



United States Department of the Interior  
OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

January 14, 2021

Memorandum

To: Secretary  
From: Solicitor  
Subject: Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights

Pursuant to your November 12, 2020, letter, the Solicitor's Office has been undertaking a thorough review of the Klamath Project ("Project") contracts and relevant legal authorities that guide the Bureau of Reclamation's (Reclamation's) discretion in the operation of the Project, in parallel with Reclamation's effort to prepare a reassessment document. In doing so, the Solicitor's Office identified tribal water rights as being an important threshold issue in determining which Project operations can be placed in the environmental baseline, and advised Reclamation that Ninth Circuit and Federal Circuit courts have viewed tribal water rights as being generally senior to irrigation rights connected to the Project. Reclamation does not dispute the existence or priority of tribal water rights, but has requested input on whether water previously stored in priority can ever be released for satisfaction of unquantified, downstream federally reserved water rights held by the Yurok and Hoopa Valley Tribes (hereinafter collectively referred to as "the Yurok and Hoopa Tribes").

This memorandum addresses that question and ultimately concludes that water previously stored in priority is not available for satisfaction of downstream federally reserved water rights, and is instead bound by the terms of the Klamath Basin Adjudication ("KBA").

**I. Background**

As noted by the federal courts, "[s]everal constraints [in the operation of the Klamath Project] force Reclamation to walk a water-management tightrope in dry years." *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001) (internal citations omitted). Reclamation's management is made more difficult "because the Upper Klamath Lake is relatively shallow and, therefore, the Klamath Project's storage capacity is limited." *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1231 (N.D. Ca. 2001) (hereinafter "*Pacific Coast*").

The issue is further complicated by the fact that Endangered Species Act (ESA) compliance and tribal trust compliance have historically been conflated in the operation of the Klamath Project. Put differently, in the absence of quantified tribal water rights, the United States has taken the position that ESA compliance serves as a proxy for its minimum duty to the tribes because that tribal water right "cannot [be] any less than the quantity that would have been needed to avoid reducing appreciably the likelihood of ... the survival of these same fish." *Baley v. United States*, 134 Fed. Cl. 619, 672-73 (2017) ("*Baley I*") (noting that ESA compliance and

the unique tribal trust requirements in the operation of the Klamath Project are “essentially a similar standard.”) (internal citations omitted). But in reality, ESA compliance and tribal trust obligations are legally distinct.

There are—in effect—distinct categories of tribal water rights in connection with the Project: the Klamath Tribes’ right to certain lake levels in Upper Klamath Lake (“UKL”), and the Yurok and Hoopa Tribes’ in-stream flow rights for the Klamath River. The Klamath Tribes’ rights to water levels in UKL have been quantified under McCarran Amendment proceedings in Oregon, and are not at issue for purposes of this memorandum. The Yurok and Hoopa Tribes’ in-stream rights—while clearly identified by the federal courts—have not been fully quantified by an adjudication or enacted settlement.

In order to fully appreciate the issue presented here, it is necessary to briefly examine the relationship between the tribal rights, and their impact on Project operations as described by the federal courts.

Tribal water rights on the Klamath were first recognized in the *Adair* litigation. See *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). There, the Ninth Circuit affirmed a district court determination that the Klamath Tribes had reserved on-reservation hunting and fishing rights upon establishment of the Reservation. *Id.* at 1398. The court held that those rights carried with them federally reserved water rights to support the tribal fishery. *Id.* at 1414. Further, because treaty rights are not “a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted,” the priority date for those reserved water rights predated the establishment of the reservation and were set at “time immemorial.”<sup>1</sup> *Id.* at 1413–14 (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

As mentioned above, these rights have since been administratively adjudicated and quantified, as part of the Klamath Basin Adjudication (“KBA”) in Oregon, which culminated in the Amended and Corrected Findings of Fact and Order of Determination (“ACFFOD”). The ACFFOD, *inter alia*, quantifies the Klamath Tribes’ federally reserved water rights, and “thus, the Klamath Tribes have a legally enforceable federal right to maintain streamflow levels as quantified.” *Hawkins v. Bernhardt*, 436 F. Supp. 3d 241, 251 (D.D.C. 2020). Accordingly, Reclamation must operate the project such that UKL lake levels satisfy the Klamath Tribes’ quantified, senior right.<sup>2</sup>

The Yurok and Hoopa Tribes also have federally reserved water rights connected to the establishment of their reservations. Like the Klamath Tribes, the origin of those water rights is in reserved fishing rights, recognized at the establishment of their reservations. See *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995).

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<sup>1</sup> Put another way, the treaty recognized rights that had been exercised by the Klamath Tribes pre-European contact and promised not to *impair* those rights. Thus, unlike other treaties whose purpose was to provide agricultural land in exchange for cession of traditional hunting and fishing grounds, the Klamath Tribes retained those rights, and thus priority date for the Klamath Tribes’ water rights necessarily was prior to treaty execution, and thus described as “time immemorial.” *Adair*, 723 F.2d at 1413–14.

<sup>2</sup> Due to a stipulation signed by the Klamath Tribes, United States, and Project water users, this senior right will not be enforced against the Project until the KBA is complete. So, Reclamation has not yet had to actually operate the Project to satisfy these UKL levels.