

OREGON STATE UNIVERSITY
SEMINAR ON
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THE KLAMATH BASIN ADJUDICATION

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This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least: but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should have settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded in to mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; ... Jarndyce and Jarndyce has passed into a joke.

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

INTRODUCTION

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.¹ 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.²

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 of federal irrigation, flood control and hydroelectric projects; and to manage rivers and lakes for protection of threatened or endangered aquatic species.

¹ ORS 537.110.

² ORS 537.250(3).

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..

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.³ 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.

The Project was approved by the President on January 5, 1911. The total irrigable area of the Project was estimated at approximately 240,000 acres, of which approximately 210,000 acres was public land and 130,000 acres was in private ownership. About 90,000 acres of the Project was 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 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.

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 include, repayment contracts – commonly referred to as “A” contracts,⁴ Warren Act contracts – commonly referred to as “B” contracts,⁵ and annual surplus water contracts – commonly referred to as “C” contracts.

³ Act of February 9, 1905, ch. 567, 33 Stat. 714. The lands formerly inundated by Tule and Lower Klamath Lake were dewatered and were homesteaded by farmers as late as 1949.

⁴ 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.

⁵ 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.

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% 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,⁶ 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% of the former Reservation land.

OREGON ADJUDICATION PROCESS

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 which began prior to February 24, 1909, is deemed to be a vested water right subject to quantification and documentation in an adjudication proceeding.⁷

Pre-1909 and federal reserved water rights⁸ 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.

⁶ 25 U.S.C. §§ 564.

⁷ 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.

⁸ 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.

Outline of the Oregon Adjudication Process.

1. Director initiates adjudication with notice to basin 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, Department prepared maps of water use which 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.
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 ten 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 has 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 Basin Adjudication (KBA).⁹ The KBA is the seventh subbasin adjudication in the Klamath Basin.¹⁰ 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 1990-91 private right claiming period. The United States and Klamath Tribes were required to file claims during the 1996-97 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 Department's preliminary evaluation were made available for inspection. Following the open inspection period, approximately 5600 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.

KLAMATH ADJUDICATION CASES

*United States v. Adair*¹¹

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.

The United States and Tribe argued that, notwithstanding the Klamath Termination Act, the Tribe and individual Indians retained an implied reserved water right for agricultural purposes and to protect their traditional hunting and fishing lifestyles.

⁹ 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 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 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.

¹⁰ 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.

¹¹ 723 F.2d 1394 (9th Cir. 1983).

The federal district court (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 United States 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 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 non-consumptive, instream water right not based on the doctrine of prior appropriation — it is a right to prevent depletion below a protected level.

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*,¹² 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 9th Circuit held that the federal agencies that took over control of the land within the former Reservation did not received an “Indian” reserved water right with a time immemorial or 1864 priority date. However, these agencies (the United States Forest Service and 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 (Filed January 16, 2001)

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

¹² 83 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 FN 13.) 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.

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 District Court issued an opinion and order specifying that the Klamath Tribes' instream flow rights may not be quantified or reduced "to a level below that which is necessary to support a productive habitat." Ultimately, the 9th Circuit Court vacated the District Court's judgement and ordered a stay of "... all federal proceedings pending completion of the Oregon Adjudication...."

United States v. Oregon¹³

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.¹⁴ This suit was filed on behalf of various federal agencies that manage federal land in the Basin, including the Bureau of Reclamation, as operator the Klamath Project. The Klamath Tribes and the individual Klamath Indian allottees filed for intervention in the suit.¹⁵

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 agencies 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 to suit in state court unless Congress has expressly waived its immunity. However, in 1952, the McCarran Amendment was enacted waiving federal sovereign immunity in state general stream adjudications.¹⁶ 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.

¹³ 44 F.3d 758 (9th Cir. 1996).

¹⁴ 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. (See ORS 539.210.)

¹⁵ 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.)

¹⁶ 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...."

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 9th Circuit Court of Appeals. The 9th Circuit 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.

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 af
Upper Basin (above Upper Klamath Lake)	
Acreage	
	88,000 acres
Water	±184,000 af
Storage Capacity	
Upper Klamath Lake	486,830 af
Clear Lake	481,300 af
Gerber Reservoir	92,300 af
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	5400 cfs

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 & 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 feet of water/ 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 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 3,505cubic feet per second (cfs) for irrigation of 218,654 acres of irrigation
- 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

STATUS OF ADJUDICATION CONTESTS

CLAIM	NO. OF CLAIMS	NO. OF CONTESTS	STATUS
National Park Service (in-stream and consumptive uses)	21	49	Resolved
USFS (Wild and Scenic River)	3	54	Settled
USFS (in-stream and minimum lake level under MUSYA)	117	2075	Settled
USFS (Wilderness Act of 1964)	5	88	Settled
USFS (implied forest purposes under Organic Act and MUSYA)	16	292	Settled
USFS (in-stream flows for fire break/barriers under Organic Act)	47	849	Settled
USFS (favorable conditions of stream flows under Organic Act)	45	770	Settled
Bureau of Reclamation (BOR, individual, private and USF&WS)	29	169	Active
BLM (Federal Wild and Scenic Rivers Act)	1	26	Resolved
BLM (PWR 107 – water holes)	39	75	Active
BIA (in-stream)	57	310	Active
BIA (PIA)	5	20	Active
US F&WS (Klamath Wildlife Refuge)	19	76	Active
Allottees (PIA)	60	124	Active
Allottees (Contest to Preliminary Evaluation)	2	2	Settled
Walton Claims	101	400	Active
Walton Claims (without federal contests)	14	22	Active
Pre-1909 (claims along Link River)	21	37	Completed by HO Panel
Pre-1909 (without federal contests)	30	40	Active
Pre-1909 (with federal contests)	41	166	Active
TOTAL	673	5644	81% resolved or settled

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