

OSU EXTENSION SPECIAL REPORT 1037

Water Allocation in the Upper Klamath Basin:

An Assessment of Natural Resource, Economic, Social and Institutional Issues

LEGAL ASPECTS

of Upper Klamath Basin Water Allocation

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Legal Aspects of Upper Klamath Basin Water Allocation

Reed Marbut

This chapter provides background on Oregon water law, the Klamath Reclamation Project's relationship to the Endangered Species Act, Indian water rights, and several court cases related to water allocation in the Upper Klamath Basin (defined here as the area above Iron Gate Dam). It does not address issues related to water rights in the Lower Klamath Basin.

Oregon water law

As in most western states, Oregon law provides that all water within the state belongs to the public.¹ All such water is subject to appropriation for beneficial use. Except for certain defined exempt uses and uses that were 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 (OWRD).²

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 in accordance with the terms of the certificate of water right. Water rights are subject to loss only by nonuse.³

In addition to state water right systems, certain authority to use and control water arises

under federal law. This authority gives the federal government the power to do the following:

- Set aside (reserve) land from public domain for particular purposes (e.g., national forests, national parks, Indian reservations, military bases, etc.)
- Develop federal irrigation, flood-control, and hydroelectric projects
- Manage rivers and lakes for protection of threatened or endangered aquatic species
- Protect navigation

Water law statutes

Notwithstanding the very modest riparian-like 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,

¹ORS 537.110

²ORS 537.130(1)

³ORS 537.250(3)

river-basin project development, interstate compacts,⁴ hydroelectric power projects,⁵ water use organizations,⁶ and weather modification.⁷ The basic statutory provisions of Oregon's appropriation doctrine are:

- Water resource administration—ORS 536
- Appropriation—ORS 537
- Withdrawal of waters from appropriation—ORS 538
- Determination of pre-1909 vested and federal reserved water rights—ORS 539
- Distribution and transfer of rights—ORS 540
- 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 OWRD.

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 overappropriation, 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 apply 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.⁸

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 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.⁹ 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.¹⁰

Groundwater appropriation

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.¹¹ Uses of groundwater for (1) stock watering, (2) watering any lawn or noncommercial garden not exceeding 0.5 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 do not need to secure a water use permit.¹² The Water Resources Commission is authorized to designate limited and/or critical

⁴ORS 542

⁵ORS 543

⁶ORS 545–555

⁷ORS 558

⁸ORS 536.050(1)

⁹ORS 772.305

¹⁰ORS 537.320

¹¹ORS 537.505–537.720

¹²ORS 537.545

groundwater areas where evidence of declining water levels or patterns of substantial interference between wells is found.¹³ Well construction is regulated by the OWRD.¹⁴

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

Pre-1909 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.¹⁶ Pre-1909 and federal reserved water rights¹⁷ are verified, quantified, and documented through 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 have been adjudicated in approximately two-thirds of the river basins in Oregon.

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, 1994.¹⁸ 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.¹⁹

Any person claiming an interest in the stream subject to the determination is made a party to and is bound by the adjudication. The court then reviews the Director's determination and any exceptions that are filed, affirms or modifies the order, and enters a final judgment in the form of a stream decree.

The Oregon adjudication process

Each river basin adjudication is initiated by notice of the OWRD Director. Persons claiming a vested, unadjudicated right must file a "proof of claim" with the OWRD. The Director reviews the claims; examines each water use development; provides opportunities for affected parties

¹³ORS 537.730

¹⁴ORS 537.747–537.780

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

¹⁶Pre-1909 vested water rights are verified and documented in the adjudication process described in this chapter. 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.

¹⁷Federal reserved water rights, sometimes referred to as "Winters" rights, are water rights 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 associated 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 generally is the date of the treaty or executive order creating the reservation.

¹⁸ORS 539.230–539.240. The Klamath Basin Adjudication (see description of the KBA, below) is the last adjudication conducted under the pre-1987 version of the Code. Klamath Basin claimants were not required to file registration statements under ORS 539.240.

¹⁹43 U.S.C. § 666. See description of the McCarran Amendment below in the discussion of the *United States v. Oregon* case.

to submit contests of claims; 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 stream or river is located. The specific process is as follows.

1. OWRD Director initiates an adjudication with notice to basin property owners and the United States Attorney General.
2. Individuals who believe they have a pre-1909 water right, as well as the United States government (federal reserved water right), may file a “notice of intent” to claim a right.
3. Before the 1987 amendments to ORS 539, the OWRD prepared maps of water use, which located all irrigation uses by quarter-quarter section. Under the 1987 amendments, individuals must supply a map with each statement and proof of claim.
4. Notice is sent 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 OWRD’s maps correctly delineate their water use may check a box accepting the Department’s map. Claimants who disagree with the Department’s 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 and/or documentation may be requested.
7. A preliminary evaluation of each claim is prepared.
8. Open inspection is held. Notice of the open inspection must be given at least 10 days before the beginning of the 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 (Adjudicator).
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 findings 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 Basin adjudication

The Klamath Basin adjudication (KBA)²⁰ is the seventh subbasin²¹ adjudication in the Klamath Basin.²² 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 Department during the 1990–1991 private-right claiming period. The United States and Klamath Tribes were required to file claims during the 1996–1997 federal-right claiming period.

Approximately 700 claims were filed in the KBA, including approximately 400 claims filed by various agencies of the United States Government and the Klamath Tribes (Appendix A). The KBA is the first Oregon general stream adjudication in which large, complex federal claims have been filed.

OWRD staff conducted a preliminary evaluation of each claim. The claims and the Department'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 Department 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 likely will involve a number of related matters such as the balance between water supply and demand, connected surface water/groundwater administration, water quality, endangered species, interstate water administration, and state/federal coordination in water management. Therefore, OWRD has initiated a voluntary ADR process to provide a forum to address adjudication claim issues and these related matters.

The ADR process is intended to provide a way to resolve KBA contests as well as a forum for evaluating the full range of water allocation and management issues in the Basin. It 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 OWRD is the ADR process leader. The Department has held regular ADR monthly meetings since September 1997.

²⁰The State Engineer (Director) initiated the current Klamath Basin Adjudication in 1975 and notified 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 Department, including filings by a number of irrigation districts on behalf of their district members. Upon receipt of the notices of intent, the Department conducted water use surveys of the adjudication area. Individual water uses in 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 Reclamation Project irrigation districts to file statements and proofs of claim.

²¹The KBA is confined to the area of the former Klamath Indian Reservation, along with that portion of the Basin between Upper Klamath Lake and the Oregon–California state line (roughly the area receiving water from Upper Klamath Lake, Link River, Lake Ewauna, and the Klamath River). The Lost River; Cherry, Sevenmile, and Annie creeks; the North and South forks of the Sprague River; and portions of the Wood River have been adjudicated. All of these adjudications were conducted before adoption of the McCarran Amendment.

²²The KBA court is the Klamath County Circuit Court. The KBA Court's jurisdiction is limited to water used or diverted in Oregon. The Klamath River and its tributaries in California are under the jurisdiction of the California Water Resources Control Board (CWRCB) and the California courts. The State of California has completed four adjudications of Klamath River tributaries in California (Shasta River in 1932, Scott River in 1980, Willow Creek in 1972, and Cold Creek in 1978). In addition, in 1959, the CWRCB issued Permit Order No. 124 for transbasin diversion of Trinity River water to the Sacramento River for use in the Central Valley Project. There are no ongoing or planned adjudications of the Klamath River Basin in California.

Klamath Reclamation 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 Reclamation Project in Oregon and California. Following the filing of this notice in 1905, the Bureau of Reclamation filed plans and authorized necessary construction in compliance with the Reclamation Act.²³

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 submersed lands, Congress authorized the Secretary of the Interior to raise or lower the level of Lower Klamath Lake and Tule Lake.²⁴

Because 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.”²⁵ Likewise, California ceded its “... right, title, interest, or claim...” to the lands uncovered by lowering said water levels.²⁶

The Project was approved by the President on January 5, 1911 in accordance with the Act of June 25, 1910.²⁷ The total irrigable area of the Project was estimated at approximately 240,000 acres, of which approximately 110,000 acres was public land and 130,000 acres was in private ownership. About 90,000 acres of the Project were located in California and

150,000 acres in Oregon. The cost of the Project was estimated at approximately \$4.5 million. 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 Klamath Reclamation Project in 1905. The Klamath Canal Company, Van Brimmer 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 Project currently delivers irrigation water to approximately 130,000 acres in Oregon and 70,000 acres in California. During a normal year, the net water use on the Project is approximately 2 acre-feet per acre, including water used by the U.S. Fish and Wildlife Service in the Tule Lake and Lower Klamath national wildlife refuges.²⁸

The Reclamation Act of 1902 and authorizing legislation for the Project authorized the U.S. Reclamation Service (later the U.S. Bureau of Reclamation) to enter into contracts with individuals and duly formed irrigation districts for the delivery of water within the Project. These

²³The 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).

²⁴Act of February 9, 1905, ch. 567, 33 Stat. 714. The lands formerly inundated by Tule Lake and Lower Klamath Lake were dewatered and were homesteaded by farmers as late as 1949.

²⁵General Laws of Oregon, 1905, p. 63, January 20, 1905

²⁶Cal. Stats. 1905, p. 4, February 3, 1905

²⁷36 Stat. 835

²⁸The Lower Klamath National Wildlife Refuge was established in 1908, and the Upper Klamath Lake and Tule Lake national wildlife refuges were established in 1928.

contracts include repayment contracts (commonly referred to as “A” contracts),²⁹ Warren Act contracts (commonly referred to as “B” contracts),³⁰ and annual surplus water contracts (commonly referred to as “C” contracts). Historically, only about 4,000 acres in the Project receive water under temporary annual surplus water contracts.

Project operations plans and the Endangered Species Act

Since 1995, the U.S. Bureau of Reclamation (BOR) has operated the Klamath Project according to annual operations plans. The annual operations plans have been developed to assist the BOR 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 the BOR’s contractual obligations to deliver water to Project irrigators and its responsibilities under the ESA, each operations plan must be able to address varying annual 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 the BOR’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, Project operational considerations began to change. In 1989, the BOR began consultation with the U.S. Fish and Wildlife Service (USFWS) under Section 7 of the ESA.³¹

The USFWS issued its first Biological Opinion (BiOp) for recovery of suckers in 1992. This BiOp set the minimum lake elevation for Upper Klamath Lake at 4,141 feet above sea level by May 31 and 4,139 feet from June 1 through the end of February. In addition, the

1992 BiOp allowed the lake elevation to drop to 4,137 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.

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, the BOR initiated consultation with the National Marine Fisheries Service (NMFS) under Section 7 of the ESA. Considerations for lower Klamath River coho relate to flows over Iron Gate Dam to maintain in-stream flows in the lower Klamath. 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.

However, in 2001, the water needs of the listed species (suckers in Upper Klamath Lake and coho salmon in the lower Klamath River),³² along with the reduced water supplies caused by

²⁹Repayment 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 instead on beneficial use as the limit of water used. Klamath Reclamation Project repayment contracts are all written in perpetuity.

³⁰Act 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.

³¹Section 7 of the ESA requires federal agencies who intend to take an action that would be likely to jeopardize the existence of a listed endangered species to consult with the federal agency responsible for the listing and recovery of that species. Because operation of the Project is deemed to be an “action” under the ESA, the BOR must consult on each of its annual operation plans with both USFWS and NMFS. These agencies then issue Biological Opinions on the likely effects of the Project operations plan on suckers (USFWS) and coho salmon (NMFS).

³²New BiOps on both suckers and coho salmon were issued in early 2001.

the severe drought of 2000–2001, resulted in an April announcement that there would be no irrigation deliveries during the 2001 season from Upper Klamath Lake.³³

On February 25, 2002, the BOR issued its Biological Assessment (BA) for the 2002 Klamath Project Operations Plan.³⁴ Unlike the 2001 BA or BiOp, the 2002 BA contains several paragraphs of legal analysis concerning authorization of the Project and associated water rights.

The following excerpts are examples of such language:

“[W]ater can only be stored and delivered by the Project for authorized purposes for which Reclamation has asserted or obtained a water right in accordance with Section 8 of the Reclamation Act of 1902 and applicable federal law. Reclamation must operate the Project in a manner that does not impair senior or prior water rights. Reclamation has an obligation to deliver water to the Project water users in accordance with the Project water rights and contracts between Reclamation and the water users (which may be through a water district). Water lawfully stored in Project’s reservoirs can be used for Project purposes to the extent the water is applied to beneficial use within the Project.

The beneficial interest in the Project water right is in the water users who put the water to beneficial use.

Federal law concerning Reclamation projects, which is consistent with Oregon law, also provides that the use of water acquired under the Act ‘shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right.’

Reclamation has no general authority to reallocate Project water. As to the Klamath Project, Reclamation, in certain circumstances, may be unable to deliver water for Project purposes.”

With respect to the BOR’s proposed action for the period covered by the BA (2002–2012), including the 2002 irrigation season, the BOR proposes “... to continue operation of the features and facilities of the Klamath Project consistent with the historic operation of the Project from water year 1990 through water year 1999.” Apparently, for the 2002 irrigation season, the BOR proposes full deliveries to Project water users.

Chapter 5.0 of the 2002 BA sets out the “Effects of the Proposed Action.” In analyzing the operation’s effects, the BOR described, and apparently relied upon, the findings of the National Academy of Science (NAS).³⁵ The NAS findings conclude that there was no substantial scientific support for the recommendations in the 2001 USFWS and NMFS BiOps concerning minimum water levels in Upper Klamath Lake (for suckers) or increased minimum flows in the Klamath River mainstem (for coho salmon). Therefore, it seems that the BOR is proposing that, if operations conform to the general pattern followed between 1990 and 1999, future operation of the Project will not be likely to jeopardize suckers or coho.

³³Project 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-feet of water from Upper Klamath Lake for irrigation deliveries.

³⁴In fact, the BA describes the BOR’s proposed operations of the Project from April 1, 2002 through March 31, 2012. This is the BOR’s first attempt to develop an operations plan covering more than 1 year.

³⁵The National Academy of Sciences formed a Committee on Endangered and Threatened Fishes in the Klamath River Basin to conduct an independent peer review of the science concerning suckers and coho salmon. The report was issued in early February 2002.

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 Klamath Indian 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,³⁶ 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. Adair³⁷

In September 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 Tribes and the State of Oregon intervened in the case.³⁸

The United States and the Tribes argued that the Tribes and individual Indians retained an implied reserved water right for agricultural purposes and to protect their traditional hunting and fishing lifestyles, notwithstanding the Klamath Termination Act. The State moved for dismissal of the federal court action under the Colorado River “abstention doctrine,” arguing that the rights of the claimants should be decided in a state adjudication proceeding, not in a federal court action.³⁹

The Federal District Court (Judge Solomon) denied the motion for dismissal and issued a pretrial order setting out the issues to be decided:

- Whether water rights had been reserved for the use of the Klamath Reservation by the 1864 treaty with the Klamath and Modoc Tribes
- Whether such rights passed to the federal government and to private persons who took title to such lands
- What priority dates should be accorded to each of the present owners
- Whether quantification of the rights should be left to the state court proceeding under the provisions of the McCarran Amendment

³⁶25 U.S.C. §§ 564-564w

³⁷723 F.2d 1394 (9th Cir. 1983)

³⁸The Klamath Tribes, 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 landowners hold their water rights through the State, intervened as a defendant.

³⁹See *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.

Judge Solomon held:

- 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.
- The Klamath Termination Act did not abrogate such water rights.
- 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.
- 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.
- The United States Forest Service acquired reserved water rights for timber production and conservation of water flows.
- Quantification of the tribal water rights is to be left to the State of Oregon under the McCarran Amendment.

The United States, Tribes, and Oregon all appealed the District Court decision to the 9th Circuit Court of Appeals. The 9th Circuit 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 nonconsumptive, in-stream 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.⁴⁰ 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*,⁴¹ and it 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 nonuse under state law.

Finally, the 9th 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 United States Forest Service and USFWS) will be able to claim reserved water rights for forest and wildlife purposes in the state adjudication.

Adair III CV No. 75-914 (Opinion and Order February 27, 2002)

The United States and the Klamath Tribes 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

⁴⁰The Court, in describing the nature of the Tribes’ 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.”

⁴¹83 S.Ct. 1468, 1497-98 (1963). When the United States government sets aside land for an Indian reservation, the courts 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 practicably 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.

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 posed two questions to the Court:

- "[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?"
- "[W]hat is the proper measure of the tribal water rights to support their treaty, hunting, fishing, trapping, and gathering rights?"

The second question includes the following three related issues:

- What is the role of the "moderate living" doctrine in quantifying the Tribes' water rights?
- What is the role of the phrase "as currently exercised" in quantifying the Tribes' water rights?
- 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 reopened the *Adair* case.

On February 27, 2002, Judge Panner issued his Opinion and Order in *Adair III*. The Order declares that "... the Klamath Tribe's water rights include a water right to support resources the Tribes gather, in addition to the resources they hunt, fish, and trap." The Order also declares that the moderate living standard has limited application in this case, and, finally, "... [I]n no event shall the [KBA] adjudicator quantify or reduce the Tribal water right to a level below that which is necessary to support productive habitat."

United States v. Oregon⁴²

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 an 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 Reclamation Project. The Klamath Tribes and the individual Klamath Indian allottees filed for intervention in the suit.⁴³

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 expressly waives its immunity. However, in 1952, the McCarran Amendment was enacted, which waived federal sovereign immunity in state general stream adjudications.⁴⁴ 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

⁴²44 F.3d 758 (9th Cir. 1996).

⁴³The Klamath Tribes and members of the Tribes 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.)

⁴⁴43 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...."

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 U.S. argued that the OWRD'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 held that the United States must file claims in the Klamath adjudication and must pay the state adjudication fees. In addition, the Tribes must file claims, but are not required to pay fees. The allottees' motion to intervene was denied.

The United States and Tribes filed an appeal to the 9th Circuit Court of Appeals. The 9th Circuit affirmed the District Court except for the fees, holding that, under the McCarran Amendment, the United States cannot be required to pay state fees. 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.

Appendix A. Summary of federal agency claims in the Klamath Basin adjudication

U.S. Forest Service

214 claim forms claiming 416 water rights

- 17 Claims for consumptive uses
- 117 Claims for in-stream flows for timber production, channel maintenance (favorable conditions of stream flow), fish, wildlife, and recreation
- 13 Claims for in-stream rights for lakes
- 62 Claims for in-stream 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 in-stream 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-feet of water per year for wildlife refuge uses
- 1 Claim for approximately 80 cfs for stockwater

U.S. Bureau of Indian Affairs

393 claims on behalf of the Klamath Tribes

- 5 Claims for consumptive uses
- 52 Claims for in-stream 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

5 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

7 consolidated claims for the Klamath Project

Diversion of 3,505 cfs for irrigation of 218,654 acres

486,830 acre-feet of storage in Upper Klamath Lake

92,300 acre-feet of storage in Gerber Reservoir

481,300 acre-feet of storage in Clear Lake

Appendix B. Court cases related to water allocation in the Upper Klamath Basin

Kimball v. Callahan, 493 F.2d 564 (9th 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 (9th Cir. 1979) (Kimball II)

The Treaty rights survived the Klamath Termination Act.

U.S. v. Adair, 723 F.2d 1394 (9th Cir. 1983)

See discussion above.

Adair III CV No. 75-914

See discussion above.

U.S. v. Oregon, 44 F.3d 758 (9th Cir. 1996)

See discussion above.

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

Lost River irrigators have standing to bring judicial challenge to the U.S. Fish and Wildlife Service Biological Opinion, which made a jeopardy finding on the Lost River and shortnose sucker and identified minimum water levels in Clear Lake and Gerber Reservoir as reasonable and prudent alternatives. Irrigators had standing to challenge the Biological Opinion based on injury in fact from reduced water delivery, which was traceable to the Biological Opinion.

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

On remand, District Court held that the record did not support the U.S. Fish and Wildlife Service determination that retaining minimum lake levels in Clear Lake and Gerber Reservoir would help avoid jeopardy.

Klamath Water User's Association v. Patterson, 204 F.3d 1206 (9th Cir. 1999)

Klamath Water Users Association brought a contract action in the federal district court in Oregon against the Bureau of Reclamation and PacifiCorp, challenging the operation of Link River Dam (which controls the level of Upper Klamath Lake). The court held that the irrigators are not third-party beneficiaries under the contract between the BOR and PacifiCorp for operation of the dam. In addition, the court pointed out that the BOR "... has authority to direct operation of the Dam to comply with the ESA [and] with Tribal trust requirements." However, it should be noted that the issues related to water rights, the ESA, and tribal interests were not briefed or argued in the case; therefore, the court's discussion of these matters likely will be treated as dictum and, thus, not binding as precedent in future cases.

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

The LVID challenges BOR releases from Clear Lake, in the Lost River side of the Klamath Basin, for delivery to various uses on the Klamath side. Request for the injunction was denied, and the case was dismissed without prejudice.

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

Water for Life sought an injunction to delay the KBA on procedural grounds. Water for Life argued that certain notice procedures in the KBA were deficient and that the

adjudication should be suspended while the notice defects were corrected. 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 Reclamation 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 predates 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 intraagency 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)

The Bureau is enjoined from sending irrigation deliveries to the 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., 145 F.Supp.2d 1192 (D. Oregon, April 30, 2001)

Irrigators in the Project sought preliminary injunction against the 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. The preliminary injunction was denied, and the case was dismissed without prejudice.

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)

The 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. The 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, and thus have effected a physical taking. The Klamath Irrigation District has filed claims for damages based upon a taking of property rights (water rights) in the United States Court of Federal Claims.

Alsea Valley Alliance v. Evans and NMFS,
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. The case currently is on appeal to the U.S. 9th Circuit Court of Appeals.

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 United States 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 into 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 the ESA that prohibit “take” of a listed species. To date no actions have been initiated.

Appendix C. 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: \pm 500,000 acre-feet

Upper Basin (above Upper Klamath Lake)

Acreage: 155,000 acres

Water: \pm 310,000 acre-feet

Storage capacity

Upper Klamath Lake: 486,830 acre-feet

Clear Lake: 481,300 acre-feet

Gerber Reservoir: 92,300 acre-feet

Adjudication claims (approximate)

Total claims: 700

Private: 300

Federal agencies
and Klamath Tribes: 400

Permitted, certificated, and decreed water rights

Water rights

Surface: 966

Groundwater: 664

Reservoir: 467

Dams: 54

Total diversion rate: 5,400 cfs