community have raised questions about the relationship between the Klamath River Adjudication, the Klamath Basin Restoration Agreement and the Bureau of Reclamation Drought Plan. I offer the following observations and partial responses to several specific questions that have been posed to Greg Addington. The following comments are intended to provide my perspective of some of the historical and legal issues that resulted in the so called ABC system on which the BOR drought plan is based, and the potential interplay between the ABC priorities and the KBRA. These comments are my personal perspective and are not offered or intended to provide legal advice to any party and do not represent the position of any other person or entity. Each party to the KBRA and, particularly, each district and water user in the Klamath Reclamation Project, has an open, direct conflict of interest with respect to prioritizing rights to receive water. Therefore, I cannot provide legal advice, generally, to the group of Project districts, and I strongly recommend that each participant in the discussion obtain that advice from his or her independent legal counsel.

## A. Joint Prosecution Agreement.

The potential conflict among the Klamath Project irrigation districts and water users that results from the contract priorities described by the BOR as A, B, and C Contracts was recognized by the districts at the time the districts agreed to jointly submit claims for water rights in the Klamath River Adjudication. Paragraph 11 of the Joint Prosecution, Defense, Cooperation and Confidentiality Agreement for Klamath River Adjudication, dated November 12, 1996, and signed by all of the Klamath Project districts provides:

"The parties acknowledge that their interests or positions may not be identical in the Klamath River Adjudication, or at least that their interests or positions may differ on certain subjects. Without limiting the preceding statement, the parties expressly recognize and acknowledge that they have or may have different opinions or positions with respect to whether certain districts or individuals or land have, by virtue of the type of contract they hold or for other reasons, a priority or preference to water supplies available for use through Klamath Project facilities. This preference or priority is sometimes identified as the 'A,' 'B' and 'C' contract or lands issue. The parties agree that the existence and legality

of such preferences need not and should not be an issue that is determined or adjudicated in the Klamath River Adjudication. To this end, the parties agree that they will support the inclusion in the order of determination and decree or judgment entered in the Adjudication, a statement to the effect that the order, judgment or decree does not determine whether such a priority or preference exists and that, if necessary to fully resolve any dispute concerning this issue, the order, judgment or decree shall be reopened.

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While the parties recognize that their interests, positions, or obligations may potentially conflict on these and other issues, the parties currently believe that their common interests are much more substantial, and justify participation in this agreement. Subject to their needs or obligations to assert and protect their own interests, each party agrees that it will, in good faith, endeavor to advise the other parties if it anticipates that it will assert a position or claim adverse to another party."

#### B. Adjudication Claims.

There are three divergent positions with respect to the water right claims made in the Klamath River Adjudication for the Klamath Project. Claims were made by the federal government and separately by the irrigation and drainage districts on behalf of their members. The United States contested parts of the claims made by the districts; the districts contested parts of the claims made by the United States; and, generally, some individual water users upstream of Upper Klamath Lake, commonly referred to as the "Nicholson group," filed contests to all parts of the district and U. S. claims.

The United States asserts that there is a water right for irrigation for all land entitled to receive water from or through the Klamath Project under Contract with the United States. In the Adjudication and in the takings litigation, the United States asserts a position that the land owner - water users only right to use water is his or her or the district's contractual rights with the United States. The United States asserts that it is the owner and entitled to be the holder of the water rights for the Klamath Project, and that it will then administer those rights consistent with the terms of the various Contracts between the United States, the districts, and the individual water users.

The district's claims assert that the proper holders of the water rights are either the districts for the benefit of the land owners, the landowners themselves, or the landowners and districts jointly. The water right is appurtenant to the land that puts that water to beneficial use in the Project, and the various claims that have differing priority dates should apply across all of the land in the Project. Separately, Van Brimmer Ditch Co. asserted a right to 50 cubic feet per second of water during the irrigation season with a priority date of 1883 arising from the notices of appropriation filed by the Van Brimmer brothers and from its Contract with the United States, which reserved to it a right of 50 cubic feet per second of water.

The Nicholson group asserts that due to errors in the filings made by the United States with

the State of Oregon from 1905 through 1908, none of the land in the Project is entitled to a pre-1909 water right. Alternatively, the Nicholson group's position is that the map filed by the United States in 1908 describing Project facilities only shows those canals that currently provide water to the land within the Klamath Irrigation District and to the Van Brimmer land and does not show any structures for delivery of water to any other land, including that of the Shasta View Irrigation District and the Malin Irrigation District.

### C. BOR Drought Plan.

In the available literature and contracts, the Bureau of Reclamation has consistently taken the position that the Klamath Project facilities were being developed primarily for the benefit of land that could be served by gravity from Lost River and Upper Klamath Lake. The initial map shows the Lost River Diversion Channel, and the initial plan included diverting the flow of Lost River to the Klamath River to dry up the area of Tule Lake, and then to make that land available for entry and homesteading. The early correspondence and other documents refer to the Klamath Irrigation District as the "main division" and the area that was initially under Tule Lake or in the proximity of Tule Lake, as the "Tule Lake division." The correspondence and documents refer to the other land now in the Klamath Project as "pumping land" or "pumping districts," indicating that to serve those lands with water from the Klamath Project, it would be necessary to pump that water to a higher elevation, and that those lands could not be served by gravity from the system.

Consistent with the correspondence and other documents, the Bureau of Reclamation entered into Contracts with KID in 1918 and TID in 1956 under provisions of the 1902 Reclamation Act, the act under which the Klamath Project was authorized. It also contracted with Van Brimmer recognizing Van Brimmer's claim to 50 cfs and agreeing to provide that water to Van Brimmer in exchange for eliminating Van Brimmer's diversion from the Lower Klamath Lake area. In making Contracts with the "pumping districts," the Bureau relied on statutory authority provided to it under the 1911 Warren Act to make Contracts for delivery of irrigation "water excess to the needs of the main project." Therefore, all of the Contracts made by the Bureau of Reclamation for delivery of water in the Klamath Project, except those of KID, TID, and Van Brimmer, provide that the rights of those districts and/or individual water users to receive Project water are subject to the prior rights of KID, TID, and Van Brimmer. The Contracts made under the Warren Act are commonly referred to as "B" contracts because those served through the facilities operated and maintained by KID are described on "Exhibit B" of the US – KID 1954 Contract. That Contract also includes an "Exhibit C" which lists several contracts that are subordinate to the contract rights of KID and the Warren Act contracts. Those entities and people receiving water under the contracts listed on Exhibit C are commonly referred to as "C" waterusers.

In 1992 and 1994 the Bureau of Reclamation, by written directive, allocated the available water supply giving priority to "A" districts and directing the "A" districts to reduce or eliminate supplies to "B" and "C" water users. Rather than strictly follow the BOR directive, the Klamath Irrigation District opted to establish its own procedures for allocating the available water and, to the greatest extent possible, provided for the transfer of water for lands served by or through the

KID system without regard to whether the land was entitled to receive water under an "A," "B," or "C" Contract.

#### E. Questions and Responses.

The following questions have been posed and are followed by my responses:

1. First, if all we have is a water claim and not a water right until Adjudication, then how can the BOR drought plan be enforced?

In response to the first question, if the position taken in the Adjudication by the United States is correct, then each of the district's rights to water are strictly controlled by the terms of their Contracts, and those Contracts provide that the "A" water users, KID, TID, and Van Brimmer, have priority and are entitled to receive all of their water prior to the rights of Malin, Shasta View, KBID, and all the other districts that have Warren Act Contracts. The Bureau's drought plan is based on the provisions of the Contract, and if the United States has the ability or authority to manage the Klamath Project water, then the BOR drought plan can be enforced by the BOR.

This question assumes that we have only a "water claim and not a water right." The districts disagree with that position. Oregon's law refers to unadjudicated water rights that relate to the diversion and beneficial use of water prior to 1909 as "vested" pre-1909 rights. If we had no water right, then the State of Oregon would be required by law to prevent the diversion of water to our lands. Under state law, you may only divert and use water if you have an existing pre-1909 vested right, a decreed water right, a water right permit, or a water right certificate.

2. The second question posed was: "So, why can't we legislate in the KBRA the whole project to a 1909 contract?"

I assume that Congress can do whatever Congress wants to do, and Congress could pass legislation stating that the Contract rights to receive water from the Project are all the same. However, I do not believe that would necessarily resolve many of the existing issues or result in equal treatment of Project land with respect to the surface water rights. For example, it is likely that the Adjudication Order and Final Decree will determine that the land in Van Brimmer has a water right with a priority date of 1883 for 50 cfs. Although, both the United States and the district's claims assert that date for all Project land, it is possible that the Adjudicator will determine that only the Van Brimmer lands are entitled to that date. Further, in the Project Claims, we have asserted various other priority dates, many of which relate to early diversions and canals that serve land located in what is now KID and did not serve any other land. It is possible that the Adjudicator will decide that some KID land in the Henley area has a water right of 1890, but only that land has a water right with a priority date of 1890. If Van Brimmer and/or other areas within the Project are found to hold water rights with priority dates, then under State water law, those lands may make a call on all other land that has a later priority date, including other land within the Project. Legislating a 1902 Contract date for the Project Contracts would not alter the adjudicated State water rights. Further, it is unlikely that land owners in Van Brimmer would be willing to legislate away any priority rights adjudicated to them.

Other issues that exist with the Contracts include the varying financial obligations of the parties under the Contracts. For example, approximately 10,000 acres of KBID land is served through KID. KBID has no ditch riders. It has no facilities. All of the KBID land in KID is administered by KID. It is common for KBID and KID land to be under the same pivot or the same wheel line and served through the same canals and laterals. The cost of delivering water to KBID land in KID is the same as delivering water to KID land in KID. However, by Contract, the KBID land pays only 50 percent of the per acre charge KID land pays for operation and maintenance expenses. In the past, there has been discussion of merging KBID into KID. However, some KBID land owners have resisted that suggestion because it would result in a doubling of their annual irrigation assessments. Further, the KID land paid its proportionate share of the construction costs of the Klamath Project, whereas KBID land did not pay any of the initial construction costs of the Klamath Project. The KBID land did pay to make improvements in the Project that increased the supply of water to parts of the KID system.

KID provides water to the Pine Grove Irrigation District. Since 1922, the Pine Grove Irrigation District has paid \$76.32 a year toward the operation and maintenance expenses incurred by KID in delivering that water. In the past few years, KID has spent more than \$1 million in maintaining and improving facilities, including the A Canal tunnel, to be able to deliver water to the land served by KID, including Pine Grove. Yet, Pine Grove paid no part of that substantial expense.

In return for paying nearly nothing toward the operation and maintenance of the Klamath Project, Pine Grove's Contract provides that Pine Grove is entitled to a maximum of 2 acre feet per acre and its right to receive water is subordinate to the rights of the land in KID to receive water. If all land and all districts within the Project are, by legislation or otherwise, going to be entitled to equal right to the water provided by the Project, then the parties should also address an equitable distribution of the cost of operating and maintaining the facilities.

3. The third question posed is: "I thought the purpose of KBRA was to keep the project whole?"

Likely, different people have different perspectives on what "keeping the project whole" means. Neither the Adjudication of Project water rights nor the KBRA will provide a full supply of water to the Project every year. In the Adjudication, the cards play themselves. As stated above, it is possible that some land within the Project will have, under a state water right, priority to water over the rights of other land within the Project. If the Adjudicator determines that some land, such as the Shasta View and Malin Irrigation districts' lands, were not included in the initial map and plans of the Project and those lands were not irrigated until after 1909, then it is also possible, but not probable, that those lands, may be found to have no pre-1909 water right. We believe we made a valid arguments that, in fact, all irrigate land in the Klamath Project is entitled to a pre-1909 water right. The United States does not dispute that position, but the Nicholson group does.

F. Conclusion.

In my view, the benefits of the KBRA are not that it will somehow equalize the rights and obligations under the various Contracts within the Project, but rather that it will provide a substantial sum, approximately \$100 million, to compensate the land owners including those who have B or C Contracts, for water they may not receive in the future because of (a) Adjudication priority dates; or (b) drought; or (c) the agreement of the Project to limit its diversions of water to not more than 380,000 acre-feet of water per year. Further, it provides \$35 million or more to fund projects that will offset power costs to Project irrigators and districts, of which potentially both Malin and Shasta View will be substantial beneficiaries, and it will provide millions of dollars to develop habitat conservation plans with a life span of up to 50 years to protect the Project water supply from endangered species issues.

It is important to note that before the agreement of Project irrigators to limit their diversions becomes permanent, each benefit that flows from the KBRA to Project irrigators must occur. So, therefore, the agreement of the Project irrigators to limit diversions will not become permanent unless, in fact, the appropriate habitat conservation plans are developed and whatever measures are required to implement those plans are funded by the federal government. The same is true of the funding for power and to compensate for loss of water. If that money is not forthcoming, then the agreement to limit diversions will not become final.

When the Project districts decided it was necessary and appropriate to file claims in the Adjudication providing the same priority dates for all land in the Project, they knew they could not work together in accomplishing that task without putting aside the ABC Contract issue. In my opinion, the same is true of the KBRA. If it is necessary to resolve the ABC issue, which includes not only priority to water but other contract issues such as equitable sharing of the cost of O & M for storing and delivering that water, it is unlikely that can occur before the deadline for signing onto the KBRA. Districts that choose to not sign the KBRA are disqualified under the terms of the KBRA from sharing in the benefits of the KBRA. If the districts as a group decide to refrain from approving the KBRA because of the ABC issue, then it is likely there will be no benefit to the Project from the water bank, power mitigation, habitat conservation provisions, and other provisions of the KBRA, and the districts and their water users will be left with (a) addressing ESA issues year to year through litigation, as they have in the past; and (b) diverting and allocating water based on whatever rights the Adjudicator determines are held for the benefit of the Project and their contract rights, in which case I anticipate that the A districts will assert contractual rights to that water. The KBRA provides funding to develop a water management plan, which may include addressing the ABC issue and/or compensating people who do not receive a full supply of water.