

# **Water Law and the Klamath Basin**

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## **Introduction**

The Klamath River begins in the mountains of Oregon and California east of the Cascade Range, flows generally southwesterly, and enters the Pacific Ocean near Crescent City, California. The Basin covers more than 16,000 mi<sup>2</sup>. (For perspective, the states of New Jersey and Delaware combined cover approximately 10,000 mi<sup>2</sup>.) Crater Lake, the only national park in Oregon, sits at the top of the Klamath River headwaters. The Klamath Marsh, Agency Lake Marsh, Lower Klamath Lake, Tule Lake Sump, and Clear Lake Reservoir are all designated as National Wildlife Refuges. Klamath Lake, at the confluence of the Williamson and Sprague rivers, is the largest lake in Oregon.

The lower Klamath River is home to a number of anadromous fish species, including the coho salmon. The Klamath Basin provides wintering habitat for the largest gathering of bald eagles in the lower 48 states. Over 80 percent of the seasonal habitat for Pacific Flyway waterfowl is found in the Klamath Basin. Hydroelectric power production has been an important resource in the Klamath since the late 19th century. Oregon has designated its lower segment of the Klamath River as a state scenic water way.

## **Oregon water law**

As is the case in most western states, Oregon statutory law provides that all water within the state from all sources belongs to the public.<sup>1</sup> All such water is subject to appropriation for beneficial use. Once appropriated under the provisions of the state's water code, the right to use the water continues in the owner so long as the water is applied to a beneficial use under and in accordance with the terms of the certificate of water right, subject only to loss by non-use.<sup>2</sup> Except for certain defined exempt uses and uses that vested prior to enactment of the state's water code, any person intending to acquire a water right must apply to the Oregon Water Resources Department.<sup>3</sup>

In addition to the various state water right systems, certain authority to use and control water arises under Federal law. This authority includes the power of the Federal government to set aside (reserve) land from public domain for particular purposes (e.g., national forests, national parks, Indian reservations, military bases, etc.); to develop Federal irrigation, flood control, and hydroelectric projects; to manage rivers and lakes for protection of threatened or endangered aquatic species; and to protect navigation.

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<sup>1</sup>ORS 537.110.

<sup>2</sup>ORS 537.250(3).

<sup>3</sup>ORS 537.130(1).

## **Water law statutes**

Notwithstanding the modest rule concerning use of water from a spring under ORS 537.800, Oregon water law is governed by the doctrine of prior appropriation. Oregon's appropriation procedure is set out in Oregon Revised Statutes (ORS) Chapters 536 through 541. Other ORS chapters address matters related to water resource surveys, river basin project development and interstate compacts,<sup>4</sup> hydroelectric power projects,<sup>5</sup> water use organizations,<sup>6</sup> and weather modification.<sup>7</sup> The basic statutory provisions of Oregon's appropriation doctrine are:

1. Water resource administration—ORS 536;
2. Appropriation—ORS 537;
3. Withdrawal of waters from appropriation—ORS 538;
4. Determination of pre-1909 vested and federal reserved water rights—ORS 539;
5. Distribution and transfer of rights—ORS 540; and
6. Miscellaneous provisions—ORS 541.

Water-use policy is set by the legislature and is implemented by a seven-member Water Resources Commission appointed by the Governor. Certain administrative responsibilities are delegated both by statute and by regulation to the director of the Water Resources Department (WRD). The Oregon legislature has articulated several policy standards concerning beneficial uses of water and public interest criteria associated with water use. In addition, the legislature has created programs for statewide coordination of water development and use, identification of minimum stream flows, stream basin planning, drought management, and enforcement of water use. Pursuant to its stream basin planning authority, the Commission may restrict or prohibit certain uses of water within a basin, or in cases of extreme over-appropriation, completely withdraw a stream or river from further appropriation.

## **Water right appropriation under Oregon's water code**

Pursuant to ORS 537.130(1), an individual must submit an application for a permit before initiating a water use development. The application must describe all elements of the proposed water use. A map prepared by an Oregon certified water right examiner (CWRE) must accompany the application. (Any Oregon professional engineer or land surveyor may become certified as a CWRE upon completion of the certifying examination.) A fee must be submitted with the water right application and map.<sup>8</sup>

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<sup>4</sup>ORS 542.

<sup>5</sup>ORS 543.

<sup>6</sup>ORS 545 through 555.

<sup>7</sup>ORS 558.

<sup>8</sup>ORS 536.050(1).

The United States, the state, or any person has the power to secure a right-of-way across any public or private land as necessary for construction, maintenance, repair, and use of such right-of-way for the purpose of conveying water for all beneficial purposes. Such right-of-way may be acquired by condemnation in the manner provided by law for the taking of private property for public use.<sup>9</sup> In addition, any person may enter upon any land for the purpose of locating a point of diversion or a proposed canal, ditch, or other conveyance.<sup>10</sup>

### **Groundwater appropriation in Oregon**

Groundwater is declared to be part of the public waters of the state, and except in limited circumstances, must be appropriated through the application/permit/certificate process.<sup>11</sup> Uses of groundwater for (1) stock watering, (2) watering any lawn or noncommercial garden not exceeding one-half acre in size, (3) certain school grounds and fields, (4) single or group domestic uses not exceeding 15,000 gallons per day, (5) down-hole head exchanges, and (6) single industrial or commercial uses not exceeding 5,000 gallons per day are exempt, and as such, do not need to secure a water-use permit.<sup>12</sup> The Commission is authorized to designate limited and/or critical groundwater areas where evidence of declining water levels or patterns of substantial interference between wells is found.<sup>13</sup> Well construction is regulated by the WRD.<sup>14</sup>

The Oregon Groundwater Code (ORS 537.505 to 537.793 and 537.992) preempts all local ordinances relating to well location, well construction, groundwater water allocation, and flow testing of wells.<sup>15</sup>

### **Pre-code water rights and adjudication**

Since February 24, 1909, the right to appropriate water in Oregon has been governed by the provisions of ORS 537.110 through 270. Any use of water that began prior to February 24, 1909 is deemed to be a vested water right subject to quantification in an adjudication proceeding.<sup>16</sup>

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<sup>9</sup>ORS 772.305.

<sup>10</sup>ORS 537.320.

<sup>11</sup>ORS 537.505-537.720.

<sup>12</sup>ORS 537.545.

<sup>13</sup>ORS 537.730.

<sup>14</sup>ORS 537.747-537.780.

<sup>15</sup>See *Ashland Drilling, Inc. v. Jackson County*, 4 P.3d 748 (Or. App. 2000).

<sup>16</sup>Pre-1909, vested water rights are verified and documented in the adjudication proceeding described below. During the adjudication process, the right holder has the opportunity to prove the quantity of water that he/she has vested by beneficial use. Once quantified by the court, the right holder receives a decreed right for that amount.

Pre-1909 and Federal reserved water rights<sup>17</sup> are verified, quantified, and documented through such adjudication proceedings in the circuit court of the county in which the water use is located. This adjudication procedure is set out in ORS 539.010 through 539.240. Pre-1909 vested water rights in approximately two-thirds of the river basins in Oregon have been adjudicated.

In order to expedite collection of pre-1909 claims in the remaining river basins, the 1987 Oregon Legislature amended ORS Chapter 539 to require all property owners claiming a pre-1909 vested right to file a registration statement on or before December 31, 1994.<sup>18</sup> Federal reserved water right claimants, including federally recognized Indian tribes, are not required to file surface water registration statements; however, federal and Indian claimants can be required to participate in all general stream adjudications in Oregon in accordance with the McCarran Amendment.<sup>19</sup>

Each river basin adjudication is initiated by notice of the WRD director. Persons claiming a vested, unadjudicated right must file a "proof of claim" with the WRD. The director reviews the claims, examines each water use development, provides opportunities for affected parties to submit contests of claims and schedules appropriate hearings, and finally, prepares a "finding of fact and order of determination" to be filed in the circuit court in the county where the adjudication stream or river is located. Any person claiming an interest in the stream subject to the determination is made a party and is bound by the adjudication. The court will then review the director's determination and any exceptions that are filed, affirm or modify the order, and enter a final judgment in the form of a stream decree.

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<sup>17</sup>Federal reserved water rights, sometimes referred to as "Winters" rights, are rights to water created under Federal law. (See *Winters v. United States*, 28 S. Ct. 207 (1908).) These water rights are created, usually by implication, when the Federal government sets aside land from the public domain. The clearest articulation of the federal reserved water right concept is set out in the United States Supreme Court's opinion in *Cappaert v. United States*, 96 S. Ct. 2062 (1976). "When the Federal government withdraws land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, at 2069. "The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, at 2071. The priority date of a water right associated with a federal reservation is the date the reservation was created. In the case of an Indian reservation, the date is generally the date of the treaty or executive order creating the reservation.

<sup>18</sup>ORS 539.230-539.240.

<sup>19</sup>43 U.S.C./666. See description of the McCarran Amendment below in the discussion of the *United States v. Oregon* case.

## **Outline of the Oregon adjudication process**

1. Director initiates adjudication with notice to basic property owners and the United States Attorney General.
2. Individuals who believe they have a pre-1909 water rights and the United States (federal reserved water right) may file a “notice of intent” to claim a right.
3. Before the 1987 amendments to ORS 539, the WRD prepared maps of water use that locate all irrigation uses by quarter-quarter section (Klamath). Under the 1987 amendments, individuals must supply a map with each statement and proof of claim.
4. Notice to individuals who filed “notice of intent” to file a “statement and proof of claim” during a specified claiming period.
5. Claimants file statements and proofs of claim. Claimants who agree that the WRD maps correctly delineate their water use may check box accepting the WRD map. Claimants who disagree with the WRD map must submit a map prepared by a certified water right examiner (CWRE).
6. Claims are reviewed by the director (adjudicator) for completeness. Supplemental information/documentation may be requested.
7. Preliminary evaluation of each claim is prepared.
8. Open inspection is held. Notice of the open inspection must be at least 10 days before the beginning of open inspection period.
9. The contest period begins immediately following the open inspection period. Any person owning any irrigation works or claiming any interest in the stream involved in the adjudication may file a contest(s) opposing any claim or the director’s preliminary evaluation of a claim(s). The contest period must run at least 15 days and may be extended up to an additional 20 days at the discretion of the director.
10. Contests are referred to hearing. Contests may be settled by negotiation (stipulation).
11. The hearing officers submit preliminary orders and/or stipulations to the director (adjudicator).
12. The director (adjudicator) submits findings of fact and order of determination to the circuit court in the county where the adjudication basin is located.
13. The director provides notice to all parties that the findings and order have been submitted to the court. Any party may file exceptions to the finding and order. If no exceptions are filed, the court must enter a judgment affirming the director’s findings and order. If exceptions are filed, the court may hear the case or remand to the director or a referee for further findings.

14. Appeal of the court's final judgment is to the Oregon Court of Appeals and the Oregon Supreme Court if necessary. If there is a federal question in the adjudication, a petition for certiorari (asking for review of the Oregon Supreme Court holding) may be filed with the United States Supreme Court.

### **Klamath adjudication<sup>20</sup>**

The Klamath Basin Adjudication (KBA) is the seventh subbasin adjudication in the Klamath Basin.<sup>21</sup> All persons claiming a right to water, the use of which began before February 24, 1909, were required to file proofs of claim with the WRD during the 1990-1991 private right claiming period. The United States and Klamath Tribes were required to file claims during the 1996-1997 federal water right claiming period. Approximately 700 claims were filed in the KBA, including approximately 400 claims filled by various agencies of the United States Government and the Klamath Tribes. The KBA is the first Oregon general stream adjudication in which large, complex federal claims have been filed.

Department staff conducted a preliminary evaluation of each claim. The claims and the WRD's preliminary evaluation were made available for inspection. Following the open inspection period, approximately 5,600 contests were filed during the contest period. All of the contests have been referred to the state Central Hearing Panel, and proceedings on several groups of contests are ongoing.

### **Alternative dispute resolution**

Given the magnitude of the claims and the complex adjudication of these claims, the WRD believes that some form of alternative dispute resolution (ADR) could be used to resolve many of the issues surrounding the adjudication. In addition, resolution of the adjudication issues will likely involve a number of collateral matters such as the balance between water supply and demand, conjunctive surface water/ground water administration, water quality, endangered species, interstate water administration, and state/federal coordination in water management. Therefore, the WRD has initiated a voluntary ADR process to provide a forum to address adjudication claim issues and the collateral matters related to allocation and management of water in the basin.

The ADR process is intended to provide a voluntary process for resolution of KBA contests as well as a forum for evaluation of the full range of water allocation and management issues in the basin. The ADR process is a forum for claimants, other water right holders, and interested parties to meet and discuss opportunities for resolution of the basin's water issues. The director of the WRD is the ADR process leader. The department has held regular ADR monthly meetings since September 1997.

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<sup>20</sup>The State Engineer (director) initiated the current Klamath Basin Adjudication in 1975 with notice to almost 30,000 property owners that if they intended to file a claim in the adjudication, they must file a "Notice of Intent." Approximately 1,200 notices of intent were submitted to the WRD, including filings by a number of irrigation districts on behalf of their district members. Upon receipt of the notices of intent the WRD conducted water use surveys of the adjudication area. Individual water uses on 108 townships were mapped. On September 7, 1991, the director mailed notice to all individuals who had filed notices of intent to file statements and proofs of claim. The claiming period for federal and tribal claims was delayed by the *U.S. v. Oregon* case. Upon final resolution of the *U.S. v. Oregon* case, in August 1996, the director provided notice to the United States, the Klamath Tribes and the Klamath Project irrigation districts to file statements and proofs of claim.

<sup>21</sup>The Lost River, Cherry, Sevenmile, and Annie creeks, portions of the Wood River, and the North and South Forks of the Sprague River have been adjudicated. All of these adjudications were conducted before adoption of the McCarran Amendment.

## **Klamath Project (U.S. Bureau of Reclamation)**

Pursuant to the Reclamation Act of 1902, on May 19, 1905, the U.S Reclamation Service filed a notice in the office of the State Engineer stating that the United States intended to utilize "all of the waters of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath River and Lost River, and all of the lakes, streams and rivers supplying water thereto or receiving water therefrom ..." to furnish water to the Klamath Irrigation Project in Oregon and California. Following the filing of its notice in 1905, the Bureau of Reclamation filed plans and authorized necessary construction in compliance with the Reclamation Act.<sup>22</sup>

The Act of February 9, 1905, authorized the Secretary "... to dispose of any lands ... under the terms and conditions of the Reclamation Act of 1902." Since much of the area to be served by the project consisted of, in 1905, submersed lands, Congress authorized the Secretary of the Interior to raise or lower the level of Lower Klamath Lake and Tule Lake.<sup>23</sup> However, since the title to these submersed lands had passed to the states of Oregon and California at the time of admission to the Union, it was necessary for each state to cede title back to the United States. In 1905, Oregon "... ceded to the United States all right, title, and interest ... to any land uncovered by the lowering of water levels or by drainage of any or all of said lakes."<sup>24</sup> Likewise, California ceded its "... right, title, interest, or claim ..." to the lands uncovered by lowering said water levels.<sup>25</sup>

The project was approved by the President on January 5, 1911 in accordance with the act of June 25, 1910.<sup>26</sup> The total irrigable area of the project was estimated at approximately 240,000 acres, of which approximately 210,000 acres were public land and 130,000 acres were in private ownership. About 90,000 acres of the project were to be located in California and 150,000 acres in Oregon. The cost of the project was estimated at approximately \$4,500,000. Major project facilities include Link River Dam (completed in 1921), Clear Lake Dam (completed in 1910), and Gerber Dam (completed in 1925).

It should be noted that there was significant irrigation development in the vicinity of Klamath Falls before initiation of the Reclamation Service Project in 1905. The Klamath Canal Company, Van Bimmer Ditch Company, the Little Klamath Water Ditch Company, and the Big Water Ditch Company were in operation for many years before initiation of the federal project. The irrigation companies, along with a number of other private water users, were incorporated into the project and ultimately served by the project facilities.

The Klamath Project currently delivers irrigation water to approximately 130,000 acres in Oregon and 70,000 acres in California. During a normal year, the net use of water on the project is approximately 2.0 acre-ft per acre including water used by the U.S. Fish and Wildlife Service in the Tule Lake and Lower Klamath Wildlife Refuges.<sup>27</sup>

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<sup>22</sup>The Project was authorized by the Secretary of the Interior on May 1, 1905, in accordance with the Reclamation Act of June 17, 1902 (43 U.S.C. §372 et seq., 32 stat. 388).

<sup>23</sup>Act of February 9, 1905, ch. 567, 33 Stat. 714. The lands formerly inundated by Tule and Lower Klamath lakes were dewatered and were homesteaded by farmers as late as 1949.

<sup>24</sup>General Laws of Oregon, 1905, p. 63, January 20, 1905.

<sup>25</sup>Cal. Stats. 1905, p. 4, February 3, 1905.

<sup>26</sup>36 Stat. 835.

<sup>27</sup>The Lower Klamath Lake Wildlife Refuge was established in 1908, and the Upper Klamath Lake and Tule Lake wildlife Water Law

The Reclamation Act of 1905 and authorizing legislation for the Klamath Project authorized the U.S. Reclamation Service (later the U.S. Bureau of Reclamation) to enter contracts with individuals and duly formed irrigation districts for the delivery of water within the project. These contracts included repayment contracts—commonly referred to as “A” contracts,<sup>28</sup> Warren Act contracts—commonly referred to as “B” contracts,<sup>29</sup> and annual surplus water contracts—commonly referred to as “C” contracts. Historically, only about 4,000 acres in the Project received water under these temporary annual surplus water contracts.

## **Klamath Project operations plans and the Endangered Species Act**

Since 1995, the U.S. Bureau of Reclamation (Reclamation) has operated the Klamath Project according to annual operations plans. The annual operations plans have been developed to assist Reclamation in operating the project consistent with its federal statutory obligations and responsibilities, including obligations under the Reclamation Act, the Endangered Species Act (ESA), and in accordance with the U.S. Department of the Interior’s tribal trust responsibilities. In addition, to Reclamations contractual obligations to deliver water to project irrigators and responsibilities under the ESA, each operations plan must be able to address annual varying hydrological conditions, changes in agricultural cropping patterns, and changes in national wildlife refuge operations.

Prior to 1994, operation of the project was primarily dictated by Reclamation’s contractual obligations for delivery of irrigation water and for downstream river flows made in coordination with PacifiCorp. Deference was given to PacifiCorp’s Klamath River Federal Power Act license (FERC License). However, in 1988, with the listing of the Lost River and shortnose suckers as endangered under the ESA, Reclamations operational considerations began to change. In 1989, Reclamation began consultation with the U.S. Fish and Wildlife Service (USFWS) under Section 7 of the ESA.

The USFWS issued its first biological opinion (BiOp) for recovery of the suckers in 1992. This BiOp set minimum lake elevations for Upper Klamath Lake at 4,141 ft above sea level by May 31, and 4,139 ft from June 1 through the end of February. In addition, the 1992 BiOp allowed the lake elevation to drop to 4,137 ft from June 1 through September 30 in no more than 2 consecutive years and in no more than 4 years in a 10-year period. Since there were adequate supplies of water for most of the years between 1992 and 2001, the minimum lake elevations in these years did not deprive the project of regular supplies.

However, in 1997, the water budget picture was further complicated by the listing of southern Oregon/northern California coho salmon as threatened under the ESA. In 1998, Reclamation initiated consultation with the National Marine Fisheries Service (NMFS) under Section 7 of the ESA.<sup>30</sup> The first BiOp on the coho was issued in 1999. Again, adequate water years in 1999 and 2000 allowed for regular deliveries to project irrigators during those seasons.

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refuges were established in 1928.

<sup>28</sup>Repayment contracts are entered into by the U.S. Bureau of Reclamation pursuant to Article 9(d) of the Reclamation Act of 1939 to provide for repayment of Project costs. The contracts specify an acreage to be covered. In most cases these contracts do not specify an amount of water, relying on beneficial use as the limit of water used. Klamath project repayment contracts are all written in perpetuity.

<sup>29</sup>Act of February 21, 1911, ch. 141, 36 Stat. 925. These contracts provide for a water supply at a certain point, with responsibility of the contractor to construct, operate, and maintain all necessary conveyance facilities.

<sup>30</sup>Section 7 of the ESA requires Federal agencies that intend to take an action, which would be likely to jeopardize the existence of a listed species, to consult with the Federal agency responsible for the listing and the recovery of a threatened or endangered species. Since operation of the project is deemed to be an “action” under the ESA, Reclamation must consult on each of its annual operation plans with both USFWS and NMFS.



However, in 2001, the water needs of the listed species (suckers in Upper Klamath Lake and coho in the lower Klamath River<sup>31</sup>), along with the reduced water supplies caused by the record drought of 2001, resulted in an April announcement that there would be no irrigation deliveries during the 2001 season from Upper Klamath Lake.<sup>32</sup>

## **Klamath Indian Reservation**

The Klamath Indians have hunted, fished, and foraged in the Upper Klamath River Basin for many generations. In 1864, the Klamath and Modoc tribes entered into a treaty with the United States whereby they relinquished aboriginal claim to some 12 million acres in exchange for a reservation of approximately 800,000 acres in the Upper Basin. The tribes held the land in communal ownership until Congress passed the General Allotment Act of 1887. Pursuant to the Allotment Act, parcels of tribal land were granted to individual Indians in fee. Approximately 25 percent of the original reservation passed from tribal ownership to individual Indians. Over time, many of these allotments passed into non-Indian ownership.

In 1954, Congress enacted the Klamath Termination Act,<sup>33</sup> under which tribal members could give up their interest in tribal property for cash. A large majority of the tribal members chose to sell. In 1958, the Federal government purchased 15,000 acres of the Klamath Marsh to create the Klamath Forest Wildlife Refuge. In 1961, and again in 1975, the United States purchased large forested portions of the former reservation to become part of the Winema National Forest. In 1973, the United States condemned most of the rest of the tribal land and essentially extinguished the original Klamath Reservation. The United States now holds title to approximately 70 percent of the former reservation land.

## ***United States v. Adair***<sup>34</sup>

In September of 1975, the United States filed suit in Federal district court in Portland for a declaration of water rights within an area whose boundaries roughly coincide with the former Klamath Indian Reservation. The suit named as defendants some 600 individual owners of land within the former reservation. The Klamath Tribe and State of Oregon intervened in the case.<sup>35</sup>

The United States and tribe argued that the tribe and individual Indians retained an implied reserved water right for agricultural purposes and to protect their traditional hunting and fishing

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<sup>31</sup>New BiOps on both the suckers and the coho were issued in early 2001. In the case of the suckers, the minimum lake elevations were set no lower than 4,140 ft. In the case of the coho, revised downriver releases were increased from those set in the 1999 BiOp.

<sup>32</sup>Klamath Project irrigation supplies were curtailed in 2001 only for deliveries from Upper Klamath Lake. Deliveries in the Lost River portion of the project from Clear Lake and Gerber Reservoir were made on a regular schedule for the 2001 season. In addition, on July 24, 2001, the Department of the Interior was able to release approximately 75,000 acre-ft of water from Upper Klamath Lake for irrigation deliveries

<sup>33</sup>25 U.S.C. §§ 564.

<sup>34</sup>723 F.2d 1394 (Ninth Cir. 1983).

<sup>35</sup>The United States filed suit in the Federal district court in Portland for a declaration of water rights within an area whose boundaries roughly coincide with the former Klamath Indian Reservation. The suit named as defendants some 600 individual owners of land within the former Reservation. The Klamath Tribe, arguing that they and their members had interests in the water within the former reservation, and thus in the potential outcome of the case, intervened as a plaintiff. The State of Oregon, arguing that since landowners hold their water rights through the state, intervened as a defendant.

lifestyles, notwithstanding the Klamath Termination Act. The state moved for dismissal of the Federal court action under the Colorado River Conservation District “abstention doctrine,” arguing that the rights of the claimants should be decided in a state adjudication proceeding, not in a Federal court action.<sup>36</sup>

The Federal district court (Judge Solomon) denied the motion for dismissal, under the Colorado River abstention doctrine, and issued a pretrial order setting out the issues to be decided: (1) whether water rights had been reserved for the use of the Klamath Reservation by the 1864 treaty with Klamath and Modoc Tribes, (2) whether such rights passed to the government and to private persons who took title to such lands, (3) what priority dates should be accorded to each of the present owners, and (4) whether actual quantification of the rights should be left to the state court proceeding under the provisions of the McCarran Amendment.

Judge Solomon held:

(1) The 1864 Treaty with the Klamath and Modoc Indians granted the Indians an implied reserved water right to as much water on the reservation as was necessary to preserve their hunting and fishing rights;

(2) The Klamath Termination Act did not abrogate such water rights;

(3) Individual Indians who were allotted lands within the former reservation are entitled to water essential to their agricultural needs with a priority date of 1864;

(4) Non-Indian successors to Indian allottees have an 1864 water right for actual acreage under irrigation when the non-Indian obtained title from the Indian and to additional acreage developed with reasonable diligence; and

(5) The U.S. Forest Service acquired reserved water rights for timber production and conservation of water flows.

The United States, tribes, and Oregon all appealed the district court decision to the Ninth Circuit Court of Appeals. The Ninth Circuit Court generally affirmed Judge Solomon, while providing more specific detail as to the various reserved water rights within the former reservation.

The priority date of the tribes’ reserved water right to support its hunting and fishing lifestyle is time immemorial. This right is a non-consumptive, instream water right not based on the doctrine of prior appropriation—it is a right to prevent depletion below a protected level; however, it is not a wilderness servitude.<sup>37</sup> The water is protected to support hunting and fishing as currently exercised to maintain the livelihood of tribe members, not as these rights once were exercised by the tribe in 1864.

The priority date of the individual Indians holding allotted lands is 1864. This right is to be determined by the “practicably irrigable acreage” (PIA) standard as set out in *Arizona v. California*,<sup>38</sup>

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<sup>36</sup>See, *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976.). The United States Supreme Court in the *Colorado River Conservation District* case indicated that where a state adjudication proceeding was in progress, the policy evinced in the McCarran Amendment to avoid piecemeal adjudication of water rights counseled abstention.

<sup>37</sup>The Court, in describing the nature of the tribe’s water right to support its treaty hunting and fishing rights, stated that the right “... retains a priority date of first or immemorial use. This does not mean, however ... that the former Klamath Reservation will be subject to a ‘wilderness servitude’ in favor of the Tribe.”

<sup>38</sup>83 S. Ct. 1468, 1497-98 (1963). When the United States Government sets aside land for an Indian reservation, the courts

and is not forfeitable. Non-Indian Successors (Walton Rights) have a priority date of 1864 for acreage under irrigation on the date title passes from his/her Indian predecessor, with additional acreage developed with reasonable diligence. This right can be forfeited for non-use under state law.

Lastly, the Ninth Circuit Court held that the Federal agencies that took over control of the land within the former reservation did not receive an “Indian” reserved water right with a time immemorial or 1864 priority date. However, these agencies, the U.S. Forest Service and U.S. Fish and Wildlife Service, will be able to claim reserved water rights for forest and wildlife purposes in the state adjudication.

### ***Adair III CV No. 75-914***

The United States and the Klamath Tribe filed a “Motion for Exercise of This Court’s Continuing Jurisdiction” in Federal district court in Portland on January 16, 2001. The United States’ motion asks the court “... to construe certain legal issues regarding the priority date and scope of the Klamath Tribes’ water rights that were previously decided in this action and thereby provide the necessary direction to certain parties to this case who are also parties to the State of Oregon’s Klamath Basin Adjudication.”

The United States has posed two questions to the court: First, “[D]o the Klamath Tribes have water rights to support plants from which the Tribes gather food and other items under Art. 1 of the 1864 Treaty?” Second, “[W]hat is the proper measure of the tribal water rights to support their treaty, hunting, fishing, trapping and gathering rights?”

The second question subsumes the following three related issues:

1. What is the role of the “moderate living” doctrine in quantifying the tribes’ water rights?
2. What is the role of the phrase “as currently exercised” in quantifying the tribes’ water rights?
3. Is the measurement of the tribes’ water rights the “*minimum* amount of water” necessary to meet the needs of the Klamath Tribes’ treaty resources?

The State of Oregon moved for dismissal under the Colorado River abstention doctrine. Judge Panner denied the state’s motion and has reopened the *Adair* case and has agreed to accept briefing on legal issues to be in conflict with prior orders in the case.

### ***United States v. Oregon***<sup>39</sup>

On December 20, 1990, the United States filed suit in Federal district court in Portland seeking a temporary restraining order (TRO) and a permanent injunction to prohibit Oregon from requiring the Federal government to file claims in the Klamath adjudication. (Oregon law states that if a party to

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have held that there is created an implied reserved water right for enough water to satisfy the purpose of the (Indian) reservation. (See discussion of federal reserved water rights above at n., 17.) In *Arizona v. California*, at 1498, the United States Supreme Court stated that “... water was intended to satisfy the future as well as the present needs of the Indian Reservations ... that enough water was reserved to irrigate all practically irrigable acreage on the Reservations.” The determination of “practicable irrigable acreage” (PIA) in the adjudication of a reservation is fact specific as to each parcel on the reservation. Factors such as soil conditions, topography, and access to water are considered in the determination of whether any particular acre is irrigable.

<sup>39</sup>44 F.3d 758 (Ninth Cir. 1996).

adjudication fails to file a statement and proof of claim within the time specified in the notice, all rights are forfeited and such party may not later claim a water right.) This suit was filed on behalf of various Federal agencies that manage Federal land in the Basin, including the Bureau of Reclamation, as operator of the Klamath Project. The Klamath Tribes and the individual Klamath Indian allottees filed for intervention in the suit.<sup>40</sup>

The Federal district court granted the TRO and injunction to allow the case to be argued on the merits. The United States and Oregon entered a stipulated agreement to not require the Federal government to file claims until 60 days after the suit was concluded.

The underlying issue of the case is whether the United States is immune from suit in state court. In general, the United States is immune unless Congress has expressly waived its immunity. However, in 1952, the McCarran Amendment was enacted waiving Federal sovereign immunity in state general stream adjudications.<sup>41</sup> The United States argued that, notwithstanding the McCarran Amendment, it had not waived its sovereign immunity in the Klamath adjudication, and therefore, it need not file claims. In addition, the tribes argued that they would be deprived of due process because the state had a history of hostility to the tribes' treaty rights, including the claims to water rights.

The United States' argument that sovereign immunity had not been waived was based upon a strict reading of the language in the McCarran Amendment. Their point was that Oregon's adjudication system was not a "suit" for the determination of water rights. In addition, the United States argued that the department's adjudication procedure was administrative, not judicial, and that the adjudication was not comprehensive in that it did not include all water users and did not include groundwater uses.

The Federal district court (Portland) held that the United States must file claims in the Klamath adjudication and must pay the state adjudication fees. In addition, the tribe must file claims, but is not required to pay fees. The allottees' motion to intervene was denied. The United States and tribes filed an appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit Court affirmed the district court except for the fees, holding that the United States cannot be required to pay state fees under the McCarran Amendment. The Klamath Tribes petitioned the United States Supreme Court for certiorari. The United States opposed this petition. The Supreme Court denied the tribes' petition and did not take the case. The allottees eventually settled with the state and filed claims in the adjudication.

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<sup>40</sup>The Klamath Tribe, and members of the tribe holding allotments within the former reservation, argued to be allowed to intervene in the case to protect their rights to the water of the reservation as determined in the *Adair* case. (See discussion of *United States v. Adair* above.)

<sup>41</sup>43 U.S.C. /666(a). Consent is hereby given to join the United States as a defendant in any suit ... for the adjudication of rights to the use of water of a river system or other source ... The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of sovereignty ...

# Klamath Basin fact sheet

## Irrigation demand (does not include Lost River Valley irrigation)

### *Project (includes irrigation and refuge uses)*

Acreage	
BOR	202,000 acres
Districts	187,000 acres
Water	±500,000 acre-feet

### *Upper basin (above Upper Klamath Lake)*

Acreage	88,000 acres
Water	±184,000 acre-feet

### Storage capacity

<i>Upper Klamath Lake</i>	486,830 acre-feet
<i>Clear Lake</i>	481,300 acre-feet
<i>Gerber Reservoir</i>	92,300 acre-feet

### Adjudication claims (approximate)

<i>Total claims</i>	700
<i>Private</i>	300
<i>Federal agencies and Klamath Tribes</i>	400

### Permitted, certificated and decreed water rights

#### *Water rights*

Surface	966
Groundwater	664
Reservoir	467
<i>Dams</i>	54
<i>Total diversion rate</i>	5,400 ft <sup>3</sup> /s

## **Summary tabulation of the Federal agency claims**

### **U.S. Forest Service—214 claim forms claiming 416 water rights**

- 17 Claims for consumptive uses
- 117 Claims for instream flows for timber production, channel maintenance (favorable conditions of stream flow), fish, wildlife and recreation
- 13 Claims for instream rights for lakes
- 62 Claims for instream rights for springs
- 5 Claims for wilderness water rights

### **U.S. Bureau of Land Management—52 claims for water on BLM land**

- 51 Claims for waterholes (Public Reserve No. 107)
- 1 Claim for the Klamath Wild and Scenic River

### **National Park Service—21 claims for Crater Lake National Park**

- 10 Claims for instream water rights
- 11 Claims for 44 consumptive uses

### **U.S. Fish and Wildlife Service—22 claims for water rights in four wildlife refuges**

- 9 Claims for irrigation of approximately 63,000 acres
- 12 Claims for approximately 200,000 acre-ft of water/year for wildlife refuge uses
- 1 Claim for approximately 80 ft<sup>3</sup>/s for stockwater

### **U.S. Bureau of Indian Affairs—393 claims on behalf of the Klamath Tribes**

- 5 Claims for consumptive uses
- 52 Claims for instream flows in, above and below the former reservation
- 1 Claim for minimum water level in Upper Klamath Lake
- 1 Claim for minimum water level in the Klamath Marsh
- 334 Claims for wildlife seeps and springs within the former reservation

**Klamath Tribes**—five claim forms incorporating all of the claims filed by the Bureau of Indian Affairs. In effect duplicate claims to the BIA filing

### **U.S. Bureau of Reclamation—seven consolidated claims for the Klamath Project**

- Diversion of 3,505 ft<sup>3</sup>/s for irrigation of 218,654 acres of irrigation
- 486,830 acre-ft of storage in Upper Klamath Lake
- 92,300 acre-ft of storage in Gerber Reservoir
- 481,300 acre-ft of storage in Clear Lake

## **Klamath Basin cases**

***Kimball v. Callahan***, 493 F.2d 564 (Ninth Cir. 1974) (Kimball I)

The 1864 treaty with the Klamath Tribes gave the tribes the exclusive right to hunt, fish and gather on their reservation.

***Kimball v. Callahan***, 590 F.2d 768 (Ninth Cir. 1979) (Kimball II)

The treaty rights survived the Klamath Termination Act.

***U.S. v. Adair***, 723 F.2d 1394 (Ninth Cir. 1983)

See discussion above.

***Adair III*** CV No. 75-914 (Filed January 16, 2001)

See discussion above.

***Parravano v. Babbitt***, 70 F.3d. 539 (Ninth Cir. 1995)

Hoopa Valley and Yurok tribes have federally reserved fishing rights.

***U.S. v. Oregon***, 44 F.3d 758 (Ninth Cir. 1996)

See discussion above.

***Bennett v. Spear***, 117 S. Ct. 1154 (1997)

Lost River irrigators have standing to bring judicial challenge to the USFWS biological opinion, which made a jeopardy finding on the Lost River and shortnose sucker and identified maintenance of minimum water levels in Clear Lake and Gerber Lake as reasonable and prudent alternatives. Irrigators had standing to challenge the biological opinion under the ESA based on injury in fact from reduced water delivery, which was traceable to biological opinion.

***Bennett v. Spear***, 5 F. Supp. 882 (D. Or 1998)

On remand, district court held that the record did not support the USFWS determination that retaining minimum levels in Clear and Gerber lakes would help avoid jeopardy.

***Klamath Water User's Association v. Patterson***, 204 F.3d 1206 (Ninth Cir. 1999)

Klamath Water Users Association brought contract action against the Bureau of Reclamation and PacifiCorp, challenging the operation of Link River Dam (which controls level of Upper Klamath Lake). Court held that the irrigators are not third party beneficiaries of the contract for the operation of the dam. The court went on to observe, in dictum, that the Bureau can operate the dam to meet ESA and tribal trust obligations.

***Langell Valley Irrigation District v. Babbitt***, Case No. 00-6265-HO (D. Or. 2000)

LVID challenges Bureau releases from Clear Lake, on the east side of the Klamath Basin, for delivery to various uses on the west side. Same result as in *KWUA v. Patterson*.

***Water for Life v. State of Oregon***, Case No. 00-1260CV, (Klamath County Circuit Court, August, 2000)

Water for Life sought to enjoin the Klamath Basin Adjudication on procedural grounds. Circuit court dismissed the action on the ground that plaintiffs can raise procedural arguments when the adjudicator's findings and order of determination reach circuit court.

***In the Matter of Lost River***, Case No. 1918-001 (2000) (Klamath County Circuit Court, May 12, 2000)

Lost River irrigators sought modification of the 1918 Oregon decree adjudicating the waters of the Lost River. The decree “recognized,” without determining, the United States water rights for the Klamath Project. The Bureau moved to dismiss the modification request on the ground that (1) the 1918 decree was not valid as to the United States because the decree pre-dates the McCarran Amendment; and (2) the decree cannot be modified without the participation of the Bureau, which is an indispensable party. The court agreed and dismissed the action.

***Dept. of the Interior v. Klamath Water Users Protective Assoc.***, 121 S. Ct. 1060 (2001)

Documents relating to claims filed in the adjudication by the Bureau of Indian Affairs on behalf of the Klamath Tribes are not exempt from disclosure under the Freedom of Information Act as interagency or intra-agency memoranda or letters.

***Pacific Coast Federation of Fishermen’s Assoc. v. U.S. Bureau of Reclamation***, 138 F. Supp. 1228 (D. N. Cal., April 3, 2001)

Bureau was enjoined from sending irrigation deliveries to the Klamath Project at any time when required downstream flows are not met, until the Bureau completes a plan to guide operations during the new water year, and consultation on that plan is completed.

***Kandra v. U.S.***, 2001 WL 668940 (D. Oregon, April 30, 2001)

Irrigators in Klamath Project sought preliminary injunction against Bureau’s 2001 Operating Plan, under which no irrigation water deliveries would be made to the majority of land within the Klamath Project because of extreme low water conditions, ESA obligations, and tribal trust obligations. Preliminary injunction denied.

***U.S. v. Adair***, CV No. 75-914-PA (D. Oregon, August 9, 2001)

See discussion above.

***Tulare Lake Basin Water Storage District v. United States***, U.S. Cl. Ct., No. 98-101 L (April 30, 2001)

Water Storage District claimed that their contractually conferred right to use water was taken from them when the Federal government imposed water use restrictions under the Endangered Species Act. Plaintiffs seek compensation under the Fifth Amendment of the United States Constitution. Court held that by limiting plaintiffs’ ability to use an amount of water, the government essentially substituted itself as the beneficiary of the contracted rights, totally displacing the contract holder. By preventing plaintiffs from using water to which they would otherwise have been entitled, they have rendered the right valueless; they have thus effected a physical taking.



*Alsea Valley Alliance v. Evans and MMFS*, U.S. D. Ct. Or. Case No. 99-6265 (Sept. 10, 2001)

Plaintiffs challenge the 1998 listing of the Oregon Coast coho salmon evolutionary significant unit (ESU). In its final rule listing the coho ESU as threatened, NMFS only listed the “naturally spawned” coho. Plaintiffs sought to invalidate the 1998 listing decision because the distinction between “naturally spawned” and “hatchery spawned” coho salmon is arbitrary and capricious and thus unlawful under the Federal Administrative Procedures Act. The Court agreed and held that the 1998 NMFS listing decision is unlawful and should be set aside as arbitrary and capricious.

### **Methow Valley Situation.**

A number of private irrigation ditches divert water from tributaries of the Methow River in north central Washington. Several species of fish found in the Methow River and its tributaries have been listed as either threatened or endangered under the ESA (some by the NMFS and some by the USFWS). Some of the points of diversion of the irrigation ditches, along with portions of the ditches themselves, are located within the U.S. Forest Service’s (USFS) Okanogan National Forest. The owners of these ditches were issued Special Use Permits (SUP) by the USFS to allow use of the national forest lands for diversion and conveyance of water. As a result of the ESA listings, the USFS was required to enter §7 consultation with the NMFS and the USFWS to ensure that diversion of water within the forest was not “likely to affect” the listed species. The consultation resulted in reduced irrigation deliveries. Those ditches diverting water from the tributaries of the Methow not located within the forest are subject to provisions of §9 of the ESA which prohibit “take” of a listed species. To date no §9 actions have been initiated.