



KLAMATH IRRIGATION DISTRICT

6640 K.I.D. LANE

KLAMATH FALLS, OREGON 97603

Phone: (541) 882-6661 Fax (541) 882-4004

6 August 2026

MEMORANDUM

TO: John Rich, Special Envoy for American Landowners
c/o Office of the Secretary
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250
cc: Office of the Secretary — Lawfare Submissions

FROM: Klamath Irrigation District
Gene Souza, Executive Director
6640 KID Lane,
Klamath Falls, OR 97603
Gene.Souza@KlamathID.org

RE: Supplemental Information Supporting Lawfare Complaint — Klamath Irrigation District, submission of May 28, 2025

I. Executive Summary

The Klamath Irrigation District (K.I.D.) is a special government district representing over 1,200 family farms in the Klamath Basin of Oregon and California. K.I.D. submits this report in response to the USDA's request for further evidence of lawfare against Klamath farmers within the Klamath Reclamation Project. The documents supporting this submission are compiled in an accompanying exhibit volume. Each page of that volume is stamped "Exhibit N, Page x of y" in the lower right corner, and citations in the form (Ex. N at P) refer to those stamped exhibit pages.

Oregon initiated a general adjudication of all water rights in the Klamath Basin on December 23, 1975. The purpose of that proceeding was to determine every water right in the basin, state and federal, in a single forum, so that water could be distributed according to determined rights rather than competing assertions. The McCarran Amendment, 43 U.S.C. § 666, requires the United States to participate in that kind of proceeding. Yet after Oregon initiated its adjudication, the United States commenced litigation and spent the next twenty years litigating to keep the adjudication from happening. Specifically, it filed *United States v. Adair* in federal court in September 1975, as trustee for the Klamath Tribes, and Oregon's water rights adjudication prescribed by federal law sat at the starting line while that case was litigated. The Ninth Circuit acknowledged as much in 1983: "[i]n effect, the state proceeding has been stayed during the pendency of this federal suit." (Ex. 1 at 22.)

As a result, while Oregon began its adjudication in 1975, it was unable to issue its

notice to file claims until September 1990. When it did, the United States immediately sued Oregon directly, contending that federal and tribal rights could not be determined in the adjudication at all, which excused federal claim-filing for six more years during the pendency of the litigation.

Ultimately, the United States lost. In *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994) (Ex. 3), the Ninth Circuit held that the United States must adjudicate all of its water right claims in the Oregon adjudication, including the rights it holds in trust for tribes. Federal claims were finally filed in 1997, twenty-one years after the adjudication commenced. The adjudication remains pending in the Klamath County Circuit Court today, more than fifty years after it began, and water is still not distributed according to the rights it determined. Neither fact is an accident. Both are the product of the United States' litigation.

The United States did not stop attempting to thwart the adjudication federal law required it to participate in after it lost. Instead, lawyers in the Interior Solicitor's Office issued memoranda in 1995 and 1997 asserting that Reclamation could curtail deliveries to Klamath Project farmers to protect unquantified, unadjudicated tribal rights and to comply with the Endangered Species Act, without waiting for the adjudication, and that this authority would continue "after completion of the adjudication." (Ex. 4; Ex. 6 at 11.) The Department of Justice and the Bureau of Indian Affairs paid Dr. Thomas Hardy more than \$850,000 under expert witness contracts captioned "Klamath River Basin Adjudication" and "Yurok Water Rights Adjudication System" to develop the flow studies that would justify curtailing the Project. (Ex. 9 at 10, 12, 18.) Yet the United States never filed any water right claim for the Yurok Tribe in the adjudication at all. (Ex. 32 at 14.)

Instead, in September 2000, DOJ opened a further Hardy contract captioned "Klamath Project Curtailment of Water." (Ex. 9 at 13.) And six-months later, on April 6, 2001, the United States issued a curtailment notice to farmers that it was completely shutting off the Klamath Project in a water year that began with Upper Klamath Lake six inches above average. Thereafter, the Hardy studies became the "best available science" in the Biological Opinions and have restricted the Project ever since – even after they were determined to be deeply flawed by the National Academy of Sciences. (Ex. 36 at 3–4.)

Finally, in 2013, Oregon was able to complete the first phase of its adjudication process comprehensively determining all water rights in the Klamath Basin. The adjudication determined that the water stored in Upper Klamath Lake is stored for irrigation of the Klamath Project, and that the Klamath Tribes water rights, in Upper Klamath Lake are senior to those irrigation water rights, they cannot curtail the irrigation rights by virtue of a stipulated agreement. The adjudication also it denied the only tribal claims to instream flows in the mainstem Klamath River, which were asserted by the United States on behalf of the Klamath Tribes, not the Yurok Tribes.

Eleven weeks later, the United States issues its 2013 Biological Opinion stating in writing that "the proposed action is not modified based on the Findings of Fact and Order of Determination." (Ex. 11 at 21.) The government kept distributing water under the ESA

and tribal trust theories its own lawyers had built, not the water rights claims determined in Oregon's adjudication conducted in accordance with the federal McCarran Amendment. Interior's Solicitor eventually described the practice in a January 14, 2021 memorandum: "the United States has taken the position that ESA compliance serves as a proxy for its minimum duty to the tribes," and "until the issuance of the ACFFOD, all tribal rights were determined by proxy through ESA compliance." (Ex. 18 at 1, 6.) No statute created that proxy regime. No court with jurisdiction over water rights ever approved it.

The United States has also obtained rulings since the adjudication was completed that defeat the water rights the adjudication determined. In *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019) (Ex. 15), the United States defeated the farmers' takings claims for the 2001 shutoff by invoking the very tribal rights it had withheld from the adjudication, measured by its own biological opinions. In *Klamath Irrigation District v. United States Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) (Ex. 35), the Ninth Circuit held that the tribes are required parties to any challenge to Klamath Project operations, that tribal sovereign immunity bars their joinder, and that the farmers' suit therefore had to be dismissed without any ruling on the merits. The United States was the named defendant in that case, but it argued, together with the tribes, the positions that resulted in dismissal. (Ex. 35 at 11–12.) And in *Yurok Tribe v. USBR* and its affirmance, the United States obtained rulings that the ESA preempts Oregon's enforcement of the adjudicated rights. (Ex. 27; Ex. 32.) The current administration has concluded these rulings are wrong. (Ex. 29.) They nevertheless remain in effect.

The combined effect of these rulings is that the farmers' adjudicated water rights have been reduced to nothing. Water in the Klamath Basin is distributed as agency officials decide, through "non-jeopardy" biological opinions that do not even propose fulfilling the farmers' determined rights. The farmers cannot challenge these decisions in any court, no matter how arbitrary or baseless they are or how severely their rights are curtailed. The Yurok Tribe, which holds no adjudicated water right, and the Klamath Tribes, whose adjudicated rights cannot curtail the Project by virtue of stipulation, are deemed required parties to any such challenge, and their sovereign immunity requires dismissal. *Klamath Irrigation District v. United States Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022) (Ex. 35 at 9, 12).

This is lawfare as USDA has defined it: the strategic use of legal and regulatory processes to obtain results that could not be obtained lawfully. K.I.D. conservatively estimates the cost to Klamath communities at more than \$1 billion since 2001. On June 17, 2026, a divided Ninth Circuit panel held that the ESA applies to the Klamath Project and reaffirmed that ESA requirements "override the water rights of the Irrigators," even though the United States had withdrawn its position and moved to vacate. (Ex. 32 at 26.) Fifty years after Oregon commenced its adjudication, the water rights it determined are, under current Ninth Circuit law, overridden by the ESA, unenforceable by the State, uncompensable when taken, and unreviewable at the request of the farmers who hold them. Petitions for rehearing en banc are pending. K.I.D. asks USDA to stand with the farmers while there is still something left to save.

II. The Documented Record

Every factual assertion in this report is supported by a government document, court record, or filing identified in the appendix. Where an individual is named, a cited document places that individual personally in the events described.

A. The Adair litigation stalls the adjudication (1975–1990)

On December 23, 1975, the Oregon Water Resources Department issued its “Notice to Water Users, Klamath River and Its Tributaries,” commencing the Klamath Basin Adjudication. The adjudication was a general stream adjudication to determine all water rights in the basin, state and federal, including federal reserved rights. *Amended and Corrected Findings of Fact and Order of Determination* (“ACFFOD”), Introductory Material §§ A-1, A-3 (Feb. 2014) (Ex. 12 at 1, 4).

The United States, as trustee for the Klamath Tribes, went to federal court instead. In September 1975, three months before Oregon’s notice issued and while the State prepared to commence its adjudication, the United States filed *United States v. Adair* in federal district court, seeking a declaration of water rights in the former Klamath Reservation area. Its original complaint asked the federal court to quantify the rights and administer them under a federal decree. It abandoned that request only “upon the district court’s suggestion” that quantification be left to the State. *United States v. Adair*, 723 F.2d 1394, 1399, 1404 n.7 (9th Cir. 1983) (Ex. 1 at 19, 33). Oregon moved to dismiss the federal suit in favor of its own proceeding and was denied.

The effect of the federal suit was to stop the adjudication. The Ninth Circuit acknowledged as much in 1983: “even at this time, some seven years after the Oregon Water Resources Director issued his notice of investigation, the state determination of water rights in the Klamath Basin has not proceeded beyond administrative investigation . . . In effect, the state proceeding has been stayed during the pendency of this federal suit.” *Id.* at 1405–06 (Ex. 1 at 22). The federal courts declared the legal framework for the Klamath Tribes’ rights, including time immemorial priority, but they did not quantify anything. The pretrial order provided that “[a]ctual quantification . . . will be left for judicial determination . . . by the State of Oregon under the provisions of 43 U.S.C. § 666 [the McCarran Amendment].” *Id.* at 1399, 1406, 1411 n.19 (Ex. 1 at 19, 22, 35). The Adair litigation ended in 1984, when the Supreme Court denied certiorari. Oregon did not issue its Notice to File Claims until September 1990. The adjudication Oregon commenced in 1975 had been held at the starting line for fifteen years.

B. United States v. Oregon (1990–1996)

When Oregon finally moved to collect claims, the United States sued again. On December 18, 1990, months after Oregon issued its Notice to File Claims, the United States sued Oregon, contending that the adjudication was not a proceeding in which federal and tribal rights could be determined. It argued that the adjudication was not a “suit” within the meaning of the McCarran Amendment and that it was insufficiently comprehensive. The immediate effect was more delay. As a result of the lawsuit, federal agencies, the Klamath

Tribes, and certain Klamath Project water users were not required to file claims during the original claiming period. ACFFOD Intro. § A-5 (Ex. 12 at 7). The Ninth Circuit rejected both arguments and held that “the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment.” *United States v. Oregon*, 44 F.3d 758, 765–70 (9th Cir. 1994), *cert. denied* (Oct. 30, 1995) (Ex. 3 at 8–12). Federal agencies and the Klamath Tribes were then required to file their claims between October 1, 1996 and April 30, 1997. Twenty-one years after Oregon commenced the adjudication, the United States’ claims finally entered it.

C. The Solicitor memoranda (1993–1997)

The United States did not respond to *United States v. Oregon* by bringing its water management into the adjudication. Its lawyers built a separate legal theory that would make the adjudication irrelevant.

Solicitor Opinion M-36979 (Oct. 4, 1993) declared that the Yurok and Hoopa Valley Tribes are entitled to up to 50% of the Klamath fishery harvest and that the federal trust obligation extends “to all agencies and departments of the Executive Branch.” (Ex. 2 at 3, 29.)

On July 25, 1995, Regional Solicitor David Nawi advised Reclamation that it “cannot store or divert water for project purposes that is needed to satisfy prior existing rights,” that unadjudicated Yurok and Hoopa water rights carry a priority of “at least as early as 1891,” and that Reclamation “must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights.” Nawi Memo at 5–10 (Ex. 4 at 5–10). No Yurok water right had been presented to any adjudication, then or ever.

Oregon’s Department of Justice objected. Its March 18, 1996 letter to the Water Resources Department stated that the draft Klamath Project Operations Plan “purports to authorize the Bureau . . . to reallocate water from irrigation uses to other, unquantified and unadjudicated uses for the protection of fish and satisfaction of California tribal claims,” and concluded that “there is no such federal authority.” ODOJ Letter to WRD at 5, 7–8 (Ex. 5 at 5, 7–8).

The Solicitor’s Office answered on January 9, 1997. The Nawi/Peterson memorandum asserted that “a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights,” that the unadjudicated Yurok rights “are vested, senior rights,” and that Reclamation “will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication.” Nawi/Peterson Memo at 5–6, 11 (Ex. 6 at 5–6, 11). That last sentence deserves attention. The memorandum did not describe an interim measure pending the adjudication. It claimed an authority that the adjudication, whatever it decided, would never displace.

Reclamation’s 1997 Annual Operations Plan put the theory into operation. The Plan

rested its “Guiding Principles” expressly on the 1995 and 1997 memoranda and allocated lake levels and river flows for ESA and tribal trust purposes “prior to completion of the Oregon water rights adjudication.” 1997 AOP at 1–2 (Ex. 7 at 1–2).

D. The Hardy contracts (1996–2000)

The scientific support for the new theory was purchased through an Interagency Agreement between DOJ and the Bureau of Indian Affairs (IAA No. AG6K000029). The agreement’s stated purpose was to “support United States claims for water on behalf of the Hoopa Valley, Klamath and Yurok Tribes . . . in administrative and potential legal proceedings.” (Ex. 9 at 9.) The DOJ ENRD-236 expert witness forms carry the following captions:

- “Klamath River Basin Adjudication.” \$15,000 (Mod. 5, approved Feb. 1999) and \$550,086 (Mod. 6, Feb. 18, 2000), DJ No. 90-6-2-70. Expert: Dr. Thomas B. Hardy. “Expert Testimony required on behalf of U.S.” Client agency: DOI BIA. (Ex. 9 at 10, 18.)
- “Matter — Yurok Water Rights Adjudication System.” \$286,694.37 (Sept. 29, 2000), DJ No. 90-6-2-00815. The form notes the DJ number was changed from the adjudication file and that “[f]unds moved from FY00-30018.” (Ex. 9 at 12.)
- “Matter — Klamath Project Curtailment of Water.” \$5,200 (Sept. 29, 2000), DJ No. 90-1-2-10086/1. This contract was opened the same week as the Yurok contract and more than six months before any curtailment was announced to Klamath farmers. (Ex. 9 at 13.)

Robert T. Anderson, then Counselor to Interior Secretary Babbitt and later the Department’s senior solicitor under the Biden Administration, personally drove this effort. Dr. Hardy told the Klamath Fisheries Task Force in 1997: “I was already under contract with DOJ . . . But I work for Mr. Anderson and the Bureau of Indian Affairs.” (Ex. 9 at 6.) A February 3, 2000 note from Scott Bergstrom of the Solicitor’s Office to DOJ, pressing for expedited funding, reports that “the contractor has stopped work vitally needed to address scientific issues in the coming months . . . and David and I have Bob Anderson and other DOI types hounding us to get this through asap.” (Ex. 9 at 8.) Hardy’s own letter of September 7, 2000 confirms what the work was for. His declaration concerned “litigation stemming from the Bureau of Reclamation’s actions to ensure that the Klamath Irrigation Project . . . is operated in compliance with the Endangered Species Act and Reclamation’s responsibilities to protect tribal trust resources,” work he described as “directly related to the United States’ reserved water rights claims in the Klamath Basin General Stream Adjudication.” (Ex. 9 at 11.)

Taxpayer money moved under adjudication case captions, including a caption for a Yurok adjudication claim that was never filed. It produced the flow studies that were then used to curtail the Klamath Project under the ESA.

E. The withheld Yurok claims and the 2001 curtailment (1997–2001)

The court-ordered claiming period closed on April 30, 1997. The United States filed claims for the Klamath Tribes (Claims 671–673), for the Klamath Project (Claim 294), for the refuges, and for BLM’s Wild and Scenic reach (Claim 376). (Ex. 8.) It filed nothing for the Yurok Tribe. These were the same rights its Solicitor memoranda were asserting as “vested, senior” constraints on the Project, and the same rights its DOJ contracts were captioned to support. The omission is now judicially established. “The United States in the Klamath Basin Adjudication did not assert Winters rights on behalf of the Yurok and Hoopa Valley Tribes.” *Yurok Tribe v. Klamath Water Users Ass’n*, Nos. 23-15499/23-15521, slip op. 13 (9th Cir. June 17, 2026) (Ex. 32 at 14). Interior’s own Solicitor conceded that the tribes “could have asserted storage rights in the KBA, [but] no such rights were asserted.” Solicitor Mem. (Jan. 14, 2021) at 6 (Ex. 18 at 6). The Yurok Tribe pleads to this day that its rights “have not yet been adjudicated or quantified.” Second Supp. Compl. ¶ 16, *Yurok Tribe v. USBR*, No. 3:19-cv-04405-WHO (filed June 15, 2026) (Ex. 31 at 7).

On April 6, 2001, Reclamation halted irrigation deliveries to the Klamath Project for the first time in its history, citing ESA obligations informed by the Hardy Phase I study. The water year had begun with Upper Klamath Lake six inches above its 1987–2009 average. The curtailment-litigation expert contract had been signed the previous September. The 2002 NMFS Biological Opinion then built its Klamath River flow targets on Hardy Phase I (1999) and the draft Hardy Phase II (2001), quoting Hardy’s statement that the flow recommendations were necessary “in light of the Department of Interior’s trust responsibility to protect tribal rights and resources as well as . . . the Endangered Species Act.” 2002 BiOp at 2, 5 (Ex. 10 at 5, 9). The National Research Council reviewed the same science and found “no convincing scientific justification” for departing from historical operations. NRC Interim Report (2002) (quoted, Ex. 10 at 9); NRC, *Causes of Decline* (2004). In 2007, the National Research Council’s full evaluation of the Hardy work found “significant shortcomings” in the Hardy Phase II study — monthly rather than daily data, no tributary analyses, and flaws in its experimental design — and “fundamental shortcomings compromising the study’s conclusions, including flaws in the construction and calibration of the model” in the companion Natural Flow Study, and concluded that the two assessments “are not likely to contribute effectively to sound decision making.” NRC, *Hydrology, Ecology, and Fishes of the Klamath River Basin* (2007) (Ex. 36 at 3–4).

The farmers sought just compensation for the 2001 curtailment. The Federal Circuit denied it. The court held that the tribes’ unfiled, unquantified rights were senior to the farmers’ adjudicated rights and “at least co-extensive” with the 2001 BiOp requirements, and that “there is no need for a state adjudication to occur before federal reserved rights are recognized.” *Baley v. United States*, 942 F.3d 1312, 1336–41 (Fed. Cir. 2019), *cert. denied* (2020) (Ex. 15 at 12, 18). Rights that were withheld from the adjudication were measured by the BiOps that the withheld-rights theory had produced, and the farmers’ compensation claims were defeated with them.

F. The 2013 adjudication and the 2013 Biological Opinion

Oregon issued its Findings of Fact and Order of Determination on March 7, 2013, amended and corrected in February 2014. Thirty-eight years of proceedings, more than 730

claims, more than 5,600 contests. The results that matter here are three:

- The Klamath Project's storage right (KA 294) and the irrigators' right to use that stored water (KA 1000) were confirmed. Under the ACFFOD, the only authorized use of the water stored in Upper Klamath Lake is irrigation. (Ex. 22 at 5.)
- The Klamath Tribes' Claims 671–673, the only tribal claims to instream flows in the mainstem Klamath River, were denied as a matter of law: “off-reservation water right claims are outside the scope of the federal reserved water right doctrine as a matter of law. The claims must be denied for this reason.” Corrected Partial Order of Determination, Claims 671–673, at 4–5 (Ex. 13 at 4–5).
- The Yurok claims had never been submitted.

After fifty years of adjudication, no one holds an adjudicated right to instream flows in the mainstem Klamath River because the claims the United States asserted in the adjudication for such a right were rejected. But the water is delivered downstream anyway. Eleven weeks after the FFOD issued, the 2013 joint Biological Opinion stated: “the proposed action does not anticipate or account for the Findings of Fact and Order of Determination . . . Therefore, the proposed action is not modified based on the Findings of Fact and Order of Determination.” Its flow prescriptions rest on Hardy et al. (2006) and Hardy (2012) as “the best available data.” 2013 BiOp § 2.1.1 at 3, § 11.1.3 at 205 (Ex. 11 at 21, 29).

Oregon let it happen. That same June, the Governor's natural resources office assured the Yurok Tribe in writing that OWRD “is not interfering with BOR's obligations under the Biological Opinion . . . and does not intend do so, unless otherwise directed to do so by order of a court with proper jurisdiction.” OWRD/Yurok Dispute Resolution Notice emails (June 16, 2013) (Ex. 9 at 52). The State that spent four decades adjudicating the basin declined to enforce its own determination.

G. Enforcement and the federal response (2018–2023)

Enforcement of the adjudication came only because K.I.D. compelled it. K.I.D. obtained the Marion County Circuit Court general judgments of 2018 and 2021 (Exs. 14, 24) and the October 13, 2020 order directing OWRD to act. OWRD complied under protest. Its April 6, 2021 Final Order stated that the agency had “identified no source of state law” authorizing the prohibition the court had directed, found cause to believe Reclamation would “release legally stored water . . . to comply with the Bureau's federal tribal trust obligations and ESA obligations,” and ordered Reclamation to stop. (Ex. 22 at 8–10.) By that point the imbalance was not subtle. In the 2020 season Reclamation released over 150,000 acre-feet more to the river than the total inflow to Upper Klamath Lake. KWUA Letter to Solicitor Jorjani, Att. A at 6–7 (July 16, 2020) (Ex. 16 at 9–10).

The federal government's response to the compelled order came on three fronts. In May 2021, Reclamation installed bulkheads at K.I.D.'s A Canal, physically locking the district out of its own facilities. Deliveries in 2021 were zero, notwithstanding water stored in priority for that sole purpose. When K.I.D. sought a state court injunction to enforce the

ACFFOD, the United States removed the case to federal court and defeated remand. The Ninth Circuit denied mandamus over a lengthy dissent by Judge Baker, who wrote that “the Bureau failed to file any such claim on behalf of the Tribes,” that Reclamation’s own January 2021 Reassessment admitted the ACFFOD “preclude[s] releases of water previously stored in priority” for the downstream tribes, and that the refusal to remand was “a textbook case warranting mandamus relief.” *In re Klamath Irrigation District*, 69 F.4th 934 (9th Cir. 2023) (Baker, J., dissenting) (Ex. 28 at 26, 29, 47). And in *Yurok Tribe v. USBR*, the United States, litigating alongside the Yurok Tribe, obtained a declaration that the OWRD order was preempted by the ESA and an injunction against its enforcement. Judge Orrick granted the crossclaim while denying K.I.D. discovery and stating that “[t]his is not a water rights adjudication or quantification case.” 654 F. Supp. 3d 941 (N.D. Cal. Feb. 6, 2023) (Ex. 27 at 6, 34). Water was reallocated away from adjudicated rights holders without the priority question being litigated in any court.

H. Klamath Irrigation District v. USBR: Rule 19 and tribal sovereign immunity (2019–2022)

A separate ruling prevents the farmers from obtaining judicial review of the decisions described above. In March 2019, K.I.D. and other water users sued Reclamation under the Administrative Procedure Act and Section 8 of the Reclamation Act. They sought a declaration that Reclamation’s operating procedures — under which Reclamation “confirmed that it would continue using the water in UKL for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, necessarily limiting the amount of water available to other water users who hold junior rights” — were unlawful, because Reclamation intended to use water stored in Upper Klamath Lake for instream purposes “without a water right or other authority under the laws of the State of Oregon.” *Klamath Irrigation District v. United States Bureau of Reclamation*, 48 F.4th 934, 942 (9th Cir. 2022) (Ex. 35 at 8).

The districts never received a ruling on the merits. The Hoopa Valley and Klamath Tribes intervened as of right, then moved to dismiss the case they had joined, arguing that they were required parties who could not be joined because of tribal sovereign immunity. The Ninth Circuit affirmed dismissal. It held that the tribes’ unquantified rights are “at a minimum coextensive with Reclamation’s obligations to provide water for instream purposes under the ESA,” so that any suit that “seeks to amend, clarify, reprioritize, or otherwise alter Reclamation’s ability or duty to fulfill the requirements of the ESA implicates the Tribes’ long-established reserved water rights.” (Ex. 35 at 9.) It held that the United States — the tribes’ trustee, which had asserted their rights everywhere except the adjudication — was not an adequate representative of them. (Ex. 35 at 10–11.) It held that the McCarran Amendment’s waiver of sovereign immunity did not apply because the suit was “not an administration of previously determined rights but is instead an APA challenge to federal agency action.” (Ex. 35 at 12.) And it dismissed, citing “a wall of circuit authority” requiring dismissal when a required tribe cannot be joined, because the districts’ claims and the tribes’ claims “are mutually exclusive.” (Ex. 35 at 12.)

That holding must be evaluated against the record set out above. The Yurok Tribe

holds no adjudicated water right; the United States never filed its claims, and the Tribe refuses quantification to this day. The Klamath Tribes' adjudicated rights in Upper Klamath Lake, though senior, cannot curtail the Project by virtue of stipulation, and their mainstem instream claims were denied. Neither tribe holds an adjudicated right that Klamath Project operations affect. Yet both are "required parties" whose immunity bars every suit. Judge Bumatay's concurrence acknowledged the problem: because the Hoopa Valley Tribe's rights "were never adjudicated, then there would be nothing to 'administ[er]' here." (Ex. 35 at 14.) The absence of adjudicated tribal rights, an absence the United States itself created by withholding the claims, is what defeats the McCarran Amendment's waiver of sovereign immunity and prevents judicial review. The United States, the named defendant, argued for this result: it contended the suit was not a McCarran administration, and joined the tribes in arguing that a judgment for the districts would imperil tribal water rights. (Ex. 35 at 11–12.) The United States nominally opposed dismissal while making the arguments that produced it.

The result is that federal water decisions in the Klamath Basin are effectively immune from judicial review. Reclamation and the fisheries agencies write the operations plans. The same agencies then approve the plans they wrote in "non-jeopardy" biological opinions that do not even propose fulfilling the farmers' adjudicated rights. And no challenge to those decisions can be heard in any court, no matter how arbitrary or baseless they are or how severely the farmers' rights are curtailed, because the tribes are required parties who cannot be joined. Adjudicated water rights that cannot be enforced, compensated, or litigated are not water rights in any meaningful sense.

I. The 2020–2021 Interior review and its withdrawal

In 2020 and 2021, at the request of the water users, Interior reviewed its own conduct and put its conclusions in writing:

- Secretary Bernhardt's letters of November 12, 2020 and January 16, 2021 (to KWUA and to K.I.D. counsel) found that Klamath operations "have come to suffer from a tortured consultation history" and that the conflation of water supply, ESA, and tribal trust "begets litigation and discord to no one party's service." Finding (d): "Water stored previously and in priority on behalf of the Klamath Project is not available for re-allocation for the purpose of meeting these in-stream flow rights, even if they are senior." (Ex. 17; Ex. 21 at 1–2.)
- Reclamation's signed January 15, 2021 Reassessment concluded: "Reclamation therefore cannot release water previously stored in priority . . . for the specific purposes of producing instream flows in the Klamath River either in Oregon or California." At 23–24 (Ex. 20 at 23–24).
- The January 14, 2021 Solicitor memoranda concluded that stored water "is bound by the ACFFOD" and that the Project contracts leave Reclamation no ESA discretion. They also described the practice this report documents: "the United States has taken the position that ESA compliance serves as a proxy for its minimum duty to the tribes," and "until the issuance of the ACFFOD, all

tribal rights were determined by proxy through ESA compliance.” (Ex. 18 at 1, 6; Ex. 19.)

On April 8, 2021, Secretary Haaland withdrew all of these documents, citing tribal trust commitments and “longstanding Departmental positions.” (Ex. 23.) The Department’s senior solicitor at that point was Robert T. Anderson, the same official the year-2000 funding records place at the center of the Hardy contracts. The Solicitor’s office had also hired Daniel Cordalis, spouse of then-Yurok General Counsel Amy Cordalis, counsel of record in the Yurok litigation. Operations resumed under the proxy regime. The 2022 Annual Operations Plan allocated 62,000 acre-feet to the Project and nothing at all to non-“A” contractors, set by BiOp lake elevations and Iron Gate flow targets, with 15,000 to 20,000 acre-feet arranged for a Yurok ceremonial flow event. (Ex. 25 at 7, 9; Ex. 26 at 6–7.) The ACFFOD is not the rule of distribution anywhere in the plan.

J. The current posture (2025–2026)

In 2025 the elected branches repudiated the regime. Congress enacted the Klamath Basin Water Agreement Support Act of 2024, Pub. L. 118-246 (signed Jan. 4, 2025), which mandates operation of Link River Dam “to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts.” (Ex. 29 at 5.) Secretary Burgum vacated the Haaland withdrawal on February 10, 2025. (Ex. 29 at 1–2.) Acting Solicitor Zerzan’s updated analysis of May 14, 2025 reinstated the 2021 conclusions: the Project contracts are non-discretionary force majeure instruments under *NRDC v. Haaland*; stored water is bound by the ACFFOD; “there is no duty to use water stored in Upper Klamath Lake to satisfy downstream tribal rights”; and the 1995 Regional Solicitor opinion, the founding document of the regime, “is hereby withdrawn.” (Ex. 29 at 7, 9–10.) The United States withdrew its litigating position in the Ninth Circuit and moved to dismiss and vacate. (Ex. 32 at 21.)

The panel refused and decided the case anyway. On June 17, 2026, a divided Ninth Circuit affirmed, reaffirming *Patterson*’s statement that ESA requirements “override the water rights of the Irrigators” while stating in the same opinion that “neither we nor the district court have adjudicated any water rights.” (Ex. 32 at 26, 39.) Judge Nelson dissented: after *Home Builders*, “no statutory provision or contract provides agency discretion sufficient to trigger the ESA.” (Ex. 32 at 56.) Three Article III judges in four years, Nelson, Baker, and Bumatay, have now dissented on the same question. K.I.D. and KWUA filed petitions for rehearing en banc on August 3, 2026. (Exs. 33, 34.) The petitions are pending. K.I.D.’s petition states the dilemma the judgment cannot escape: it “must either adjudicate water rights or adjudicate nothing.” (Ex. 33 at 22.) If it reallocates water, it works an uncompensated taking. If it does not, it is advisory. The Yurok Tribe’s supplemental complaint of June 15, 2026 continues the litigation on ESA theories while expressly refusing to consent to any adjudication or quantification of the Tribe’s rights. (Ex. 31 at 7–8.) That is the strategy of 1997, unchanged in 2026.

That is where the United States’ litigation has led. The United States began in 1975 by suing to keep tribal water rights out of Oregon’s adjudication. Fifty years later, the Ninth Circuit has held that the ESA applies to the Klamath Project and overrides the rights the

adjudication determined. That holding issued after the United States had abandoned the position, over a dissent, and alongside the rulings that leave the determined rights uncompensable (*Baley*), unenforceable by the State (*Yurok Tribe v. USBR*), and unreviewable at the farmers' request (*Klamath Irrigation District v. USBR*). Unless the en banc court or the Supreme Court intervenes, the water rights Oregon spent fifty years adjudicating will have no practical effect for farmers in the Klamath project.

II. Why This Is Lawfare

USDA defines lawfare as the use of legal systems and processes as a strategic tool to achieve political or ideological objectives. The record set out above meets that definition several times over.

The United States manipulated the forum. For the adjudication's first two decades, federal litigation kept it from proceeding at all: *Adair* held the state proceeding in place from 1975 to 1984, and *United States v. Oregon* excused federal claim-filing from 1990 to 1996. When the United States lost the forum fight, it withheld the Yurok claims from that forum and asserted them everywhere else. When Oregon's courts finally enforced the adjudication, the United States removed the case, defeated remand, and obtained a federal injunction against the State's order. The result is that no court has ever answered the question of who owns this water as between the farmers' adjudicated rights and the tribes' asserted rights. That is not an accident of litigation. The tribes' position to this day expressly refuses quantification. The adjudication's fifty-year lifespan is itself a product of this conduct. Fifteen years were lost to *Adair*. Six more were lost to *United States v. Oregon*. The exceptions to the ACFFOD have been pending in the Klamath County Circuit Court since 2014, and in the meantime federal operations and federal injunctions, not the determined rights, control the water. A proceeding meant to settle the basin's water rights has been kept from settling them for two generations, and the beneficiaries of the delay are the claims that were never adjudicated.

The science was procured for litigation. The Hardy studies were commissioned under DOJ expert witness contracts captioned to an adjudication claim that was never filed, at the insistence of senior Interior officials named in the funding records, with a "Klamath Project Curtailment of Water" contract opened six months before farmers were told anything (Ex. 9 at 13). Those studies were then designated the "best available science" in successive BiOps, including the 2013 BiOp that declared Oregon's completed adjudication irrelevant to federal operations (Ex. 11 at 21), and the 2024–2029 operations plan that still relies on them.

The legal theory was built to survive every check on it. The proxy regime described in Interior's January 14, 2021 memorandum (Ex. 18) was created by Solicitor memoranda, not by statute. It was applied against rights the adjudication confirmed and in favor of claims the adjudication denied or never received. The 1997 memorandum claimed it would persist after the adjudication was complete, and it did. When the farmers sought compensation, the unfiled rights defeated the claim in *Baley*. When the State enforced the adjudication, federal preemption enjoined the State in *Yurok v. USBR*. When the United

States itself abandoned the theory in 2025, the Ninth Circuit entrenched it anyway.

The litigation has been coordinated. Federally funded claim-development work supplied the scientific basis for the curtailment suits brought by the Yurok Tribe and allied plaintiffs from 2002 forward. From 2021 to 2025 the United States litigated side by side with the Tribe against Oregon and the districts. Tribal sovereign immunity has been used to block the districts' own suits. In the 2022 Rule 19 ruling, the tribes intervened as of right and then obtained dismissal of the case they had joined, on the ground that they were required parties who could not be joined, while the United States, their trustee and the named defendant, made the arguments that compelled that result. (Ex. 35 at 11–12.) A Yurok right that was never adjudicated and a Klamath Tribes right that cannot curtail the Project by stipulation are sufficient to bar every suit. The tribes' absence from the adjudication, which the United States caused by withholding their claims, is now the basis for the immunity that prevents review of the agencies' decisions. Every door has been open to curtailment claims. Every door has been closed to the farmers' defense of their adjudicated rights.

III. The Toll

K.I.D. conservatively estimates economic losses to Klamath Basin communities above \$1 billion since the 2001 curtailment. The 2021 zero-delivery year alone cost K.I.D. farmers on the order of \$150 million. Farms have been foreclosed. The basin's producers face a documented mental health crisis. And the curtailments have produced no demonstrated recovery of any listed species. The National Research Council found the Hardy-based flow prescriptions scientifically unjustified as early as 2002, and its 2007 evaluation concluded the Hardy Phase II and Natural Flow studies "are not likely to contribute effectively to sound decision making" (Ex. 36 at 4); and the Upper Klamath Lake elevation mandates have shown no demonstrable benefit to the sucker populations they were imposed to protect.

IV. Requests for USDA Action

1. **Support the rule of law in the Klamath Basin.** Provide public support, including coordination with the Departments of the Interior and Justice, for the position the United States itself has now taken twice: water stored in priority for the Klamath Project is bound by the adjudication and the contracts, and the ESA is a duty, not a grant of power to reallocate other people's property.
2. **Support reforms** to prevent the misuse of federal litigation funding and expert contracting, including transparency requirements for interagency litigation-support agreements of the kind documented here, and ensure farmers have a federal advocate when federal agencies litigate against their water rights.
3. **Provide public comment supporting regulatory relief** for Klamath farmers in the pending consultation and operations-planning processes, so that the 2024–2029 plan

is conformed to the 2024 Support Act, the ACFFOD, and the Department's May 14, 2025 legal analysis.

We appreciate USDA's commitment to addressing lawfare and stand ready to provide the underlying documents, testimony, and any additional information. Please contact the K.I.D. Executive Director below.

Sincerely,

A handwritten signature in blue ink that reads "Gene R Souza". The signature is written in a cursive style with a large "G" and "S".

Gene Souza

Executive Director, Klamath Irrigation District
6640 K.I.D. Lane
Klamath Falls, Oregon 97603
Gene.Souza@KlamathID.org
(541) 882-6661

Appendix: Exhibit Index

All exhibits are contained in the accompanying compilation, “Exhibits to Lawfare Against Klamath Farmers” (1,043 pages). Each page is stamped “Exhibit N, Page x of y” in the lower right corner, and citations in this submission in the form (Ex. N at P) refer to those stamped pages. Exhibits 11, 33, and 34 are excerpts as noted; complete copies are available on request.

Ex.	Document	Length
1	U.S. v. Adair / U.S. v. Braren decisions: 478 F. Supp. 336 (D. Or. 1979); 723 F.2d 1394 (9th Cir. 1983); 187 F. Supp. 2d 1273 (D. Or. 2002); 338 F.3d 971 (9th Cir. 2003)	49 pp.
2	Solicitor Opinion M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 4, 1993)	50 pp.
3	United States v. Oregon, 44 F.3d 758 (9th Cir. 1994)	16 pp.
4	Regional Solicitor (Nawi) memorandum (July 25, 1995)	10 pp.
5	Oregon Department of Justice letter to Water Resources Department (Mar. 18, 1996)	11 pp.
6	Regional Solicitors (Nawi/Peterson) memorandum (Jan. 9, 1997)	11 pp.
7	Klamath Project 1997 Annual Operations Plan (Apr. 1997)	8 pp.
8	United States’ Statements and Proof of Claim in the Klamath Basin Adjudication: Claim 671 (pp. 1–8); Claim 672 (pp. 9–12); Claim 673 (pp. 13–16); Claim 294 (pp. 17–34); Amended Claim 376 (pp. 35–55)	55 pp.
9	Hardy funding records: Klamath Fisheries Task Force minutes (p. 6); Bergstrom note to DOJ (p. 8); Interagency Agreement AG6K000029 (p. 9); ENRD-236 expert contracts (pp. 10, 12, 13, 18); Hardy letter of Sept. 7, 2000 (p. 11); OWRD/Yurok dispute-resolution emails (p. 52)	52 pp.
10	NMFS Biological Opinion, Klamath Project Operations (May 31, 2002)	108 pp.
11	Joint Biological Opinion, Klamath Project Operations (May 31, 2013) (excerpts: cover through p. 24; § 11.1.3 flow-habitat analysis)	32 pp.
12	Amended and Corrected Findings of Fact and Order of Determination, Introductory Material (Feb. 2014)	70 pp.
13	Corrected Partial Order of Determination, Claims 671–673 (2014)	50 pp.
14	KID v. OWRD, General Judgment, Marion County Circuit Court (Aug. 15, 2018)	5 pp.
15	Baley v. United States, 942 F.3d 1312 (Fed. Cir. 2019)	24 pp.
16	KWUA et al. letter to Solicitor Jorjani, with Attachment A and enclosures (July 16, 2020)	96 pp.

Ex.	Document	Length
17	Secretary Bernhardt letter to KWUA and Solicitor memorandum (Nov. 12, 2020)	11 pp.
18	Solicitor memorandum, Use of Water Previously Stored in Priority for Satisfaction of Downstream Rights (Jan. 14, 2021)	7 pp.
19	Solicitor memorandum, Analysis of Klamath Project Contracts (Jan. 14, 2021)	10 pp.
20	Reclamation, Reassessment of Klamath Project Operations and ESA Section 7(a)(2) (Jan. 15, 2021)	42 pp.
21	Secretary Bernhardt letter to Nathan R. Rietmann (Jan. 16, 2021)	3 pp.
22	OWRD Final Order Regarding Release of Water Stored Under Determined Claim KA 294 (Apr. 6, 2021)	10 pp.
23	Secretary Haaland, Withdrawal of Klamath Project-Related Memoranda, Letters, and Analyses (Apr. 8, 2021)	2 pp.
24	KID v. OWRD, General Judgment, Marion County Circuit Court (June 14, 2021)	13 pp.
25	Reclamation letter to Yurok Tribe transmitting 2022 Annual Operations Plan (Apr. 11, 2022)	13 pp.
26	Klamath Project 2022 Annual Operations Plan (Apr. 11, 2022)	10 pp.
27	Yurok Tribe v. USBR, Order on Summary Judgment, 654 F. Supp. 3d 941 (N.D. Cal. Feb. 6, 2023)	34 pp.
28	In re Klamath Irrigation District, 69 F.4th 934 (9th Cir. 2023)	47 pp.
29	Secretary Burgum memorandum (Feb. 10, 2025) and Acting Solicitor Zerzan memorandum, Klamath Updated Analysis of ESA Obligations (May 14, 2025)	11 pp.
30	Joint Case Management Statement, Dkt. 1200, Yurok Tribe v. USBR (June 12, 2026)	19 pp.
31	Yurok Tribe Second Supplemental Complaint, Dkt. 1201 (June 15, 2026)	44 pp.
32	Yurok Tribe v. Klamath Water Users Ass'n, Nos. 23-15499/23-15521 (9th Cir. June 17, 2026)	56 pp.
33	KID Petition for Rehearing En Banc (Aug. 3, 2026) (petition only)	26 pp.
34	KWUA Petition for Rehearing En Banc (Aug. 3, 2026) (petition only)	20 pp.
35	Klamath Irrigation District v. United States Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022)	14 pp.