Testimony of the Klamath Tribes
Senate Committee on Judiciary and Ballot Measure 110 Implementation
In Support of SB 1563

February 28, 2022

This written testimony is being submitted by Edmund Clay Goodman, Tribal Attorney for the Klamath Tribes ("Tribes"). On behalf of the Tribes, I would like to thank Chairman Prozanski, Vice-Chair Thatcher and the Committee for the opportunity to provide testimony in favor of SB 1563. I would also like to thank Senator Anderson for taking the lead on this issue of great importance to the Klamath Tribes. SB 1563 is necessary legislation to give full life and meaning to the Tribal Consultation requirements originally enacted as SB 770 in 2001, and codified at ORS 182.162-68. The amendment is a simple and straightforward fix to the existing law. It will remove the language that prevents Oregon's tribes from enforcing the rights that the rest of that statute codified into law. Without such an amendment, the important consultation rights and obligations set out in the statute will remain largely aspirational.

On behalf of the Klamath Tribes, whom I have represented for over 30 years, I first want to note that the Tribes have developed a government-to-government relationship with a number of State agencies, including the Oregon Department of Fish and Wildlife and the Oregon Water Resources Department. But there are other agencies whose work impacts the Klamath Tribes, and other tribes, who have not developed and who only pay lip service to the consultation obligations set out in the existing law. Without the ability to enforce SB 770 through a cause of action, it has proven difficult to ensure that the law's vision of a robust government-to-government relationship can be given meaning.

The ability to seek and obtain judicial enforcement is a critically-important mechanism for bringing meaning to substantive rights and obligations, which may otherwise remain paper rights. I started my comments by mentioning the relationships that the Tribes have developed with the Oregon Fish and Wildlife and Oregon Water Resources Departments. But it has not always been so. In fact, with those two agencies, it took years of judicial enforcement to secure protection of rights reserved by the Klamath Treaty of 1864 and subsequent federal legislation.

The present-day Klamath Tribes are comprised of three historic tribes: The Klamath, the Modoc, and the Yahooskin Paiutes. Like many tribes across the United States, the Klamath Tribes were forced to give up vast tracts of their aboriginal land (over 22 million acres) in exchange for agreeing to reside within the boundaries of a much smaller reservation (1.5 million acres), a reservation that was promised to serve as the Tribes' permanent homeland. One key part of that agreement, memorialized in the Treaty of 1864[1], was that the Klamath Tribes would have the right, in perpetuity, to hunt, fish, trap and gather on those lands. Further, it was understood by the Tribes that the water rights

[1] 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).

necessary to support those rights were also reserved, with a priority date of time immemorial.

Due to the bountiful resources on the lands that they had reserved, by the 1950s, the Klamath Tribes had developed into one of the strongest and wealthiest tribes in the nation. They had created a vigorous economy based on timber resources and imported livestock, which nearly fully supported the entire Tribal membership. Many Tribal members engaged in hunting, fishing, trapping and gathering for subsistence and to support their traditional way of life.

Yet in spite of, or perhaps, because of such successes, the Klamath Tribes were the target of the misguided and disastrous federal policy of termination in the 1954. The Klamath Termination Act, codified at 25 USC 564, divested the Tribes of ownership of their reservation lands and, for a time, deprived of the Tribes eligibility to receive services as an Indian tribe from the federal government (a status that was finally restored in 1986). Yet even the Klamath Termination Act, a terrible and since repudiated part of this Nation's history, expressly stated that nothing in the statute could be read as abrogating the reserved rights of the Tribes, and the water rights necessary to support those rights.

Nonetheless, despite the language of the Treaty, and the language of the Termination Act preserving those rights, neither the Oregon Department of Fish and Wildlife nor the Oregon Water Resources Department took the necessary steps to ensure the protection of those rights. These reserved rights were paper rights only – until the Klamath Tribes went to court to seek enforcement.

First, the Tribes fought, through two lawsuits, both of which ultimately went to the Ninth Circuit Federal Court of Appeals, for recognition and protection of their rights to hunt, fish, trap and gather on the lands that had been reserved through the Treaty of 1864. These two lawsuits, known as *Kimball v. Callahan I* and *Kimball v. Callahan II*, established that the language of the Treaty and of the Termination Act meant what it said: that those rights were reserved by the Treaty, and survived termination.[2]

Second, and on the heels of *Kimball v. Callahan II*, the Tribes sought recognition of their reserved water rights from Oregon Water Resources Department, which recognition was not forthcoming from the agency. Thus, the Tribes again went to federal court, in another case that went to the Ninth Circuit (*United States v. Adair*[3]), to obtain enforcement of the Tribal time immemorial water rights reserved by the Treaty and expressly retained by the Termination Act.

As I mentioned, the Tribes now have a productive government-to-government relationship with both ODFW and OWRD. Yet it took years of litigation against both agencies to ensure the protection of the Tribal rights enshrined on paper. From our perspective, it was the ability to enforce those rights in court that brought us to the place

[2] *Kimball v. Callahan (I)*, 493 F. 2d 564 (9th Circuit 1974); *Kimball v. Callahan (II)*, 590 F. 2d 768 (9th Cir. 1979).
[3] *See United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (*Adair II*).

where we are today with these two agencies. The Tribes and ODFW/OWRD do not agree on all issues, but we work together productively because the Tribes have the backstop of judicial enforcement.

The Tribes seek to work productively with many other State agencies whose activities and decisions have a significant impact on the Tribes and its members. The Tribes seek to rely on the government-to-government consultation obligations established in SB 770. And it has been our experience that some of these agencies do seek to work with the Tribes in a good faith, government-to-government manner. But not all. The Tribes would like to ensure that they can give life to the relationship envisioned by SB 770. But SB 770 has long been hobbled by the language that prevents judicial review and enforcement. That language is the means of taking away what the legislature has granted with the remainder of that bill. It has been twenty years since SB 770 was codified into law. It is time to allow for judicial review and enforcement to ensure that all of the State's agencies live up to the promises of that law.

The Tribes strongly support SB 1563 and urge the Oregon legislature to amend ORS 182.162-168 by removing ORS 182.168 (the provision that prohibits any judicial review or enforcement). Doing so would do much to give true meaning to the vision of SB 770.