

United States v. Adair and United States v. Braren Case Packet

Collected judicial opinions on the reserved water rights of the Klamath Tribes in the Williamson River watershed of Oregon's Klamath Basin, reproduced in full from public reporter text.

Adair I United States v. Adair, 478 F. Supp. 336 (D. Or. 1979)

Adair II United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), as modified on denial of rehearing Jan. 24, 1984

Adair III United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002)

Braren United States v. Braren, 338 F.3d 971 (9th Cir. 2003), Nos. 02-35441, 02-35446

Procedural status note

United States v. Braren, 338 F.3d 971 (9th Cir. 2003), dismissed the appeal as unripe, vacated the district court's 2002 judgment in *Adair III*, and remanded with directions to enter an order staying all federal proceedings pending completion of the Oregon (Klamath Basin) Adjudication and related appellate review.⁷

This packet reproduces opinion text only. Apart from the procedural status note above, it contains no added legal analysis, commentary, or headnotes. Captions, citations, headings, paragraph order, and official reporter page breaks (shown as *NNN star pagination) are preserved as faithfully as the source text permits.

Prepared by Perplexity Computer · Compiled August 6, 2026

7. Caselaw Access Project — 338 F.3d 971 (official reporter text) — <https://static.case.law/f3d/338/cases/0971-01.json>

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United States v. Adair (Adair I)

478 F. Supp. 336 (D. Or. 1979)

Official reporter pages 336–350. Text reproduced from the Caselaw Access Project (Harvard Law School Library) static bulk-data release of the official reporter volume.¹

UNITED STATES, Plaintiff, and Klamath Indian Tribe, Plaintiff-Intervenor, v. Ben ADAIR et al., Defendants, and The State of Oregon, Defendant-Intervenor.

Civ. No. 75-914.

United States District Court, D. Oregon.

Sept. 27, 1979.

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^{*339}Timothy LaFrance, Richard B. Collins, Daniel H. Israel, Raymond Cross, Native American Rights Fund, Boulder, Colo., for plaintiff-intervenor Klamath Indian Tribe.

Hugh L. Biggs, Jere M. Webb, Davies, Biggs, Strayer, Stoel & Boley, Portland, Or., Theodore R. Conn, Conn & Lynch, Lakeview, Or., for defendants.

James A. Redden, Atty. Gen., James W. Durham, Jr., Deputy Atty. Gen., Timothy D. Norwood, Tort Litigation Supervisor, Salem, Or., for defendant State of Or.

OPINION

SOLOMON, District Judge:

In 1864, by treaty with the Klamath and Modoc Indians (Indians), the United States created the Klamath Indian Reservation (Reservation) in south central Oregon, where the Indians had lived and maintained a hunting, fishing, and gathering economy for more than a thousand years. From time to time, the Federal Government (Government) allotted parcels of Reservation land to individual Indians. Some allottees sold or leased their land to private persons, both Indian and non-Indian.

After 1864, the Government and the Indians began irrigating the Reservation to develop agriculture.

On August 13, 1954, Congress enacted the Klamath Termination Act, 68 Stat. 718, which terminated the Reservation. By 1973, all land which the Indians had held in common was either sold to private persons or acquired by the Government for national forest or wildlife refuge purposes.

This case concerns conflicting claims to water rights. The Government and two of its agencies (the Fish and Wildlife Service and the Forest Service) brought this action to determine the rights of parties with interests in the former Reservation lands to use the waters of the Williamson River system (River).

The Klamath Indians have lived for more than a thousand years in an area of south central Oregon east of the Cascade Mountains which includes the Klamath Marsh (Marsh). The largest settlement of Klamath Indians was located along the Williamson River in the vicinity of the Marsh.

Historically, the Klamath Indians depended on the Marsh and its surrounding rivers, lakes, and forests for food. There they fished, hunted waterfowl and game, and gathered edible plants. The Indians also depended on the area for clothing and building materials.

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1. Caselaw Access Project — 478 F. Supp. 336 (official reporter text) — <https://static.case.law/f-supp/478/cases/0336-01.json>

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Even now, hunting, fishing, and gathering in the area are important to the Klamath Indians.

On October 14, 1864, the Klamath Indians entered into a treaty with the United States. Under the Treaty, the Indians ceded their interest in more than 12 million acres of land to the United States. In return, the Government reserved 768,000 acres from the public domain and created the Reservation for exclusive occupation by the Indians.

Article I of the Treaty reserved to the Indians “the exclusive right of taking fish in the streams and lakes [of the Reservation], and gathering edible roots, seeds, and berries within its limits.”

Under Article II, the government agreed to pay \$80,000 during a period of 15 years to “promote the well-being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.”

The Government also agreed to make additional payments for personnel and materials needed to farm the Reservation lands.

The Treaty protected the Indians’ right to pursue their traditional culture and means of livelihood while encouraging them to develop agriculture.

After October 14, 1864, the Government held legal title to the Reservation lands for the benefit of the Indians. From time to time, the Secretary of the Interior allotted parts of the Reservation to individual Indians. Many of the allotments were later sold or leased as pasture, often to non-Indians.

After 1864, the Bureau of Indian Affairs and the United States Irrigation Service, ^{*340}along with individual Indians, began to develop irrigation systems on Reservation land to promote livestock grazing.

In 1918, the Government claimed an undetermined amount of water from the Williamson River system to irrigate approximately 73,000 acres in the Klamath Marsh area.

By 1953, more than a third of the 668 Klamath Indian families living on the Reservation supported themselves by agriculture.

In 1954, Congress terminated the Reservation. The Government agreed to purchase the interests in the Reservation lands of any Indian who chose to withdraw from enrollment in the Klamath Tribe. 78% (1,659 out of 2,113) withdrew. To pay them, the Government sold a large part of the Reservation lands. Title to the rest of the Reservation was transferred to the United States National Bank of Oregon (Bank), a private trustee, to hold and manage for the 474 Indians who chose to stay enrolled in the Tribe.

In 1961, the Government ended its supervision over the Tribe. Thereafter, with only a few exceptions, state and federal law applied to the Tribe and its members in the same way as to other citizens of Oregon.

In 1973, the Government acquired by condemnation most of the tribal land then held by the United States National Bank of Oregon. The rest of the trust land was sold to private persons. The trust is now in liquidation.

The Klamath Tribe no longer owns any land within the area involved in this action. *Forest Lands.*

Beginning in 1893, the Government withdrew from the public domain parcels of land adjacent to the Reservation and within the watershed of the Williamson River. The Government reserved these lands as national forest. The waters of the Williamson River system are needed to maintain and preserve the forest.

In August 1958, to extend the Winema National Forest, the Government purchased the Indian interest in part of the forest lands on the Reservation itself. In 1973, the Government acquired by condemnation other forest lands on the Reservation which it added to the Winema National Forest. *Wildlife Refuge.*

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In 1960, the Government purchased the Indian interest in approximately 15,000 acres of the Klamath Marsh. The Government reserved this land from the public domain and created the Klamath National Wildlife Refuge (Refuge). The rest of the Marsh is now in private ownership.

The Fish and Wildlife Service has a duty to maintain and develop the Refuge as an inviolate migratory-bird sanctuary.¹

The Fish and Wildlife Service wants to maintain the Refuge in its historic natural state, as wetlands to provide optimal conditions for wildlife and, in particular, for migratory birds.

Agricultural Lands.

The private parties to this action use most of this land for agriculture, and especially for cattle grazing. All of this land was originally part of the Reservation, and all private owners, both Indian and non-Indian, derive their title from conveyances by the Tribe or by individual Indian allottees.

Present state of the Marsh.

Much less water now reaches the Marsh than it did 75 years ago. Large areas of the Marsh have dried up. The number of migratory birds which use the Marsh has declined.

As the Marsh dries up, vegetation harmful to the growth of wildlife spreads. This leads to the further decline in the Marsh's capacity to support wildlife. Only about 10% of the Refuge is now open water. 75 years ago the proportion was 50%. A 50/50 balance is necessary to encourage the growth of animals and desirable vegetation. Unless the process is reversed, the Refuge will become meadowland unsuitable for waterfowl nesting, and will no longer serve its intended purpose as a wildlife refuge.

^{*341} *The Government Contends:*

1. When the Reservation was created, the Indians reserved their rights to use as much water as they needed to fulfill the purposes of the Reservation. *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

Here, the Government asserts that one of the purposes of the Klamath Reservation was to protect the Indians' traditional use of the Marsh and the forests in the Reservation. The Government asserts that this purpose cannot be fulfilled unless enough water flows through the Marsh to maintain it as wetlands, and flows through the forests to provide the Indians' traditional resources on a sustained-yield basis. The Government asks for a declaration that since 1864 no one has been entitled to divert or appropriate water from the River, if the diversion or appropriation would threaten the Marsh and forests.

2. When the Government purchased parts of the Marsh and Reservation forest lands in 1960 to create the Refuge and to extend the Winema National Forest, it acquired the Indians' rights to use as much water as necessary to maintain the Marsh as a natural wetlands, and to ensure that the forest could be used on a sustained-yield basis.

From 1864 to 1960, the Government held legal title to the Reservation for the benefit of the Indians. In 1960, in connection with the termination of the Tribe, the Government bought the Indians' beneficial interests in approximately 15,000 acres of the Marsh to create a migratory bird refuge.² The Government also bought the Indians' beneficial interest in most of the Reservation forest lands to extend the Winema National Forest.

In support of its second contention, the Government relies on the rule that when land is sold, appurtenant water rights pass with the land, unless a contrary intent is shown. The Government asserts that, in enacting the 1958 Act, Congress intended it to acquire the Refuge lands and the Indians' right to enough water from the River to keep the

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land in a natural wetlands state, and to ensure that the forest resources used by the Indians could continue to be used on a sustained-yield basis. The Government also claims it has the same water rights as the Indians because it uses the Marsh and forest lands in the same way that the Indians did before 1960.

3. When the Government acquired another part of the Klamath Indian forest lands in 1973 to extend the Winema National Forest, it obtained the Indians' appurtenant water rights.

When the Reservation was terminated in 1954, the Government transferred legal title to these forest lands to the Bank, as a private trustee. The Bank managed the forest for the Indians who elected to remain in the Tribe. The Government asserts that the parties to the conveyance intended appurtenant water rights to pass with the land and to be held for the benefit of the Indians. The Government contends that when Congress authorized condemnation of the land in 1973 to add to the Winema National Forest,³ Congress intended the Government to acquire any appurtenant water rights needed to maintain the land as a national forest.

The Government also contends that it enjoys the same rights to the water for this land as the Indians enjoyed, because the Government administers the forest in the same way as the Bank administered it for the Indians before 1973.

4. When the Government withdrew forest land adjacent to, but not a part of the Reservation in 1893, 1906, 1907, and 1930 for use as national forest, it reserved rights to use as much unappropriated water as necessary to fulfill the purposes of the national forest.

To support this contention, the Government asserts that when the United States^{*342} withdraws land from the public domain for a particular purpose, it generally reserves a right to use water necessary to fulfill the purpose of withdrawing the land. The Government relies on *Arizona v. California*, *supra*, and *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976), for its assertion that the priority date of this water right is the date the land was withdrawn.

5. The Government holds water rights in the Refuge and Winema National Forest necessary to protect the Indians' hunting and fishing rights.

By the Klamath Termination Act of 1954, Congress reserved the Indians' Treaty hunting, fishing and gathering rights and intended to maintain and protect fish and wildlife habitats on the land, because hunting and fishing rights are worthless without sufficient game, fish, and edible plants on the land. The prohibition of hunting within the Refuge is irrelevant, because proper maintenance of the Refuge ensures that sufficient wildlife will be available outside the Refuge where Indians may hunt.

6. The Government makes the following additional contentions on the water rights of private persons who acquired Reservation land:

First, individual Indian allottees or Indian purchasers acquired the appurtenant water rights which the Treaty reserved to the Indians in 1864. *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939); *Arizona v. California*, *supra*.

Second, non-Indian purchasers of Indian land also obtained reserved water rights with an 1864 priority date, but their rights are subject to loss by non-use or abandonment. Non-Indian purchasers are entitled to only as much water (1) as their Indian predecessors actually used for irrigation and domestic purposes when the land was conveyed, *and* (2) as the non-Indian purchaser "might with reasonable diligence place under irrigation." *United States v. Hibner*, 27 F.2d 909 (D.C.Idaho 1928). After the "reasonable diligence" period, the non-Indian purchasers are subject to the doctrine of prior appropriation.

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Under the Government's argument, if an Indian allottee never diverted water for farming or domestic use, the water rights of his non-Indian successor would depend wholly on the doctrine of prior appropriation.

7. The Government asks the District Court to retain jurisdiction after it enters a declaratory decree so that State action to implement the decree may be reviewed.

The Pre-Trial Order provides that the declaration will not bind "state officials as to decisions made in their official capacity affecting the rights or interests of non-parties to this litigation." The Government fears that state officials may take action which is inconsistent with the Court's declaration and adverse to the Government's declared rights. The Government therefore asks this court to retain jurisdiction.

8. Finally, the Government denies the defendant's contention that the Klamath River Compact is relevant to this action. The Compact is the agreement between Oregon and California for the division of Klamath River water between those states.

The United States is not a party to the Compact. The Government submits (a) that it cannot be bound by the Compact, but (b) that even if bound, the Compact is irrelevant here because this action involves a small amount of Klamath River water, and the exercise of the Government's rights would have no effect on the flow of water downstream to California. The Pre-Trial Order provides that this action will not decide the rights of any downstream user, state agencies included.

The Klamath Tribe contends:

1. It is entitled to enough River water to preserve the Marsh as a suitable wetlands habitat for fish and wildlife.

Under the Treaty, the Tribe reserved the exclusive right to hunt and fish on the Reservation. By reason of this reservation, the Tribe asserts that it reserved to itself as much water as it needed to fulfill the purposes of the Reservation, including the preservation of hunting and fishing rights.^{*343} *Winters v. United States, supra; United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956). Under *Winters*, Indian water rights prevail over any conflicting claims by other parties, including the United States and the State of Oregon, and the determination of Indian water rights is not subject to a balancing of interests.

2. The priority date of the Indians' hunting and fishing rights, and of the water rights needed to preserve hunting and fishing, is time immemorial.⁴

Indians have fished and hunted on the Reservation lands since time immemorial, and under the Oregon Territorial Act of 1848, 9 Stat. 323, the Government recognized the Indians' right to occupy and use these lands.

The 1864 Treaty confirmed their pre-existing rights to hunt and fish. In *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Court stated that the treaty right of taking fish was not a grant of right to the Indians but a reservation of rights already possessed and not granted away by them.

3. A non-Indian purchaser of Indian land is entitled to use a share of Tribal water only to the extent that his Indian predecessor actually used the water.

In making this contention, the Tribe concedes that *United States v. Ahtanum Irrigation District, supra*, is against them, but the Tribe argues that the 9th Circuit Court "adopted this position without the benefit of argument on the issue by the parties."

4. The Klamath Termination Act of 1954, which expressly preserved the Tribe's Treaty hunting and fishing rights, gave the Tribe implied rights to have enough water flow through the Reservation lands to preserve them as suitable

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habitat for fish and wildlife.

The State of Oregon contends:

1. No water rights attach to Indian hunting and fishing rights.

Like the individual landowner defendants, Oregon asserts that water rights are appurtenant to land, that a person cannot have water rights without a possessory interest in land, and that the Klamath Tribe does not have water rights because it no longer owns any land.

2. This court should not declare Indian water rights; it should let the Indians pursue ordinary tort remedies if any party interferes with their hunting and fishing rights by appropriating water.

3. The Tribe lacks standing to assert the hunting and fishing rights of its members.

4. The doctrine that when the Government withdraws land from the public domain for a particular purpose, it impliedly reserves water needed to fulfill that purpose, as enunciated in *Winters v. United States*, *supra*, applies only to land reserved from the public domain, and not to land acquired by purchase or condemnation.

Specifically, Oregon asserts that the Government cannot claim *Winters* doctrine water rights either for the Refuge or for the forest lands which were once part of the Reservation, because the Government acquired those lands by purchase or condemnation.

5. Oregon is entitled to Indian water rights appurtenant to Reservation land which Oregon acquired from Indian allottees, subject only to loss of those rights by abandonment. Oregon claims an 1864 priority date for these rights.

6. Oregon owns 92,000 acres of former Reservation land along with all appurtenant water rights, except those which it may have abandoned to the public.

The individual landowners contend:

They are entitled to the water rights which were reserved to the Indians by the Treaty with a priority date of 1864. *United States v. Powers*, *supra*; *Arizona v. California*, *supra*; *United States v. Ahtanum Irrig.* ³⁴⁴ *Distr.*, *supra*; *United States v. Hibner*, *supra*.

The individual landowners, in reply to the Government's claims and contentions, assert :

1. The Government is not entitled to an 1864 priority date for its water rights on the Refuge because the Government did not acquire beneficial title to the Refuge lands until 1960.

2. The *Winters* doctrine is not applicable to all Government land in this action, regardless of how acquired. The *Winters* doctrine applies only to land reserved from the public domain and which was never in private or State ownership. When the Government acquires land by purchase or condemnation, it gets only those water rights which are appurtenant to and pass with the conveyance of the land. Additional water rights can be acquired only in accordance with State law.

3. The Government when it set lands aside as a national forest outside the Reservation did not reserve water for fish conservation and recreational purposes; the Government's water rights on these lands are strictly limited under *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978).

4. The Klamath River Compact binds the United States and governs future acquisition of water rights by all parties to this action.

5. This court should not retain jurisdiction after it enters a declaratory judgment; the State court is the proper forum for the handling of all subsequent matters.

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In reply to the Klamath Tribe's claims and contentions, the individual landowners assert :

1. The Tribe has no water rights, because it does not own any land within the relevant area.

Water rights are always appurtenant to land.

When the Tribe disposed of its land, the Tribe and its members lost their water rights, even though, under *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), they retained their hunting and fishing rights.

2. The right to hunt and fish on public land does not entitle the Indians to require other parties to preserve public land as a suitable habitat for fish and wildlife. Congress never intended to impress the former Reservation lands with a “wilderness servitude.”

3. *Kimball v. Callahan* was wrongly decided. The Tribe has no hunting and fishing rights and lacks standing to assert those rights on behalf of its members.

Issues.

1. Should this court exercise jurisdiction to declare the water rights of the parties?

2. What rights are the Indians entitled to on the former Reservation:

- (a) hunting and fishing rights;
- (b) water rights;
- (c) individual rights;
- (d) tribal rights;
- (e) does the Tribe have standing to assert rights on behalf of individual Indians?

3. What are the water rights of the Government for:

- (a) the wildlife refuge;
- (b) the forest lands within the former Reservation;
- (c) the forest lands outside the former Reservation?

4. What water rights are non-Indian landowner defendants entitled to?

5. What water rights is the State of Oregon entitled to?

6. What are the priority dates of these rights?

7. What is the effect of the Klamath River Basin Compact on this action?

8. Should the court retain jurisdiction if it enters a declaratory judgment? Jurisdiction.

Oregon asserts that this court should not declare Indian water rights because the court will be prevented from balancing equities. *Cappaert v. United States*, 426 U.S. 128, 139, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). The remedy for the claims of the ^{*345}Indians that their hunting and fishing rights are interfered with is in tort where the competing equities of the parties may be balanced.

Tort remedies are not appropriate here. Hunting and fishing are an integral part of the Indians' traditional way of life. Damages would be difficult to assess and would be inadequate to compensate the Indians for the loss of their hunting and fishing rights. Before a court could grant tort relief, it would have to determine the rights of the Indians under federal law. I believe it is appropriate to declare those rights now. *The Indians' rights*.

(a) Hunting and fishing.

The Indians have hunted, fished, and gathered food on the Reservation lands since time immemorial.

Article I of the Treaty of 1864 secured for the Indians the exclusive right to fish and gather edible plants on the Reservation. That provision includes the right to hunt and trap. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. den.*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974) (*Kimball I*). This was not a grant of rights to the Indians, but a reservation of rights already possessed. *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

Treaty hunting and fishing rights for the Tribe, for all its members on the final tribal roll and for their descendants survived the termination of the Reservation. Klamath Termination Act, 25 U.S.C. §§ 564-564x; *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), *petition for cert. filed*, - U.S. -, 99 S.Ct. 2834, 61 L.Ed.2d 282 (1979) (*Kimball II*).

(b) Water rights.

The principal purpose of the Treaty was to provide an area for the exclusive occupation of the Indians so that they could continue to be self-sufficient. The Treaty provided two ways for the Indians to be self-sufficient.

First, it ensured that the Indians could continue their traditional way of life which included hunting, fishing, trapping, and gathering. Article I of the Treaty secured to the Indians their right to pursue their traditional way of life.

Second, it encouraged the Indians to adopt agriculture. Articles II to V provide for Government assistance; nevertheless, most of the Indians chose to retain their traditional way of life.

In my view, the provisions of Article I, particularly the protection of Indian hunting and fishing rights, were more important to the Tribe in 1864 than were the provisions of Articles II to V.

The Treaty should be construed liberally in favor of the Indians. *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939). Ambiguities and uncertainties in the Treaty should be resolved from the standpoint of the Indians. *Winters v. United States*, *supra*, 207 U.S. at 576, 28 S.Ct. 207.

When, by treaty, the Government withdraws land from the public domain and reserves it for a federal purpose, the Government impliedly reserves appurtenant unappropriated water to the extent needed to fulfill the purposes of the reservation. *Cappaert v. United States*, *supra*; *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939); *Winters v. United States*, *supra*. Here, the Government reserved land from the public domain and created the Klamath Reservation to preserve Indian hunting and fishing rights and to encourage agriculture.

The Treaty granted the Indians an implied right to as much water on the Reservation as was necessary to fulfill these purposes. The termination of the Reservation did not abrogate the Indians' water rights. Klamath Termination Act, § 14, 25 U.S.C. § 564m. The Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights. If the preservation of these rights requires that the Marsh be main^{*346}tained as wetlands and that the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessary to achieve those results.⁵

(c) Individual Indians.

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Individual Indians are entitled to the hunting and fishing rights secured by the Treaty, *Kimball I*, and this implies all of the water rights necessary to protect their hunting and fishing rights.

Some of the individual Indians in this action own land which was allotted or sold to them or to their ancestors. Many of these Indians are farmers; they need water to irrigate their land. In addition to water rights for the preservation of hunting and fishing rights, the Treaty also granted the Indians an implied right to use water necessary for agriculture.

When parts of the Reservation were allotted to individual Indians, they acquired the right to use a portion of the tribal waters essential for cultivation. *United States v. Powers, supra*. Indian allottees were not required to appropriate water within any specific period of time, but they could appropriate it as the need arose. Their Indian successors in interest acquired the allottees' water rights to the same extent as if the allottees still possessed the land. *United States v. Ahtanum Irrigation District, supra*.

The individual Indian landowners are entitled to use water essential to their agricultural needs when those needs arise. This right, however, is subject to the superior right of other Indians to use the water for the preservation of hunting and fishing on the Reservation lands.

(d) The Tribe's rights.

The Tribe, when it possessed land, possessed hunting and fishing rights and also water rights. Now the Tribe no longer possesses land within the former Reservation.

The defendants contend that water rights are always appurtenant to land; when the Tribe disposed of its land, the Tribe also relinquished all its water rights.

This contention overlooks the nature of the connection between Indian water rights and Indian hunting and fishing rights. The Indians obtained their reserved right to the water they need to cultivate their land from Article II of the Treaty. Their other rights to water come from the hunting and fishing rights reserved to them in Article I. Without sufficient water to preserve fish and wildlife on the Reservation lands, Indian hunting and fishing rights would be worthless.

The Court of Appeals in *Kimball v. Callahan, supra*, held that Indian hunting and fishing rights survived the termination of the Reservation.

Oregon contends that, under *Kimball v. Callahan*, hunting and fishing rights belong to individual Indians only and not to the Tribe. For this contention they rely on one sentence in a note:

"Treaty rights to hunt and fish are, however, rights of the individual Indians." 493 F.2d 564, 569 n.9.

This sentence is taken out of context. When considered with the text, it merely means that the individuals retained their hunting and fishing rights even after they withdrew from the Tribe.

The Court did not say that the Tribe had no hunting or fishing rights after the Reservation was terminated. In fact, in *Kimball II*, the Court said that

"*Kimball I* held that the Act did not abrogate tribal treaty rights of hunting, fishing, and trapping." 590 F.2d 768, 776.

The termination of the Reservation and the disposition of all Tribal land did not dispossess the Tribe of water rights essential to protect hunting and fishing rights.

(e) Can the Tribe assert the rights of its members?

The defendants contend that the Tribe lacks standing to assert hunting and fishing rights on behalf of its members. There is no merit to this contention.

The Tribe has the same Treaty hunting and fishing rights and water rights as its members. Even if the Tribe had no hunting and fishing or water rights of its own, it would still have standing to assert those rights on behalf of its members. See *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339 (E.D.Wash.1978).⁶ *The Government's water rights*.

(a) Wildlife Refuge and Forest lands within the former Reservation.

The Government contends that it acquired the Indians' water rights for the land by purchase in 1960⁷ and by condemnation in 1973.⁸ Congress, in authorizing these acquisitions, intended the Government to acquire Indian rights to a streamflow which would be sufficient to keep the Refuge lands in their natural wetlands state and which would also ensure that the Indians' traditional forest resources could be used on a sustained-yield basis.

The Government also contends that it is entitled to the Indians' reserved water rights under the *Winters* doctrine because the Government uses the lands for the same purposes as the Indians used them when the Reservation existed. Defendants disagree. They assert that the *Winters* doctrine applies only to land reserved from the public domain, and does not apply to land acquired by purchase or condemnation.

It is unnecessary to decide these questions. The protection of the Indians' hunting and fishing rights requires a natural streamflow through both the Marsh and forest lands on the former Reservation. The Indians' use of their rights to that streamflow will ensure that enough water flows through the Refuge and through the Winema National Forest within the former Reservation to fulfill the Government's purposes for those lands.

It is therefore unnecessary to issue a separate declaration of Government water rights for the Refuge and forests of the Reservation.

(b) Forest lands outside the Reservation.

The Government withdrew these lands from the public domain for use as a national forest. Under the *Winters* doctrine, the Government acquired reserved rights to use as much unappropriated water as necessary to fulfill the purposes of the national forest.

The defendants do not deny that the *Winters* doctrine applies to this part of the Winema National Forest. Nevertheless, they contend that even under *Winters* the Government may not appropriate water for fish conservation or recreational purposes. Defendants rely on *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978). There, the Government in 1899 withdrew land from the public domain for the Gila National Forest. The state court held that the Government was entitled to water essential for the purposes for which the land was withdrawn, but those purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing. The United States Supreme Court affirmed. It held that, before 1960, Congress intended national forests to be reserved for only two purposes: "to conserve the water flows and to furnish a continuous supply of timber for the people."

In 1960, Congress enacted the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 *et seq.*, which extended the purposes for which⁹ national forests are reserved. The purposes now include recreation, range, timber, watershed, and wildlife and fish conservation. But the Supreme Court held that the 1960 Act was not retroactive and did not apply to the Gila National Forest.

Here, the Government withdrew land for national forest in 1893, 1906, 1907, and 1930. I agree with the defendants that the 1960 Act does not apply. The Government is only entitled to water which was unappropriated when the forest lands were reserved and which is essential for timber production and conservation of water flow.

1. Caselaw Access Project — 478 F. Supp. 336 (official reporter text) — <https://static.case.law/f-supp/478/cases/0336-01.json>

2. Justia — 478 F. Supp. (reporter volume index) — <https://law.justia.com/cases/federal/district-courts/FSupp/478/>

The rights of non-Indian landowners on former Reservation lands.

The non-Indian landowner defendants are successors in interest to Indian allottees or Indian purchasers of former Reservation land. They claim rights to water which the Treaty impliedly reserved to the Indians for domestic and agricultural purposes. All of the individual landowner defendants contend that rights under the *Winters* doctrine were appurtenant to Indian allotments and passed to the successors of Indian allottees, whether the successors were Indians or non-Indians. They rely on *United States v. Powers*, *supra*; *United States v. Ahtanum Irrig. Distr.*, *supra*; *United States v. Preston*, 352 F.2d 352 (9th Cir. 1965); and *United States v. Hibner*, 27 F.2d 909 (D.C.Idaho 1928).

Hibner was the only case which considered the precise issue involved in this case; namely, what water rights an Indian allottee can convey to his non-Indian successors in interest.

In *Powers*, the Government, for the Crow Indians, sought to prevent non-Indian successors to Indian allottees from appropriating irrigation water. The Supreme Court held that the Crow Reservation treaty contemplated farming by individual Indians and the treaty impliedly reserved water for the equal benefit of tribal members. When the Reservation was divided into allotments, the allottees and their successors acquired the right to use a portion of the tribal waters for irrigation. The Court did not consider the extent or nature of the non-Indian defendants' right to use tribal waters for irrigation.

In *Ahtanum*, the issue was the validity of an agreement which allocated water on the Yakima Reservation between the tribe and non-Indian successors to Indian allottees. The Court held that the non-Indian successors had a right to share in the water the Government diverted to irrigate the Reservation "just as if their lands were still in the possession of the original allottees."

Under *Ahtanum*, the non-Indian successor of an Indian allottee acquires a proportionate share of the water which the Indians diverted for the allottee's land; but the Court did not decide whether the successor also acquires a share of the water reserved to the Indians, but which had not been diverted by the time the allottee conveyed his land to his non-Indian successor.

In *United States v. Preston*, the Court held that an Indian living on a tribal reservation owns a proportionate share of the tribal waters "the minute the reservation is created, and his rights become appurtenant to his land the minute he acquires his allotment." 352 F.2d at 358.

In *Hibner*, as in this case, the District Court was asked to determine "the priority and amount of water to which the Indian lands . . . and those parties who have succeeded to the Indian allotments" are entitled.

The court held that non-Indian successors to Indian allottees acquire "the same character of water right with equal priority as those of the Indians," except that: (1) Indian landowners retain their water rights regardless of whether they use them, but non-Indians either use their rights or lose them; and (2) Indians may appropriate their share of reserved tribal water at any time; non-Indians acquire a water right for the actual acreage under irrigation at the time title passed from the Indians, and for any additional acreage which the non-Indian may with reasonable diligence place under irrigation. Non-Indians enjoy the same priority dates as their Indian predecessors for all appropriated water.

^{*349} *Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (E.D.Wash.1978), involved a similar problem. The court was asked to determine water rights of non-Indian successors to Indian allottees. In a carefully reasoned opinion, Chief Judge Neil reached a different conclusion from *Hibner*. Under the *Winters* doctrine, water is impliedly reserved to ensure that land set aside as a permanent Indian homeland will have the water necessary for the purposes of the reservation. Judge Neil held that the rationale of the *Winters* doctrine no longer applies after the land passes to non-Indians.

I am impressed with Judge Neil's discussion of the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, which permits sales of allotments to non-Indians⁹. Nevertheless, I prefer *Hibner* for two reasons. First, *Hibner* would advance the General Allotment Act's purpose of permitting Indians to sell their land on equal terms with non-Indians. It may be difficult for an Indian to sell his land if the conveyance to a non-Indian carries with it a right to only the amount of water actually appropriated at the time of the conveyance. This is particularly true if the priority date is the actual date of appropriation, and the appropriation was recent.

Second, *Hibner* is more consistent than *Walton* with *Ahtanum* which held that non-Indian successors are entitled to a rateable share of Indian irrigation waters "to the same extent as if their lands were still held by the original allottees." Under *Walton*, a non-Indian successor would have no right to a rateable share, but only to the amount actually used by his allottee-predecessor. Even that amount may be taken from him by an Indian landowner, who would enjoy an earlier priority date for reserved water rights.

I hold that a non-Indian successor to an Indian allottee acquires an appurtenant right to water for the actual acreage under irrigation when he gets title from his Indian predecessor. The priority date of that right is 1864.

The non-Indian also acquires a right, with an 1864 priority date, to water for additional acreage which he, with reasonable diligence, may place under irrigation. Otherwise, if the priority date of this right and the date of actual appropriation were the same, the additional water might be taken from him at any time by an Indian with reserved water rights.

Once land passes out of Indian ownership, all subsequent conveyances are subject to the doctrine of prior appropriation.

Rights of the State of Oregon.

(a) Oregon has authority, under appropriate standards, to regulate for conservation purposes the Indians' hunting and fishing rights on the former Reservation. *Kimball II*, 590 F.2d at 778.

(b) Oregon's rights to water for land it acquired by succession to Indian allottees are the same as those of the individual non-Indian landowners in this action.

(c) Oregon claims title to approximately 92,000 acres on the former Reservation. It asserts that the Swamp Lands Act of 1850, 43 U.S.C. § 982 *et seq.*, as extended to Oregon by statute in 1860, 43 U.S.C. § 988, entitled it to claim swamplands within the State. In 1902, Oregon claimed 92,000 ^{*350} acres on the Reservation. The United States Department of the Interior rejected the claim. Oregon contends that the rejection was improper and that patents should have issued to the State.

Oregon also claims "inchoate title" to the land and the right to appropriate essential water, subject to prior appropriation by others. Oregon denies that the Government and the Indians were ever entitled to appropriate water for these 92,000 acres.

The Government asserts that, regardless of whether it was right to reject the 1902 claim, Oregon did not pursue the claim, and therefore never acquired valid title to the land. The Government also asserts that Oregon's claim of inchoate title has no merit.

The facts on Oregon's claim are insufficiently developed for this court to determine title to the 92,000 acres. If Oregon wants to pursue this claim, it should file a separate action.

Priority dates of the parties' water rights.

(a) Indian hunting and fishing rights.

1. Caselaw Access Project — 478 F. Supp. 336 (official reporter text) — <https://static.case.law/f-supp/478/cases/0336-01.json>

2. Justia — 478 F. Supp. (reporter volume index) — <https://law.justia.com/cases/federal/district-courts/FSupp/478/>

By the Treaty of 1864, the Indians reserved hunting and fishing rights which they had exercised for more than a thousand years. The priority date of these rights, and of the Indians' water rights which are necessary to preserve their hunting and fishing rights, is time immemorial.

(b) Indian irrigation rights.

These rights were granted to the Tribe and its members by the Treaty. The priority date of Indian rights to water for irrigation and domestic purposes is 1864.

(c) The Government's water rights for the Winema National Forest outside the Reservation.

The Government withdrew these parcels of land for use as national forest in 1893, 1906, 1907, and 1930. The date on which the Government withdrew each parcel is the priority date of the Government's water rights for that land.

(d) The rights of the non-Indian landowners and the State of Oregon to water for irrigation and domestic purposes.

For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians. *The Klamath River Basin Compact*.

The individual defendants contend that the Government is not entitled to *Winters* doctrine rights for the Refuge and national forest within the Reservation. They assert that when the Government acquired those lands by purchase and condemnation, it acquired only the appurtenant water rights which accompanied conveyance of the land; acquisition of additional water rights after 1957 is governed by the Klamath River Basin Compact, 71 Stat. 497.

I find that it is unnecessary in this action to determine the Government's water rights for the Refuge and national forest within the Reservation. I therefore hold that there is no need to determine the Compact's relevance to acquisition of water rights by the Government after 1957.

Retention of jurisdiction.

In my view it may be necessary for this court to supervise the distribution of water consistent with this opinion and to pass on the many problems which may arise out of the allocation of water. It is therefore appropriate for this court to retain jurisdiction for a period of five years from the date of judgment or, if appealed, from the date of the final judgment on appeal.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

Counsel for the individual defendants shall submit a proposed form of judgment.

Footnotes (as printed in the official reporter)

¹ Act of August 23, 1958, 72 Stat. 816; § 4, Act of March 16, 1934, 48 Stat. 451.

² Act of August 23, 1958, 72 Stat. 816, as amended, 73 Stat. 477, 25 U.S.C. § 564w.

³ Act of August 16, 1973, 87 Stat. 349, 25 U.S.C. § 564w-2.

⁴ This contention is limited to hunting and fishing rights. The Tribe does not assert that Indian irrigation rights date from time immemorial.

⁵ I express no opinion on whether the Indians are entitled to require the Government to preserve their hunting and fishing rights. The Government's current uses of the Marsh and forests of the Reservation are consistent with the Indians' claims in this action; there is no need to decide that question now.

⁶ The Tribe does not assert irrigation rights for individual landowners. They are parties to this action and assert their own claims as defendants. It is therefore unnecessary to decide whether the Tribe has standing to assert the irrigation rights of its members.

⁷ Act of August 23, 1958.

⁸ Act of August 16, 1973.

⁹ Judge Neil held that the General Allotment Act “necessarily implies that some water may be sold with the land; otherwise the right to sell the land would be relatively worthless. The Act was designed to put Indians on an equal footing with the white man by allowing individual Indians to own fee title to land In providing fee ownership, Congress certainly intended that the Indian could sell his land like any other owner. Providing for alienability of implied reserved water rights is not necessary to accomplish this purpose. The General Allotment Act requires only that the allottee be permitted to convey a water right with his fee to the same extent as a non-Indian homesteader” “In keeping with the purpose of the General Allotment Act, the allottee, like the non-Indian homesteader, must be permitted to convey with his land the water right which he was using at the time of the conveyance, with a priority date of the first appropriation of those waters. The priority date must be the date of actual appropriation rather than that of the founding of the reservation, for no part of the Indian allottee’s implied water rights may be conveyed to a non-Indian.” 460 F.Supp. 1320 at 1328.

United States v. Adair (Adair II)

723 F.2d 1394 (9th Cir. 1983), as modified on denial of rehearing Jan. 24, 1984

Official reporter pages 1394–1420. Text reproduced from the Caselaw Access Project (Harvard Law School Library) static bulk-data release of the official reporter volume.³

UNITED STATES of America, Plaintiff-Appellee, and Klamath Indian Tribe, Plaintiff-Intervenor-Appellee, v. Ben ADAIR, et al., Defendants-Appellants, and The State of Oregon, Defendant-Intervenor-Appellant.

Nos. 80-3229, 80-3245, 80-3246 and 80-3257.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 6, 1981.

Withdrawn from Submission July 15, 1983.

Resubmitted Nov. 14, 1983.

As Modified on Denial of Rehearing Jan. 24, 1984.

Decided Nov. 15, 1983.

^{*1397}Richard B. Collins, Kim Jerome Gottschalk, Boulder, Colo., for plaintiff-intervenor-appellee.

Stephen D. Dillon, Santa Fe, N.M., amicus curiae, for New Mexico.

Robert L. Klarquist, Dept. of Justice, Washington, D.C., for U.S.

Charles F. Adams, Jere M. Webb, Stoel, Rives, Boley, Fraser & Wyse, Portland, Or., Theodore R. Conn, Lakeview, Or., Jan P. Londahl, Asst. Atty. Gen., Salem, Or., for State of Or.

Andrew P. Kerr, David Sweeney, Gilbertson, Brownstein, Sweeney, Kerr & Grim, Portland, Or., for defendants-appellants.

Before KILKENNY, GOODWIN and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

In 1975 the United States filed suit in district court, pursuant to 28 U.S.C. § 1345 (1976), 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 intervened as a plaintiff and the State of Oregon as a defendant.

After a trial on stipulated facts, supplemented by exhibits and affidavits, the district court issued an opinion declaring: (1) the Tribe and its members have water rights sufficient to maintain their treaty rights to hunt and fish on the former reservation; (2) individual Indian landowners have water rights, subject to the paramount rights of the Tribe, sufficient to maintain agriculture on their lands; and, (3) individual non-Indian landowners could acquire the water rights of their predecessor Indian landowners. The State of Oregon and the individual landowners filed a timely appeal from the district court decision, as did the United States and the Tribe.

Our jurisdiction rests on 28 U.S.C. § 1291 (1976). We modify the district court's judgment in part, and as modified, affirm.

I

BACKGROUND

A. History of the Litigation Area.

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3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

This suit concerns water rights in a portion of the Williamson River watershed. The Williamson River is part of the larger Klamath River watershed of Southern Oregon and Northern California. That part of the Williamson River watershed involved in this litigation drains an area of low, forested mountains, flat, grassy valleys and marshes east of the Cascade Range in south-central Oregon. The average rainfall in the area is low; summers are dry and winters are severe.

The major feature of the subject area is a large flat valley historically known as the Klamath Marsh. As the Williamson flows into the north end of this valley, it spreads out and soaks into the porous, pumice soil. During the wet months of the year, open water and aquatic vegetation cover the lower portion of the valley, the water to a depth of a few feet. The remainder of the valley is grassland. During dry summer months, as the water recedes, the grassland in the valley increases. This fluctuating marsh has been an important feeding and resting area for migratory ducks, geese and other waterfowl for thousands of years. In addition, the Marsh has always supported a variety of other indigenous wildlife. More recently, large parts of the Klamath Marsh have been used for grazing cattle.

The Klamath Indians have hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River for over a thousand years. In 1864 the Klamath Tribe entered into a treaty with ^{*1398}the United States whereby it relinquished its aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres in south-central Oregon. This reservation included all of the Klamath Marsh as well as large forested tracts of the Williamson River watershed. Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707. Article I of the treaty gave the Klamath the exclusive right to hunt, fish, and gather on their reservation. *Id.*; *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), *cert. denied*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974) (*Kimball I.*) Article II provided funds to help the Klamath adopt an agricultural way of life. 16 Stat. 708.

For 20 years, until 1887, the Klamath lived on their reservation under the terms of the 1864 treaty. In 1887 Congress passed the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-34, 348, 349, 381 (1976)), which fundamentally changed the nature of land ownership on the Klamath Reservation. Prior to the Act, the tribe held the reservation land in communal ownership. Pursuant to the terms of the Allotment Act, however, parcels of tribal land were granted to individual Indians in fee. Under the allotment system, approximately 25% of the original Klamath Reservation passed from tribal to individual Indian ownership. Over time, many of these individual allotments passed into non-Indian ownership.

The next major change in the pattern of land ownership on the Klamath Reservation occurred in 1954 when Congress approved the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564w (1976)). Under this Act, tribe members could give up their interest in tribal property for cash. A large majority of the tribe chose to do this. In order to meet the cash obligation, in 1961, the United States purchased much of the former Klamath Reservation. The balance of the reservation was placed in a private trust for the remaining tribe members. See *Kimball I.*, 493 F.2d at 567 (describing termination process); *Klamath and Modoc Tribes v. United States*, 436 F.2d 1008, 1010-13 (Ct.Cl.) (same), *cert. denied*, 404 U.S. 950, 92 S.Ct. 271, 30 L.Ed.2d 267 (1971). In 1973, to complete implementation of the Klamath Termination Act, the United States condemned most of the tribal land held in trust. Payments from the condemnation proceeding and sale of the remaining trust land went to Indians still enrolled in the tribe. This final distribution of assets essentially extinguished the original Klamath Reservation as a source of tribal property.

Even though the Klamath Tribe no longer holds any of its former reservation, the United States still holds title to much of the former reservation lands. In 1958 the Government purchased approximately 15,000 acres of the Klamath Marsh, the heart of the former reservation, to establish a migratory bird refuge under the jurisdiction of the United States Fish and Wildlife Service. Pub.L. No. 85-731, 72 Stat. 816 (1958) (codified as amended at 25 U.S.C. § 564w-l

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

(1976)). In 1961 and again in 1973, the Government purchased large forested portions of the former Klamath Reservation. This forest land became part of the Winema National Forest under the jurisdiction of the United States Forest Service. 25 U.S.C. §§ 564w-l(d), 564w-2 (1976). By these two purchases, the Government became the owner of approximately 70% of the former reservation lands. The balance of the reservation is in private, Indian and non-Indian, ownership either through allotment or sale of reservation lands at the time of termination.

B. Proceedings in the District Court.

In September of 1975, the United States filed suit in federal district court seeking a declaration of water rights within the Williamson River drainage above the “reef” near Kirk, Oregon.¹ In January of 1976,^{*1399} the State of Oregon initiated formal proceedings under state law to determine water rights in the Klamath Basin including that portion of the Williamson River drainage covered by the Government’s suit. See Or.Rev.Stat. §§ 539.010-539.110 (1979). Later in 1976, the State of Oregon moved to intervene as a defendant in the United States suit. The Klamath Tribe also moved to intervene in the federal suit as a plaintiff. Both motions were granted. Subsequently, the State, joined by the individual defendants, moved for dismissal of the federal court water rights adjudication in favor of the state proceeding under the rule announced by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The district court in effect denied the defendants’ motion to dismiss when on November 14, 1977, it entered a Pretrial Order to govern the conduct of the federal suit.

This order, in listing the issues to be decided, significantly limited the nature of the federal proceeding. The district court did not agree to decide any question concerning the actual quantification of water rights. The questions listed fell within three basic categories: (1) whether water rights had been reserved for the use of Klamath reservation lands in the 1864 treaty; (2) whether such rights passed to the Government and to private persons who subsequently took fee title to reservation lands; and (3) what priorities should be accorded the water rights of each of the present owners and users of former reservation lands. Although the district court agreed to specify the proper method for measuring the reserved water rights originally attached to the reservation, it declined to quantify that measure. Rather, it declared that “[a]ctual quantification of the rights to the use of waters of the Williamson River and its tributaries within the litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of 43 U.S.C. § 666 [the McCarran Amendment].”

Pursuant to the terms of the Pretrial Order, the district court determined the priority of water rights among the litigants as follows: (1) the Klamath Tribe Indians have a water right, with a priority date of time immemorial, “to as much water on the Reservation lands as they need to protect their hunting and fishing rights,” *United States v. Adair*, 478 F.Supp. 336, 345 (D.Or.1979); (2) this Indian water right is coterminous with the water right claimed by the United States as a successor land owner, and therefore renders it unnecessary to determine whether the right has been transferred to the United States, *id.* at 347; (3) those lands now owned by the United States outside the former reservation carry a water right, with priority from the date of withdrawal from the public domain, sufficient to meet the forest purposes of the withdrawal, *id.* at 348; (4) individual Indians who still own former reservation lands have water rights, with priority dating from the 1864 treaty, “to use water essential to their agricultural needs ... subject to the superior right of other Indians to use the water for the preservation of hunting and fishing ...,” *id.* at 346; and, (5) individual non-Indians who own former reservation lands have a water right “to water for the actual acreage under irrigation when [they received] title from [their] Indian predecessor[s]. The priority date of that right is 1864. [These individual non-Indians also acquired] a right, with an 1864 priority date, to water for additional acreage which ... with reasonable diligence, may [be] place[d] under irrigation.” *Id.* at 349.

The State of Oregon and the individual defendants appeal from the district court’s^{*1400} decision. They argue, first, that the district court should have dismissed the federal suit, and second, that the district court erroneously awarded

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

water rights to the Tribe and the United States as the Tribe's successor. The United States and the Tribe also appeal; they argue that the district court erroneously awarded water rights to non-Indian successors of Indian landowners.

We first consider whether the district court should have dismissed this suit under the *Colorado River* doctrine.

II

COLORADO RIVER ABSTENTION

A. Background: The Colorado River Doctrine.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court upheld a district court's dismissal of an action for federal adjudication of water rights in favor of a contemporaneous state adjudication. In *Arizona v. San Carlos Apache Tribe of Arizona*, the Court, following *Colorado River*, made clear its view that in most cases a federal court should defer to a contemporaneous and comprehensive state water rights adjudication because "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute." _ U.S. at _, 103 S.Ct. at 3216. See *Arizona v. San Carlos Apache Tribe of Arizona*, _ U.S. _, 103 S.Ct. 3201, 3216, 77 L.Ed.2d 837 (1983). The course of our review and analysis in this case is necessarily determined by the factors found controlling in those two cases.

Plainly, the district court had jurisdiction. Federal courts have jurisdiction under 28 U.S.C. § 1345 (1976) to adjudicate the water rights claims of the United States. *Cappaert v. United States*, 426 U.S. 128, 145-46, 96 S.Ct. 2062, 2072-73, 48 L.Ed.2d 523 (1976). While the Court in *Colorado River* pointed out that "state court[s] [have] jurisdiction over Indian water rights under the [McCarran] Amendment," 424 U.S. at 809, 96 S.Ct. at 1242, this statement does not imply that state courts have *exclusive* jurisdiction over such rights. In fact, the *Colorado River* Court made this point explicit when it held that "the McCarran Amendment in no way diminished federal district court jurisdiction under § 1345 and ... the District Court had jurisdiction to hear this case." *Id.* In *San Carlos Apache Tribe*, the Supreme Court reaffirmed that the McCarran Amendment did not do away with federal jurisdiction over water rights claims brought under section 1345 or section 1362. See _ U.S. at _ & n. 10, 103 S.Ct. at 3210 & n. 10.²

The *Colorado River* doctrine is an exception to the general rule that where a district court has statutory jurisdiction, it ^{*1401}has a "virtually unflagging obligation" to exercise that jurisdiction. *Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246; see *England v. Board of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 464-65, 11 L.Ed.2d 440 (1964).³ We read *Colorado River* and *San Carlos Apache Tribe* to counsel abstention in the interest of "wise judicial administration," despite that obligation, in the majority of water rights adjudications.⁴

^{*1402}The Court, however, has emphasized that its decision in *Colorado River* was not intended to preclude all adjudication in federal court of water rights arising under federal law. See *San Carlos Apache Tribe*, _ U.S. at _, 103 S.Ct. at 3215. The Court recognized in *Colorado River* that the circumstances justifying dismissal of a federal suit for reasons of wise judicial administration "are considerably more limited than the circumstances appropriate for abstention." 424 U.S. at 818, 96 S.Ct. at _.⁵ The Court concluded: "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19, 96 S.Ct. at 1247; accord *Moses H. Cone Memorial Hospital v. Mercury Construction*, _ U.S. _, 103 S.Ct. 927 at 937, 74 L.Ed.2d 765. In *San Carlos Apache Tribe*, the Court's analysis emphasized the importance, in making this judgment, of avoiding "the possibility of duplicative litigation, tension and controversy between federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights." Slip op. at 22. With these policies in mind, we turn to a review of the district court's "carefully considered judgment" in light of the facts presented to the court.

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

B. Standard of Review

Our review is limited to a determination of whether the district court abused its discretion in proceeding to decide rather than dismiss this case.⁶ In *Will v. Calvert*^{*1403} *Fire Insurance Co.*, 437 U.S. 655, 664, 98 S.Ct. 2552, 2558, 57 L.Ed.2d 504 (1978), the Supreme Court stated that the decision to dismiss for reasons of wise judicial administration is one “largely committed to the discretion of the district court.” See also *Moses H. Cone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 938; *Cf. Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 495, 62 S.Ct. 1173, 1175-76, 86 L.Ed. 1620 (1942) (decision whether to abstain from exercising federal jurisdiction in light of pending state proceeding is committed to district court’s discretion). In the present case, therefore, we will not set aside the district court’s decision to exercise its jurisdiction unless we have a definite and firm conviction that the district court committed a clear error of judgment in concluding that exceptional circumstances requiring dismissal were not presented.⁷ *Ander*^{*1404} *son v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir.1976). Accord, *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir.1981); *United States v. Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir.1980). We conclude that the district court did not abuse its discretion by choosing to determine the federal law priorities among water rights in this suit.

C. Analysis of the District Court Decision

The state of Oregon and the individual defendants argue that the district court’s exercise of jurisdiction fragments the adjudication of water rights in the Williamson River, contrary to the policy of the McCarran Amendment. The United States and the Tribe argue that the district court decision addresses a discrete water rights issue in a context that does not fragment the state general stream adjudication. They argue further that the district court judgment easily can be integrated into the state proceeding with no loss of efficiency.

Because of the posture in which this case has reached us, and because the chief goal of abstention under the *Colorado River* doctrine is the conservation of state and federal judicial resources, see *San Carlos Apache Tribe*, _ U.S. at _, 103 S.Ct. at 3215, we hold that, on the facts of this case, the district court did not abuse its discretion by proceeding to decide, rather than dismiss, the federal law questions presented to it by the United States’ suit. Indeed, were we to rule otherwise, and erase the district court’s careful and time-consuming consideration of the federal water rights questions presented by this suit, thereby necessitating relitigation of the same issues in state court, we would, in effect, “throw the baby out with the bath” and create precisely the duplication and waste of judicial effort that *Colorado River* abstention and the McCarran Amendment are designed to avoid.

The Supreme Court stated in *San Carlos Apache Tribe* that:

Colorado River, of course, does not require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication. Certainly, the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action. Moreover, it may be in a particular case that, at the time a motion to dismiss is filed, the federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort. See *Colorado River*, 424 U.S. at 820 [96 S.Ct. at 1247-1248]; *Moses H. Cone Hospital*, 460 U.S. at _ [103 S.Ct. at 937]. Finally, we do not deny that, in a case in which the arguments for and against deference to a state adjudication were otherwise closely matched, the fact that a federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights should be figured into the balance.

_ U.S. at _, 103 S.Ct. at 3215 (emphasis added). In its present posture, this case, in our view, presents the kind of circumstances recognized by the Supreme Court as features of a particular suit that tip the balance against dismissal of a federal adjudication of Indian water rights even in the face of a contemporaneous but nascent state proceeding.

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

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1. “Stay” of State Proceedings.

At the time the United States filed this action in the district court in September of 1975 there was no contemporaneous state proceeding of any kind to adjudicate water rights in the upper Williamson River watershed. Some months after the United States filed its suit in federal court, however, the Oregon State Water Resources Director issued a notice announcing that on Sept. 1, 1976, he would “begin an investigation of the flow and use of waters of the Klamath River and its tribu^{*1405}taries” Under the Oregon scheme for adjudicating water rights, such a notice of investigation is one of the prerequisites to a state court determination of water rights. In addition, the Water Resources Director, after investigation, must decide that the “facts and conditions justify” making a determination of water rights. See Or.Rev. Stat. 539.020 (1981). At the time the district court ruled on defendants’ motion to dismiss the federal suit, none of the preliminary steps in the Oregon adjudication had been completed.⁸

Of equal or greater importance to our decision in this case, however, is the fact that 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. Indeed, the information-gathering stage of the procedure is not yet complete. In effect, the state proceeding has been stayed during the pendency of this federal suit. See *San Carlos Apache Tribe of Arizona* at __, 103 S.Ct. at 3215.⁹

2. Duplication and Waste of Judicial Resources That Would be Occasioned by Dismissal of the Federal Suit.

As the Supreme Court in *San Carlos Apache Tribe* warned, “in a particular case ... the federal suit at issue [may be] well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort.” At __, 103 S.Ct. at 3215.¹⁰ It is our opinion that this case presents precisely such a situation. First, we note that the district court carefully tailored its exercise of jurisdiction to decide only the priority among water rights created under federal law. See *infra* Section 11(C)(1)(c); see also *Moses H. Gone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 941. Second, the contemporaneous state proceeding for adjudicating water rights was, and still is, nascent. Finally, the district court has taken evidence, heard extensive argument from all of the parties, and developed a multi-volumed record on which to base its decision of the water rights questions presented by this case. Both the individual defendants as well as the intervenor, State of Oregon, have been offered, and have taken, a full opportunity to participate in all aspects of this litigation. The district court’s determination of water rights is more than “well enough along,” it is complete. Given this factual setting, it is clear to us that neither the policies of the McCarran Amendment, nor the interest of wise judicial administration would be served by a decision from this court reversing and vacating the district ^{*1406}court’s judgment without reaching the merits. See *San Carlos Apache Tribe*, at __, 103 S.Ct. at 3214.

3. The District Court’s Adjudication of Indian Water Rights.

In its Pretrial Order, the district court carefully outlined the issues it would decide and those it would leave to subsequent state adjudication. The court limited its determination to ordering the priority among reserved water rights arising under federal law. The district court explicitly anticipated that “[a]ctual quantification of the [reserved] rights to use of the waters of the Williamson River and its tributaries within the [federal] litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of [the McCarran Amendment].”

In so limiting its exercise of jurisdiction, the district court avoided passing on questions of state water law and indeed ruled only on those questions involving application of the federal Indian law doctrine of reserved water rights. Far from improperly intruding on the role of the state court, we find that in exercising federal jurisdiction in this fashion the district court coordinated its adjudication of water rights with adjudication by the state court so as to

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allow each forum to consider those issues most appropriate to its expertise.¹¹

In addition, while this case was not filed initially by the Klamath Tribe under the ^{*1407}provisions of 28 U.S.C. § 1362, the Tribe intervened on its own behalf shortly after the United States filed suit. Such intervention was quite proper since, had the Tribe not intervened, the United States could have been in the difficult position of representing competing interests in the same law suit. See *infra* Section III(C); see also *Nevada v. United States*, ¹⁴⁰⁷U.S. ¹⁴⁰⁷_, 103 S.Ct. 2906, 2917, 77 L.Ed.2d 509 (1983) (recognizing problems faced by Government when it is given the duty to represent competing interests). Once the Tribe intervened, in light of the district court's limited exercise of jurisdiction, the case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe. See *San Carlos Apache Tribe*, ¹⁴⁰⁷U.S. at ¹⁴⁰⁷_, 103 S.Ct. at 3214.

4. Summary.

The district court limited its exercise of jurisdiction to a determination of the priority among federal water rights on lands roughly within the boundaries of the former Klamath Indian Reservation. It did not undertake a general stream adjudication. Proceeding in this fashion, it avoided the duplication of any state water rights adjudication and, we think, the pitfalls of piecemeal determination of water rights. In fact, the district court considered those factors identified as “secondary” in *Colorado River*, see 424 U.S. at 820, 96 S.Ct. at 1247-48, and found, correctly we think, that they did not counsel dismissal.¹² Under these circumstances we cannot say that the district court abused its discretion. Because the district court had statutory jurisdiction to act as it did, and because we believe it would be an exercise in unwise and wasteful judicial administration inconsistent with the Supreme Court's decision in *San Carlos Apache Tribe* to vacate and cast aside the district court's carefully considered judgment in these matters, we proceed to a review of the merits of the district court's decision.

III

WATER RIGHTS

The district court declared reserved water rights within the litigation area to ^{*1408}the Klamath Tribe, the Government, individual Indians, and non-Indian successors to Indian land owners. Each of the parties appeals from a different aspect of the district court's judgment. We address, first, the State and individual defendants' appeal from the court's declaration of water rights to the Tribe.

A. A Reservation of Water to Accompany the Tribe's Treaty Right to Hunt, Fish, and Gather.

Article I of the 1864 treaty with the Klamath Tribe reserved to the Tribe the exclusive right to hunt, fish, and gather on its reservation. 16 Stat. 707, 708; *Kimball I*, 493 F.2d at 566. This right survived the Klamath Termination Act, 25 U.S.C. §§ 564-564w (1976). See *Kimball v. Callahan*, 590 F.2d 768, 775 (9th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979) (*Kimball II*); *Kimball I*, 493 F.2d at 569. The issue presented for decision in this case is whether, as the district court held, these hunting and fishing rights carry with them an implied reservation of water rights.

1. Reservation of Water in the 1864 Treaty-

In *Winters v. United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 211-12, 52 L.Ed. 340 (1908), the Supreme Court held that the treaty creating the Fort Belknap Indian Reservation contained an implied reservation of water to irrigate the arid Indian lands. More recently, in *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976), and *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978), the Supreme Court addressed the scope and nature of *Winters* doctrine water rights on federal lands other than Indian reservations. In *Cappaert*, the Court upheld a lower court determination that, in setting aside the Devil's Hole National Monument, the United States had reserved

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a quantity of water sufficient to meet the purposes for which the Monument was established. The Court stated:

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. at 139, 96 S.Ct. at 2070. In *New Mexico*, the Supreme Court clarified the scope of the reserved water rights doctrine in the course of determining whether the United States had reserved water for use on the Gila National Forest in New Mexico. The Court indicated that water may be reserved under the *Winters* doctrine only for the primary purposes of a federal reservation. 438 U.S. at 702, 98 S.Ct. at 3015. Hence, even though the Supreme Court agreed that hunting, fishing, and recreation are among the purposes for which the National Forest System is maintained, it determined that these purposes are secondary to the purposes of “securing favorable conditions of water flows,” and furnishing “a continuous supply of timber.” 16 U.S.C. § 475 (1976), *quoted in United States v. New Mexico*, 438 U.S. at 706-07, 98 S.Ct. at 3017. Accordingly, only the latter purposes carried with them an implied reservation of water rights. 438 U.S. at 713-15, 98 S.Ct. at 3020-22. *New Mexico* and *Cappaert*, while not directly applicable to *Winters* doctrine rights on Indian reservations, see F. Cohen, *Handbook of Federal Indian Law* 581-85 (1982 ed.),¹³ establish several useful guidelines. First, water rights may be implied only “[w]here water is necessary to”¹⁴⁰⁹ fulfill the very purposes for which a federal reservation was created,” and not where it is merely “valuable for a secondary use of the reservation.” *New Mexico*, 438 U.S. at 702, 98 S.Ct. at 3014. Second, the scope of the implied right is circumscribed by the necessity that calls for its creation. The doctrine “reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.” *Cappaert*, 426 U.S. at 141, 96 S.Ct. at 2071.

The question, therefore, is whether securing to the Indians the right to hunt, fish, and gather was a primary purpose of the Klamath Reservation. Resolution of this question, in turn, depends on an analysis of the intent of the parties to the 1864 Klamath Treaty as reflected in its text and the surrounding circumstances. See *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 675-76, 99 S.Ct. 3055, 3069-70, 61 L.Ed.2d 823 (1979); *United States v. Winters*, 207 U.S. at 575-76, 28 S.Ct. at 211. The State and individual appellants argue that the intent of the 1864 Treaty was to convert the Indians to an agricultural way of life. The Government and the Tribe argue that an equally important purpose of the treaty was to guarantee continuity of the Indians’ hunting and gathering lifestyle. Under the guidelines established in *Cappaert* and *New Mexico*, we find that both objectives qualify as primary purposes of the 1864 Treaty and accompanying reservation of land.

Article I of the Klamath Treaty expressly provides that the Tribe will have exclusive on-reservation fishing and gathering rights. 16 Stat. 708. This language has been interpreted to include, in addition, a grant of exclusive hunting and trapping rights. *Kimball I*, 493 F.2d at 566; *Klamath & Modoc Tribes v. Maison*, 139 F.Supp. 634, 637 (D.Or.1956), *aff’d in part, rev’d in part*, 338 F.2d 620 (9th Cir.1964). As this court noted in *Kimball I*,

The specific treaty provision reserving the Klamaths’ exclusive right to fish could prompt the argument that their treaty excludes the right to hunt. However, in light of the highly significant role that hunting and trapping played (and continue to play) in the lives of the Klamaths, it seems unlikely that they would have knowingly relinquished these rights at the time they entered into the treaty.

493 F.2d at 566 (footnote omitted).¹⁴ In view of the historical importance of hunting and fishing, and the language of Article I of the 1864 Treaty, we find that one of the “very purposes” of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle. This was at the forefront of the Tribe’s concerns in negotiating the treaty and was recognized as important by the United States as well.¹⁵

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At the same time, as the State and individual defendants argue, Articles II^{*1410} through V of the 1864 Treaty evince a purpose to convert the Klamath Tribe to an agricultural way of life. Article II provides that monies paid to the Tribe in consideration for the land ceded by the treaty “shall be expended ... to promote the well-being of the Indians, advance them in civilization, *and especially agriculture*, and to secure their moral improvement and education.” 16 Stat. 708 (emphasis added). A similar focus on agriculture is reflected in the language of Articles III, IV and V. *Id.* at 708-09. It is apparent that a second essential purpose in setting aside the Klamath Reservation, recognized by both the Tribe and the Government, was to encourage the Indians to take up farming.

Neither *Cappaert* nor *New Mexico* requires us to choose between these activities or to identify a single essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve. See *supra* note 11. In fact, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981), this court found that provision of a “homeland for the Indians to maintain their agrarian society,” *id.* at 47, as well as “preservation of the tribe’s access to fishing grounds,” *id.* at 48, were dual purposes behind establishment of the Colville Reservation. Consequently the court found an implied reservation of water to support both of these activities. President Grant established the Colville Reservation in a one-paragraph Executive Order that stated only that the land would be “set apart as a reservation for said Indians.”¹⁶ Thus the court in *Colville* discovered the purposes of the reservation and implied water rights from a much less explicit text than that provided by the 1864 Klamath Treaty, Articles I through V. See *Colville*, 647 F.2d at 47 n. 8. We therefore have no difficulty in upholding the district court’s finding that at the time the Klamath Reservation was established, the Government and the Tribe intended to reserve a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe’s treaty right to hunt and fish on reservation lands.

A water right to support game and fish adequate to the needs of Indian hunters and fishers is not a right recognized as a part of the common law doctrine of prior appropriation followed in Oregon.¹⁷ Indeed, one of the standard requirements of the prior appropriation doctrine is that some diversion of the natural flow of a stream is necessary to effect a valid appropriation.¹⁸ But diversion of water is not required to support the fish and game that^{*1411} the Klamath Tribe take in exercise of their treaty rights. Thus the right to water reserved to further the Tribe’s hunting and fishing purposes is unusual in that it is basically non-consumptive. See 1 R. Clark, *Waters and Water Law* § 55.2, at 578-81 (1967). The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies. See *Cappaert*, 426 U.S. at 143, 96 S.Ct. at 2072 (characterizing right in similar manner). In this respect, the water right reserved for the Tribe to hunt and fish has no corollary in the common law of prior appropriations.¹⁹

2. Effect of the Klamath Termination Act on the Tribe’s Hunting and Fishing Water Rights.

In 1954, Congress terminated federal supervision of the Klamath Tribe. 25 U.S.C. §§ 564-564w (1976). The state and individual appellants now argue that the Termination Act also abrogated any water rights reserved by the 1864 Treaty to accompany the Tribe’s right to hunt and fish. Appellants contend that when federal supervision was terminated, former reservation lands were sold at full market value without limitations on use. See Act of Aug. 23, 1958, Pub.L. No. 85-371, 72 Stat. 816, 817 (1958 amendments to Termination Act). They conclude that recognition of a reserved water right to sustain the Tribe’s hunting and fishing rights would impose a servitude or limitation on the use of former reservation lands in contravention of the Termination Act policy of unencumbered sale.

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Appellants' argument, however, overlooks the substantive language of the Termination Act,²⁰ the canons of construction for legislation affecting Indian Tribes, and the implications of our decision in *Kimball I*. Section 564m(a) of the Termination Act provides, "[n]othing in sections 564-564w of this title shall abrogate any water rights of the tribe and its members." 25 U.S.C. § 564m(a) (1976); see *Menominee Tribe v. United States*, 391 U.S. 404, 416 n. 7, 88 S.Ct. 1705, 1712-13 n. 7, 20 L.Ed.2d 697 (1968) (Stewart, J., dissenting). This provision admits no exception, nor can it be read to exclude reserved water rights. Congress presumably was aware of the importance of such rights to Indian tribes at the time it drafted section 564m of the Klamath Termination Act.²¹ A conclusion that the Termination Act ended the Klamath's hunting and fishing water rights would impute to Congress the intention to abrogate rights guaranteed to the Tribe in the 1864 Treaty. As the Supreme Court noted in *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968), it is "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty." See *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir.1983); *United States v. State of Washington*, 520 F.2d 676, 693 (9th Cir.1975) ("[o]nce a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress."), *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); Comment, *The Water Rights of Klamath Indian Allottees*, 59 Ore.L.Rev. 299, 312-17 (1980). Because Congress in section 564m of the Termination Act explicitly protected tribal water rights and nowhere in the Act explicitly denied them, we can only conclude that such rights survived termination.

Our conclusion is confirmed by this court's prior decision in *Kimball I*. There we found that the Tribe's hunting and fishing rights, protected by Article I of the 1864 Treaty, survived passage of the Termination Act. 493 F.2d at 568-69; see *Kimball II*, 590 F.2d at 775. Were we to deny today reservation of sufficient water to protect the rights recognized in *Kimball I* and *II*, we would effectively nullify the substance of those decisions. In sum, we agree with the district court that the water rights reserved to the Klamath Tribe by Treaty in 1864 were not abrogated by enactment of the Klamath Termination Act in 1954.

3. Priority of the Water Right Reserved to Accompany the Tribe's Treaty Right to Hunt and Fish.

The district court found that the Tribe's water right accompanying its right to hunt and fish carried a priority date for appropriation of time immemorial. *United States v. Adair*, 478 F.Supp. at 350. The State and individual appellants argue that an implied reservation of water cannot have a priority date earlier than establishment of the reservation. The Government and the Tribe argue that a pre-reservation priority date is appropriate for tribal water uses that pre-date establishment of the reservation. We have been unable to find any decisions that squarely address this issue. We therefore begin our analysis by turning to well-established principles of Indian treaty interpretation and Indian property rights for guidance.

Foremost among these is the principle that "the treaty is not a grant of ¹⁴¹³rights to the Indians, but a grant of rights from them — a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905); accord *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678, 680-81, 99 S.Ct. 3055, 3070-71, 3071-72, 61 L.Ed.2d 823 (1979); *United States v. Wheeler*, 435 U.S. 313, 327 n. 24, 98 S.Ct. 1079, 1088 n. 24, 55 L.Ed.2d 303 (1978). Further, Indian treaties should be construed as the tribes would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 1334-35, 25 L.Ed.2d 615 (1970); *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir.1976); *Kimball I*, 493 F.2d at 566 & n. 7 (treaty construed as Indians would have understood it given practices and customs of tribe at time treaty was negotiated); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54, 8 L.Ed. 483 (1832). And any ambiguity in a treaty must be resolved in favor of the Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n. 17, 98 S.Ct. 1011, 1020 n. 17, 55 L.Ed.2d 209 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112-13, 48 L.Ed.2d 710 (1976); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir.), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982). A corollary of these principles, also recognized by the

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Supreme Court, is that when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 208, 98 S.Ct. at 1020-21; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir.1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957).

In 1864, at the time the Klamath entered into a treaty with the United States, the Tribe had lived in Central Oregon and Northern California for more than a thousand years. This ancestral homeland encompassed some 12 million acres. Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian title" to all of its vast holdings. See *United States v. Klamath and Modoc Tribes*, 304 U.S. 119, 122-23, 58 S.Ct. 799, 801, 82 L.Ed. 1219 (1938); *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 62 S.Ct. 248, 251, 86 L.Ed. 260 (1941); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244, 21 L.Ed. 523 (1872). See generally, Note, "Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial," 75 Colum.L.Rev. 655 (1975). Aboriginal title is "considered as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745, 9 L.Ed. 283 (1835); *accord United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 345, 62 S.Ct. at 251. The Supreme Court has specifically held that the Tribe had aboriginal title to, timber on the Klamath Reservation. *United States v. Klamath and Modoc Tribes*, 304 U.S. 119, 122-23, 58 S.Ct. 799, 801, 82 L.Ed. 1219 (1938). The Tribe's title also included aboriginal hunting and fishing rights, *see Sac & Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F.2d 145, 151 (8th Cir.), *cert. denied*, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978), and by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland. *Cf. United States v. Santa Fe Pacific R. Co.*, 314 U.S. at 344, 359, 62 S.Ct. at 257—58 (accounting ordered for rents, issues and profits derived from lands to which tribe held aboriginal title). Only the United States can extinguish such aboriginal title. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46, 67 S.Ct. 167, 170, 91 L.Ed. 29 (1946). Until the latter part of the nineteenth century, aboriginal title was most often extinguished by a treaty between the affected tribe and the United States. See C. Wilkinson & J. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?* 63 Calif.L.Rev. 601, 608-12 (1975).

With this background in mind, we examine the priority date attaching to the Klamath Tribe's reservation of water to support its hunting and fishing rights. In Article I of the 1864 Treaty the Tribe expressly ceded "all [its] right, title and claim" to most of its ancestral domain. 16 Stat. 707. In the same article, however, the Tribe reserved for its exclusive use and occupancy the lands that became the Klamath Reservation, the same lands that are the subject of the instant suit. 16 Stat. 708. There is no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself. See *United States v. Winans*, 198 U.S. at 381, 25 S.Ct. at 664; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d at 326. See also *Bryan v. Itasca County*, 426 U.S. at 392, 96 S.Ct. at 2112-13. Nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home. See *Choctaw Nation v. Oklahoma*, 397 U.S. at 631, 90 S.Ct. at 1334-35; *Kimball I*, 493 F.2d at 566. Further, we find no language in the treaty to indicate that the United States intended or understood the agreement to diminish the Tribe's rights in that part of its aboriginal holding reserved for its permanent occupancy and use. Accordingly, we agree with the district court that within the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.

Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 678-81, 99 S.Ct. at 3070-72; *State v. Coffee*, 97 Idaho 905, 908, 556 P.2d 1185, 1188 (1976); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823). See

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

generally *W. Veeder, Indian Prior and Paramount Rights to the Use of Water*, 16 Rocky Mtn.Min.L.Inst. 631, 649-57 (1971). To assign the Tribe's hunting and fishing water rights the later, 1864, priority date argued for by the State and individual appellants would ignore one of the fundamental principles of prior appropriations law — that priority for a particular water right dates from the time of first use. See 5 R. Clark, *Waters and Water Rights* §§ 410, 414.2 (1972). Furthermore, an 1864 priority date might limit the scope of the Tribe's hunting and fishing water rights by reduction for any pre-1864 appropriations of water. This could extinguish rights the Tribe held before 1864 and intended to reserve to itself thereafter. Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.²²

This does not mean, however, as the individual appellants argue, that the former Klamath Reservation will be subject to a “wilderness servitude” in favor of the Tribe. Apparently, appellants read the water rights decreed to the Tribe to require restoration of an 1864 level of water flow on former reservation lands now used by the Tribe to maintain traditional hunting and fishing lifestyles. We do not interpret the district court's decision so expansively.

In its opinion discussing the Tribe's hunting and fishing water rights, the district court stated “[t]he Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights.” 478 F.Supp. at 345. We interpret this statement to confirm to the Tribe the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as ^{*1415}these rights once were exercised by the Tribe in 1864. We find authority for such a construction of the Indians' rights in the Supreme Court's decision in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). There, citing *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), a reserved water rights case, the court stated “that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living.” 443 U.S. at 686, 99 S.Ct. at 3075. Implicit in this “moderate living” standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 686, 99 S.Ct. at 3074-75.²³ As limited by the “moderate living” standard enunciated in *Fishing Vessel*, we affirm the district court's decision that the Klamath Tribe is entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights.²⁴

B. Water Rights of Successors-in-interest to Klamath Indian Allottees.

The district court declared water rights to both Indian and non-Indian successors-in-interest to Klamath Indian allottees. As to the Indian owners of allotted lands, appellants argue that the terms of the Klamath Termination Act subject any water rights of such allottees to state water law. See 25 U.S.C. § 564m (1976). The Tribe, by cross-appeal, also challenges the district court's declaration of water rights to non-Indian successors-in-interest to lands previously allotted to members of the Tribe. We affirm the district court's determination in all respects on these issues.

1. Indian Successors to Allotted Reservation Lands.

With regard to individual Indian landowners, the district court stated:

The individual Indian landowners are entitled to use water essential to their agricultural needs when those needs arise. This right, however, is subject to the superior right of other Indians to use the water for the preservation of hunting and fishing on Reservation lands.

The priority date of Indian rights to water for irrigation and domestic purposes is 1864.

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

478 F.Supp. at 346, 350. The scope of Indian irrigation rights is well settled. See *Arizona v. California*, 373 U.S. 546, 599-601, 83 S.Ct. 1468, 1497-98, 10 L.Ed.2d 542 (1963). It is a right to sufficient water to “irrigate all the practicably irrigable acre^{*1416}age on the reservation.” *Id.* at 600, 83 S.Ct. at 1498. Individual Indian allottees have a right to use a portion of this reserved water. *United States v. Powers*, 305 U.S. 527, 531, 59 S.Ct. 344, 346, 83 L.Ed. 330 (1939). Moreover, the full measure of this right need not be exercised immediately. As with rights reserved to the Tribe, water may be used by Indian allottees for present and future irrigation needs.²⁵ See *Colville Confederated Tribe v. Walton*, 647 F.2d at 51; *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir.1956).

This right is limited here only by section 14 of the Klamath Termination Act, 25 U.S.C. § 564m (1976). This section provides, first, that “[n]othing in [The Termination Act] shall abrogate any water rights of the tribe and its members,” and second, that “the laws of the State of Oregon with respect to abandonment of water rights by non-use shall not apply to the tribe and its members until fifteen years after the date of the proclamation [of termination].” *Id.* The State and individual appellants argue that the second part of section 564m was meant to apply all Oregon water law, except that respecting abandonment of water rights by non-use, to the Tribe immediately upon the proclamation of termination.²⁶

We cannot accept this position. To do so would undermine the explicit command in the first part of section 564m that termination does not abrogate Klamath tribal water rights. For example, under appellants’ interpretation of section 564m, after the proclamation in 1961 any water rights of the Tribe not perfected under the Oregon system, whether or not these rights were in actual use, would be lost to the Tribe. See, e.g., Or.Rev.Stat. §§ 537.211-537.270, 537.410-537.450 (1981). Moreover, if all Oregon water law except the non-use provisions were applied to the Tribe in 1961, the Tribe’s ability to appropriate its full measure of reserved water rights would be cut off because Oregon water law, unlike the law of federal reserved rights, has no provision to protect reserved but unappropriated waters.

In order to effectuate the Termination Act’s explicit command that Klamath water rights survive unimpaired, we must interpret the second part of section 564m to mean that starting in 1976, fifteen years after the proclamation of termination in 1961, reserved water actually appropriated for use by members of the Tribe on allotments, could be lost under Oregon laws “with respect to abandonment of water rights by non-use.” However, no other provision of Oregon water law that might preclude appropriation of the full measure of Klamath reserved water rights may be applied to the Tribe or its members consistently with the unequivocal language of protection in the first sentence of section 564m.²⁷ ^{*1417}To hold otherwise would sanction destruction of treaty rights in the absence of the required express Congressional approval. See *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968) (abrogation of treaty rights not lightly imputed to Congress in the absence of explicit statement); accord, *Kimball I*, 493 F.2d at 569; *United States v. State of Washington*, 520 F.2d 676, 693 (9th Cir. 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). See generally Comment, *The Water Rights of Klamath Indian Allottees*, 59 Ore.L.Rev. 299, 312-17 (1980).

2. Non-Indian Successors to Allotted Reservation Lands.

The district court held that:

a non-Indian successor to an Indian allottee acquires an appurtenant right to water for the actual acreage under irrigation when he gets title from his Indian predecessor. The priority date of that right is 1864.

The non-Indian also acquires a right, with an 1864 priority date, to water for additional acreage which he, with reasonable diligence, may place under irrigation.

478 F.Supp. at 349. The sole claim raised by the Tribe in its cross-appeal is to this aspect of the district court’s decision.

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

The claim, however, is foreclosed by our recent decision in *Colville Confederate Tribes v. Walton*, 647 F.2d at 42. There we held that “[t]he full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser.” *Id.* at 51. The limitations on this transfer, recognized in *Colville* are, first, that the non-Indian successor’s right to water is “limited by the number of irrigable acres [of former reservation lands that] he owns,” *id.*, and second, that the non-Indian purchaser may lose the right to that quantity of water through non-use. Thus, citing the district court’s opinion in the instant case, in *Colville*, we limited a non-Indian successor to lands allotted to a member of the Colville Tribe to the amount of water used by the Indian predecessor plus additional water that “he or she appropriates with reasonable diligence after the passage of title.” *Id.*; see *United States v. Hibner*, 27 F.2d 909 (D.Idaho 1928).²⁸ Accordingly, the district court’s decision on this point is affirmed.

C. The United States’ Water Rights in Former Klamath Reservation Lands.

The district court did not determine the scope or priority of the Government’s water rights on land it now owns within the former Klamath Reservation,²⁹ although the Government’s claims had been developed fully in the record before the court. These Government lands constitute approximately 70% of the former reservation and include the Klamath National Wildlife Refuge and large portions of the Winema National Forest. Rather than determine the Government’s water rights in these lands, however, the district court concluded:

The protection of the Indians’ hunting and fishing rights requires a natural streamflow through both the Marsh and forest lands on the former Reservation. The Indians’ use of their rights to that streamflow will ensure that enough water flows through the Refuge and through the Winema National Forest within the former Reservation to fulfill the Government’s purposes for those lands.

It is therefore unnecessary to issue a separate declaration of Government water rights for the Refuge and forests of the Reservation.

478 F.Supp. at 347. The Government, in its brief, states that “while the court below assumed that fulfillment of the Indians’ Article I rights will also satisfy all of the rights of the United States, this thesis was”¹⁴¹⁸ not asserted, much less established, before the district court.” We agree.

The most significant water rights still held by the Klamath Tribe on former reservation lands are those that accompany their treaty hunting and fishing rights. See *supra* Section III(A)(1).³⁰ These rights are essentially nonconsumptive in nature. *Id.* Thus, to the extent that the United States now owns former reservation lands which may be benefited by a compatible nonconsumptive use of water, the Government may participate in the enjoyment of the Klamath’s hunting and fishing water rights. See *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 859-60 (9th Cir.) (discussing water right for recreation), *cert. denied, sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District*, _ U.S. __, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

We must point out, however, that the Government has no ownership interest in, or right to control the use of, the Klamath Tribe’s hunting and fishing water rights. The hunting and fishing rights from which these water rights arise by necessary implication were reserved by the Tribe in the 1864 treaty with the United States. See *supra* section III(A). The hunting and fishing rights themselves belong to the Tribe and may not be transferred to a third party. See *generally Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Because the Klamath Tribe’s treaty right to hunt and fish is not transferable, it follows that no subsequent transferee may acquire that right of use or the reserved water necessary to fulfill that use.³¹

It follows that the district court erred in concluding that it was unnecessary to determine the scope and priority of the Government’s water rights in former reservation lands. Because, on the record below, these rights may be defined as a matter of federal law, we have concluded that a remand on this issue is unnecessary. See *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 821 (9th Cir.), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982).

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3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

The Government claims that its water rights in former reservation land derive from two sources. The first is its acquisition of land, together with appurtenant water rights, from Indian allottees. The second is its implied reservation of water rights under the *Winters* doctrine. We conclude that the Government is entitled to claim rights as successor to Indian allottees. We further conclude that the Government may not claim further reserved water rights with an 1864 priority date. The Government has not asserted, and we thus do not decide, whether additional rights could have been reserved by implication pursuant to the Klamath Termination Act.

1. Appurtenant Water Rights.

The Government acquired the former reservation lands by purchasing land from Indian allottees and condemning land ^{*1419}held in trust for Indian allottees. See *supra* Section I. It is therefore entitled to the same appurtenant water rights as other non-Indian successors, subject to the limitations articulated in *Colville*. The priority-date of these rights is 1864.

2. Reserved Water Rights.

The Government has argued that it reserved water rights in 1864 for Indian reservation purposes and converted those rights to forest and wildlife preserve purposes upon acquisition of beneficial interest in the land. We disagree.

The purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights. See *United States v. New Mexico*, 438 U.S. at 700, 98 S.Ct. at 3014. Because the reserved rights doctrine is an exception to Congress's explicit deference to state water law in other areas, see *id.* at 715, 98 S.Ct. at 3021, the Supreme Court has emphasized the importance of the limitation of such rights to only so much water as is essential to accomplish the purpose for which the land was reserved. *Id.* at 700, 98 S.Ct. at 3014. We conclude that it would be inconsistent with the principles expressed in *United States v. New Mexico* to hold that the Government may "tack" a currently claimed *Winters* right to a prior one by asserting that it has merely changed the purpose of its previously reserved water right.

There is another reason why we must reject the Government's assertion that, by virtue of the water rights impliedly reserved in 1864, the Government owns a reserved right to water for forest and wildlife preserve purposes with an 1864 priority date. The government has claimed that the irrigation rights reserved in 1864 passed to it upon acquisition of former reservation land, and we have agreed. We have also held that the hunting and fishing rights reserved in 1864 are currently held by the Tribe. Thus, all water rights reserved in 1864 on land the Government now owns are accounted for. The Government cannot claim both that the reserved rights passed to Indian allottees and their successors and that the rights were retained by the United States.

The Government has not argued that Congress intended to reserve water rights for forest and wildlife purposes in enacting the Klamath Termination Act, and we express no opinion on the merits of such a claim. It is possible that, after the water rights to which we have held the Government to be entitled have been quantified, the Government will find that it has insufficient water to use former Klamath Reservation lands for the purposes Congress has designated. Congress, however, has the power to acquire the additional water the Government may need by explicitly exercising its constitutional authority under article IV, section 3. See U.S. Const, art. IV, § 3.

8. Klamath River Basin Compact.

Finally, we address the contention of the State of Oregon and the individual defendants that the Government's acquisition of appurtenant water rights in former reservation land is limited by the Klamath River Basin Compact, Pub.L. No. 85-222, 71 Stat. 497 (1957). The Compact explicitly preserves Indian water rights, including irrigation rights that are more fully exercised after the Compact's ratification, from diminution. See Art. X, 71 Stat. at 505. The Compact further preserves all federal rights, powers and jurisdiction except as explicitly conceded. See Art. XI, *id.* We conclude

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that Congress did not intend to make the terms of the Compact control the government's acquisition of Indian irrigation rights or the Tribe's continued enjoyment of hunting and fishing rights. See *Arizona v. California*, 373 U.S. 546, 566, 83 S.Ct. 1468, 1480-81, 10 L.Ed.2d 542 (1963). These are the only water rights at issue here.

IV

CONCLUSION

After a careful review of the record in this case, we hold that the district court did not abuse its discretion in its exercise of jurisdiction to determine the scope and priority among the federal reserved water rights involved in this litigation. As to the district court's determination of these water^{*1420} rights issues, we affirm in all respects except the district court's decision not to declare separately the water rights of the United States on former reservation lands that it now owns. On this point, we modify the district court's judgment to incorporate the declaration of the Government's water rights within the former Klamath Reservation contained in Section III, part C of our opinion. As modified, the district court's opinion is AFFIRMED.

Footnotes (as printed in the official reporter)

¹ The "reef" is a geologic formation that constricts the flow of the Williamson River at the downstream end of the Klamath Marsh. The "reef" is located near the town of Kirk, Oregon. ^{*1399} Except for the upper reaches of some of its tributaries, the Williamson River drainage above the "reef" is entirely within the boundaries of the former Klamath Reservation. The only lands outside the former reservation, but within the area covered by the Government's suit, were certain parcels of land withdrawn by the United States from the public domain for national forest purposes. These withdrawals occurred in 1893, 1906, 1907 and 1930. See Act of Sept. 28, 1893, 28 Stat. 1240; Act of Sept. 17, 1906, 34 Stat. 3231; Act of Jan. 25, 1907, 34 Stat. 3270; Act of May 14, 1930, 46 Stat. 278.

² The McCarran Amendment waives the United States' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication of water rights. The Amendment provides in full text: 43 U.S.C. § 666 (1976).

³ We believe that this obligation is heightened in a case where not only Indian property rights, including water rights, are involved, but where all rights to be adjudicated were reserved for the benefit of an Indian Tribe. See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 94 S.Ct. 772, 777-78, 39 L.Ed.2d 73 (1974); *United States v. Kagama*, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 (1886). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-44, 100 S.Ct. 2578, 2582-84, 65 L.Ed.2d 665 (1980); *Bryan v. Itasca Co.*, 426 U.S. 373, 388 n. 14, 96 S.Ct. 2102, 2111 n. 14, 48 L.Ed.2d 710 (1976). This is because the federal policy of leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history. See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168, 93 S.Ct. 1257, 1260, 36 L.Ed.2d 129 (1973); *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945). All of the water rights to be adjudicated by the federal court in this case derive from the "Winters doctrine" of reserved water rights. See *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). They are water rights reserved to the Klamath Tribe by treaty and passed to subsequent Government, individual Indian, and non-Indian appropriators by operation of federal Indian law. The only water rights addressed by the instant federal court suit lacking roots in the Klamath Treaty of 1864 or other aspects of federal Indian law are the water rights reserved by the Government to those parcels of land withdrawn from the public domain in 1893, 1906, 1907, and 1930. See *supra* note 1. Even these rights depend on the *Winters* doctrine and federal law of reserve water rights for a proper determination of their scope. The preference for a federal forum in which to litigate Indian rights governed by federal law has received express congressional approval in a number of statutory enactments. See, e.g., 25 U.S.C. §§ 345, 1322(b) (1976); 28 U.S.C. §§ 1360(b), 1362 (1976).

⁴ In *Colorado River*, the United States filed suit in federal district court in November, 1972, pursuant to 28 U.S.C. § 1345 (1976), for a declaration of the water rights of the United States and certain Indian Tribes, as well as over 1000 individual water users. Shortly after commencement of the federal suit, one of the defendants in that suit sought to have the United States served as a defendant in a continuous state court water rights adjudication under the Colorado Water Rights Determination and Administration Act. The adjudication pursuant to the Colorado statute encompassed the entire drainage basin of which the area addressed by the federal suit was only a part. In early 1973, the United States was served in the state proceeding pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1976). The defendants in the federal suit then moved to dismiss the action in favor of the state suit. The district court

agreed that the doctrine of abstention required dismissal in deference to the state proceeding. The Tenth Circuit then reversed the district court's decision to abstain. The Supreme Court, in reviewing the lower court decisions, agreed with the district court that the McCarran Amendment allows concurrent state and federal jurisdiction over water rights disputes, see *Colorado River*, 424 U.S. at 809, 96 S.Ct. at 1242, and that the state's jurisdiction extends to federal reserved water rights including Indian water rights. See *id.* at 809-13, 96 S.Ct. at 1242-44. The Supreme Court, while agreeing with the district court's decision to dismiss, rejected the district court's reliance on traditional abstention doctrine to justify dismissal. *Id.* at 813, 96 S.Ct. at 1244. Instead, the Court concluded that: *Id.* at 817, 96 S.Ct. at 1246 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). The Court proceeded to analyze the "considerations of '[w]ise judicial administration' " in the *Colorado River* case that counseled dismissal of the federal action in favor of the state proceeding. The most important factor in favor of dismissal was the McCarran Amendment itself, in which the Court found expressed a "clear federal policy" to avoid "piecemeal adjudication of water rights in a river system" where a comprehensive state system for adjudication of water rights is available. 424 U.S. at 819, 96 S.Ct. at 1247; accord *San Carlos Apache Tribe*, ___ U.S. at ___, 103 S.Ct. at 3214-15. Of lesser importance, but consistent with the policies underlying the McCarran Amendment, the Court also found significant in its decision to uphold dismissal of the federal action: *Id.* 424 U.S. at 820, 96 S.Ct. at 1248 (footnote omitted). The Court found that together, these factors "justify the District Court's dismissal in this particular case." *Id.* (footnote omitted).

⁵ While the Court's analysis in *Colorado River* of traditional abstention doctrine appears equally applicable to this case, the State argues that recent decisions have significantly expanded *Younger* abstention. See *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977). It also contends that the abstention discussed in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), should require dismissal of the federal district court case in favor of the state proceeding. We are not persuaded. Unlike *Colorado River*, all claims raised in the federal suit here have their genesis in federal law. Thus we find no occasion to apply *Burford* abstention. As for *Younger* abstention, we note that while the complaint in the federal court proceedings sought declaratory and injunctive relief, the request for such relief was not aimed at restraining any state proceeding, nor did the federal plaintiffs seek a declaration as to the validity of any state law or regulation. See *Colorado River*, 424 U.S. at 816-17, 96 S.Ct. at 1245-46 (discussing abstention under the doctrine enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)). Thus, even if the principles enunciated in *Younger* have been expanded by recent decisions of the Supreme Court, the instant case is not appropriate for *Younger* abstention because federal jurisdiction has not been invoked for the purpose of restraining state proceedings or invalidating a state law.

⁶ Although the district court never expressly ruled on the motion to dismiss under *Colorado River*, the court's Pretrial Order and ultimate decision reflect consideration of the *Colorado River* factors. At a September 13, 1976 hearing on defendants' motions to dismiss, the district court and counsel thoroughly discussed the *Colorado River* case and its application to the facts of this case. In the course of this hearing, the following colloquy between court and counsel occurred: Out of this initial discussion grew the district court's Pretrial Order. Apparently, no formal denial of the defendants' motions to dismiss was ever entered.

⁷ The State argues that this traditional test for an abuse of discretion should be replaced by a narrower test. This narrower test the State would have us apply derives from *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). In *Wycoff*, the plaintiff sought a declaratory ruling that it was involved in interstate commerce. The Supreme Court held that it would be an abuse of discretion to issue such a ruling because the controversy before the court was too abstract. *Id.* at 245-48, 73 S.Ct. at 241-43. The State argues that the district court's adjudication of water rights in this case is similarly abstract. We disagree. In this case there exists a genuine controversy which the district court could have resolved finally in every respect. The original complaint requested as relief The duties of such a master would have included yearly allocation of specific quantities of water to the various parties to the federal suit. The United States only abandoned its request for such specific quantification of water rights and administration of the river system under a federal court decree upon the district court's suggestion that cooperation between state and federal courts would best be served if the federal court addressed only the legal principles governing the extent of and priority among water rights arising under federal law in the litigation area, and left quantification and administration of these rights to later proceedings to be conducted by the State Water Resources Director. See Or.Rev.Stat. §§ 539.040-539.140 (1979). We commend this effort to coordinate federal and state resolution of water rights. Any generality in the district court's order resulted from these coordinating efforts not from the abstract nature of the controversy. Unlike the situation in *Wycoff*, the plaintiffs request for relief was not one for "preliminary findings and conclusions intended to fortify the litigant against future regulation." 344 U.S. at 246, 73 S.Ct. at 241. Rather, the district court properly ¹⁴⁰⁴decided those elements of a ripe controversy that were governed by federal law, while leaving state law issues necessarily involved in a detailed resolution of the controversy to subsequent state proceedings in order to harmonize the concurrent federal and state jurisdiction mandated by the McCarran Amendment, 43 U.S.C. § 666 (1976).

⁸ We realize, of course, that where both the state and the federal proceedings are in their infancy at the time of a motion to dismiss the federal proceeding, both *Colorado River* and *San Carlos Apache Tribe* indicate that absent unusual circumstances, the federal court

should defer to the state proceeding. See *San Carlos Apache Tribe*, at __, 103 S.Ct. at 3213-15.

⁹ The parties argue extensively over the meaning of the word “suit” in the McCarran Amendment. The Government and the Tribe may be technically correct when they suggest that the Oregon water adjudication system is not a “suit” but an administrative proceeding for which there is a form of judicial review. See Or.Rev.Stat. §§ 539.030, 539.150 (1979). However, the Supreme Court has warned against overly technical application of the McCarran Amendment. *United States v. District Court for Eagle County*, 401 U.S. 520, 525, 91 S.Ct. 998, 1002, 28 L.Ed.2d 278 (1971). Thus, although the Oregon water rights adjudication system is initially administrative and need not be judicial in nature,⁹ we will assume, without deciding, for the purposes of this case that it is not too informal to qualify as a “suit” within the meaning of the McCarran Amendment or a “comprehensive state adjudication” within the meaning of *Colorado River* and *San Carlos Apache Tribe*, see *San Carlos Apache Tribe*, __ U.S. at __, __ & n. 20, 103 S.Ct. at 3214, 3215 & n. 20.

¹⁰ Although the Supreme Court’s warning is cast in terms of whether the federal proceeding is well enough along at the time of a motion to dismiss, see *San Carlos Apache Tribe*, at __, 103 S.Ct. at 3214, the institutional concerns of “wise judicial administration” must not be blind to the overall course of a particular piece of litigation. Judicial resources may as readily be wasted at the trial and appellate levels as at the stage of pre-trial proceedings.

¹¹ A determination of the priority among reserved water rights, similar to that undertaken by the district court, would require a separate proceeding in the state adjudication prior to the overall quantification of water rights in the Williamson River drainage. See, e.g., *Colorado River*, 424 U.S. at 825, 96 S.Ct. at 1250 (Stewart, J., dissenting); *United States v. New Mexico*, 438 U.S. 696, 703-04, 98 S.Ct. 3012, 3015-16, 57 L.Ed.2d 1052 (1978) (Government’s claim of reserved water rights in New Mexico general stream adjudication referred out to special master for determination); *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 32 & n. 3, 577 P.2d 9, 11 n. 3 (1978) (noting that the reserved rights of the United States were entered in a partial judgment rendered prior to “adjudicating the rights of the other parties.”); see also Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 Stan.L.Rev. 1111, 1125 (1978). Such a separate proceeding is necessary because reserved water rights are established by reference to the purpose of the reservation rather than any actual beneficial use of water. See *United States v. New Mexico*, 438 U.S. at 700, 98 S.Ct. at 3014; *Arizona v. California*, 373 U.S. 546, 599-600, 83 S.Ct. 1468, 1497-98, 10 L.Ed.2d 542 (1963); *Winters v. United States*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908). See generally F. Cohen, *Handbook of Federal Indian Law* 578-96 (1982 ed.). Because the State had begun no proceeding to determine the priority and extent of federal reserved water rights, the district court’s decision to conduct the limited and separate ordering of water rights under federal law created little potential for conflicting state and federal court rulings. For much the same reasons, the district court’s exercise of jurisdiction did not enlarge the potential for duplication of judicial effort, or generate needless costly proceedings for the parties. The court recognized that the federal law issues it proposed to resolve could be addressed in the state administrative adjudication of water rights in the Klamath Basin. The court also recognized, however, that such a state administrative determination of federal reserved water rights could be avoided by a prior federal court adjudication. Accordingly, the district court concluded that its resolution of the federal questions raised by the United States’ suit would not add an otherwise unnecessary step in the judicial proceedings for establishing water rights in the Klamath Basin. We agree with the district court’s conclusion on this point; its allocation of water rights under federal law neither duplicated an on-going state court proceeding nor added a proceeding that the state court would not ordinarily conduct. In fact, the district court exercised its jurisdiction in a manner to avoid *any* direct adjudication of state water rights. Within the federal litigation area all claimants derive their asserted water rights from federal law. The district court recognized this unique aspect of the federal suit and decided only the priority among these federal law-created rights. As the Supreme Court noted in *Moses H. Cone Memorial Hospital v. Mercury Construction*, 103 S.Ct. at 941, where “federal law provides the rule of decision on the merits” for all of the issues under adjudication, dismissal under the rationale of *Colorado River* is disfavored. See also *Will v. Calvert Fire Ins. Co.*, 437 U.S. at 667, 98 S.Ct. at 2559 (Blackmun, J., concurring); *id.* at 667-68, 98 S.Ct. at 2559-60 (Brennan, J., dissenting). Thus, we have no doubt that the district court’s decision was proper under the standards set forth in *Colorado River*.

¹² In *Colorado River*, the Supreme Court recognized four secondary factors, less important than the McCarran Amendment policy, that also favored dismissal. First, the Court suggested that the absence of any proceedings in the district court, other than the filing of a complaint, prior to the motion to dismiss, was a factor that favored dismissal. 424 U.S. at 820, 96 S.Ct. at 1247-48. This factor, to the extent that it is important, seeks to avoid waste or duplication of judicial effort. As we have noted, in the instant case, the district court recognized the potential for waste and tailored its exercise of jurisdiction to avoid adjudication of issues that would also arise subsequently in the state forum. Second, in *Colorado River*, the “extensive involvement of state water rights” counseled dismissal. 424 U.S. at 820, 96 S.Ct. at 1248. There, “the Government asserted reserved rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law.” Third, the state water court in *Colorado River* was some 300 miles closer than the federal court to the water system under adjudication. 424 U.S. at 805, 96 S.Ct. at 1240. The inconvenience to the parties occasioned by this distance favored proceeding in the state court. Here, the federal court normally sits in Portland, although it is authorized to sit in

Medford and Klamath Falls, Oregon, both communities quite close to the Williamson River. In fact, the district judge offered to conduct the suit in either Medford or Klamath Falls. None of the parties urged a change of location, so we may assume that the inconvenience, if any, of proceeding in Portland was minimal. Finally, in *Colorado River*, the Supreme Court found “participation by the Government in Division 4, 5, and 6 proceeding,” a factor that favored dismissal of the federal suit in order to encourage Government participation in Division 7 water rights proceedings. 424 U.S. at 820, 96 S.Ct. at 1247-48. The State argues that dismissal is similarly appropriate here to encourage the United States to participate in state stream adjudications. Although there is no statewide system in Oregon directly analogous to the Colorado system, Oregon has a water rights adjudication process that may be applied to any stream. See Or.Rev.Stat. 539.010-539.110 (1979). The State argues that the approximately 4,000 Government filings under the state system for determining water rights meets the Government participation factor in *Colorado River*. Even if the State is correct on this point, we do not find Government participation standing alone, sufficiently weighty to require dismissal of the United States efforts to secure a limited adjudication of federal water rights in a federal court.

- ¹³ See also W. Canby, *American Indian Law* 245-46 (1981) (“While the purpose for which the federal government reserves other types of lands may be strictly construed, *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1979) (national forest), the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained.”). Additionally, where interpretation of an Indian treaty is involved, not only the intent of the Government, but also the intent of the tribe must be discerned. See *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 675-76, 99 S.Ct. 3055, 3069-70, 61 L.Ed.2d 823 (1979).
- ¹⁴ The central importance of the Tribe’s hunting and fishing rights is confirmed by reference to the historical fact that at the time the 1864 Treaty was negotiated, the Tribe *Klamath and Modoc Tribes v. Maison*, 139 F.Supp. at 636-37.
- ¹⁵ In fact, the Government was probably aware that hunting and fishing held the greatest promise for sustaining the Klamath on their reservation: 1864 Report of the Commissioner of Indian Affairs 121.
- ¹⁶ The order creating the Colville Reservation read: *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir.1981) (quoting Executive Order of July 2, 1872, reprinted in 1 Kappler, *Indian Affairs and Treaties* 916 (2d ed. 1904)).
- ¹⁷ 3 W. Hutchins, *Water Rights Laws in the Nineteen Western States* 440-74 (1971); 5 R. Clark, *Waters and Water Rights* § 400, at 3-4 (1967).
- ¹⁸ See, e.g., *Colorado River Water Conservation District v. Rocky Mountain Power Co.*, 158 Colo. 331, 335, 406 P.2d 798, 799-801 (1965) (“there is no support in the law of this state for the proposition that a minimum flow of water may be ‘appropriated’ in a natural stream for piscatorial purposes without diversion of any portion of the water ‘appropriated’ from the natural course of the stream”); *State ex rel. State Game Commission v. Red River Valley Co.*, 51 N.M. 207, 216, 182 P.2d 421, 427-32 (1945) (state law does not allow appropriation of waters flowing in a stream for fishing purposes). For other cases stating that some form of diversion is required to effect an appropriation, ¹⁴¹¹see, e.g., *Rodgers v. Pitt*, 129 F. 932, 939-40 (D.Nev.1904); *Crawford v. Lehi Irrig. Co.*, 10 Utah 2d 165, 168, 350 P.2d 147, 150 (1960); *Sherlock v. Greaves*, 106 Mont. 206, 216, 76 P.2d 87, 90 (1938). See also 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States* 371 (1971). We note, however, that the modern trend in prior appropriation states is to recognize water rights in a natural body of water where the water in its natural state is a source of significant economic benefits. See *Colorado River Water Conservation District v. Colorado River Water Conservation Board*, 197 Colo. 469, 474, 594 P.2d 570, 574 (1979) (applying 1973 Colorado statute); *State Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, 443, 530 P.2d 924, 928-29 (1974) (applying 1971 Idaho statute).
- ¹⁹ The fact that water rights of the type reserved for the Klamath Tribe are not generally recognized under state prior appropriations law is not controlling as federal law provides an unequivocal source of such rights. The Supreme Court decisions in *New Mexico* and *Cappaert* establish beyond any doubt that the *Winters* doctrine is a source of rights to a streamflow, see *New Mexico*, 438 U.S. at 718, 98 S.Ct. at 3023 and to a given volume of water in a natural pond, see *Cappaert*, 426 U.S. at 143, 96 S.Ct. at 2072. The Court in those cases found no need to look for a state law basis for the rights it upheld. Rather, a careful reading of the cases confirms that the water rights recognized were defined by federal, not state, law. See *New Mexico*, 438 U.S. at 713 n. 21, 98 S.Ct. at 3021 n. 21 (suggesting that such a federal right could even now be created by Congress without any overt appropriation, even though the right would take its priority from state law); *id.* at 715, 98 S.Ct. at 3021-22 (“reserved rights doctrine is a doctrine built on implication and is an exception to Congress’ explicit deference to state water law in other areas”); *Cappaert*, 426 U.S. at 145, 96 S.Ct. at 2073 (“[f]ederal water rights are not dependent upon state law”); see also *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 859-60 (9th Cir.), *cert. denied, sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District*, ___ U.S. ___, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983). This is not to say, however, that the Tribe’s rights are unaffected by state law. Specifically, the priority of the right is, in part, determined by state law, see *New Mexico*, 438 U.S. at 713 n. 21, 98 S.Ct. at 3021 n. 21, and the precise quantity of water protected must be determined in accordance with state techniques and procedures, see *Colorado River*, 424 U.S. at 804-05, 819, 96 S.Ct. at 1239-40, 1247 (approving use of “comprehensive state systems” for quantification of water rights). This blend of federal and

state law to adjudicate water rights has had recent application by the Supreme Court. See *Colorado v. New Mexico*, 459 U.S. 176, 103 S.Ct. 539, 74 L.Ed.2d 348 (1982) (combination of prior appropriation and equitable apportionment doctrines).

- ²⁰ Appellants cite language from subsection 28(c) of the 1958 amendments to the Termination Act, 72 Stat. 817. Subsection (c) details the method for appraising the fair market value of Klamath Reservation lands: “each appraiser shall estimate the fair market value of such forest units and marshlands *as if they had been offered for sale on a competitive market without limitation on use ...*Id. (emphasis added.) These appraisal instructions cannot be read to dictate the substantive conditions of termination.
- ²¹ The reserved water rights doctrine enunciated in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), was well recognized by the early 1950’s. See, e.g., *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 339-40 (9th Cir.1939); *Conrad Investment Co. v. United States*, 161 F. 829, 831 (9th Cir.1908); see also *Federal Power Comm’n v. Oregon*, 349 U.S. 435, 444, 75 S.Ct. 832, 838, 99 L.Ed. 1215 (1955); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 325 (1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957).
- ²² In the present case, the Klamath Tribe, as we have noted, has depended upon the waters in question to support its hunting and fishing activities for over 1,000 years. It would be inconsistent with the principles we follow in today’s decision to hold that the priority of the Tribe’s water rights is any less ancient than the “immemorial” use that has been made of them. See *United States v. Shoshone Tribe*, 304 U.S. 111, 117, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938); F. Cohen, *Handbook of Federal Indian Law* 591 & n. 100 (1982).
- ²³ For a thoughtful argument that this case understates the scope of tribal reservations by treaty of an interest in an environmentally sensitive resource, see Comment, *Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries*, 61 Ore.L.Rev. 93 (1981).
- ²⁴ Appellants argue vigorously that the Tribe can no longer hold a water right to support its treaty hunting and fishing rights because the Tribe no longer owns land to which this water right is appurtenant. Their argument, however, misperceives the history and nature of the Klamath’s reserved water rights. In 1864, when the Klamath Reservation was created and water was impliedly reserved for the benefit of the Tribe, the Indians owned appurtenant land. See *United States v. New Mexico*, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978). The issue is whether these water rights, once reserved, are terminated by a transfer of the appurtenant land. We have already held in *Kimball I* that the Tribe’s hunting and fishing rights guaranteed by the treaty survived despite the land transfer. 493 F.2d at 569-70. To find that the water rights necessary to give meaning to these hunting and fishing rights have been lost because the Tribe has disposed of the appurtenant land would effectively overrule the *Kimball* decisions. We refuse to do so.
- ²⁵ The water rights of Indian irrigators, as the district court noted, are subordinate to the Tribe’s right to water for support of its hunting and fishing lifestyle. 478 F.Supp. at 346. This hierarchy among Indian water rights arises, not from any implication in the 1864 treaty that the purpose of hunting and fishing should predominate over any of the other purposes for which the Klamath Reservation was established, but rather from the analytically separate question of what priority date for appropriation the various water rights reserved in the treaty carry. Analysis of this latter question, under the unique circumstances of this case, leads to the conclusion that the Tribe’s hunting and fishing water rights carry an earlier priority date for appropriation, because of historical use, than do water rights for irrigation. See *supra* section III(A)(3).
- ²⁶ Termination of the Klamath Reservation was proclaimed on Aug. 10, 1961. See 26 Fed. Reg. 7362 (1961) (proclamation of James K. Carr, Acting Sec. of Interior, terminating the federal trust relationship with the Klamath Tribe pursuant to 25 U.S.C. § 564q (1976)). Thus according to the second part of section 564m, Oregon law “with respect to abandonment of water rights by nonuse” became applicable to the Tribe and its members in August of 1976.
- ²⁷ This result is consistent with our statement in *Colville Confederated Tribes v. Walton* to the effect that: 647 F.2d at 50.
- ²⁸ The district court correctly ruled that, like the water rights of Indian irrigators, the rights of their non-Indian successors are subordinate to tribal hunting and fishing water rights. See 478 F.Supp. at 350; see also *supra* note 30.
- ²⁹ The district court did determine the Government’s water rights in forest lands outside of the reservation. See 478 F.Supp. at 347-48. The district court’s substantive conclusions on that issue have not been challenged on appeal.
- ³⁰ We do not mean to imply, of course, that the tribe holds no other water rights or that some of these rights may not be significant in a particular setting.
- ³¹ A forceful argument can be made that the Klamath’s hunting and fishing water rights should not be treated differently from other reserved water rights, such as those for irrigation. Under this view, the Tribe’s hunting and fishing water rights would be transferrable to the United States. Cf. *Colville Confederated Tribe v. Walton*, 647 F.2d at 50-51 (transfer of reserved irrigation water rights). We decline to adopt this analogy, however, because even when the Tribe transfers the land to which the hunting and fishing water rights might be said to be appurtenant, it is the Tribe and its members, not some third party, that retains the right to hunt and

fish and needs water to support that right. Where the Tribe transfers land without reserving the right to hunt and fish on it, there is no longer any basis for a hunting and fishing water right. For this reason, we find the Klamath Tribe's hunting and fishing water rights virtually unique and not subject to the ordinary rules of transfer and change of use. See F. Cohen, *Handbook of Federal Indian Law* 592-96 (1982 ed.) (discussing transfer and change in use of Indian reserved water rights); see also D. Getches, *Water Rights on Indian Allotments*, 26 S.D.L.Rev. 405 (1981) (criticizing transfer of reserved water rights rule adopted by this court in *Colville Confederated Tribe v. Walton*).

3. Caselaw Access Project — 723 F.2d 1394 (official reporter text) — <https://static.case.law/f2d/723/cases/1394-01.json>

4. Casemine — United States v. Adair, 723 F.2d 1394 — <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>

United States v. Adair (Adair III)

187 F. Supp. 2d 1273 (D. Or. 2002)

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UNITED STATES, Plaintiff, and Klamath Indian Tribes, Plaintiff-Intervenor, v. Ben ADAIR, et al., Defendants, and State of Oregon, Defendant-Intervenor.

No. CV 75-914-PA.

United States District Court, D. Oregon.

As Amended April 9, 2002.

Feb. 27, 2002.

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AMENDED OPINION & ORDER

PANNER, District Judge.

I. BACKGROUND

In this action, the Court declared the existence, nature, scope and priority of the reserved Indian water rights of the Klamath Tribes, but left the quantification of those rights to the State of Oregon’s Klamath Basin Adjudication (“KBA”). See, *United States v. Adair*, 478 F.Supp. 336 (D.Or.1979) (“*Adair I*”). The Court entered a Declaratory Judgment on April 21, 1980, which was affirmed in *United States v. Adair*, 723 F.2d 1394 (9th Cir.1983) (“*Adair II*”), cert. denied sub nom, *Oregon v. United States*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). This Court retained continuing jurisdiction of this matter “for the purpose of enabling the parties or their successors in interest to apply to this court at any time for such orders and directions as may be necessary or appropriate for the construction and effectuation of this judgment, for the modification of any of the provisions hereof, and for the enforcement of compliance with this judgment.” Declaratory Judgment, ¶ 15.

Pursuant to Paragraph 15 of the Declaratory Judgment, Plaintiffs filed motions ^{*1275}for exercise of this Court’s continuing jurisdiction. A dispute has arisen among the parties in the KBA over the proper interpretation of the Declaratory Judgment and how to effectuate rulings in this case to quantify the Tribes’ water rights in the state proceeding. The motions were granted, and this Court is exercising its continuing jurisdiction to determine two narrow issues: (1) whether the Klamath Tribes have a water right to support reserved gathering rights; and (2) whether and to what extent the “moderate living” standard applies in quantifying the Tribes’ water rights.¹

II. DISCUSSION

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5. Caselaw Access Project — 187 F. Supp. 2d 1273 (official reporter text) — <https://static.case.law/f-supp-2d/187/cases/1273-01.json>

6. Justia — United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002) — <https://law.justia.com/cases/federal/district-courts/FSupp2/187/1273/2310122/>

A. The Gathering Right

The Klamath Tribes have reserved gathering rights, along with supporting water rights. The 1980 Declaratory Judgment explicitly holds that the tribal water right included water for, gathering purposes. Paragraph 3 of the Declaratory Judgment provides: “In creating the Reservation by treaty in 1864 the Government reserved land from the public domain to preserve the Tribe’s hunting, fishing, trapping and gathering rights and to encourage agriculture. The treaty granted the Tribe an implied right to as much water on the Reservation as was necessary to fulfill these purposes.” Paragraph 11 of the Declaratory Judgment provides: “The priority date of the Tribe’s hunting, fishing, trapping and gathering rights, and their water rights necessary to preserve these hunting, fishing, trapping and gathering rights is time immemorial.” The Court could not have been more clear in articulating its holding that gathering rights, and supporting water rights, are reserved to the Tribe. Moreover, the plain language of the 1864 Treaty, and a commonsense reading of *Adair I & Adair II*, and *United States v. OWRD*, 774 F.Supp. 1568 (D.Or.1991), aff’d. and modified, 44 F.3d 758 (9th Cir.1994), support this position. The Ninth Circuit’s use of “hunting and fishing” language as a shorthand phrase shall not be construed to eliminate the Tribes’ right to water for gathering purposes. There is nothing in *Adair I* or *Adair II* that is inconsistent with the Declaratory Judgment on this issue. Accordingly, the Klamath Tribes’ water rights include a right to water to support resources the Tribes gather, in addition to the resources they hunt, fish, and trap.

B. Legal Standard for Measuring Water Rights

The parties dispute how to apply the legal standard for quantifying the Tribes’ water rights. The Oregon Department of Justice (“ODOJ”) attempted to provide legal advice to the Adjudicator in the KBA on this issue, but admitted it was uncertain how to apply the relevant standards. The parties dispute not only what standard should be applied, but how it should be applied, and which party has the burden of proof. The primary dispute revolves around applying the “moderate living” doctrine announced in *Adair II*. The parties also struggle to interpret the phrase “as currently exercised” from *Adair II*.

At the outset, it is worth noting that any argument that would have the practical effect of quantifying the Tribes’ reserved water right at a level that would not support productive habitat is rejected. That would result in abrogating the Tribes’ treaty rights to hunt, fish, gather, and trap on the reservation lands. The Ninth Circuit has recently confirmed, in the context of the Klamath Tribes’ water rights, that ^{*1276} “[o]nly Congress can abrogate Indian treaty rights, see *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986), and it has not done so here.” *Klamath Water Users Prot. Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir.1999), cert. denied, 531 U.S. 812, 121 S.Ct. 44, 148 L.Ed.2d 14 (2000). Moreover, both *Adair I* and *Adair II* announce that water must be maintained at some level on the land to fulfill the purpose of the reservation. In *Adair II*, the Ninth Circuit could not have been more clear that it intended to “prevent other appropriators from depleting the streams and waters below a protected level in any area where the non-consumptive [water] right applies.” *Adair II*, 723 F.2d at 1411.

With these arguments put to rest, this Court must reconcile the quantification standard announced in *Adair I*, with the “moderate living” standard announced in *Adair II*. The two standards are not in conflict and what Defendants have apparently lost sight of is that the initial quantification of water rights is a separate analysis from the “moderate living” standard. The adjudicator is called upon to first quantify the Tribes’ water rights to establish an allocation of water to fulfill the purpose of the reservation. Only after the quantification stage can the “moderate living” doctrine be considered to possibly adjust the quantification.

1. Step One — Quantifying the Water Right

Adair I announced the legal standard for quantifying the Tribes’ water rights by holding:

5. Caselaw Access Project — 187 F. Supp. 2d 1273 (official reporter text) — <https://static.case.law/f-supp-2d/187/cases/1273-01.json>

6. Justia — United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002) — <https://law.justia.com/cases/federal/district-courts/FSupp2/187/1273/2310122/>

The Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights. If the preservation of these rights requires that the Marsh be maintained as wetlands and that the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessary to achieve those results.

Adair I, 478 F.Supp. at 345-46. *Adair II* and the “moderate living” standard did not change this threshold quantification standard.

The quantification standard does not involve an analysis of any actual beneficial use of the water, or any actual harvest of treaty protected resources on a fixed day or time in history. *Adair II*, 723 F.2d at 1406 n. 11; see also *Arizona v. California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) (“*Arizona I*”) (reserved water rights measured by “practicably irrigable acres” to fulfill treaty purposes, and not based upon number of Indians on reservation or actual use of land). Instead, the focus must be on fulfilling the purpose of the reservation. *Id.*

Adair II held that there were two primary purposes of the reservation and accompanying implied water rights. One was to support Klamath agriculture, and the other, which is at issue here, was “for the purpose of maintaining the Tribe’s treaty right to hunt and fish on reservation lands.” *Adair II*, 723 F.2d at 1409. In order to provide the Tribe an opportunity to continue hunting and fishing on the reservation lands, it is axiomatic that there be sufficient water to support productive habitat so there may be game to hunt, and fish to fish, as well as edible plants to gather. As *Adair I* announced, this may require that the “Marsh be maintained as wetlands” and that the “forest be maintained on a sustained-yield basis.” *Adair I*, at 345-46. Quantifying the reserved water right so that productive habitat can be supported is the only meaningful way to measure the water requirements to meet the goal of fulfilling the purpose of the reservation.

Defendants interpret the rulings in this case to hold that Plaintiffs are “entitled to the minimum amount of water necessary to protect the Tribes’ hunting and fishing water rights,” and that “the minimum amount necessary is a factual ^{*1277}determination that must be made based upon the material supplied by the claimants.” Although there seems to be no dispute that Plaintiffs carry the initial burden of proving that a certain amount of water is needed to support productive habitat, the assertion that the tribes are entitled only to some “minimum amount” of water is an incorrect statement of the law. In quantifying the right under *Adair I*, the Tribe is entitled to “whatever water is necessary to achieve” the result of supporting productive habitat. *Adair I*, 478 F.Supp. at 346. Once the adjudicator has quantified the Tribes’ water rights under the principles announced in *Adair I*, the moderate living standard may be considered.

2. Step Two — The Moderate Living Standard

In *Adair II*, the Ninth Circuit Court of Appeals stated that:

“Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living.” 443 U.S. at 686, 99 S.Ct. at 3075. Implicit in this “moderate living” standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living. See *Washington v. Fishing Vessel Ass’n*, 443 U.S. at 686, 99 S.Ct. at 3074-75. As limited by the “moderate living” standard enunciated in *Fishing Vessel*, we affirm the district court’s decision that the Klamath Tribe is entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights.

Adair II, 723 F.2d 1414-15.

5. Caselaw Access Project — 187 F. Supp. 2d 1273 (official reporter text) — <https://static.case.law/f-supp-2d/187/cases/1273-01.json>

6. Justia — United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002) — <https://law.justia.com/cases/federal/district-courts/FSupp2/187/1273/2310122/>

Under the traditional application of the moderate living standard, the initial quantification of a reserved right may be limited “if tribal needs may be satisfied by a lesser amount.” *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 685, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). However, this case is unlike *Fishing Vessel* where the reserved right could be reduced without completely frustrating the purpose of the reservation. For example, if the tribes’ 50% allocation of the harvestable fish run at issue in *Fishing Vessel* would have been reduced to a 35% allocation, the reserved right would still survive after the reduction. In contrast, the Klamath Tribes’ reserved water right does not readily lend itself to such a reduction. Ultimately, the water level cannot be reduced to a level below that which is required to support productive habitat, and the Tribes are entitled to “whatever water is necessary to achieve” the result of supporting productive habitat. This would be true even if there were fewer members of the Tribe. Reducing the water level below a level which would support productive habitat would have the result of abrogating the reserved rights. Because only Congress can abrogate treaty rights, and it has not done so here, the moderate living standard cannot be applied to have the effect of reducing water levels below a level that would support productive habitat.

To the extent the moderate living standard can be applied in this case, the Supreme Court’s guidance in *Fishing Vessel* on the burden of persuasion and the applicable legal test was followed in *United States v. Washington*, 873 F.Supp. 1422, 1445-46 (W.D.Wash.1994) [hereinafter *Shellfish I*], *aff’d*. in relevant part, *rev’d* in part, 135 F.3d 618 (9th Cir.1998), opinion amended and superceded on other matters, 157 F.3d 630 (9th Cir.1998). The district court in *Shellfish I* looked for “persuasive evidence ... presented to the ^{*1278}Court by the State and the interveners [parties opposing the tribal right]” demonstrating that the full resource amount claimed by the tribes was in fact not necessary to provide the tribes with a moderate living. *Id.* 873 F.Supp. at 1445. Because the parties opposing the tribal right did not present sufficient persuasive evidence, the district court in *Shellfish I* did not apply the moderate living standard to reduce the treaty right from its initial allocation. The same burdens should be used to the extent non-tribal parties seek to reduce the Tribes’ water rights based on the moderate living standard. However, if reducing the full resource amount would result in reducing the water level below that which is necessary to support productive habitat, no such reduction may be made regardless of the outcome of the moderate living standard analysis.

3. “As currently exercised”

The parties dispute the meaning of the “as currently exercised” language in *Adair II* where the Court of Appeals “confirm[ed] to the Tribe the amount of water necessary to support its hunting and fishing rights *as currently exercised* to maintain the livelihood of the Tribe members, not as these rights once were exercised.” *Adair II*, 723 F.2d at 1414 (emphasis added). Some defendants have interpreted this phrase to be the definitive measure for quantifying the tribal water right in the KBA. Under these defendants’ interpretation, the amount of water associated with the Tribes’ right is fixed by a specific date in 1979 — the date of the *Adair I* decision. For example, Oregon’s Preliminary Evaluation concluded that the Tribes’ right is to “that amount of unconsumed water flowing through [each described reach] as of September 27, 1979, the date of [*Adair I*], or the quantity of water claimed by the BIA for physical habitat maintenance flows, whichever is less.” Some private defendants also assert that water flows in 1979 or 1984 (the date of *Adair II*) are the proper measure of the Tribes’ water rights.

Defendants’ interpretations conflict with the meaning of *Adair II* and are inconsistent with the cases relied upon therein. In particular, in *Fishing Vessel* the Supreme Court did not limit the Indian treaty harvest of the fishery to the number of fish that were currently being harvested as of the date of the opinion, or on any other fixed date. By the time of the *Fishing Vessel* litigation, the Indian harvest had shrunk to only about 2% of the harvestable fishery and current fishery management “exclude[d] most Indians from participating in it.” *Fishing Vessel*, 443 U.S. at 669, 99 S.Ct. 3055. Rather, *Fishing Vessel* confirmed 50% of the harvest to the tribes (unless opponents could prove that a lesser share was appropriate under the “moderate living” standard) and confirmed that the treaty fishing right remained undiminished by the fact that non-treaty fishermen had, at the time of the litigation, overwhelmed Indian

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5. Caselaw Access Project — 187 F. Supp. 2d 1273 (official reporter text) — <https://static.case.law/f-supp-2d/187/cases/1273-01.json>

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participation in the fishery. *Id.* at 684-87, 99 S.Ct. 3055. Similarly, in *Arizona I*, which *Fishing Vessel* relied upon, the court confirmed enough water to the tribes to irrigate all irrigable acres on their reservation lands regardless of the amount of irrigation then currently being exercised by the tribes. *Arizona I*, 373 U.S. at 600-01, 83 S.Ct. 1468.

Defendants' interpretations have the effect of assigning a 1979 (or 1984) priority date to the Tribes' water right. This result cannot be reconciled with this Court's holding, which was affirmed in *Adair II*, that the Tribes' priority date is "time immemorial." Moreover, a stream without water cannot be reconciled with the purpose of the tribal right which is to "guarantee continuity of the Indians' hunting and gathering lifestyle," (*Adair II*, 723 F.2d at 1412-13), and its acknowledgment that "the treaty is not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted." *Id.*, quoting *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). Fixing the tribal water rights to a ¹²⁷⁹specific date is not related to the fulfillment of purposes of the Klamath Indian Reservation, which is the paramount consideration mandated by *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

The "as currently exercised" phrase refers only to the moderate living standard which recognizes that changing circumstances can affect the measure of a reserved right. *Fishing Vessel*, 443 U.S. at 686-87, 99 S.Ct. 3055. The "as currently exercised" language does not set a water right to a level in 1979 or 1984, for that would clearly be contrary to the intent of *Adair II*. This is the only way to interpret the phrase to be consistent with the rest of *Adair II*, to not result in changing the Tribes' priority date, and to not result in abrogating the Tribes' reserved rights.

C. Hufford Defendants' Preclusion Argument

A significant portion of the Hufford Defendants' opening brief is devoted to their contention that "[t]he Klamath Tribes and their members have relinquished their rights to hunt, fish and gather and all interests in water incident thereto through disposal of the lands upon which those rights, under the Treaty of 1864, were necessarily appurtenant." Memorandum of Private Defendants, p. 43. This contention was rejected by Judge Solomon in *Adair I*. It is too late to relitigate that issue now, over twenty years later.

The Hufford Defendants also contend that an award of compensation made by the Court of Claims in 1971 extinguished water rights under Article I of the Treaty. The short answer is that this argument could and should have been asserted in *Adair I*, which was decided in 1979. It is too late now. Finally, in their reply brief, the Hufford Defendants assert that they need more time to marshal evidence in support of their preclusion argument, and seek to delay a decision on that defense. However, no additional "evidence" can change the fact that this argument comes twenty years too late.

CONCLUSION

For the foregoing reasons, it is hereby Ordered and Declared that: (1) the Klamath Tribes' water rights include a right to water to support resources the Tribes gather, in addition to the resources they hunt, fish, and trap; (2) *Adair I* announced the standard for quantifying the tribal water right; and (3) the "moderate living" standard has limited application in this case, but could be used to adjust the initial quantification of the tribal water right upon a proper showing by non-tribal opponents. In no event shall the adjudicator quantify or reduce the Tribal water right to a level below that which is necessary to support productive habitat.

Footnotes (as printed in the official reporter)

¹ The State of Oregon resisted the motion for exercise of the Court's jurisdiction on the ground that deference to the state adjudication was appropriate under the *Colorado River* doctrine. The court rejected that argument. Opinion and Order, August 9, 2001, dkt. no.

2359. Thereafter, the State of Oregon did not participate in the current proceeding, and took no position with regard to the merits of the substantive issues addressed in this opinion.

5. Caselaw Access Project — 187 F. Supp. 2d 1273 (official reporter text) — <https://static.case.law/f-supp-2d/187/cases/1273-01.json>

6. Justia — United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002) — <https://law.justia.com/cases/federal/district-courts/FSupp2/187/1273/2310122/>

United States v. Braren (Braren)

338 F.3d 971 (9th Cir. 2003), Nos. 02-35441, 02-35446

Official reporter pages 971–976. Text reproduced from the Caselaw Access Project (Harvard Law School Library) static bulk-data release of the official reporter volume.⁷

UNITED STATES of America, Plaintiff-Appellee, v. Boyd P. BRAREN; Boyd P. Braren Trust; Marilyn J. Mosby; John M. Mosby; Leslie Hufford; Kenneth J. Hufford; Hart Estate Investment Company; Peggy Marengo, Defendants-Appellants, and State of Oregon, Defendant-Intervenor, v. Klamath Indian Tribes, Plaintiff-Intervenor-Appellee. United States of America, Plaintiff-Appellee, v. Boyd P. Braren; Boyd P. Braren Trust; Marilyn J. Mosby; John M. Mosby; Leslie Hufford; Kenneth J. Hufford; Hart Estate Investment Company; Peggy Marengo, Defendants, and State of Oregon, Defendant-Intervenor-Appellant, v. Klamath Indian Tribes, Plaintiff-Intervenor-Appellee.

Nos. 02-35441, 02-35446.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 8, 2003.

Filed July 21, 2003.

See also 478 F.Supp. 336, 723 F.2d 1394.

^{*972}William F. Schroeder and Carol DeHaven Skerjanec, Vale, OR, and Jerome C. Muys, Washington, DC, for appellants Brarens.

Stephanie L. Striffler, Special Counsel to the Oregon Attorney General, Salem, OR, for appellant Oregon.

Andrew C. Mergen, United States Department of Justice, Washington, DC, for appellee United States.

Walter R. Echo Hawk, Native American Rights Fund, Boulder, CO, for appellees Klamath Tribes.

Before LAY, WALLACE, and TALLMAN, Circuit Judges.

OPINION

TALLMAN, Circuit Judge.

The State of Oregon, the United States, the Klamath Tribes, and many individual landowners have spent the past twenty-five years trying to determine rights to water in Oregon's Klamath Basin. The federal courts were the first forum for this effort, determining the scope of the federal water rights in 1979. We affirmed the legal rights at issue and approved leaving the quantification of water amounts to state proceedings. For the past decade or so, Oregon has proceeded with a massive and comprehensive administrative adjudication (Adjudication) of the competing claims to water in the Klamath Basin.

Now, the United States and the Klamath Tribes have returned to federal court asking the district court to clarify the scope of the federal water rights involved and to assess the propriety of the water rights standard recently announced in a preliminary administrative assessment issued in the Oregon Adjudication. Because the federal dispute presented here is not ripe for our determination, we dismiss the appeal and remand this case to the district court for it to enter an order vacating its judgment and staying federal proceedings ^{*973}until the completion of the Oregon Adjudication (including any appellate review).

I

7. Caselaw Access Project — 338 F.3d 971 (official reporter text) — <https://static.case.law/f3d/338/cases/0971-01.json>

8. Maricopa County Superior Court — slip opinion PDF, United States v. Braren (9th Cir. July 21, 2003)

<https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/nonazdecisions-USvBrarenOR072103.pdf>

A

In the late 1970s, the district court determined the nature and scope of water rights granted by treaty to the Klamath Tribes. *United States v. Adair*, 478 F.Supp. 336 (D.Or.1979) (*Adair I*). After announcing the standard for prioritizing how the water is applied to fulfill these rights, the district court left to Oregon the task of adjudicating the amounts of water to be allocated to each of the many claimants in the Klamath Basin (including the United States and the Klamath Tribes). The district court expressly retained jurisdiction over the case if necessary to effectuate its judgment. We approved the district court's assessment of the Indian water rights — with one caveat — and also embraced the district court's division of jurisdiction for resolving the dispute (federal courts announce the standard; Oregon applies and quantifies it). *United States v. Adair*, 723 F.2d 1394 (9th Cir.1983) (*Adair II*).

Oregon commenced a comprehensive water rights adjudication process to resolve the competing claims. In 1990, the Oregon Water Resources Department (Water Department) issued to all interested parties a "Notice to File Claim." This document informed putative claimants that they had to file their asserted water claims before the Water Department. By 1996, the United States had filed 395 claims, including claims by the Bureau of Indian Affairs on behalf of the Klamath Tribes. The Tribes submitted five claims of their own, incorporating by reference all claims filed by the Bureau of Indian Affairs. We are informed that more than 5,000 claims in all were received and require processing.

In 1998 and 1999, the Water Department requested legal and scientific justification supporting the claims filed by the United States and Tribes. The United States provided a response for itself and the Tribes. The Water Department solicited legal advice from the Oregon Department of Justice (ODOJ). The ODOJ provided the Water Department with a letter concluding that the Tribes "are entitled to the minimum amount of water necessary to support the Tribes' fishing and hunting rights as they were exercised contemporaneously with the *Adair* decision."

On October 4, 1999, shortly after receiving the ODOJ's advice letter, the Water Department's Adjudicator issued a "Summary and Preliminary Evaluation" of water rights claimed in the Adjudication. For the claims asserted by the Bureau of Indian Affairs, the Adjudicator announced the following standard:

Claims for instream flow to fulfill the purposes of the Klamath Tribes' treaty rights for hunting and fishing are proper if the record shows that the claimed amount is the minimum quantity of water necessary to protect treaty fish and wildlife resources as they existed in 1979....

The Preliminary Evaluation also stated that "[c]laims for [water to support] gathering rights are improper."

After a period of open inspection, "contests" were filed. The United States filed 480 contests; the Klamath Tribes filed 242. Individuals filed 134 contests against the claims made by the Bureau of Indian Affairs; 36 contests were filed against the Tribes' claims. The parties contesting the United States and tribal claims adopted the interpretation of *Adair II* set forth in the Water Department's Preliminary Evaluation.

⁹⁷⁴ Although the Adjudication has made much progress, it is far from complete. As of May 2001, 5,654 contests had been filed. Proceedings have been initiated in 2,267 of these contests, consolidated into five cases. Proceedings have not been initiated on the contests regarding the claims made by the Tribes and Bureau of Indian Affairs.

These contests will be heard before an administrative panel. Or. Admin. R. 137-003-0515. Parties in these hearings will be allowed to engage in discovery, file motions, subpoena witnesses, introduce documentary evidence, and provide testimony. Or. Admin. R. 137-003-0501 through 0700. The hearing panel will then issue proposed orders.

Next, the Water Department will review the proposed orders and the record as a whole and ultimately issue its "Findings of Fact and Order of Determination," which will resolve all of the water rights claimed in the entire Adjudication. Or.Rev.Stat. § 539.130. This Determination will be lodged with a state circuit court. *Id.* Parties may then file exceptions to the Determination, after which the court will file a judgment that may be appealed to the Oregon

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7. Caselaw Access Project — 338 F.3d 971 (official reporter text) — <https://static.case.law/f3d/338/cases/0971-01.json>

8. Maricopa County Superior Court — slip opinion PDF, *United States v. Braren* (9th Cir. July 21, 2003)

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appellate courts. Or.Rev.Stat. § 539.150. After the Oregon appellate remedies are exhausted, the parties may seek review by the United States Supreme Court on petition for certiorari.

B

The appeal now before us originated in 2001 when the United States and the Tribes returned to the district court seeking a declaratory judgment. Both the United States and the Tribes sought a declaration that the Tribes have a water right to support the gathering of plants. They also asked the district court to construe and clarify the nature and scope of tribal water rights announced by it in *Adair I* and by us in *Adair II*.

Oregon argued that the dispute was not yet ripe. Oregon also opposed the district court's exercise of jurisdiction; Oregon based its opposition on the theory of abstention announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The district court rejected Oregon's arguments and opted to exercise its jurisdiction.

The district court proceeded to decide the merits of the declaratory judgment sought by the Tribes and the United States. 187 F.Supp.2d at 1275. The court announced a two-step method of establishing tribal water rights. *Id.* at 1276-77. The district court also held that the individual defendants were precluded from arguing that the Tribes had lost their treaty rights to hunt, fish, and gather because this issue was conclusively resolved in *Adair I* and *II*. *Id.* at 1279.

II

Oregon and several individuals (collectively, the Brarens) appeal. Oregon renews its position that the dispute is not ripe and the district court should have abstained from exercising its jurisdiction. The Brarens alone appeal the district court's declaratory judgment clarifying the *Adair* standard. Whether a matter is ripe for judicial determination is a legal question that we review *de novo*. *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir. 1995).

Oregon contends that neither the Preliminary Evaluation of the Water Department nor the contests pending in the Adjudication make this case ripe. Oregon argues that the Preliminary Evaluation, while "an important tool in the adjudication," does not set a permanent standard for how to measure the Tribes' water⁹⁷⁵ rights. Instead, the parties remain free to argue in the hearings on their contests that their rights are something other than what was established in the Preliminary Evaluation. The results of these contests will then be evaluated by the Water Department, which will issue final administrative findings. These findings will then be subject to appeal in the Oregon courts. Oregon maintains that further factual development is needed because the Adjudication has not yet reached a final decision, so the Adjudication's ultimate interpretation and application of the *Adair* standard is not yet known. We are persuaded by Oregon's argument.

There are two components to ripeness: constitutional ripeness and prudential ripeness. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir.2000) (en banc). The constitutional ripeness of a declaratory judgment action depends upon "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941); accord *Central Montana Electric Power Co-op., Inc. v. Bonneville Power Administration*, 840 F.2d 1472, 1474 (9th Cir.1988).

There is little doubt that the constitutional ripeness test is met here. Oregon does not overtly argue otherwise. The Water Department adopted a standard that allegedly conflicts with the Tribes' federal water rights as announced in *Adair I* and *Adair II*. This position indicates a "substantial controversy" between the parties that is immediate.

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8. Maricopa County Superior Court — slip opinion PDF, *United States v. Braren* (9th Cir. July 21, 2003)

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The prudential component of ripeness requires more thorough consideration. “In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: [1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.” *Thomas*, 220 F.3d at 1141 (internal quotation marks and citation omitted).

“A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *Winter v. California Medical Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir.1989) (internal quotation marks and citation omitted). In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952), the Supreme Court stated that “the declaratory judgment procedure will not be used to preempt and prejudice issues that are committed for initial decision to an administrative body.” *Id.* at 246, 73 S.Ct. 236. Our past decisions have explicitly mandated that an agency action be final before a declaratory judgment action is ripe: “the ripeness doctrine was designed ... ‘to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.’ ” *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 618 (9th Cir.1978) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). See also *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir.2001); *Dietary Supplemental Coalition, Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir.1992) (“The fitness element requires ... a final agency action”); *Boating Industry Ass’ns v. Marshall*, 601 F.2d 1376, 1384(9th Cir.1979).

The fitness aspect of prudential ripeness is not satisfied here because further factual development is needed to establish what standard Oregon will actually ^{*976}apply to the federal water claims. The United States and the Tribes sought a declaration of their water rights because the Adjudication allegedly embraced a standard contrary to those rights. But the Adjudication has not yet embraced *anything*. At most, the Adjudication announced a starting point in analyzing the federal claims. This announcement in no way binds the administrative panels that will hear the contests in the Adjudication. Nor does it bind the Water Department when it considers those panels’ proposed orders and then issues its final administrative findings. Nor does it bind the Oregon courts when they review the Water Department’s findings. Oregon has not yet applied any final standard to the water claims of the United States and the Tribes. It is possible that the standards applied by the contest panels, the Water Department, and the Oregon courts could differ from the standard announced in the Preliminary Evaluation.

This case also fails to satisfy the fitness aspect of prudential ripeness because it is a challenge to an agency action that is nowhere near final. There remain at least two steps in the Adjudication in which the Water Department could alter the standard it uses. The panels that hear the contests can abandon the Preliminary Evaluation. And the Water Department can set aside the panels’ conclusions when the Department issues its final findings. This agency decision will then be subject to review by the Oregon courts.

Prudential ripeness is also absent from this case because there is no hardship for the United States and the Tribes to wait for additional factual development. At a minimum, the United States Supreme Court will remain open to the Tribes and the United States upon the completion of the Oregon Adjudication for final review on grounds that the Adjudication applied the incorrect standard. A declaration of water rights from a federal court today would provide no relief in any event. The district court’s declaratory judgment still left to the Adjudication the actual calculation of the amounts of water that will need to flow to the United States and the Tribes. The distribution of water — the ultimate relief sought by all of the parties in this case — cannot occur until the Adjudication is completed, regardless of whether the federal courts weigh in more than we already have on the standard for measuring the federal water rights.

Finally, it is of no consequence that both the *Adair I* and *II* courts implicitly considered that the legal issues presented were sufficiently ripe for determination. In *Adair I* and *II*, the dispute was whether the Tribes had *any* right to water. That issue was purely legal and separate from any proceedings in the Adjudication. By contrast, the dispute in

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8. Maricopa County Superior Court — slip opinion PDF, *United States v. Braren* (9th Cir. July 21, 2003)

<https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/nonazdecisions-USvBrarenOR072103.pdf>

this case is wholly about the Adjudication: the United States and the Tribes seek a clarification of the *Adair* standard to determine if the Preliminary Evaluation announced the right standard. That question can only be answered when the Adjudication is complete.

III

We hold that this dispute is not ripe for federal judicial determination. We do not reach the challenges to the district court's exercise of jurisdiction or the merits of the declaratory judgment. We VACATE the district court's judgment and REMAND this case to the district court to enter an order staying all federal proceedings pending completion of the Oregon Adjudication and related appellate review.

Each party shall bear its own costs in this appeal.

7. Caselaw Access Project — 338 F.3d 971 (official reporter text) — <https://static.case.law/f3d/338/cases/0971-01.json>

8. Maricopa County Superior Court — slip opinion PDF, United States v. Braren (9th Cir. July 21, 2003)
<https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/nonazdecisions-USvBrarenOR072103.pdf>

Sources and retrieval notes

Every opinion in this packet was reproduced in full from the sources listed below. Numbers correspond to the superscript markers in the packet and to the source lines printed at the foot of each page.

1. Caselaw Access Project — 478 F. Supp. 336 (official reporter text). <https://static.case.law/f-supp/478/cases/0336-01.json>
2. Justia — 478 F. Supp. (reporter volume index). <https://law.justia.com/cases/federal/district-courts/FSupp/478/>
3. Caselaw Access Project — 723 F.2d 1394 (official reporter text). <https://static.case.law/f2d/723/cases/1394-01.json>
4. Casemine — United States v. Adair, 723 F.2d 1394. <https://www.casemine.com/judgement/us/5914c36fadd7b049347c669a>
5. Caselaw Access Project — 187 F. Supp. 2d 1273 (official reporter text). <https://static.case.law/f-supp-2d/187/cases/1273-01.json>
6. Justia — United States v. Adair, 187 F. Supp. 2d 1273 (D. Or. 2002).
<https://law.justia.com/cases/federal/district-courts/FSupp2/187/1273/2310122/>
7. Caselaw Access Project — 338 F.3d 971 (official reporter text). <https://static.case.law/f3d/338/cases/0971-01.json>
8. Maricopa County Superior Court — slip opinion PDF, United States v. Braren (9th Cir. July 21, 2003).
<https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/nonazdecisions-USvBrarenOR072103.pdf>
9. Caselaw Access Project — static bulk case data (Harvard Law School Library). <https://static.case.law/>

Completeness note

All four decisions are reproduced complete, including the opinions' footnotes as printed in the official reporters. *Adair I*, 478 F. Supp. 336 (D. Or. 1979), was located in full in the Caselaw Access Project reproduction of Federal Supplement volume 478; no retrieval-only substitute sheet was required. Minor optical-character-recognition artifacts in the underlying reporter scans — hyphenated line-break splits, malformed bracketed editorial letters (for example “[a]ctual”), and misread digits or letters in citations — were corrected to the printed text after checking the parallel sources listed above; no text was added, summarized, or omitted.



United States Department of the Interior



OFFICE OF THE SOLICITOR
Washington, D.C. 20240

October 4, 1993

M-36979

Memorandum

To: Secretary

From: Solicitor

Subject: Fishing Rights of the Yurok and Hoopa Valley Tribes

You have asked for an opinion concerning the rights of the Yurok and Hoopa Valley Indian Tribes to an allocation or quantified share of the Klamath River Basin anadromous fishery resources. The request arises from the need of this Department for definitive legal guidance in setting yearly tribal harvest allocations. The Department of Commerce, although it does not have authority to regulate in-river Indian fisheries, has also requested a legal determination from this Department on the Tribes' rights because of the impact on decisions that the Commerce Department must make concerning ocean fisheries that harvest Klamath basin fishery resources.¹

¹ By memorandum dated September 16, 1991, the Assistant Secretary - Indian Affairs, originally requested this opinion. On March 10, 1993, in a letter to the Secretary of Commerce, you stated the position that in the absence of a formal legal determination, the most reasonable and prudent course for the United States, as trustee for the Tribes, would be to set aside at least a 50 percent share of the harvestable surplus of Klamath River stocks for the Indian in-river fishery. As a temporary resolution of differences between your recommendation and concerns expressed by the Department of Commerce, which has jurisdiction over ocean fisheries, this Department set the in-river tribal harvest ceiling in 1993 at 18,500, and both Departments agreed that additional conservation measures for 1993 were appropriate. The Secretary of Commerce directed a 1993 ocean fishing season that conformed to the in-river tribal harvest constraint, and provided a natural spawner escapement floor of 38,000 for 1993. See "Commerce and Interior Departments Set Chinook Salmon Management Measures," April 29, 1993 (U.S. Department of Commerce Press Release NOAA 93-R117); Ocean Salmon Fisheries Off the Coasts of Washington, Oregon, and California, 58 Fed. Reg. 26922 (May 6, 1993) (emergency interim rule); Ocean Salmon Fisheries Off the Coasts of Washington, Oregon, and California, 58 Fed. Reg. 31664 (June 4, 1993) (amendment to emergency interim rule).

During the past twenty-two years, numerous court decisions have confirmed that when the United States set aside in the nineteenth century what are today the Yurok and Hoopa Valley Indian Reservations along the Klamath and Trinity Rivers, it reserved for the Indians federally protected fishing rights to the fishery resource in the rivers running through the reservations.² This Department, through legal opinions and policy statements, also has acknowledged the fishing rights of the Yurok and Hoopa Valley Indians, and the Department's corresponding obligations.³ None

² See, e.g., United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986); Pacific Coast Federation of Fishermen's Ass'n v. Secretary of Commerce, 494 F. Supp. 626, 632 (N.D. Cal. 1980); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606 (1988); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, cert. denied, 469 U.S. 1062 (1984); Arnett v. 5 Gill Nets, 48 Cal. App. 3d 454, 121 Cal. Rptr. 906 (1975), cert. denied, 425 U.S. 907 (1976); Donahue v. California Justice Court, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1971).

³ The Solicitor's office, through the Associate Solicitor, Division of Indian Affairs, has issued a variety of legal opinions since 1976 concerning the nature, extent, and scope of federal reserved Indian fishing rights in the Klamath River basin. See, e.g., Memorandum from Acting Associate Solicitor, Indian Affairs, to Director, Office of Trust Responsibilities (November 4, 1976) (regulation of on-reservation Indian fishing on the Klamath River); Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary, Indian Affairs (May 4, 1978) (rights of the Klamath and Hoopa Reservation Indians to fish for commercial purposes); Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary - Indian Affairs (March 14, 1979) (Indian legal considerations with respect to Trinity River diversions at Lewiston Dam).

In addition, as a matter of policy this Department has acknowledged the existence of Indian fishing rights on the Klamath and Trinity Rivers and the Department's corresponding obligations. See, e.g., Letter from Assistant Secretary - Indian Affairs to Secretary of Commerce, May 19, 1992; Letter from Secretary of the Interior to Acting Chairperson, Yurok Transition Team, August 23, 1991; Letter from Assistant Secretary - Indian Affairs to Secretary of Commerce, July 25, 1991; Letter from Secretary of the Interior to Secretary of Commerce, May 1, 1991; Trinity River Flows Decision (May 8, 1991) (Decision of the Secretary of the Interior) (adopting recommendation for 1992 through 1996 flow releases, based in part on Department's trust responsibility to the Hoopa Valley and Yurok Tribes); Secretarial Issue Document on Trinity River Fishery Mitigation (approved by Secretary, January 14, 1981) (flow releases of water in the Trinity River); Memorandum from Assistant Secretary for Fish and

of the court decisions, however, have decided whether the Tribes' fishing rights entitle them to a specific allocation or quantified share of the Klamath and Trinity River fishery resources.

I conclude that the fishing rights reserved for the Tribes include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living. I also conclude that the Tribes' entitlement is limited to fifty percent of the harvest in any given year unless varied by agreement of the parties.

I have reached my conclusions by examining the history of the reservations, the Indians' dependence on the Klamath and Trinity River fisheries, the United States' awareness of that dependence, and the federal intent to create the reservations in order to protect the Indians' ability to maintain a way of life, which included reliance on the fisheries. I have conducted this examination in the context of the now-substantial body of case law examining the history of the present-day Hoopa Valley and Yurok reservations and confirming the reservation Indians' fishing rights,⁴ and the variety of cases involving other tribes' reserved fishing rights.

I. BACKGROUND

A. The Fishery Resource

The Klamath River originates in Oregon and flows southwesterly into California to its juncture with the Trinity River. The lower 40-50 miles of the Klamath River lie within the Yurok Reservation. From the point of confluence, the Klamath River flows northwesterly to discharge into the Pacific Ocean. The lower 12 miles of the Trinity River flow through the Hoopa Valley

Wildlife and Parks to Assistant Secretary for Land and Water Resources, October 24, 1979.

The Department of Commerce also has recognized that the tribes of the Klamath River basin have federal reserved fishing rights. Letter from Director, National Marine Fisheries Service, Department of Commerce, to Assistant Secretary - Indian Affairs, Department of the Interior, October 16, 1992.

⁴ In addition to the cases cited in footnote 2, see Crichton v. Shelton, 33 I.D. 205 (1904) (history of Klamath River and Hoopa Valley Reservations); Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, S. Rep. No. 564, 100th Cong., 2d Sess. 2-9 (1988) (same); and Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, H. Rep. No. 938, pt. 1, 100th Cong., 2d Sess. 8-15 (1988) (same).

Reservation, before discharging into the Klamath River near the boundary between the Hoopa and Yurok Reservations.

The Klamath and Trinity Rivers provide habitat for runs of salmon and other anadromous fish. Anadromous fish hatch in fresh water, migrate to the ocean, and complete their life cycles by returning to their freshwater places of origin to spawn. Because of the regular habits of the fish, it is possible to some extent to forecast stock abundance and to control harvesting throughout their range in order to maintain appropriate spawner escapement numbers for conservation and regeneration. However, different species have different life cycles, and different stocks intermix in the ocean before sorting themselves out and returning to the rivers of their origin. See generally Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662-64 (1979) (discussion of anadromous fish). As such, it is more difficult to regulate the numbers of particular stocks harvested in mixed-stock ocean fisheries, than to regulate stock-specific harvests by ocean terminal or in-river fisheries.

B. The Reservations⁵

1. Klamath River Reservation

The reservations which today constitute the Hoopa Valley and Yurok Reservations originally were created by executive orders issued pursuant to statutes authorizing the President to create Indian reservations in California. The Act of March 3, 1853, authorized the President "to make . . . reservations . . . in the State of California . . . for Indian purposes." 10 Stat. 226, 238. On November 10, 1855, the Commissioner of Indian Affairs submitted a report to the Secretary of the Interior, recommending a reservation that would encompass "a strip of territory one mile in width on each side of the (Klamath) river, for a distance of 20 miles." I Kappler, Indian Affairs: Laws and Treaties 816 (1904) ("Kappler"). The Commissioner's report noted that the proposed reservation had been selected pursuant to the Secretary's instructions "to select these reservations from such 'tracts of land adapted as to soil, climate, water-privileges, and timber, to the comfortable and permanent accommodation of the Indians.'" Id. The report also noted in particular the representations of the federal Indian officials in California

⁵ Attached as Appendix A is a copy of a map of the former Hoopa Valley Reservation appended to the Supreme Court's decision in Mattz v. Arnett, 412 U.S. 481 (1973). The map pre-dates the more recent partition of the reservation but generally speaking, the Hoopa Valley Reservation today includes what the map refers to as the "Original Hoopa Valley Reservation," and the Yurok Reservation today encompasses the "Old Klamath River Reservation" and the "Connecting Strip" shown on the map.

"that the selection at the mouth of the Klamath River is a judicious and proper one." Id. On November 12, 1855, the Secretary of the Interior recommended the proposed reservation to the President, and four days later President Pierce signed the proclamation establishing the Klamath Reservation. Id. at 817.⁶ The lands were mostly occupied by Yurok Indians, and the reservation encompassed what is today the lower portion of the Yurok Reservation.

2. Original Hoopa Valley Reservation

The original Hoopa Valley Reservation is a 12-mile square extending six miles on each side of the Trinity River. The Superintendent of Indian Affairs for California located and proclaimed it in 1864, pursuant to legislation enacted that same year. The legislation authorized the President to set apart up to four tracts of land in California "for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended." Act of April 8, 1864, § 2, 13 Stat. 39, 40 ("1864 Act"); see I Kappler at 815; see also Donnelly v. United States, 228 U.S. 243, 255-57 (1913); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 610 (1988). The reservation was mostly inhabited by Hoopa Indians. Although Congress itself thereafter recognized the existence of the Hoopa Valley Reservation as early as 1868, Donnelly, 228 U.S. at 257, it was not until 1876 that President Grant issued an executive order formally setting aside the reservation "for Indian purposes, as one of the Indian reservations authorized . . . by Act of Congress approved April 8, 1864." I Kappler at 815.

3. Extended Hoopa Valley Reservation

Between 1864 and 1891, the legal status of the Klamath River Reservation as an Indian reservation came into doubt. Although the Klamath Reservation had been created pursuant to the 1853 statute, the subsequent 1864 Act limited to four the number of reservations in California, and contemplated the disposal of reservations not retained under authority of the 1864 Act. See 1864 Act, § 3, 13 Stat. at 40. By 1891, the Round Valley, Mission, Hoopa Valley, and Tule River reservations had been set apart pursuant to the 1864 Act. Mattz v. Arnett, 412 U.S. at 493-94. Still, the Department of the Interior continued to recognize that the Klamath Reservation was critical for protecting the Indians who lived there and for protecting their access to the fishery, and continued to regard it as a

⁶ See also Mattz v. Arnett, 412 U.S. 481, 487 (1973); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 610 (1988).

reservation throughout the period from 1864 to 1891. As the Court noted in Mattz v. Arnett, the reservation "continued, certainly, in de facto existence," during that time. Id. at 490.

Finally, in 1891, in order to eliminate doubt, to expand the existing reservation, and to better protect the Indians living there from encroachment by non-Indian fiehermen, President Harrison issued an executive order under the authority of the 1864 Act. The order extended the Hoopa Reservation along the Klamath River from the mouth of the Trinity River to the ocean, thereby encompassing and including the Hoopa Valley Reservation, the original Klamath River Reservation, and the connecting strip in between. Thereafter, the original Klamath Reservation and connecting strip have been referred to jointly as the "Extension" or the "Addition," because they were added to the Hoopa Valley Reservation in the 1891 Executive Order. See I Kappler at 815 (Executive Order, October 16, 1891); Mattz v. Arnett, 412 U.S. at 493-4; Donnelly, 228 U.S. at 255-259. The validity of the 1891 addition and the continuing existence of the area included within the original Klamath Reservation were subsequently upheld by the Supreme Court in the Donnelly and Mattz v. Arnett decisions.⁷

4. Partition into the Yurok and Hoopa Valley Reservations

In 1988, Congress enacted the Hoopa-Yurok Settlement Act, which partitioned the extended Hoopa Valley Reservation into the present Hoopa Valley Reservation, consisting of the original 12-mile square bisected by the Trinity River and established under the 1864 Act, and the Yurok Reservation, consisting of the area along the Klamath River included in the 1891 Extension (excluding Resighini Rancheria).⁸ Hoopa-Yurok Settlement Act of 1988, Pub.

⁷ In Donnelly v. United States, 228 U.S. 243, modified and rehearing denied, 228 U.S. 708 (1913), the Court affirmed the federal conviction of the defendant for murdering an Indian within the boundaries of the 1891 Extension. The Court concluded that the Extension had been lawfully established and constituted Indian country. In Mattz v. Arnett, 412 U.S. 481 (1973), the Court rejected California's argument that the Act of June 17, 1892, 27 Stat. 52, opening the original Klamath Reservation to non-Indian settlement, had diminished the boundaries of the extended reservation. The Court struck down a state forfeiture proceeding against gill nets confiscated from a Yurok Indian, holding that the act opening the reservation to settlement did not alter the boundaries of the extended Hoopa Valley Reservation.

⁸ For the history and background of the 1988 Settlement Act, see S. Rep. No. 564 and H. Rep. No. 938, pt. 1, supra note 4. You asked for an opinion addressing the right of the Hoopa and

L. No. 100-580, 102 Stat. 2924, 25 U.S.C.A. § 1300i-1300i-11 (Supp. 1993).

The congressional partition "recognized and established" each area as a distinct reservation, and declared that "[t]he unallotted trust land and assets" of each reservation would thereafter be held in trust by the United States for the benefit of the Hoopa Valley and Yurok Tribes, respectively. 25 U.S.C.A. § 1300i-1(b)&(c). Both the House and Senate committee reports accompanying the legislation make specific mention of the Yurok Tribe's interest in the fishery. See S. Rep. No. 564, supra note 4, at 2, 14; H. Rep. No. 938, pt. 1, supra note 4, at 20.⁹

Although there are now two distinct reservations for the Yurok and Hoopa Valley Tribes, the events most relevant to your inquiry occurred prior to the 1988 partition. For purposes of this opinion, the various reservation areas will be referred to as the original Klamath River Reservation, the Hoopa Valley Reservation (original 12-mile square), and the extended Hoopa Valley Reservation (the post-1891 reservation, consisting of the Hoopa Square, the original Klamath River Reservation, and the connecting strip).

Yurok Tribes. We do not address the fishing rights of the Coast Indian Community of the Resighini Rancheria or other tribes in the Klamath River basin in California.

⁹ Both House and Senate committee reports refer to the substantial economic value of the Yurok Reservation fishery. The Senate Committee Report on the Settlement Act states:

Tribal revenue derived from the "Addition" [now the Yurok Reservation] recently has totalled only about \$175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the "Addition" is also in excess of \$1,000,000 a year. The Committee also notes that because of the cooperative efforts of the Hoopa Valley Tribe and other management agencies to improve the Klamath River system, and because the Fisheries Harvest Allocation Agreement apportioning an increased share of the allowable harvest to the Indian fishery, the tribal revenue potential from the "Addition" is substantial.

S. Rep. No. 564, supra note 4, at 14-15; see H. Rep. No. 938, pt. 1, supra note 4, at 20. See also Central Valley Improvement Act, Pub. L. No. 102-575, Title XXXIV, § 3406(b)(23), 106 Stat. 4706, 4720 (1992) (reference to federal trust responsibility to protect the fishery resources of the Hoopa Valley Tribe).

C. Historic Dependence of the Yurok and Hoopa Indians on the Salmon Fishery

Since prehistoric times, the fishery resources of the Klamath and Trinity Rivers have been a mainstay of the life and culture of the Indians residing there.¹⁰ See Mattz v. Arnett, 412 U.S. 481, 487, (1973); Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981). One estimate is that prior to settlement along the coast by non-Indians, the Indians in the Klamath River drainage "consumed in excess of 2 million pounds . . . of salmon annually from runs estimated to have exceeded 500,000 fish." U.S. Department of the Interior, Environmental Impact Statement - Indian Fishing Regulations 2 (Hoopa Valley Reservation, California) (April 1985)..

The Indians' heavy dependence on the salmon fishery for their livelihood has been well-documented.¹¹ "The salmon fishery permitted the [Klamath-Trinity basin] tribes to develop a quality of life which is considered high among native populations." AITS

¹⁰ The Indians' reliance on fishing continues. As the court noted in United States v. Wilson:

To modern Indians of the [pre-1988] Hoopa Valley Reservation, fishing remains a way of life, not only consistent with traditional Indian customs, but also as an eminently practical means of survival in an area which lacks the broad industrial or commercial base which is required to provide its population, Indian or otherwise, with predictable, full-time employment and income adequate to provide sufficient quantities and qualities of the necessities of life.

611 F. Supp. 813, 818 n.5 (N.D. Cal. 1985) (citing National Park Service, Environmental Assessment: Management Options for the Redwood Creek Corridor, Redwood National Park (1975)), rev'd and remanded on other grounds sub nom., United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986).

¹¹ See, e.g., Anthropological Study of the Hupa, Yurok, and Karok Indian Tribes of Northwestern California: Final Report 10, 22, 67-68, 101, 107 (American Indian Technical Services, Inc. January 1982) (Prepared for the U.S. Department of the Interior) ("AITS (1982)"); Edwin C. Bearss, History Resource Study - Hoopa-Yurok Fisheries Suit - Hoopa Valley Reservation 60 (U.S. Department of the Interior 1981); see also Ethnohistorical Data on the Klamath-Trinity Tribes of Northwestern California With Particular Emphasis on the Yurok (Klamath) Indians of the Lower Klamath Area (American Indian Technical Services, Inc. June 1984) (prepared for the U.S. Department of the Interior) ("AITS (1984)").

(1982) at 10. The salmon resource was the primary dietary staple of the tribes, and was the center of their subsistence economy. As the court noted in Blake v. Arnett, 663 F.2d at 909, the fishery was "not much less necessary to the existence of the [Yurok] Indians than the atmosphere they breathed" (quoting United States v. Winans, 198 U.S. 371, 381 (1905)).

During the pre-contact period, the salmon fishery also held significant commercial and economic value in Yurok and Hoopa culture and economy. Both tribes appear to have held firm concepts of property rights associated with the fishery. Fishing rights were considered personal property and part of an individual's wealth. Rights to fishing sites could be owned privately, fractionally, or communally, and could be inherited, sold, or transferred to pay debts.¹² Ownership of fishing sites gave owners the right to do what they wished with the fish taken, including sale or trade.¹³ Access to the fishery was the subject of trade and barter, and use of fishing sites not one's own might be paid for by providing a portion of the catch. Virginia Egan-McKenna, Persistence with Change: The Significance of Fishing to the Indians of the Hoopa Valley Reservation in Northwestern California 74-75 (Unpublished M.A. Thesis, University of Colorado 1983). Ownership of fishing rights associated with particular sites also may have given the owner control over downstream activities. Id. at 69.

According to one source:

A key factor in [trading of fishing rights between tribes] appears to have been the number of salmon runs a tribe received each year. For example, the Chilula received only one run a year and they often either traded with the Hupa for fish or bartered for temporary fishing rights (Curtis 1924:4). The Chimariko "sometimes paid the Hupa for the privilege of fishing at the falls near Cedar Flats" (Nelson 1978: 25-26).

AITs (1982), supra note 11, at 73; see Egan-McKenna at 76.

¹² AITs (1982) at 23, 49, 57, 72-73, 99, 105; Testimony of Dr. Arnold Pilling, Transcript of Proceedings at 55, California v. Eberhardt, No. 76-051-C (Cal. Super. Ct., County of Del Norte) (May 18, 1977).

¹³ Declaration of Arnold R. Pilling at 3, People v. McCovey, No. A012716 (Cal. Ct. App., 1st App. Dist., Div. 3) (Dec. 10, 1982) (Exhibit 25 to State's Brief).

Although experts have disagreed on the extent that harvested salmon was used in trade,¹⁴ the above example and other evidence indicate that such trading did occur. In years when salmon were plentiful throughout the Klamath-Trinity river system, there was little or no need to trade salmon to support the Indians' standard of living.¹⁵ Salmon were dried and stored, however, and were used in trading partnerships in years when other Indians in the basin did not have access to salmon because of river blockage or low flows. Pilling Testimony, supra note 12, Transcript at 56, 102-03 ("[I]f you have lots of stored salmon [when the Klamath was blocked], why, you're in a position to make very good bargains with your trading partners."), 106-09. Gourmet items such as salmon cheeks were "great trade items." Id. at 58-59. The trading partnerships were part of a complex economic, social, and ceremonial system within the tribal society. Id. at 109-115; see also George Gibbs, Journal of the Expedition of Colonel Redick McKee, United States Indian Agent, Through North-Western California, Performed in the Summer and Fall of 1851, in Henry R. Schoolcraft, Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States 146 (1853) ("Some understanding, however, seems to exist as to opening

¹⁴ The ethnographic and archeological documentation appears somewhat limited on the issue of trade, although it has been asserted that the sale and trade of harvested salmon was not extensive among the tribes of the Klamath-Trinity basins. See AITS (1982) at 117, 173. In declarations introduced by the State of California in 1982 in People v. McCovey, Drs. William Wallace and Arnold Pilling criticized the AITS (1982) study. See Declaration of William J. Wallace, People v. McCovey, No. A012716 (Cal. Ct. App., 1st App. Dist., Div. 3) (Dec. 10, 1982) (Exhibit 24 to State's Brief); Declaration of Arnold Pilling, supra note 13; see also William J. Wallace, Detailed Account of Yurok Aboriginal Fishing Practices 17-18, attached as Exhibit 2 to Declaration of William J. Wallace, supra. In 1977, in California v. Eberhardt, Dr. Pilling had testified as a defense witness, and Dr. Wallace testified as a witness for the prosecution. In their declarations in 1982, both Wallace and Pilling criticized the AITS (1982) study's conclusion concerning the extent to which trade or sale of salmon played a role in aboriginal Yurok and Hoopa culture. Although a subsequent AITS study responded to that criticism, AITS (1984), at 45-46, determining the extent of the Tribes' legal rights does not require resolving that dispute, which focuses on a specific form of use rather than the degree of dependence as a source of livelihood and culture.

¹⁵ See Pilling Testimony, supra note 12, Transcript at 106; Testimony of William J. Wallace, Transcript of Proceedings at 276, California v. Eberhardt, No. 76-051-C (Cal. Super. Ct., County of Del Norte) (May 19, 1977).

portions of [fish dams] at times, to allow the passage of fish for the supply of those above.").

In California v. Eberhardt,¹⁶ the trial court relied on the testimony of Drs. Pilling and Wallace to recognize that "[i]t is probably true that there was some degree of mutual exchange between and among Yuroks themselves and with other tribes in which fish was one of the items of exchange." The court also stated that "the anthropological testimony is not persuasive that the nature of the aboriginal custom of the Yurok Indians in 'commercial fishing' as that term might have been considered in aboriginal times, is anything like the concept of commercial fishing in present times." Id. As discussed below,¹⁷ the legal quantification of the reserved right depends not so much on the degree to which historic uses of salmon parallel modern uses, but on the degree of dependence on the salmon fishery.

Following non-Indian settlement in the area, the Indians of the Klamath-Trinity basin adapted to the new trading and economic opportunities presented. When non-Indians entered the area, there is some evidence that the Indians sold salmon to them. Pilling Testimony, supra note 12, Transcript at 61-62; Wallace Testimony, supra note 15, Transcript at 279. As the commercial fishing industry developed in the late 19th century, the Indians played an important role in supplying fish to and working at local canneries. See AITS (1982), supra note 11, at 119-21.

When the canneries developed, according to Dr. Pilling, the basic ownership right of access to the fishery seemed to be viewed by the cannery owners "as in Indian hands, and this was something that had to be negotiated. You had to meet specific contractual relationships, especially with the Spott family, to participate as canners on the lower Klamath, because it was essentially Indian territory. This is my understanding of the mercantilism." Pilling Testimony, supra note 12, Transcript at 69-70. The salmon cheeks were recognized as a luxury cut, which "[t]he cannery didn't get . . . unless the Indians waived [their] right" to keep the salmon heads. Id. at 58.

In 1876, the first commercial fishery was established on the Klamath by Martin V. Jones and George Richardson. Bearss, supra note 11, at 159-60. In 1879, in order to protect the Indian fishery from outside interference, the U.S. military sent a force to the Klamath Reservation with orders "[t]o suppress all fishing by whites and require all citizens residing on the Reservation to leave without delay." Id. at 146. The military construed this

¹⁶ Ruling on Motion to Dismiss for Lack of Jurisdiction, at 2, No. 76-051-C (July 18, 1977).

¹⁷ See infra, at 18 to 22.

as extending to the expulsion of non-Indian fisheries from the river, even if they did not land on the shore, because under no circumstances were the Yuroks to be "deprived of the Salmon as it is their main subsistence." *Id.* at 148-49. After the expulsion of the Jones and Richardson commercial fishery from the Klamath reservation, a small military outpost was maintained at Requa "to protect the Yuroks in the enjoyment of their only industry--salmon fishing." *Id.* at 151. Jones then erected a cannery nearby. "The Indians would catch and deliver the salmon for so much a head. . . . As the cannery was off the reservation and the Indians were benefitted by its presence, the military took no action to interfere with its operation." *Id.* at 160-61.

In 1883, R.D. Hume sought to lease the Klamath fisheries from the United States. Because it considered the fishery to be within the Klamath Reservation and subject to federal protection of the Indians' access to their fishery, the Department of the Interior declined Mr. Hume's request.¹⁸ The Indians apparently opposed R.D. Hume's efforts to establish a cannery operation because Hume's activities interfered with Yurok fishing and Hume wasn't interested in purchasing fish from the Indians but instead brought his own men to fish. AITS (1984), *supra* note 11, at 46.

By contrast, in 1886, John Bomhoff contracted with a number of Yuroks to supply his cannery with salmon. "By this agreement the Yuroks were not to fish for any other person nor give any other white the right to fish in the Klamath." Bearss at 163 (emphasis added); *see* AITS (1982), *supra* note 11, at 131. Bomhoff apparently also employed some Indians for wages. Bearss at 164. The Indian Bureau sanctioned Bomhoff's arrangement to purchase fish from the Indians. *Id.* at 186.

Eventually additional canneries were established in the area, and at the turn of the century, most of the commercial fishermen were Indians, some fishing at night and taking employment in the canneries during the day. *See* Bearss at 348; AITS (1982) at 121 & 131.

II. EXISTENCE AND CHARACTER OF YUROK AND HOOPA FEDERAL RESERVED INDIAN FISHING RIGHTS

The power of the United States to create or reserve fishing rights for Indian tribes is derived from its plenary power over

¹⁸ Appendix B to this opinion recounts the conflict that developed between the Government and Hume. After a court upheld Hume's resistance to expulsion, the United States expanded the Hoopa Valley Reservation to ensure that the original Klamath Reservation would have Indian reservation status. *See* Appendix B at 7-18.

Indian affairs, grounded in the Indian Commerce Clause, and from the Interstate Commerce Clause.¹⁹

In Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 617 (1988), the Supreme Court of California squarely rejected the State's assertion that the Federal Government lacked the authority to reserve Indian fishing rights in the Klamath River fishery when it created the reservation. Notwithstanding the substantial body of case law recognizing the extended Hoopa Valley Reservation Indians' federally reserved fishing rights,²⁰ the State contended otherwise, arguing specifically that the Indians had no federally reserved right to fish commercially. The Supreme Court of California rejected the State's contention based on federal and state court precedent and upon its own substantive legal review of the merits of the State's argument. As the Court noted, the State's theory in essence sought a repudiation of the well-established federal reserved rights doctrine recognized by the Supreme Court in Arizona v. California, 373 U.S. 546 (1963). Mattz v. Superior Court, 758 P.2d at 617; see id. at 616 (right to take fish from the Klamath River was reserved for the Indians when the reservation was created).²¹

¹⁹ See Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985) ("Constitution vests the Federal Government with exclusive authority over relations with Indian tribes"); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Hughes v. Oklahoma, 441 U.S. 322 (1979) (overruling Geer v. Connecticut, 161 U.S. 519 (1896)); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281-82 (1977) (Congress' power under the Commerce Clause to regulate taking of fish in state waters where there is some effect on interstate commerce); Sohappy v. Smith, 302 F. Supp. 899, 912 (D. Or. 1969) ("Statehood does not deprive the Federal Government of the power to enter into treaties affecting fish and game within a state, especially migratory species.") (citing Missouri v. Holland, 252 U.S. 416 (1920)); see also Arizona v. California, 373 U.S. 546, 596-601 (1963) (post-statehood executive order reservations included federally reserved water rights); Toomer v. Witsell, 334 U.S. 385, 399-402 (1948).

²⁰ See note 2, supra.

²¹ A few years earlier, the State had made a similar argument in another case. See Respondent's Supplemental Memorandum of Points and Authorities and Brief on Appeal, at 29-30, People v. McCovey, Crim. 23387 (Cal.) (Nov. 28, 1983). The State contended that the federal power to appropriate or reserve proprietary interests, including Indian fishing rights, was limited to the pre-statehood period. That argument was implicitly rejected in the California Supreme Court's decision in that case. People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, 697,

In 1940, one of my predecessors issued an opinion concerning the right of the Indians of the extended Hoopa Valley Indian Reservation to fish in the Klamath River within the boundaries of the reservation. See Right of Hoopa Valley Indians to Fish in Klamath River Without California State Interference, 1 Op. Sol. (Indian Affs.) 945 (March 13, 1940). It assumed without much consideration that the Indians' rights depended on a determination of whether the United States owned the bed of the Klamath River, suggesting that if the State of California owned the bed, the Indians' fishing rights were subject to plenary state regulation. That opinion rested on the same mistaken premise unsuccessfully asserted by the State in People v. McCovey and Mattz v. Superior Court.²² In light of subsequent federal and state court decisions confirming the Indians' federal reserved fishing rights,²³ that opinion must be overruled. Both the Commerce Clause and the Indian Commerce Clause provide constitutional authority for the United States to reserve fishing rights for Indians in migratory fishery resources, regardless of state ownership of a riverbed passing through the reservation. Therefore, this opinion does not address questions of navigability and title to the Klamath River.²⁴

In short, it is now well-established that the Yurok and Hoopa Valley Indians have federal reserved fishing rights,²⁵ created in

205 Cal. Rptr. 643 ("rights were granted by Congress when it authorized the President to create the reservation for Indian purposes"), cert. denied, 469 U.S. 1062 (1984).

²² In Mattz v. Superior Court, the State specifically cited the 1940 opinion to support its argument. See 758 P.2d at 616 & n.8.

²³ See note 2, supra.

²⁴ The 1940 opinion did not determine whether the Klamath River was in fact navigable at statehood.

²⁵ A federally reserved fishing right is not one of ownership in particular fish, but a right to an opportunity to obtain possession of a portion of the resource, which can best be expressed by either the numbers of fish taken or an allocation of the harvestable resource. See United States v. Washington, 520 F.2d 676, 687 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); see also Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct., 573 F.2d 1123, 1129 n.6 (9th Cir. 1978), vacated and remanded, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (vacating judgments of Ninth Circuit and state supreme court and remanding for further proceedings not inconsistent with the U.S. Supreme Court's opinion).

the nineteenth century when the lands they occupied were set aside as Indian reservations. Numerous court decisions have recognized that the United States intended to reserve for the Indians the rights and resources necessary for them to maintain their livelihood.²⁶ As the Ninth Circuit has stated, the right includes "fishing for ceremonial, subsistence, and commercial purposes." United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986).²⁷

Appendix B to this opinion recounts and summarizes the history of the Klamath River and Hoopa Valley Reservations, reviewing in particular the Annual Reports of the Commissioner of Indian Affairs. As described there, at the time the reservations were created, the United States was well aware of the Indians' dependence upon the fishery. A specific, primary purpose for establishing the reservations was to secure to the Indians the access and right to fish without interference from others.²⁸ As

²⁶ See cases cited supra, note 2; see also Menominee Tribe v. United States, 391 U.S. 404, 406 (1968); United States v. Adair, 723 F.2d 1394, 1408-10 (9th Cir. 1983) (reservation of water rights to accompany reserved rights to hunt, fish, and gather).

²⁷ See also Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary, Indian Affairs (May 4, 1978) (Indian fishing on Klamath and Trinity Rivers); United States v. Wilson, 611 F. Supp. 813, 817-18 (N.D. Cal. 1985), rev'd on other grounds sub nom., United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986) (same); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, 690 (same), cert. denied, 469 U.S. 1062 (1984); and see Arnett v. 5 Gill Nets, 48 Cal. App. 3d 454, 458, 121 Cal. Rptr. 906, 909 (1975) (Indian commercial fishing early in 20th century), cert. denied, 425 U.S. 907 (1976).

²⁸ See Mattz v. Arnett, 412 U.S. 481, 487-88 (1973); Donnelly v. United States, 228 U.S. 243, 259, modified on other grounds and rehearing denied, 228 U.S. 708 (1913); United States v. Eberhardt, 789 F.2d at 1360 (9th Cir. 1986) (Hoopa Valley Reservation Indian fishing rights were granted by Congress when it authorized President to create reservations for Indian purposes) (citing McCovey, 36 Cal. 3d at 534, 685 P.2d at 697; Wilson, 611 F. Supp. at 817-18 & n.5; Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 618 (1988) (river and Indian fishing played a primary role in the 1891 extension of the Hoopa Valley Reservation to include the old Klamath Reservation and connecting strip); 5 Gill Nets, 48 Cal. App. 3d at 459-62, 121 Cal. Rptr. at 909-911 (Klamath); Donahue v. California Justice Court, 15 Cal. App. 3d 557, 562; 93 Cal. Rptr. 310, 313 (1971) (Hoopa Valley Reservation); Crichton v. Shelton, 33 I.D. 205, 217 (1904) ("the prevailing motive for setting apart the [Klamath River] reservation was to secure to the Indians the fishing privileges

against third parties, the Indians' reserved fishing rights were of no less weight because they were created by executive orders pursuant to statutory authority rather than by treaty.²⁹ Courts have uniformly rejected a "treaty vs. non-treaty" distinction as a basis for treating Hoopa and Yurok fishing rights differently from the treaty-reserved fishing rights of tribes in other areas of the United States.³⁰

of the Klamath river"); cf. Fishing Vessel Ass'n, 443 U.S. at 665 n.7, 666 n.8 (dependence of Stevens Treaty tribes on fishing); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.) (executive order reservation for Indian purposes included purpose of preserving tribal access to fishing grounds and acted to reserve water rights necessary to maintain the fishery), cert. denied, 454 U.S. 1092 (1981); Quechan Tribe v. Rowe, 350 F. Supp. 106, 111 (S.D. Cal. 1972) (executive order reservation for "Indian purposes" necessarily included right to hunt, trap, and fish on the reservation).

²⁹ The congressional committee reports accompanying the 1988 Hoopa-Yurok Settlement Act concluded that, as against the plenary power of Congress to make further dispositions of the reservation property and resources, no constitutionally protected property rights had vested in any particular tribes or individuals when the reservation areas were established by executive order. S. Rep. No. 564, supra note 4, at 12; H. Rep. No. 938, pt. 1, supra note 4, at 18-19. That conclusion was based on "peculiar facts and law" relevant to the extended Hoopa Valley Reservation. S. Rep. No. 564, at 14. The same conclusion had been reached in the Court of Claims more than a decade earlier. Short v. United States, 202 Ct. Cl. 870, 486 F.2d 561 (1973), cert. denied, 416 U.S. 961 (1974).

This conclusion does not affect the present analysis. Short and related court decisions, as well as the legislative history of the 1988 Act, confirm that the Hoopa Valley Reservation was created for Indian purposes. See S. Rep. No. 564, at 12; H. Rep. No. 938, pt. 1, at 18. The absence of a compensable vested property interest as against congressional authority to allocate reservation resources among the tribes or tribal members settled thereon is not inconsistent with the history of the reservation demonstrating that the United States granted rights of use and occupancy to the Indians, including fishing rights, which were protected against third party or state interference while reserved for federal purposes. See Arnett v. 5 Gill Nets, 48 Cal. App. 3d 459, 121 Cal. Rptr. 906 (1975), cert. denied, 425 U.S. 907 (1976); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687 (Cal. 1984).

³⁰ See Blake v. Arnett, 663 F.2d 906, 909-910 (9th Cir. 1981); Wilson, 611 F. Supp. at 817-18; McCovey, 685 F.2d at 696-97; 5 Gill Nets, 48 Cal. App. 3d at 459-62, 121 Cal. Rptr. at

III. QUANTIFICATION OF THE FISHING RIGHT AND ALLOCATION OF HARVEST

A. Introduction

The legal measure of the Tribes' fishing rights depends primarily on the purpose of the United States in reserving such rights when it created the Klamath River, Hoopa Valley, and extended Hoopa Valley Reservations. See United States v. Walker River Irrigation Dist., 104 F.2d 334, 336 (9th Cir. 1939) (statute or executive order setting aside a reservation may be equally indicative of intent as treaty or agreement; intent is discerned by taking account of the circumstances and needs of the Indians and the purpose for which the lands had been reserved); cf. Arizona v. California, 373 U.S. 546, 596-600 (1963).³¹

910-11. See also Antoine v. Washington, 420 U.S. 194, 200-03 (1975). In response to California's petition for Supreme Court review of Arnett v. 5 Gill Nets, Solicitor General Bork's brief for the United States noted:

That executive orders played a prominent role in the creation of the Reservation does not change this result [that the United States reserved to the Indians the right to fish on the Reservation without state interference]. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. . . .

With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

Memorandum for the United States as Amicus Curiae, at 5, Arnett v. 5 Gill Nets, (U.S. No. 75-527), cert. denied, 425 U.S. 907 (1976).

³¹ The legal quantification of non-treaty federally reserved on-reservation Indian fishing rights to a specific share of an anadromous fishery resource appears to be a matter of first impression. It is well-settled, however, that non-treaty federally reserved rights, recognized when an Indian reservation is created, can affect off-reservation use of a natural resource. See, e.g., Arizona v. California, 373 U.S. at 596-600. In addition, the cases adjudicating the treaty fishing rights of the Northwest tribes have recognized that location-specific Indian reserved rights affect fishing taking place outside those locations. See, e.g., U.S. v. Washington, 459 F. Supp. 1020, 1070 (W.D. Wash. 1978); Schappy v. Smith, 302 F. Supp. 899, 911 (D. Ore. 1969). As such, while the precise issue addressed in this opinion may be one of first impression, many of the principles applied are well-established.

The fishing rights now established in the Yurok and Hoopa Valley Tribes were reserved when the reservations were set aside for Indian purposes. See Act of April 8, 1864, § 2, 13 Stat. 39, 40 (reservations to be set aside "for the accommodation of the Indians," with "due regard to their adaptation to the purposes for which they are intended."). Because the rights arose by implication rather than by express language, the purposes of the reservation are discerned by examining the historical record and circumstances surrounding creation of the reservation.³²

Therefore, we must consider the evidence of the dependence of the Indians on the fishery "as a source of food, commerce, and cultural cohesion," Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979), and the Federal Government's awareness of the Indians' reliance on the fishery. This inquiry must also include recognition of the Indians' "need to maintain themselves under changed circumstances." Colville v. Confederated Tribes v. Walton, 647 F.2d 42, 47 & n.10 (9th Cir.), cert. denied, 454 U.S. 1092 (1981). Finally, the United States is presumed to have intended to deal fairly with the Indians. Arizona v. California, 373 U.S. at 600.

B. Quantification

The history of the creation of the Klamath River and Hoopa Valley Reservations, and the extension of the Hoopa Valley Reservation to include the Klamath River Reservation and connecting strip, plainly shows a purpose by the United States to reserve for the Indians what was necessary to preserve and protect their right to obtain a livelihood by fishing on the reservation. As discussed earlier, the Indians were highly dependent upon the fishery resource. As recounted in Appendix B, the United States was well aware of the importance of this fishery to the Indians and created the reservations to preserve their access to an adequate supply of fish. The historical record demonstrates the importance of the reservations to achieving the Federal Government's objectives of creating and maintaining peaceful relations between the Indian tribes and non-Indians, protecting the Indians from further encroachment and displacement by non-Indians, and obtaining the resources necessary for the Indians to maintain their livelihood and be self-sufficient on the reservation.³³ The United States

³² Indian hunting and fishing rights generally arise by implication when a reservation is set aside for Indian purposes. See, e.g., Quechan Tribe v. Rowe, 350 F. Supp. 106, 111 (S.D. Cal. 1972). The precise extent of the right, however, is determined by examining the facts and circumstances of each case.

³³ As the court in United States v. Wilson, noted, "[i]n establishing the Hoopa Valley Reservation, Congress reserved those rights necessary for the Indians to maintain on the land ceded to them their way of life, which included hunting and

sought to isolate and protect the Indians from non-Indians who would otherwise appropriate the lands and the fishery resource upon which the Indians were so dependent for their livelihood.

The physical locations of the reservations--one mile on each side of the Klamath, six miles on each side of the Trinity--plainly demonstrate the United States' awareness of the centrality of the rivers and the fisheries to the purposes for which the reservations were created. As the Supreme Court noted in Mattz v. Arnett, 412 U.S. 481 (1973), the Klamath River Reservation was ideal for the Indians because of the river's abundance of salmon and other fish. The United States was well aware of the Indians' dependence on the fishery resource and of the need to protect the Indians' use of the fishery from non-Indian encroachment. Id. at 487 & n.6; Crichton v. Shelton, 33 I.D. 205, 216-18 (1904).

While the United States also sought to introduce agriculture to the Indians, see, e.g., Appendix B at 4 & 7, it anticipated that the Indians would continue to rely on the reservation fishery. Thus, the fishery and agriculture may be said to be twin primary purposes for creating the reservation. Cf. Walton, 647 F.2d at 47-48 (reserved water right for agriculture and fishing, based on primary purposes of reservation).³⁴

fishing." 611 F. Supp. 813, 817-18 (N.D. Cal. 1985), rev'd and remanded on other grounds sub nom., United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986); see Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981).

³⁴ In his journal of the 1851 expedition visiting Indian tribes in Northwestern California, George Gibbs recognized the value of protecting the Indian fisheries within a reservation, even while pursuing other assimilationist objectives:

The Indians of the Klamath and its vicinity afford a field for a new experiment. Their country furnishes food of different kinds and in quantity sufficient to supply their absolute wants. . . . If collected as occasion may offer, and its advantage be shown to them, upon reservations, where their fisheries can still be carried on, where tillage of the soil shall be gradually introduced, and where the inducements to violence or theft will be diminished or checked they may possibly be made both prosperous and useful to the country.

George Gibbs, Journal of the Expedition of Colonel Redick McKee, United States Indian Agent, Through North-Western California, Performed in the Summer and Fall of 1851, in Henry R. Schoolcraft, Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States 142-43 (1853).

Upon establishment of the original Klamath Reservation in 1855, the Commissioner of Indian Affairs contemplated that the inclusion of the fishery would eliminate any need to provide the Indians with rations of beef, as was common on other Indian reservations. See Appendix B at 1. Between 1855 and 1891, when the Hoopa Valley Reservation was extended to ensure the reservation status of the lower Klamath area, the annual reports of the Commissioner are replete with references to the importance of the fishery for the continued livelihood and welfare of the Indians. See, e.g., id. at 3-4, 8-9.

In short, the fishery here, no less than the water in the arid southwest, was deemed "essential to the life of the Indian people" for whom the reservation was created. Arizona v. California, 373 U.S. 546, 599 (1963). The inclusion within the reservation of the fishery at the mouth of the Klamath within the boundaries of the reservation demonstrates the purpose to prevent non-Indians from establishing commercial fisheries there to supplant the Indian fishery. Thus here, no less than with the Pacific Northwest treaty tribes, the Government "recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979).

At the time the reservation was created, ocean trolling was of little commercial consequence and was not of sufficient magnitude to interfere with the in-river fishery. Bearss, supra note 11, at 235. Only with subsequent technological advances did the ocean fishery begin to have a significant impact on salmon runs. As a practical matter then, the reservation boundaries as established were substantially equivalent to protecting the Indian fishery from significant non-Indian encroachment.

The standard for determining the extent of the Pacific Northwest treaty tribes' fishing rights has been stated by the Supreme Court as one which will "assure[] that the Indians' reasonable livelihood needs [will] be met." Fishing Vessel Ass'n, 443 U.S. at 685 (citing Arizona v. California, 373 U.S. at 600; Winters v. United States, 207 U.S. 564 (1908)). The "central principle here must be that Indian . . . rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate living." Fishing Vessel Ass'n, 443 U.S. at 686.

With respect to the reserved fishing right, I can find no meaningful difference between the federal purpose in creating the reservations for the Yurok and Hoopa Valley Indians, and the bilateral intent in the treaties with the Pacific Northwest tribes to guarantee to the tribes "an adequate supply of fish."

United States v. Washington, 506 F. Supp. 187, 197 (W.D. Wash. 1980), aff'd in relevant part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S. 994 (1985). Although the circumstances of this case may differ in certain respects from those of the Pacific Northwest treaty tribes,³⁵ they are not relevant to the outcome. Therefore, I conclude that the Government intended to reserve for the tribes on the Hoopa and Yurok Reservations a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living.

There is, as discussed earlier, some uncertainty over the extent to which salmon was traded or sold "commercially" in aboriginal Hoopa and Yurok culture. But the focus of the inquiry into the Tribes' legal rights is on the degree of dependence on the fishery resource at the time the reservation was created or expanded, rather than on what particular uses were made of the fish, which may or may not approximate patterns of use or trade in non-Indian culture. As the Court in Fishing Vessel Ass'n noted with respect to the tribes in western Washington, it is not possible to compare Indian uses of fish for trade in aboriginal times with the volume of present day commercial use of salmon. 443 U.S. at 665 n.7. The same could be said of comparisons of the uses of salmon in aboriginal times to support a "reasonable livelihood," as compared with modern-day uses to the same end.³⁶ Present-day tribal needs to support the livelihood of members may be more or less than the volume utilized in aboriginal times. Cf. Fishing Vessel Ass'n, 443 U.S. at 687. In short, the United States Supreme Court has rejected the notion that prehistoric patterns or volumes of use must mirror modern economic uses of salmon in order to find sufficient Indian dependence on the

³⁵ For example, while the importance of salmon to the diet and cultural cohesion appears similar, historical evidence more extensively documents the use of harvested salmon for trade by the Pacific Northwest treaty tribes than by the Yurok and Hoopa Tribes. Cf. AITS (1984), supra note 11, at 45 ("trade patterns of the Northwestern California tribes in general have received little attention from anthropologists and historians"). The Yurok and Hoopa Indians' concepts of private ownership of fishing access sites also appear to contrast with the cultures of the Northwest tribes, which viewed fishing rights as more communal. See United States v. Washington, 384 F. Supp. 312, 353 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

³⁶ Indeed, a "subsistence" right limited to quantities based on aboriginal consumption levels might well equal or exceed modern-day notions of moderate living needs as satisfied by both consumptive and commercial uses.

salmon fishery sufficient to justify application of the moderate living standard.³⁷

The Yurok and Hoopa Indians had a "vital and unifying dependence on anadromous fish," compare Fishing Vessel Ass'n, 443 U.S. at 664, which the historical evidence demonstrates was well-known to the United States. As with the Northwest treaty tribes, salmon was the great staple of their diet and livelihood. Although the anthropological evidence does not clearly demonstrate the use of dried fish for trade in the same manner as was shown for the Northwest treaty tribes, it does demonstrate that anadromous fish constituted the primary means for the Indians' livelihood, and that fishing rights and the fishery were an integral part of the diet, economy, and culture of the tribes. Cf. United States v. Washington, 384 F. Supp. 312, 350-58, 406-07 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). There is some evidence of the Indians' readiness to capitalize on the economic value of the fishery by selling or bartering dried fish with non-Indians passing through the area, and certainly the Indians adapted their utilization of the fishery to provide fish to the non-Indian canneries.

In this case, considering the nature of the right, which the courts have already confirmed, and considering the Indians' historic dependence on the fishery and the federal purposes of the reservation, the "reasonable livelihood" needs must satisfy ceremonial, subsistence, and commercial fishing needs. See Fishing Vessel Ass'n, 443 U.S. at 686-88.

C. Allocation of the Harvest

While the moderate standard of living generally has been identified as the benchmark for identifying the quantity of tribal reserved fishing rights, see United States v. Washington, 506 F. Supp. 187, 198 (W.D. Wash. 1980), aff'd in relevant part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S. 994 (1985), various Indian fishing rights cases have also limited tribal

³⁷ As the amicus brief for the United States in Arnett v. 5 Gill Nets stated,

Petitioner cites no authority, and we know of none, that would limit an Indian's on-reservation hunting or fishing to subsistence. The purpose of a reservation is not to restrict Indians to a subsistence economy but to encourage them to use the assets at their disposal for their betterment.

Memorandum for the United States as Amicus Curiae 8, Arnett v. 5 Gill Nets (U.S. No. 75-527) (on petition for certiorari), cert. denied, 425 U.S. 907 (1976).

harvest rights by an allocation ceiling of no more than 50% of the harvestable numbers of fish, thus providing that the tribes share the resource with non-tribal fishers. The 50% allocation has been based on express treaty language in some cases. Even where a specific treaty does not refer to sharing of the resource, at least one court has reached the same result based on the intent of the parties.

In the Pacific Northwest treaties, the tribes reserved off-reservation fishing rights at their usual and accustomed fishing places "in common with" the citizens of the Territory. The courts held that this language justified limiting the tribes' entitlement for allocation purposes to 50% of the harvestable catch. See *id.*, 506 F. Supp. at 195-98. Thus, even though the treaties were designed to guarantee the tribes an adequate supply of fish and even though the starting point for apportionment is assuring that the Indians' reasonable livelihood needs will be met, Fishing Vessel Ass'n, 443 U.S. at 685, the tribes' agreement to share the resource with non-Indian users justified limiting the tribes to a percentage allocation. See United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).³⁸ That is, the treaties protected and recognized the treaty-derived rights of both the tribes and the non-Indians to a share of the available fish. Fishing Vessel Ass'n, 443 U.S. at 684-85.

In Sohappy v. Smith, 529 F.2d 570 (9th Cir. 1976), the court of appeals refused to set aside the district court's 50% allocation formula, adopted to reflect the Columbia River treaty tribes' right to a fair share of the salmon harvest. In United States v. Oregon, the parties agreed to a Columbia River Management Plan that allowed in-river harvesting on a 60% treaty/40% nontreaty basis, an allocation which deviated from the 50%-50% starting point in order to compensate for ocean fishing by non-Indians. 718 F.2d 299, 301-02 & n.2 (9th Cir. 1983).

In United States v. Michigan, the district court contrasted treaty rights explicitly held "in common with" other citizens with the treaties of the Indian tribes in Michigan, which had no

³⁸ Limiting the tribal allocation to a 50% share of the harvestable resource in any given year is distinct from determining whether the moderate standard of living component of the right is being satisfied. Given the current depressed condition of the Klamath basin fishery, this opinion need not address how to calculate the quantities of fish needed to support the Tribes' moderate living needs. Until the fishery resource is substantially restored to the point that the evidence establishes that a 50% share is more than is needed to support the Tribes' moderate living needs, the 50% allocation is the appropriate quantification of the Tribes' rights.

such language. See 505 F. Supp. 467, 472-73 (W.D. Mich. 1980), remanded, 623 F.2d 448 (6th Cir. 1980) (to consider preemptive effect of new federal regulations), modified, 653 F.2d 277 (1981), cert. denied, 454 U.S. 1124 (1981). Although not deciding the allocation issue itself, the district court observed:

[T]he Indians of Michigan presently hold an unabridged, aboriginal, tribal right to fish derived from thousands of years of occupancy and use of the fishery of the waters of Michigan. That aboriginal right arose from the tribes' reliance upon the fishery for its livelihood, that is, from its dependence upon this fishery for food and trade. That right was confirmed in its entirety by the Treaty of Ghent and left whole by the Treaties of 1836 (7 Stat. 459) and 1855 (11 Stat. 621). Thus, today the Michigan tribes retain the right to fish Michigan treaty waters to the full extent necessary to meet the tribal members' needs.

* * * *

This 50% maximum [for the Washington treaty tribes] arises directly from the "in common with" language in the Washington treaties. [Fishing Vessel Ass'n,] 443 U.S. 686. The 50% ceiling is suggested, if not necessarily dictated by, the word "common" as it appears in the Washington treaties. No such language is present in the Michigan treaties. 443 U.S. at 686 n.27.

The general principle in Fishing Vessel is that Indian treaty rights to scarce natural resources are defined by what is necessary to assure that the Indians' reasonable livelihood expectations are met. 443 U.S. at 686. Where, as here, there was no negotiation resulting in a right held in common and the Indians implicitly reserved their aboriginal right in its entirety, this principle might, over time, mandate that the Indians have access to the entire available resource.

Id., 505 F. Supp. at 472-73.

In the lengthy Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin litigation, the court also addressed Indian treaties with language different from those in the Pacific Northwest. The Treaty of 1837 with the Chippewas provided that the "privilege of hunting, fishing and gathering the wild rice [in the ceded area] is guaranteed to the Indians, during the pleasure of the President of the United States." Lac Courte Oreilles Band v. Wisconsin, 653 F. Supp. 1420, 1425 (W.D. Wisc. 1987) ("LCO III"). The Treaty of 1842 provided that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States." Id. at 1425. Both treaties were silent concerning whether the off-reservation reserved harvesting rights would be exclusive or in

common with other citizens. Lac Courte Oreilles Band v. Wisconsin, 686 F. Supp. 226, 232 (W.D. Wisc. 1988). Because of the absence of treaty language limiting the tribes' right as one "in common with" other users, the court was reluctant to follow the 50% allocation formula adopted in the Pacific Northwest treaty cases, focusing instead on the moderate living standard. Id.

Ultimately, however, when forced to allocate the harvest, the court concluded that "[t]he only reasonable and logical resolution is that the contending parties share the harvest equally." Lac Courte Oreilles Band v. Wisconsin, 740 F. Supp. 1400, 1417-18 (W.D. Wisc. 1990). The court noted that the treaties did not reserve to the Indians an exclusive right of harvesting in the ceded area. The court also found, though, that when the treaties were made, the Indians understood that the presence of non-Indian settlers would not require that the Indians forego the level of hunting, fishing, gathering, and trading necessary to provide them with a moderate living. Id. at 1415 (citing LCO III, 653 F. Supp. at 1426). The court then stated:

This unexpected scarcity of resources makes it impossible to fulfill the tribes' understanding that they were guaranteed the permanent enjoyment of a moderate standard of living, whatever the harvesting competition from the non-Indians. It also makes it necessary to try to determine how the parties would have agreed to share the resources had they anticipated the need for doing so.

Id. at 1415. Based on the treating parties' understanding that there would be competition for the resource and the fact that the Chippewa Tribe did not retain exclusive harvesting rights in the ceded territory, the court concluded

that the parties did not intend that plaintiffs' reserved rights would entitle them to the full amount of the harvestable resources in the ceded territory, even if their modest living needs would otherwise require it. The non-Indians gained harvesting rights under those same treaties that must be recognized. The bargain between the parties included competition for the harvest.

How to quantify the bargained-for competition is a difficult question. The only reasonable and logical resolution is that the contending parties share the harvest equally.

Id. at 1416 (emphasis added). While the court emphasized its view that the Chippewa treaties differed in significant respects from those of the Pacific Northwest tribes, it concluded that the

equal division was the "fairest" and "inevitable" result. Id. at 1417-18.

In United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), in the context of addressing the relationship between reserved Indian fishing rights and federal reserved Indian water rights, the Ninth Circuit affirmed the district court's holding that the Klamath Tribe was "entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights . . . as currently exercised to maintain the livelihood of Tribe members." Id. at 1414. The court explained:

Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living.

Id. at 1415 (citing Fishing Vessel Ass'n, 443 U.S. at 686) (emphasis added). Thus, the Ninth Circuit suggested, tribal fishing rights are not necessarily accompanied by a 50% allocation ceiling.

The Klamath River and Hoopa Valley reservations and accompanying federal rights were created by executive action pursuant to congressional statutory authorization, rather than through a bilateral, bargained-for agreement, as in the Pacific Northwest and the Great Lakes Tribes' fishing rights cases. Because the operative documents creating the reservation do not expressly reserve fishing rights, neither do they expressly limit the implied rights reserved for the Indians of the reservation. Thus, an argument could be made that the tribal moderate standard of living needs should be satisfied first, before other user groups can be afforded fishing privileges. Cf. State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972) (unqualified treaty language contrasted with "in common with" treaty language, denoting a qualified right).

At the time the reservations were created, the United States doubtless contemplated that the reservation resources, and in particular the fishery, would be sufficient for the Indians to continue to be self-supporting, see Appendix B at 8, or in other words, to support a moderate standard of living. Furthermore, although there was competition for the fishery, the United States sought to reduce it by including what was then the location most desired by the early non-Indian fishing industry--the area at the mouth of the river--inside the reservation boundaries. The historical evidence does not indicate that either the United States or the Indians contemplated scarcity of the resource as a whole.

On the other hand, the Tribes' right to fish in this case does not extend beyond the reservation. Moreover, the doctrine of implied reserved fishing rights has not been extended to provide an exclusive on-reservation right to a fishery resource such as anadromous fish that migrates off the reservation. To do so could totally deprive off-reservation users of access until tribal rights are fully satisfied. The historical evidence that I have examined is not sufficient to infer that the United States, in creating the extended Hoopa Valley Reservation, contemplated that in times of scarcity, fishing by other user groups, wherever located, could be completely cut off until the Indians' total ceremonial, subsistence, and commercial needs are satisfied.³⁹

While reservation purposes should be construed broadly, after considering the relevant history, I conclude that the United States did not intend to reserve for the Indians a right to the full amount of the harvestable resource, to the complete exclusion of non-Indian fishing off the reservation until the moderate living standard could be satisfied. Instead, the case law indicates that there should be a ceiling on the tribes' right to ensure that the resource is shared. In summary, the tribes are entitled to a sufficient quantity of fish to support a moderate standard of living, or 50% of the Klamath fishery harvest in any given year, whichever is less.⁴⁰

The Tribes' fishing right is a "right to take a share of each run of fish that passes through tribal fishing areas." Fishing Vessel Ass'n, 443 U.S. at 679; Washington State Charterboat Ass'n v. Baldridge, 702 F.2d 820 (9th Cir. 1983), cert. denied, 464 U.S. 1053 (1984); Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 686-87, 689 (W.D. Wash. 1981). Thus, in the present case, it applies to Klamath River basin stocks that, absent interception, would pass through the Tribes' reservations. See U.S. v. Washington, 520 F.2d 676, 688-89 (9th Cir. 1975) (affirming 384 F. Supp. at 344), cert. denied, 423 U.S. 1086 (1976). In calculating the allocation, the numbers of fish harvested or intercepted by each user group is counted against

³⁹ This is not to say, however, that in times of severe shortage, certain tribal ceremonial and subsistence needs may not take priority over the privileges of other user groups. This issue was left open by the Supreme Court in Fishing Vessel Ass'n, 443 U.S. at 688.

⁴⁰ This rule is not inflexible, and may be varied by agreement of the parties. See Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 690 (W.D. Wash. 1981); United States v. Oregon, 699 F. Supp. 1456, 1463 (D. Ore. 1988), aff'd, 913 F.2d 576, 585 (9th Cir. 1990).

the respective party's share, regardless of where they are taken or for what purposes. Fishing Vessel Ass'n, 443 U.S. at 687-89.

Although the Tribes' rights in this case are geographically limited to the on-reservation fishery, it is well-settled that tribal fishing rights have a geographical component that requires that fishing outside of those areas be managed in such a way to permit tribal access to their share of the fishery at those geographical locations. See Hoh Indian Tribe v. Baldridge, 522 F. Supp. at 687; Sohappy v. Smith, 302 F. Supp. 899, 910-911 (D. Ore. 1969) (state cannot so manage the fishery that little or no harvestable portion of the run reaches the Indian fishing aress).

Indian reserved fishing rights have both a geographical and a "fair share" aspect. Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1511-14 (W.D. Wash. 1988). The right is not only one to harvest a particular share, but also to be able to hsrvest that share on the reservation or at other geographical locations linked to the reserved right. Thus, although the Northwest treaty tribes have fishing rights that attach both to reservations and to "usual and sccustomed" locations, while the Yurok and Hoopa Valley Tribes' rights geographically are linked to their reservations, the underlying principle is the same. In each case, the tribal fishing rights are linked to specific geographic areas, and other fishing must not interfere with the Tribes' right to have the opportunity to catch their share.

IV. FEDERAL FISHERY REGULATION AND ACTIONS AFFECTING INDIAN FISHING RIGHTS

A. Federal Trust Responsibility

The United States is the trustee of Indian reserved rights, including fishing rights.⁴¹ The role of the United States as trustee of Hoopa and Yurok Indian fishing rights has been recognized in various court decisions. See United States v. Eberhardt, 789 F.2d 1354, 1359-62 (9th Cir. 1986); id. at 1363 (Beezer, J., concurring); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, 694, 205 Cal. Rptr. 643, cert. denied, 469 U.S. 1062 (1984). As recently ss 1992, Congress explicitly acknowledged a trust responsibility in connection with the Indian fishery in the Trinity River. "[F]or the purposes of fishery restoration, propagation, snd maintenance," and "in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of

⁴¹ See, e.g., Joint Bd. of Control v. United States, 862 F.2d 195, 198 (9th Cir. 1988); United States v. Michigan, 653 F.2d 277, 278-79 (6th Cir.), cert. denied, 454 U.S. 1124 (1981); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988).

the Act of October 24, 1984, Public Law 98-541," Congress directed an instream release of water to the Trinity River of not less than 340,000 acre-feet per year. Central Valley Improvement Act, Pub. L. No. 102-575, Title XXXIV, § 3406(b)(23), 106 Stat. 4706, 4720 (1992).

The obligation of the United States as trustee of Indian resources and rights extends to all agencies and departments of the Executive Branch. See Pyramid Lake Paiute Tribe v. Department of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990); Covelo Indian Community v. FERC, 895 F.2d 581, 586 (9th Cir. 1990). As such, the Departments of Interior and Commerce, as well as other federal agencies whose actions affect the fishery resource, must ensure that their actions are consistent with the trust obligations of the United States to the Tribes.

Proper allocation of the harvest of Klamath River basin stocks is only part of the effort needed to protect the reserved fishing rights of the Tribes. The Secretary of the Interior has acted in the past to increase flows in the Trinity River, in part to improve the fishery for the benefit of the Indians.⁴² This was a recognition that protection of the fishery itself is necessary to make the tribal fishing right meaningful.

In order for both the purpose of the reservations and the objectives of the Magnuson Act⁴³ to be fulfilled, the fishery resource here must be rebuilt to sustain a viable fishery for all user groups, consistent with sound conservation practices. Cf. Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683, 691 (W.D. Wash. 1981). The Trinity River Basin Restoration Act of 1984, Pub. L. No. 98-541, 98 Stat. 2721; the Klamath River Basin Fishery Resources Restoration Act of 1986, 16 U.S.C. § 460ss; and section 3406(b)(23) of the Central Valley Improvement Act of 1992, 106 Stat. at 4720; all reflect congressional intent to restore and protect the anadromous fishery in the Klamath and Trinity River basins.

⁴² See 1991 Trinity River Flows Decision, supra note 3; 1981 Secretarial Issue Document, supra note 3; see also Memorandum from the Associate Solicitor, Division of Indian Affairs to the Assistant Secretary - Indian Affairs, March 14, 1979 (quoted in 1981 Secretarial Issue Document).

⁴³ Magnuson Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331, codified as amended at 16 U.S.C. §§ 1801 - 1882 (1988).

B. Regulation of the Klamath Fishery

The regulation of the Klamath River basin anadromous fishery resource is divided among a number of governments and agencies.⁴⁴ Within the three-mile territorial sea off the coast, the states have jurisdiction. Federal jurisdiction over management of the Klamath fishery resource is split between the Interior and Commerce Departments. The Tribes and the Department of the Interior have the authority to manage the in-river on-reservation tribal fishery.⁴⁵ See 25 C.F.R. Part 250. In the exclusive economic zone, generally three to two hundred miles offshore, the Department of Commerce has exclusive management and regulatory jurisdiction. See Magnuson Act, 16 U.S.C. §§ 1801 - 1882; Washington Crab Producers Inc. v. Mosbacher, 924 F.2d 1438, 1439 (9th Cir. 1991).

As a general matter, all parties that manage the fishery, or whose actions affect the fishery, have a responsibility to act in accordance with the fishing rights of the Tribes. This may go beyond safeguarding their right to an appropriate share of the harvest on their reservations, cf. U.S. v. Washington, 459 F. Supp. 1020, 1070 (W.D. Wash. 1978), to include a viable and adequate fishery from which to fulfill the Tribes' rights, whether those rights are fulfilled by a 50% share or by a lesser amount, if a lesser amount will satisfy fully the moderate living standard to which the Tribes are entitled. Cf. United States v. Washington, 506 F. Supp. 187, 197 (W.D. Wash. 1980) ("treaties were designed to guarantee the tribes an adequate supply of fish"), aff'd in relevant part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S. 994 (1985).

Because of the migratory nature of anadromous fish, ocean fishing has a direct impact on the available harvest in the Klamath and Trinity Rivers within the Tribes' reservations. The Magnuson Act provides:

⁴⁴ The complicated jurisdictional scheme for managing anadromous fishery resources was described in Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1442 (9th Cir. 1991). The disjuncture between ocean and in-river fishing regulation authority over the Klamath basin fishery resource was noted with concern by Judge Beezer in his concurring opinion in United States v. Eberhardt, 789 F.2d 1354, 1363 (9th Cir. 1986) (Beezer, J., concurring).

⁴⁵ As a general matter, reasonable, necessary, and nondiscriminatory conservation measures may be imposed by the Federal Government or the states, as appropriate, on the exercise of tribal fishing rights in the absence of adequate tribal regulation. See Antoine v. Washington, 420 U.S. 194, 207 (1975); United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986).

Any fishery management plan which is prepared by any Council, or by the Secretary [of Commerce], with respect to any fishery, shall . . . contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are . . . consistent with . . . any other applicable law.

16 U.S.C. § 1853(a)(1)(C) (1988) (emphasis added).

The Yurok and Hoopa Tribes' fishing rights are "applicable law" within the meaning of the Magnuson Act, because regardless of whether they were created by treaty or pursuant to statutory authority, they are rights that arise under federal law.⁴⁶ See Pacific Coast Federation v. Secretary of Commerce, 494 F. Supp. 626, 632 (N.D. Cal. 1980) ("It cannot be doubted that the Indians have a right to fish on the reservation. Congress has carefully preserved this right over the years, and the courts have consistently enforced it."); see also Washington State Charterboat Ass'n v. Baldrige, 702 F.2d 820, 823 (9th Cir. 1983) (treaty fishing rights as "applicable law"), cert. denied, 464 U.S. 1053 (1984); Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683, 685 (W.D. Wash. 1981) (same). Furthermore, nowhere in the Magnuson Act has Congress stated an intent to interfere with Indian rights in the Klamath River area. Pacific Coast Federation, 494 F. Supp. at 633. Therefore, fishery management plans and ocean fishing regulations must be consistent with those rights. The Act, however, provides no authority to either the Pacific Fishery Management Council, see 16 U.S.C. § 1852(a)(6), or the Secretary of Commerce over in-river Indian fishing or in-river tribal harvest levels. Pacific Coast Federation, 494 F. Supp. at 632. Thus, in managing the ocean fisheries, the Secretary of Commerce must rely on management by the Department

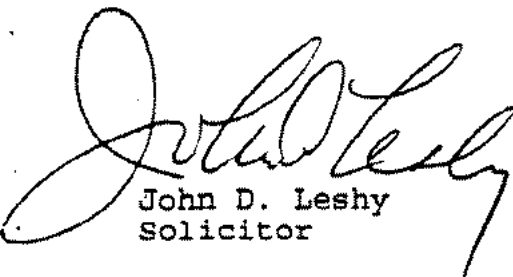
⁴⁶ The Magnuson Act expressly refers to Indian treaty fishing rights. Specifically, 16 U.S.C. § 1853(a)(2) requires that fishery management plans contain a description of "Indian treaty fishing rights, if any." Because the plans themselves are limited to management of the ocean fishery, however, this provision refers to Indian treaty fishing rights existing in ocean fishing areas, and not to in-river tribal fishing rights--treaty or otherwise. See Washington Troller's Ass'n v. Kreps, 466 F. Supp. 309, 313 (W.D. Wash. 1979) (description of in-river fishery not required by Magnuson Act). Section 1853(a)(2)'s failure to refer explicitly to other federally reserved Indian fishing rights does not affect our conclusion that § 1853(a)(1)(C) is the relevant provision requiring that fishery management plans substantively conform to Indian reserved rights. The status, scope, and character of those rights is determined by looking to their source--not to the Magnuson Act.

of the Interior or the Tribes of the in-river fishery. Cf. Washington Crab Producers, 924 F.2d at 1443.

Except for the general Magnuson Act requirement that ocean fishery plans be consistent with any other applicable law, the Act's provisions governing regulation of the ocean fishery do not extend to in-river Indian fisheries. Arguments to the contrary by both ocean fishermen and inland tribes have been rejected. Compare Washington Trollers Ass'n v. Kreps, 466 F. Supp. 309 (W.D. Wash. 1979) (rejecting ocean fishing association's argument that the fishery plan must describe inland fisheries); with Hoopa Valley Tribe v. Baldridge, No. C-82-3145, slip op. at 43-45 (N.D. Cal. June 25, 1984) (rejecting Tribe's argument that alleged discriminatory regulation of in-river tribal fishing violated the Magnuson Act's prohibition against discrimination in allocating the harvest).

V. CONCLUSION

I conclude that when the United States set aside what are today the Hoopa Valley and Yurok Reservations, it reserved for the Indians of the reservations a federally protected right to the fishery resource sufficient to support a moderate standard of living. I also conclude, however, that the entitlement of the Yurok and Hoopa Valley Tribes is limited to the moderate living standard or 50% of the harvest of Klamath-Trinity basin salmon, whichever is less. Given the current depressed condition of the Klamath River basin fishery, and absent any agreement among the parties to the contrary, the Tribes are entitled to 50% of the harvest.



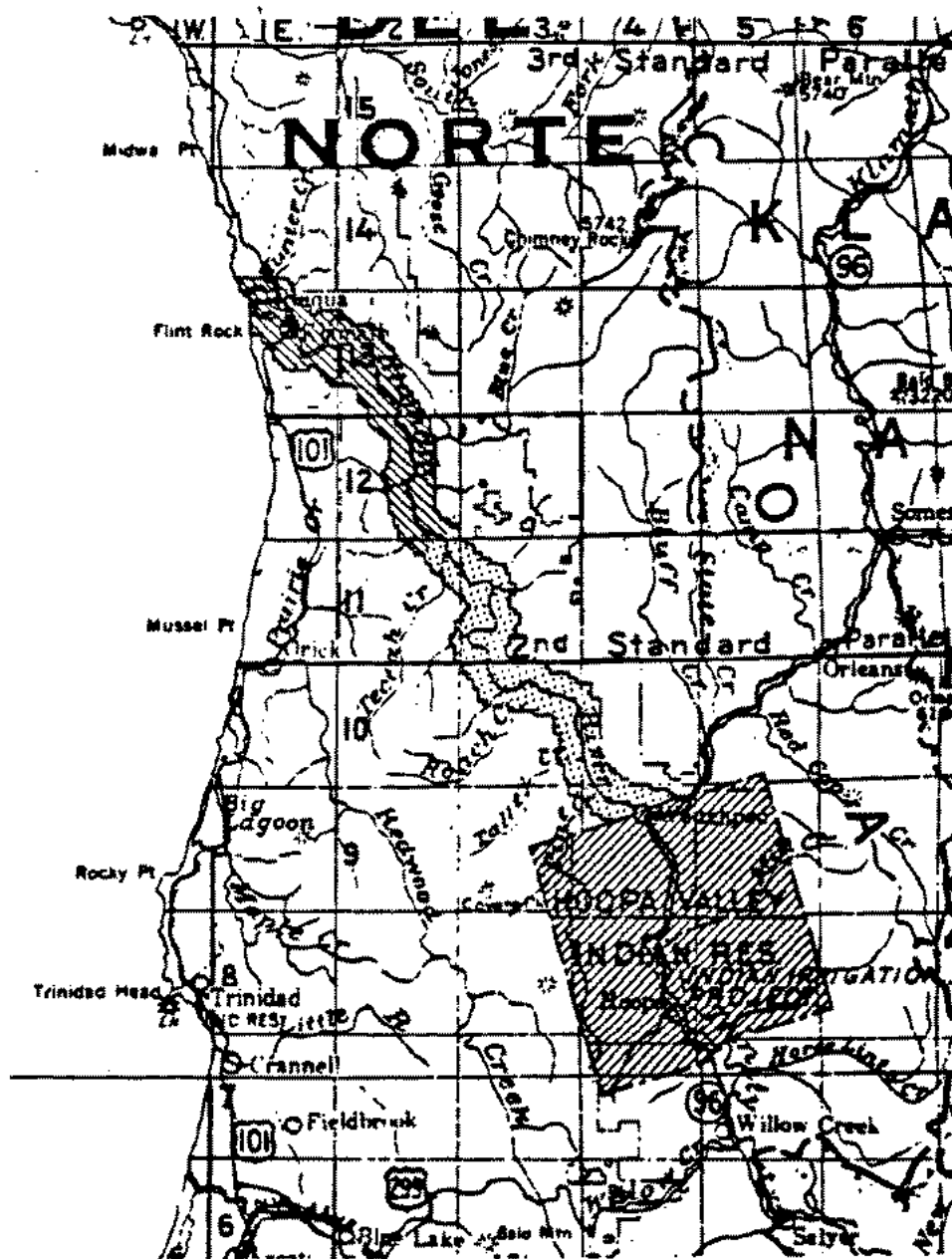
John D. Lesly
Solicitor

Mattz v. Arnett, 412 U.S. 481 (1973)

APPENDIX TO OPINION OF THE COURT

MAP OF HOOPA VALLEY INDIAN RESERVATION, CALIFORNIA*

Scale: 1 inch = 12 miles



- LEGEND:
-  Old Klamath River Reservation.
 -  Connecting Strip.
 -  Original Hoopa Valley Reservation.

*United States Department of Interior, General Land Office 1944.

APPENDIX B

Overview of the History of the
Klamath River and Hoopa Valley Reservations

The original Klamath River Reservation was established in 1855. The location had been selected pursuant to "directions [from the Secretary of the Interior] to select . . . reservations [in California] from such 'tracts of land adapted as to soil, climate, water-privileges, and timber, to the comfortable and permanent accommodation of the Indians, which tracts should be unincumbered by old Spanish grants or claims of recent white settlers.'" I Kappler, Indian Affairs: Laws and Treaties 816 (1904) ("Kappler") (Letter from Commissioner of Indian Affairs to Secretary of the Interior, Nov. 10, 1855). In creating the reservation, President Pierce accepted the Interior Department's recommendation to set aside a strip of territory one mile wide on each side of the Klamath River, for a distance of twenty miles. See id. at 816-17.

In the 1856 Annual Report of the Commissioner of Indian Affairs, the Klamath reservation is described as follows:

Klamath reservation is located on the river of that name, which discharges its waters into the Pacific ocean twenty miles south of Crescent city.

The Indians at this place number about two thousand. They are proud and somewhat insolent, and not inclined to labor, alleging that as they have always heretofore lived upon the fish of the river, and the roots, berries, and seeds of their native hills, they can continue to do so if left unmolested by the whites, whose encroachments upon what they call their country they are disposed to resist. . . . The land on this river is peculiarly adapted to the growth of vegetables, and it is expected that potatoes and other vegetable food, which can be produced in any abundance, together with the salmon and other fish which abound plentifully in the Klamath river, shall constitute the principal food for these Indians. It is confidently expected in this way to avoid the purchase of beef, which forms so expensive an item at those places where there is no substitute for it. The establishment of the Klamath reserve has undoubtedly prevented the spread of the Indian wars of Oregon down into northern California.

Annual Report of the Commissioner of Indian Affairs ("Annual Report") 238-39 (1856).

The next year, the Government agent at the Klamath Reservation described the importance of the fishery to the Indians on both the Klamath and Trinity Rivers. Because of the harm caused to the fishery on the Trinity, he recommended relocation of those Indians to the Klamath Reservation:

Salmon has been very abundant this season, and in the different villages upon the reservation there has not been less than seventy-five tons cured for winter use. . . .

We are now engaged in clearing, with Indian labor, one hundred acres of land, which will be ready for crop by the middle of October. . . .

The Indians are located at different points upon the Klamath river, which runs through the reservation, . . . for the convenience of fishing On this river, above Marippe Falls, the eastern boundary of the reserve, there are probably about fourteen hundred Indians; they subsist upon fish, game, and the natural products of the earth. Some few of them work for the settlers.

In Hoopa valley, on Trinity river, there are about seven hundred Indians; they subsist by hunting, fishing, grass seeds, and acorns. Many of them work for the white settlers in the valley, and are well paid for their labor.

On the Trinity river and its tributaries, above Hoopa, there are about five hundred Indians; their resources for fishing and gaining a livelihood have been destroyed by mining in the vicinity; . . . I would recommend their removal to this agency.

Annual Report 391 (1857) (Letter from Indian Sub-Agent Heintzelman to Sup't of Indian Affairs, July 13, 1857).

In 1858, the California Superintendent reported:

It is proper to remark, that in almost every locality in California there is a sufficiency of the natural products of the country for the subsistence of Indians residing there, and they could support themselves quite well, were it not for the encroachments of the whites, and the consequent destruction of their food by the settlement of the country.

* * * *

Klamath reservation is progressing steadily and quite satisfactorily. The crop is good, and with the yield of salmon at the fisheries the Indians are contented and happy.

Annual Report 283, 285 (1858) (Letter from Sup't of Indian Affairs to Comm'r of Indian Affairs, Sept. 4, 1858).

The Klamath Reservation sub-agent reported on the "abundance of [the Indians'] natural food," and also indicated the unlikelihood of extensive agricultural production on the Klamath reservation:

One great difficulty this reservation labors under is the small amount of land that can be brought under cultivation. The Klamath river runs through a canon the entire length, and the reservation being located upon each side of it, the only land suitable for cultivation is in the bottoms, ranging in size from one acre to seventy.

Id. at 286 (Letter from Indian Sub-agent Heintzelman to Sup't of Indian Affairs, July 1, 1858).

In 1859, the Klamath Reservation's Indian agent reported about two thousand Indians "on this reservation proper" and about four thousand more "who inhabit the mountain streams, and subsist principally on fish and game, which are very abundant, and seem inexhaustible." Annual Report 437 (1859) (Letter from Indian Agent Buel to Jas. Y. McDuffie, Esq. (undated)).

The agent's report in 1861 continues to reflect the importance of the reservation and its fishery to the Indians:

[The Klamath] reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians. The number of Indians here is not far from eighteen hundred.

* * * *

I suggest, as this reservation has never been surveyed, that it should be so laid out as to embrace the island and fishery at the mouth of the Klamath, and extend a mile in width each side of the river, to a point one mile above Wakel, and a half a mile in width each side of the river, from that point to the mouth of the Trinity river.

Annual Report 147 (1861) (Letter from Superintending Agent Geo. M. Hanson to Comm'r of Indian Affairs, July 15, 1861).

In December, 1861, the Klamath agent reported the entire loss of the agricultural developments on the Klamath Reservation by an "unparalleled freshet." Annual Report 313 (1862) (Letter from Agent Hanson to Comm'r of Indian Affairs, Dec. 31, 1861). As a result of the 1861 flood, the Superintendent and one group of the Indians moved to the Smith River reservation. Most, however, remained on the Klamath Reservation or in an area up the river. Nearly all eventually returned to the Klamath River and vicinity. See Letter from Comm'r of Indian Affairs to Secretary of the Interior, April 4, 1888, reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 19-22 (1889); Mattz v. Arnett, 412 U.S. 481, 487 (1973); Short v. United States, 202 Cl. Ct. 870, 887 (1973), cert. denied, 416 U.S. 961 (1974).

By 1862, the Indian Superintendent was recommending the sale of the Klamath Reservation and relocation of the Indians to another suitable reservation. See Annual Report 40-41 (1862). While Government officials now spoke of the Klamath Reservation as "almost worthless," and as "almost entirely abandoned by the Indians," it sought to relocate the Indians to another reservation which would continue to provide the Indians with a fishery, in addition to agricultural lands. See Annual Report 8-10 (1863). The 1863 Commissioner's report referred to the "abundance of fish" on the Round Valley reservation and noted that the Smith River valley, a recommended site, was isolated from non-Indians and would furnish the "best of fisheries" from the Pacific Ocean. Id. at 9-10.

As part of an effort to consolidate and reduce the number of Indian reservations in California, Congress in 1864 passed an act authorizing the President to set apart up to four tracts of land in California for the purposes of Indian reservations. See Act of April 8, 1864, § 2, 13 Stat. 39, 40; Donnelly v. United States, 228 U.S. 243, 257, modified and rehearing denied, 228 U.S. 708 (1913); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 610, 250 Cal. Rptr. 278 (1988).

In 1864, the Klamath, Redwood, and Trinity Indians were reported to still be at war with the forces of the United States. Annual Report 13 (1864); see Short, 202 Ct. Cl. at 889. Austin Wiley, an attorney, was appointed Superintendent of Indian Affairs for California. In order to restore and establish peaceful relations with the tribes, Superintendent Wiley entered into negotiations and concluded a treaty with the Indians, which provided for locating the Indians in the Hoopa Valley. See Annual Report 12-14 (1864); Short, 202 Ct. Cl. at 891. Although the treaty was never ratified, and there is doubt whether the Indians really

understood the terms of Wiley's treaty, see id. at 895, Wiley proceeded, consistent with the proposed treaty, to locate the Hoopa Valley Reservation. Id. at 891-92. By treating with the Indians and establishing the reservation, Superintendent Wiley "thereby brought to an end the war with the Indians of Humboldt, Klamath and Trinity counties." Id. at 896.

By 1865, the Government's original intention to remove the Klamath River Indians to the Smith River reservation had changed and refocused on use of the Klamath Reservation:

It was intended to remove the Indians from the Smith River reservation, and place them at the old Klamath reservation, still owned by government, but to place the occupants under the charge of an employee of the Hoopa Valley agency. No definite suggestions were made as to the selection of the other two permanent reservations.

Annual Report 11 (1865).

Superintendent Maltby, who had replaced Superintendent Wiley, reported on the newly located Hoopa Valley reservation, and expressed his expectation that the "Klamath Indians in the vicinity, numbering eighteen hundred, will . . . most of them move to the [Hoopa Valley] reservation." Id. at 113 (Letter from Sup't of Indian Affairs to Comm'r of Indian Affairs, Sept. 15, 1865). The same year, the Government surgeon living on the Hoopa Valley reservation along the Trinity River reported on the Indians' reliance on the salmon fishery, and the difficulties resulting from harm to the resource caused by local mining:

They no longer sport on the banks of clear streams literally alive with salmon and other fish, but gaze sadly into the muddy waters, despoiled almost of their finny prey by the impurities from the sluice-boxes of the miners at the head of the stream. In this consists one of the greatest calamities inflicted upon the Indians of recent years. Their salmon fishing is destroyed to a very great extent, and with it one of their chief means of subsistence. Those who saw the Klamath and Trinity rivers in early days say that during the summer months they ran as clear as crystal, and thronged with salmon from the sea; now they are muddy streams and almost deserted by this fish.

Id. at 116-17. The Government surgeon nonetheless noted that the Indians continued to secure "all the fish they can," id. at 117, and remarked at "the large quantity of fish oil they consume as food," id. at 118.

In 1866, Robert J. Stevens was appointed special commissioner to investigate and report on Indian affairs in California. His report dated January 1, 1867, and addressed to the Commissioner of Indian Affairs, is contained in the 1867 Annual Report 117-48. Commissioner Stevens reported on continuing difficulties in maintaining peace between the Indians and non-Indians, and of the need for reservations for the exclusive use and occupancy of the Indians. He discussed the Hoopa Valley reservation in connection with Superintendent Wiley's "treaty," and the establishment of peaceful relations with the Indians. Commissioner Stevens travelled from the Hoopa Valley reservation down the Trinity to the Klamath River, making the following report:

On the banks of the Klamath the villages were more numerous. . . .

The salmon fisheries of the river have been very much injured by the former mining operations. Only now and then one of their ingenious weirs is seen. . . .

* * * *

The count of Indians on the Klamath, made officially, but little over a year previous to my visit, gave a census of 2,217 below the mouth of the Trinity.

At this point I wish to submit my observations as to the character of the country through which flows the Klamath river. For 10 miles or more on each side to a point about 30 miles above its mouth, following its course, it is unsettled and wild, peopled almost exclusively by Indians, to whose wants and habits it is well adapted, supplying wild food and fish in abundance. Very little of it is tillable land, and whites will never care to settle upon it.

My attention had been particularly directed to this region by Major Bowman while with him at Fort Humboldt. The following is his suggestion:

"Extend the Hoopa reservation on its northern boundary, so as to include not less than six miles along the northern bank of the Klamath to the sea-shore, thence down the sea-shore to the mouth of Redwood creek, thence up Redwood creek to the point nearest to the head of Willow creek, thence down Willow creek to the boundary of the Hoopa reservation."

He adds:

"Very little of this tract is suitable for cultivation, and consequently not desirable for the settlements of white men, but will furnish sufficient tillable land, I think, for the wants of all the Indians that may be placed there, and range for necessary stock. . . ."

"The miners engaged on the river banks within the described limits are but few, and are daily diminishing in numbers."

Id. at 127-29. Commissioner Stevens recommended the withdrawal for Indian use, "not only the tract on the Klamath, . . . but an enlargement thereof." Id. at 145.

In 1868, the Indian agent at the Hoopa Valley Reservation remarked in his report that establishment of the reservation "was right and its location good," and that "it would be almost impossible to remove [the Indians] to any other locality, and then only by a great expense, endangering the peace of this section while it was being done." Annual Report 133 (1868) (Letter from Indian Agent Pratt to Comm'r of Indian Affairs, July 20, 1868).

For a number of years, the reports from the Hoopa Valley Reservation discussed the attempts to begin agriculture livestock raising, and ranged from the optimistic to the pessimistic. Compare Annual Report 16 (1869) (Hoopa Valley reservation "under a fine state of cultivation and highly prosperous"), with Annual Report 78 (1870) (Letter from Sup't of Indian Affairs to Comm'r of Indian Affairs, July 13, 1870) (Hoopa Valley reservation "has but a poor prospect of becoming self-sustaining;" "the soil at Hoopa is so poor that it is incapable of raising produce sufficient to feed 1,000 Indians").

In 1882, the Commissioner's report, while noting that "Indian farming has increased satisfactorily," noted that the salmon fishery still comprised one-third of the subsistence of Indians located on the Hoopa Valley reservation. Annual Report 10 (1882).

In 1883, a commercial fisherman named Hume contacted the Secretary of the Interior and proposed to lease the salmon fisheries of the Klamath River, within the Klamath River Reservation. The Acting Commissioner of Indian Affairs replied:

[N]o such proposition can be entertained. It would be against usage and at variance with the policy of the Department in the control and management of Indian affairs.

The permanent settlement of the Indians residing upon said reservation, and the disposal of so much of the reservation as may not be needed for that purpose, are matters engaging the attention of the Department at this time. . . .

The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority.

Letter from Acting Comm'r of Indian Affairs to D.B.¹ Hume (July 23, 1883), reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 11 (1889).

Two years later, Special Agent Paris Folsom investigated and reported on the "Condition and Needs of Non-Reservation Klamath Indians in California," noting the particular suitability of the Klamath River fisheries for satisfying the needs of the Indians:

The distance from the line of the Hoopa Valley Reservation, at the juncture of the Klamath and Trinity Rivers, to the Klamath River Reservation, upper line, by way of the river, is some 18 miles, and it is within these limits that the non-reservation Klamath Indians are located.

Nature seems to have done her best here to fashion a perfect paradise for these Indians, and to repel the approach of the white man. She filled the mouth of the Klamath River with a sand-bar and huge rocks, rendering ordinary navigation impossible, . . .

. . . [The Indians] form a very respectable peasantry, supporting themselves without aid from the Government by fishing, hunting, raising a little stock, cultivating patches of soil, and by day's labor at the Arcata lumber-mills. . . .

* * * *

. . . Fisheries, staging for holding the fishermen and their nets, are dotted along the river. Indians have had general and actual, though unrecorded, possession and occupation of the whole river line here for years and years. Their dwellings are scattered and permanent. They wish to remain here; here they are self-supporting--actually self-sustaining. This is their old home, and home is very dear to them--treasured above everything else. No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to

¹ This appears to be an error. Hume's initials apparently were "R.D." For historical works about Hume, see A Pygmy Monopolist: The Life and Doings of R.D. Hume Written by Himself and Dedicated to His Neighbors (Gordon B. Dodds, ed.) (Univ. of Wisconsin 1961); Gordon B. Dodds, The Salmon King of Oregon: R.D. Hume and the Pacific Fisheries (Univ. of North Carolina 1959).

them. No territory offers more to these Indians and very little territory offers less to the white man.

* * * *

I have the honor to further recommend that these same provisions be extended to the Indians on the Klamath River Reservation immediately adjoining the land here considered, and that the lower and remaining portion of that reservation be thrown again with the public lands, providing security and protection to the fisheries of the Indians above the mouth of the Klamath River.

Report of Special Agent on Condition and Needs of Non-Reservation Klamath Indians in California (June 25, 1885), reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 7-11 (1889).

In 1886, the Acting Agent for the Hoopa Valley Reservation reported on the "Klamath Reservation:"

My duties, as both agent and commanding officer, require me to exercise a supervision over the reservation on the Klamath. A small outpost is maintained at the mouth of that river to prevent intrusion on the Indian lands, and protect the Indians in their only industry--that of fishing for salmon.

Those Indians are also anxious for a subdivision of their lands, but before this can be done the lines of the reservation must be fixed determinately. . . .

The people, like the Hoopas, are friendly and well disposed, and maintain amicable relations with the white people about them, but should the military power of the Government be removed from this valley, both reservations would soon be overrun, and the Indians dispossessed. The Klamaths live almost exclusively on the salmon, though a few plant a little.

Annual Report 43 (1886) (Letter from Acting Agent Wm. E. Dougherty, Capt. First Infantry, to Comm'r of Indian Affairs, Aug. 15, 1886).

The following year, in 1887, Acting Agent Dougherty reported on a controversy that had arisen with the commercial fisherman Hume at the mouth of the Klamath:

There are believed to be on the Klamath river about 1,200 Indians of that name. They live in villages on the river bank, a few miles apart, from far up it to its mouth, and have always been self-sustaining, relying to a great extent for subsistence upon the salmon. . . .

* * * *

In May last, R.D. Hume, of Ellenburgh, Oreg., entered the mouth of the Klamath river, with a light-draft steamboat and a gang of fishermen brought from the north, and established a floating cannery on the fishing grounds near the mouth of the river. The Indians along the river are much disturbed at what they deem to be an intrusion that will deprive them to a great extent of their means of subsistence, and I think that unless some remedial measure is applied by the Government necessity will actuate them to seek a remedy in their own way.

Annual Report 9 (1887) (Letter from Acting Agent Wm. E. Dougherty, Captain U.S. Army, to Comm'r of Indian Affairs, July 5, 1887).

Concerned about the intrusion of R.D. Hume's steamer into the Klamath River within the Klamath Reservation, the Interior Department sought to obtain relief for the Indians and protection for their fishery. In June, 1887, the Secretary of the Interior sought an opinion from the Attorney General concerning the Government's power to protect the Indians and their unimpaired access to the fishery within the boundaries of the reservation. The Secretary's inquiry prompted exchanges between the Interior and Justice Departments on the authority of the United States to exclude Hume from the Indian fishery at the mouth of the Klamath River. Much to the consternation of the Interior Department, the Justice Department took a narrow view of the Federal Government's power to protect the Indians.

The Attorney General concluded that "so long as the acts of persons resorting to these waters to take fish fall short of invading the right of Congress to regulate commerce with foreign nations or among the several States, no case for Federal interference can be said to exist." Letter from Attorney General to Secretary of the Interior, June 11, 1887, reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 13 (1889). In reaching his conclusion, the Attorney General discussed principles of state ownership of the beds of tide-waters and of fish running in them, noted that the State had declared the Klamath River to be navigable, and found that power over the fisheries had not been granted to the United States and thus remained under the exclusive control of the State.

The Interior Department continued to press its case to establish and protect the rights of the Indians. On June 21, 1887, the Commissioner of Indian Affairs submitted a brief setting forth arguments supporting the Indians' right to the fishery, see S. Exec. Doc. No. 140, supra, at 14-16, which the Secretary

submitted to the Attorney General. Interior's brief contended that the Indians,

have had exclusive use of the fisheries in the Klamath River, from which they have supported themselves, entirely unaided by the Government, at least since the freshet of 1861.

* * * *

Have not the Indians acquired private rights in their fisheries by prescription?

* * * *

Can the legislature of the State of California by declaring the Klamath River navigable, when in fact it is not navigable, deprive the Indians of the exclusive use of fisheries?

* * * *

The Klamath Reservation having been declared by the President, in pursuance of an act of Congress, for Indian purposes exclusively, can the State of California so far defeat the purposes of said act of Congress as to grant liberty to any and all of her citizens to enter within its boundaries and engage in the business of catching and curing fish, to the injury of the Indians for whom the reservation was created?

* * * *

By seining near the mouth of the river the whites would obstruct the passage of the salmon and cut the Indians off from their accustomed supply.

Section 2149 of the Revised Statutes provides as follows:

"The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person * * * within the limits of the reservation whose presence may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians."

The presence of Hume and his party within the limits of the Klamath River Reservation is manifestly detrimental to the peace and welfare of the Klamath River Indians, in that it is likely to provoke open hostilities between them; and if they are permitted to remain the whites will deprive the Indians of their means of support. Certainly nothing could be more detrimental to their peace and welfare.

The right to navigate the river is not denied, but anchoring floats with a view to erecting buildings thereon for the accommodation of extensive business operations during an entire season is another thing.

Captain Dougherty, the acting agent in charge, is an Army officer of large experience amongst the Indians, and good judgment.

He asks that "the highest power be invoked to protect the Indians in the possession of their only (food) resource."

* * * *

A small military force has for a long time been stationed at the mouth of the Klamath to protect the Indians in their fishing privileges.

Id.

Two days after submitting the brief to the Secretary, the Commissioner sent him another letter discussing the similarity of the Klamath case with a court decision issued concerning Pyramid Lake:

Referring to my letter . . . and accompanying paper relative to the Klamath River Reservation in California, and the attempted dispossession of the resident Indians of their fishing grounds by a gang of white men under one Hume, I have the honor to draw your attention to a case [concerning the Pyramid Lake Reservation.]

[The non-Indian defendants in the case were charged with trespass for fishing on Pyramid Lake, and contended that the taking of fish inside the reservation was not unlawful], upon which the court said:

"If this argument is sound the whole purpose of the law, in setting apart lands for the separate use of the Indians, is defeated We know that the lake was included in the reservation that it might be a fishing ground for the Indians. . . . It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment those who thus encroach on the reservation and fishing ground violate the order setting apart for the use of the Indians, and consequently do so contrary to law."

It can be said with equal truth . . . that the Klamath River was included in the reservation, "that it might be a fishing ground for the Indians." True, the executive order does not so state in terms, neither does the order setting apart the Pyramid Lake Reservation. But it is manifest from the description of the boundaries of the Klamath Reservation that it was the purpose and intention to exclude white people

from fishing in the river, from its mouth to the upper extremity of the reservation.

Should the whites be permitted to enter the river to fish, but little if anything of it will be left of the reservation and the whole purpose of the law will be defeated.

Letter from Comm'r of Indian Affairs to Secretary of the Interior, June 23, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 16.

On June 23, 1887, the Attorney General asked for a more precise statement of the case and the question for which Interior was soliciting an opinion. The Commissioner of Indian Affairs then wrote the Secretary of Interior stating the case and questions he recommended be sent to the Attorney General:

So far as we can ascertain the Klamath River Indians in California have held and enjoyed exclusive fishery privileges in the Klamath River from time immemorial, and were in full possession of them at the date of the Guadalupe Hidalgo treaty, by which the territory embracing the Klamath River and the State of California was acquired by the United States.

This exclusive possession has never been disturbed, and until recently never challenged.

Letter from Comm'r of Indian Affairs to Secretary of the Interior, July 6, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 17. The Commissioner posited five questions for the Attorney General:

- (1) Did not the Klamath River Indians acquire by prescription and hold at the date of the Guadalupe Hidalgo treaty, title or property in the fisheries of the Klamath River?
- (2) Was not such title or property recognized and guaranteed by the provisions of said treaty?
- (3) Was not the legislative and executive action which fixed the present reservation on either side of the Klamath River a recognition of the Indians' right and title to the exclusive fishery privileges of Klamath River within the boundaries thereof?
- (4) If the Indians have rights under the Guadalupe Hidalgo treaty, or have acquired rights by prescription since the date of that treaty, can the State of California by direct or indirect means divest them of those rights?
- (5) If the Indians have the exclusive right to fish in the Klamath River within the boundaries of

their reservation, can not the Department, through this Bureau and its agents, protect those rights within said boundaries by the enforcement of the laws and regulations made in pursuance thereof for the maintenance of peace and order on Indian reservations?

Id.

The Attorney General replied that he deemed Interior's questions "clearly justiciable" and more properly presented to a court than to him. Letter from Attorney General to Secretary of the Interior, July 11, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 17-18. On October 4, 1887, the Acting Commissioner of Indian Affairs recommended to the Secretary of the Interior that the United States bring suit on behalf of the Indians to judicially determine their rights in the fisheries. Letter from Acting Comm'r of Indian Affairs to Secretary of the Interior, Oct. 4, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 18. The lawsuit against Hume followed, and the Interior Department's position that the Klamath River Reservation remained an Indian reservation was set forth in a letter from the Commissioner to the Secretary of the Interior, dated April 4, 1888. See S. Exec. Doc. No. 140, supra, at 19-22 (1889).

In 1888, even while the controversy with Hume continued, Acting Agent Dougherty reported that the Indians had negotiated a commercial agreement to supply a non-Indian cannery operation with fish:

The question of the prescriptive rights of the Lower Klamaths to the fisheries of the Klamath River is still in abeyance, and I do not think that any action has yet been taken on the instructions given by the honorable the Attorney-General, in October last, to institute proceedings in this case.

Meantime the Indians have made a co-operative partnership with Mr. John Bornhoff² of Crescent City, who has supplied them with boats, nets, etc., and the plant for a cannery, which is now in operation at the mouth of the Klamath. This enterprise gives occupation to all the Indians at that place, and for some distance up the river,

Mr. Hume's party from Oregon is again in the river fishing. The Indians complain as before, of this intrusion, and are awaiting with some anxiety the decision that will

² Bearss, supra note 11 in Opinion, at 163, gives the name as John Bornhoff, which is consistent with Dodds, The Salmon King of Oregon, supra note 1 in Appendix B, at 180.

determine whether the exclusive right claimed by them will be sustained or not."

Annual Report 10 (1888) (Letter from Acting Agent Wm. E. Dougherty, Captain U.S. Army, to Comm'r of Indian Affairs, Sept. 20, 1888).

The action eventually brought against Hume was prosecution of libel against his goods, for unlicensed trading in Indian country in violation of Revised Statutes § 2133, as amended. 22 Stat. 179 (1882).³ The court rejected the claim that the area in question was within an Indian reservation. While the court agreed that the area was still a federal reservation not open to public entry, it also concluded that the Government had abandoned it as an "Indian reservation." Therefore, notwithstanding its federal reservation status, the court held that it did not qualify as an Indian reservation or as Indian country for purposes of R.S. § 2133. United States v. Forty-Eight Pounds of Rising Star Tea, 35 F. 403, 406 (D.C.N.D. Cal. 1888), aff'd, 38 F. 400 (C.C.N.D. Cal. 1889); see Short v. United States, 202 Ct. Cl. 870, 912-16 (1973) (description of controversy and decision), cert. denied, 416 U.S. 961 (1974). The court never addressed or

³ Revised Statutes § 2133, as amended, provided:

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without [an Indian traders] license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars.

Act of July 31, 1882, ch. 360, 22 Stat. 179.

Much to the consternation of the Indian agent, Captain Wm. Dougherty, when the case against Hume came to trial in district court, "[t]he United States attorney did not appear . . . and the Government was not represented. His honor stated that it was the sixth time the case had been set for hearing, and decided to go on with it, and hear the Government's argument later." Letter from Agent Wm. E. Dougherty to Comm'r of Indian Affairs, May 29, 1888, reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 23 (1889).

adjudicated the questions raised by the Interior Department to the Attorney General.⁴

After losing in district court, the Secretary of the Interior requested an appeal and reported that in order to protect the Indians, authority was needed at once "to set apart these lands as a reservation and thus remove all doubt." Short, 202 Ct. Cl. at 914. On April 1, 1889, the circuit court affirmed the district court's decision, and concurred in the district court's analysis. 38 F. 400 (C.C.N.D. Cal. 1889).

Soon thereafter, Congress took up the question whether to open the reservation lands to non-Indian settlement. In 1890, the House of Representatives passed a bill rejecting allotments for the Indians on the Klamath River Reservation, and providing for public sale of the reservation lands. See Short, 202 Ct. Cl. at 917-18. Although a similar bill was introduced in the Senate, the Senate took no action on either the House-passed bill or the Senate bill. Id.

The setback in the courts and the activity in Congress prompted the Interior Department immediately to review its authority for establishing Indian reservations in California to determine whether it could better protect the Indians along the Klamath. The Department sought a legal opinion from the Assistant Attorney General. On January 20, 1891, the Assistant Attorney General replied that in his view, under the special circumstances of the case, the Department had retained the Klamath River Reservation under the 1864 four reservations Act and that it was a part of the Hoopa Valley Reservation. Letter from Assistant Attorney-General to Secretary of the Interior, January 20, 1891 (copy on file in Office of the Solicitor, U.S. Department of the Interior). In response to the decision in Forty-Eight Pounds of

⁴ The district court did note the Indians' involvement in commercial fishing:

At the proper season, [Hume] proceeds with his vessel to the river, and employs the Indians to fish for him, supplying them with seines and other appliances. He pays them 'in trade,' furnishing them with various articles composing the cargo of his vessel.

United States v. Forty-Eight Pounds of Rising Star Tea, 35 F. 403, 406 (D.C.N.D. Cal. 1888), aff'd, 38 F. 400 (C.C.N.D. Cal. 1889).

Rising Star Tea, the Assistant Attorney-General noted his disagreement with the reasoning,⁵ but concluded that

[t]his difficulty may yet be removed by the President issuing a formal order, out of abundant caution, setting apart the Klamath river reservation, under the act of 1864, as part of the Hoopa Valley reservation, or extending the lines of the latter reservation so as to include, within its boundaries, the land covered by the former reservation, and the intermediate lands, if the title to the last be yet in the United States.

Letter from Assistant Attorney-General, supra, at 28-29.

On January 21, 1891, the Secretary requested the Commissioner to prepare the necessary orders for extension of the Hoopa Valley Reservation, and on October 16, 1891, President Harrison signed the executive order extending the boundaries of the Hoopa Valley Reservation to include the Klamath River Reservation and the Connecting Strip between the two reservations. I Kappler 815; see also Mattz v. Arnett, 412 U.S. 481, 493 (1973), Donnelly v. United States, 228 U.S. 243, 255-59, modified and rehearing denied, 228 U.S. 708 (1913); Short, 202 Ct. Cl. at 920-23.

⁵ The Assistant Attorney-General did agree with the result. Following the reasoning adopted by the Attorney General in his June 11, 1887, letter, the Assistant Attorney General considered the Klamath River as not within the Klamath Reservation, and therefore beyond the authority of the United States to exclude persons fishing on the waters of the Klamath River. Letter from Assistant Attorney-General to the Secretary of the Interior, January 20, 1891, at 24-27.

In Mattz v. Superior Court, the State of California submitted this letter to establish that the Federal Government lacked the authority to reserve Indian fishing rights in the Klamath River or at least lacked the intent to reserve fishing rights for the Indians of the reservation. The Supreme Court of California rejected those arguments. 46 Cal. 3d 355, 758 P.2d 606, 616-18, 250 Cal. Rptr. 278 (1988).



KeyCite Yellow Flag

Declined to Extend by In re Klamath Irrigation District, 9th Cir., June 5, 2023

44 F.3d 758

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of
America, Plaintiff–Appellant,
and
Klamath Allottees Water Users Association;
Klamath Tribe, Plaintiffs–Intervenors,
v.
STATE OF OREGON, Water Resources
Department, and William H. Young,
Director, Defendants–Appellees.
UNITED STATES of America, Plaintiff,
and
Klamath Allottees Water Users
Association, Plaintiff–Intervenor,
and
Klamath Tribe, Plaintiff–Intervenor–Appellant,
v.
STATE OF OREGON, Water Resources
Department, and William H. Young,
Director, Defendants–Appellees.
UNITED STATES of America, Plaintiff,
and
Klamath Allottees Water Users Association,
Plaintiff–Intervenor–Appellant,
v.
STATE OF OREGON, Water Resources
Department, and William H. Young,
Director, Defendants–Appellees.
UNITED STATES of
America, Plaintiff–Appellee,
and
Klamath Allottees Water Users Association;
Klamath Tribe, Plaintiffs–Intervenors,
v.
STATE OF OREGON, Water Resources
Department, and William H. Young,
Director, Defendants–Appellants.

Nos. 92–36983, 92–36985, 92–36987 and 92–37001.

|
Argued and Submitted May 2, 1994.

|
Decided Dec. 28, 1994.

Synopsis

Federal government and Indian tribe brought declaratory judgment action against Oregon Water Resources Department (OWRD), claiming they were not required to participate in state surface water rights mass adjudication proceeding respecting river basin. On cross-motions for summary judgment, the United States District Court for the District of Oregon, Helen J. Frye, J., 774 F.Supp. 1568, granted state's motions in part and denied state's motions in part. Association of owners of former reservation land intervened. On appeal, the Court of Appeals, William A. Norris, Circuit Judge, held that: (1) fact that, under Oregon's statutory system for mass adjudication of surface water rights, administrative agency would pave the way for adjudication by court did not preclude Oregon's mass adjudication of water rights from being "suit" within meaning of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights; (2) fact, that mass adjudication did not attempt to determine rights of claimants to groundwater in basin, did not render McCarran Amendment inapplicable; (3) government could not be required to pay filing fees in mass adjudication proceeding; and (4) tribe failed to demonstrate bias to support claim that requiring tribe to submit to mass adjudication proceeding would deprive tribe of due process because state agencies involved in adjudicating its claims had shown persistent bias against tribal treaty rights.

Reversed in part, affirmed in part, appeals dismissed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (24)

[1] Indians ⚡ Sovereign Immunity**United States** ⚡ Water rights

Neither federal government nor Indian tribe could be required to participate in state adjudication to preserve water rights that had accrued under federal law, unless McCarran

Amendment waived sovereign immunity of government and tribe. 43 U.S.C.A. § 666.

[2] United States ⚡ Water rights

Fact that, under Oregon's statutory system for mass adjudication of surface water rights, administrative agency would pave the way for adjudication by court did not preclude Oregon's mass adjudication of water rights respecting river basin from being "suit" within meaning of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, despite federal government's contention that Amendment applied only to traditional civil lawsuits. 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

4 Cases that cite this headnote

[3] United States ⚡ Water rights

Fact that administrative agency, magistrate, referee, or special master will pave the way for adjudication by court does not preclude state system for adjudication of water rights from being "suit" within meaning of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights. 43 U.S.C.A. § 666.

[4] Declaratory Judgment ⚡ New parties**United States** ⚡ Water rights

Court of Appeals was not required to narrowly construe McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, so as to preclude Indian tribe's joinder in present case to avoid constitutional questions raised by tribe about fundamental fairness of Oregon's water rights mass adjudication system, in declaratory judgment action brought by federal government and tribe against Oregon Water Resources Department (OWRD), claiming that government and tribe were not required to participate in Oregon mass adjudication proceeding respecting river basin surface water

rights. 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

3 Cases that cite this headnote

- [5] **Constitutional Law** ➡ Avoidance of doubt
Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.

- [6] **United States** ➡ Construction of waiver or consent in general
Although examination of Congress' purposes and historical context of statute may not serve to waive federal government's sovereign immunity when text of statute fails to do so unequivocally, scope of such waiver can only be ascertained by reference to underlying congressional policy.

3 Cases that cite this headnote

- [7] **United States** ➡ Water rights
In McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, Congress limited its waiver to comprehensive water right adjudications. 43 U.S.C.A. § 666.

1 Case that cites this headnote

- [8] **United States** ➡ Water rights
Active participation of administrative agencies is at core of most of comprehensive state systems for adjudication of water rights contemplated by McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights. 43 U.S.C.A. § 666.

2 Cases that cite this headnote

- [9] **United States** ➡ Water rights
Whether case is initiated in court and then referred to agency for administrative proceedings, or is initiated through administrative procedure before being reviewed by court is not material distinction for

purposes of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights. 43 U.S.C.A. § 666.

1 Case that cites this headnote

- [10] **United States** ➡ Water rights
Fact, that under Oregon statute governing mass adjudication of water rights, some aspects of water rights determined through permit process or through prior adjudication were considered to be conclusively determined and not subject to contest, did not render Oregon mass adjudication of surface water rights respecting river basin insufficiently comprehensive for purposes of applicability of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, where all existing water rights claims in river system would have been determined when adjudication was finished. 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

8 Cases that cite this headnote

- [11] **United States** ➡ Water rights
In enacting McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, Congress was concerned that United States not be subjected to piecemeal, private water rights litigation. 43 U.S.C.A. § 666.

2 Cases that cite this headnote

- [12] **United States** ➡ Water rights
For purposes of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, comprehensiveness standard for adjudications to which Amendment's waiver applies requires consolidation of existing controversies, not reopening of settled determinations. 43 U.S.C.A. § 666.

- [13] **United States** ➡ Water rights

Fact, that Oregon's mass adjudication of surface water rights respecting river basin did not attempt to determine rights of claimants to groundwater in basin did not preclude adjudication from being adjudication of rights to use of water of river system or other source as required for applicability of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights; comprehensive adjudication requirement under Act did not extend that far. 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

8 Cases that cite this headnote

[14] **United States** ➡ Water rights

For purposes of comprehensive adjudication requirement for applicability of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, adjudication must include undetermined claims of all parties with interest in relevant water source. 43 U.S.C.A. § 666.

5 Cases that cite this headnote

[15] **United States** ➡ Water rights

For purposes of comprehensive adjudication requirement for applicability of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, while adjudication must avoid excessively piecemeal litigation of water rights, it need not determine rights of users of all hydrologically related water sources. 43 U.S.C.A. § 666.

1 Case that cites this headnote

[16] **Federal Courts** ➡ Particular Cases, Contexts, and Questions

Water Law ➡ Reserved Water Rights

Water Law ➡ Rehearing and review

In administering water rights, state is compelled to respect federal law regarding federal reserved

rights and, to extent it does not, its judgments are reviewable by United States Supreme Court.

1 Case that cites this headnote

[17] **United States** ➡ Water rights

By virtue of McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, federal government could not be required to pay filing fees in Oregon's surface water rights mass adjudication proceeding respecting river basin. 43 U.S.C.A. § 666(a); ORS 539.081.

[18] **United States** ➡ Water rights

Despite McCarran Amendment, under which federal government waived sovereign immunity respecting suit for adjudication of water rights, Oregon could not require federal government, as provided by state statute, to file registration statements describing its claims to waters outside of river basin presently under consideration in Oregon's surface water rights mass adjudication proceeding respecting river basin; connection between registration and adjudication was too tenuous for registration provisions to be characterized as part of adjudications to which federal government had consented to be joined under Amendment. 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4), 539.240.

1 Case that cites this headnote

[19] **Indians** ➡ Water Rights and Management

United States ➡ Water rights

In Oregon's surface water rights mass adjudication proceeding respecting river basin, absent waiver of sovereign immunity, state could not require United States or Indian tribe to register water rights claims prior to adjudication of those claims, nor could state prejudice those claims if no registration statements were filed. 43 U.S.C.A. § 666; ORS 539.240.

2 Cases that cite this headnote

[20] Constitutional Law 🔑 Water**Indians** 🔑 Water Rights and Management

Indian tribe failed to demonstrate bias to support claim that requiring tribe to submit to Oregon Water Resources Department (OWRD) surface water rights mass adjudication proceeding respecting river basin would deprive tribe of due process because state agencies involved in adjudicating its claims had shown persistent bias against tribal treaty rights, despite fact that Oregon Department of Justice (ODOJ) had argued against existence of some treaty rights held by tribe; it was not enough to show state had taken positions adverse to tribe's claims in present case, nor was generalized suspicion of inhospitable treatment enough to create due process bar, and tribe failed to show ODOJ would have any significant role to play in adjudication. U.S.C.A. Const.Amend. 14; 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

3 Cases that cite this headnote

[21] Constitutional Law 🔑 Indians

In evaluating Indian tribe's due process claim of biased decision making by state, Court of Appeals had to ask whether situation was one in which experience taught that probability of actual bias on part of judge or decision maker was too high to be constitutionally tolerable. U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

[22] Constitutional Law 🔑 Indians

Due process clause of Fourteenth Amendment guarantees Indian tribes fair trial before fair tribunal, whether it be administrative agency or court. U.S.C.A. Const.Amend. 14.

[23] Constitutional Law 🔑 Water**Indians** 🔑 Water Rights and Management

To prevail on Indian tribe's claim, that requiring tribe to submit to Oregon Water Resources Department (OWRD) surface water rights mass adjudication proceeding respecting river basin

would deprive tribe of due process because state agencies involved in adjudicating its claims had shown persistent bias against tribal treaty rights, tribe had to show unacceptable probability of actual bias on part of those who had actual decision-making power over their claims. U.S.C.A. Const.Amend. 14; 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

10 Cases that cite this headnote

[24] Federal Courts 🔑 Amending, modifying, or vacating judgment or order; proceedings after judgment

District court's order, denying motion by association of owners of former reservation land to amend district court's prior judgment to extend relief granted Indian tribe to association's members, leaving association's complaint in intervention unadjudicated, was not final judgment disposing of association's complaint in intervention and, thus, Court of Appeals lacked jurisdiction over association's appeal in action brought by federal government and tribe against Oregon Water Resources Department (OWRD), claiming they were not required to participate in state surface water rights mass adjudication proceeding respecting river basin. 28 U.S.C.A. § 1291; 43 U.S.C.A. § 666; ORS 539.021, 539.150(1, 3, 4).

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Appeals from the United States District Court for the District of Oregon.

Before: ALARCON, NORRIS, and LEAVY, Circuit Judges.

Opinion

***762** WILLIAM A. NORRIS, Circuit Judge:

These consolidated appeals arise out of the State of Oregon's attempts to adjudicate the rights of various claimants to the waters of the Klamath River Basin through a complex procedure created by state statute. We are called upon to address whether the State may compel the United States, the Klamath Indian Tribe and other owners of former reservation land to comply with certain terms of the state statute governing the Klamath Basin adjudication.

I

Facts and Procedural History

In 1975, the Oregon Water Resources Department (OWRD) invoked Oregon's statutory procedure for the mass adjudication of water rights in order to determine all claims to surface water in the Klamath River Basin. The United States claims water rights in this basin on behalf of several federal agencies and as trustee for the Klamath Tribe. The State notified over 25,000 potential claimants, including appellants United States, the Klamath Tribe and members of the Klamath Allottees Water Users Association (Association), a group of individuals who own former reservation land in fee. That same year, the United States filed a suit in federal district court seeking a declaration of the water rights of the United States and the Klamath Tribe in certain tributaries within the Klamath Basin. In 1983, this court heard an appeal from the district court's decision in that case. *See United States v. Adair*, 723 F.2d 1394 (9th Cir.1983), *cert. denied*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). We held that the United States and Klamath Tribe possessed reserved water rights to the rivers at issue in the litigation, but left the quantification of those rights to a comprehensive state adjudication of water rights under the provisions of the McCarran Amendment, 43 U.S.C. § 666. *Id.* at 1406. We further stated, "although the Oregon water rights adjudication

system is initially administrative and need not be judicial in nature, we will assume, without deciding, for the purposes of this case that it is not too informal to qualify as a 'suit' within the meaning of McCarran Amendment or a 'comprehensive state adjudication' within the meaning of *Colorado River* and *San Carlos Apache Tribe*." *Id.* at 1405 n. 9 (citations omitted).

In 1990, the State reissued notices of its intention to adjudicate water rights in the Klamath Basin. In response, the United States, as owner of federal land in the Klamath Basin and as trustee for the Klamath Tribe, filed the present action in federal district court seeking a declaratory judgment that the United States has not waived its sovereign immunity and that it need not register its water claims or pay any filing fees to preserve its water rights. The Klamath Tribe intervened, joining the claims of the United States to the protection of sovereign immunity and also asserting that subjecting the Tribe to an adjudication by the State of Oregon deprived the Tribe of due process because the State had a history of hostility to the Tribe's treaty rights, including its claims to water in the Klamath Basin. The State countered that the McCarran Amendment waived the United States' sovereign immunity and that the Tribe's claims of bias were baseless.

After hearing cross-motions for summary judgment, the district court held that in enacting the McCarran Amendment, Congress had waived sovereign immunity on behalf of the United States and Klamath Tribe and consented to their participation in the Klamath Basin adjudication. The court held that the United States could be compelled to pay filing fees for the adjudication, but could not be forced to register all of its water claims throughout the state. The court further held that an 1864 Treaty between the United States and the Tribe precluded the State from requiring filing fees from the Tribe,¹ but that otherwise subjecting the Tribes to the state procedure did not violate their due process rights.

After the court issued its summary judgment decision, *United States v. Oregon Water Resources Dept.*, 774 F.Supp. 1568 (D.Or.1991), the Klamath Allottees Water Users ***763** Association intervened, claiming to hold the same rights as the Tribe. Members of the Association own property that was once held in trust for the Tribe, but later transferred to individual tribe members in fee pursuant to federal statutes. Without explanation, the district court declined to extend the ruling to the Association's members. These appeals followed, raising the issues we left undecided in *Adair*. We affirm the summary judgment, with the exception of the district court's ruling that the United States can be required to pay filing

fees. We further dismiss the Association's appeal for lack of jurisdiction.

II

Sovereign Immunity

[1] Unless the McCarran Amendment waived the sovereign immunity of the federal government and the Tribe, neither may be required to participate in a state adjudication in order to preserve water rights that have accrued under federal law. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809–13, 96 S.Ct. 1236, 1242–44, 47 L.Ed.2d 483 (1976). The McCarran Amendment provides:

§ 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source.... The United States, when a party to any 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 its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
43 U.S.C. § 666.

The United States argues that Oregon's mass adjudication scheme is not the sort of "comprehensive suit" contemplated by the statute because much of the proceedings are before an administrative agency rather than a court and because the adjudication is insufficiently comprehensive. In order to decide whether Congress intended to waive the United States' sovereign immunity for water rights proceedings such as those held under Oregon's statute, we must examine both the McCarran Amendment and the Oregon statute, paying particular attention to their historical contexts.

In the nineteenth century, water rights in Oregon were acquired by appropriation or riparian right, or accrued to the United States and Indian Tribes under federal law as federal reserved rights. *See* 1 Robert E. Beck, *Waters and Water Rights* § 8.02(c) (1991). Under an appropriation system, as such systems developed in the West, the first party to divert water for a beneficial use has the right to continue to divert that amount of water without interference from subsequent appropriators so long as the water continues to be put to beneficial use. In case of shortages, the entire share of the most recent appropriator is lost before the share of the next latest appropriator is diminished. Under such a system, the date of appropriation and the amount of water appropriated are the critical facts in the determination of the relative rights of water users.

As was traditional in Western states, the relative rights of various claimants to water from a river system were determined piecemeal, as conflicts arose, in traditional lawsuits in equity. *See* 2 Beck, *supra* § 15.01; Samuel C. Wiel, *Water Rights in the Western States* § 624 (3d ed. 1911). As the West became more populated, conflicts over water rights increased. As the interrelation of water rights became more apparent, a dilemma emerged: the nature of traditional civil litigation made joinder of the hundreds or thousands of claimants to a river system extremely *764 cumbersome and inefficient,² while less comprehensive adjudications were of little value. As the Supreme Court noted in *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 449, 36 S.Ct. 637, 641–42, 60 L.Ed. 1084 (1916), in an adjudication of water rights,

the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined.

As it became clear that the necessary scope of comprehensive water rights adjudication could not be accommodated by traditional litigation procedures, Western states began to develop alternate, statutory adjudication systems for the mass determination of the rights of all claimants in a river system. *See* 2 Beck, *supra* § 15.01; 2 Wells A. Hutchins, *Water Rights in the Nineteen Western States* 447–48, 451–70.

In 1909, Oregon created its present statutory system for the mass adjudication of surface water rights. After 1909, water rights could only be acquired through a permit system established by the statute. Or.Rev.Stat. § 537.120. However, all water rights that had vested prior to 1909, but had never been subject to a judicial determination, have been left intact as “undetermined vested rights.” *Id.* at §§ 536.007(11), 539.010. The statute requires that every person or entity claiming an undetermined vested right must file a “registered statement” describing the claim and including the information necessary to determine the claimed vested or reserved right. *Id.* at § 539.240(1).³ The purpose of the registration is to preserve evidence of pre-1909 claims until those claims are subject to adjudication under the statute. The registration statement must be accompanied by a fee that is calculated according to the type and extent of the water's use. *Id.* at § 539.081.

Upon petition by a claimant, or on its own initiative, the Oregon Water Resources Department may commence the adjudication of the rights of all claimants to a river or stream. Or.Rev.Stat. § 539.021. Notice must be given to all interested parties. *Id.* at §§ 539.030, 539.040(2). Those claimants who have already been issued water certificates through the permit system are not required to participate in the adjudication in order to preserve their rights as already determined. *Id.* at § 539.100. However, those with undetermined claims to the water of the system are required to appear and submit proof of their claims before the OWRD. The OWRD accepts claims and objections to claims, surveys the river system, takes evidence and holds hearings regarding contested claims. *Id.* at §§ 539.070, 539.100, 539.110, 539.120. After these hearings, the OWRD makes findings of fact and an order determining the parties' water rights. *Id.* at § 539.130. This order is effective upon issuance unless a party wishes to contest the order and files a bond. *Id.* at § 539.130(4). After the order is filed, a judicial hearing is scheduled and notice of that hearing is given to the participants. *Id.* at § 539.130. Parties objecting to the department's order must file written exceptions with the court in order to preserve their objections. *Id.* at § 539.150. If no objections are filed, the court must enter a judgment affirming the order. *Id.* at § 539.150(3). Otherwise, a hearing is held at which contesting parties may offer evidence as in a normal civil case. *Id.* at §§ 539.150(1), 539.150(3). The court may remand the case to the OWRD or other referee for further findings, followed by another judicial hearing. *Id.* at § 539.150(3). At the final judicial hearing, the court reviews the exceptions and then enters a judgment affirming or modifying the order as it considers proper. *Id.* at §

539.150(4). This judgment is appealable to the Oregon Court of Appeals in the same manner as any other civil judgment. *Id.*

***765** The system adopted by Oregon at the turn of the century served as a model for Arizona, California, Nevada and Texas. *See* 2 Hutchins, *supra* at 456–57. By the time the McCarran Amendment was passed, most Western states had adopted some statutory procedure for the mass adjudication of water rights. *See* 1 *id.* at 302–03; *infra* notes 7–8. While these statutory adjudications seemed to promise an end to the confusing and conflicting adjudication of water rights in multiple cases, the system was impaired by the refusal of the federal government to participate. Since the United States had large landholdings and extensive reserved water rights in the West, its claims of sovereign immunity significantly diminished the value of the comprehensive state adjudications. Congress sought to remedy this problem by enacting the McCarran Amendment in 1952. *See* S.Rep. No. 755, 82d Cong., 1st Sess. 4–6 (1951).

Against this background, we must consider the United States' contention that the McCarran Amendment does not and was not meant to extend to Oregon's statutory procedure for adjudicating water rights in river systems.

A

Suit or Administrative Proceeding

[2] [3] The United States argues that Oregon's adjudication of water rights does not constitute a “suit” but rather an “administrative proceeding” outside the plain language of the McCarran Amendment. The Supreme Court heard a similar argument regarding the proper characterization of Oregon's water rights adjudication process in *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. at 440, 36 S.Ct. at 637. In that case, the plaintiff sought a declaration that Oregon's statute violated the due process clause of the Fourteenth Amendment because it permitted water rights to be adjudicated by an administrative agency rather than a court. The Court wrote:

A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court.... [T]he board merely paves the way for an adjudication by the court of all the rights involved.

As the Supreme Court of the State has said, the board's duties are much like those of a referee.

Id. at 451. In the end, water rights are assigned according to a judgment of a court which has held hearings in which the United States has been joined as a defendant. That an administrative agency, magistrate, referee or special master should “pave the way for an adjudication by the court” does not make the label “suit” inappropriate.

[4] [5] [6] The United States argues, however, that we are required to construe narrowly the language of any statute waiving sovereign immunity and that an appropriately narrow construction of the McCarran Amendment allows joinder of the United States only in traditional lawsuits initiated in court and tried exclusively before a judge.⁴ In *United States v. Idaho*, 508 U.S. 1, —, 113 S.Ct. 1893, 1896, 123 L.Ed.2d 563 (1993), the Supreme Court emphasized that “waivers of federal sovereign immunity must be ‘unequivocally expressed’ in the statutory text.” The plain language of the McCarran Amendment, however, expressly waives immunity. The question in this case is whether the case at bar is one of those adjudications, described in the provision, to which this express waiver applies. Although an examination of Congress' purposes and the historical context of the statute may not serve to waive immunity *766 when the text of the statute fails to do so unequivocally, see *United States v. Nordic Village, Inc.*, 503 U.S. 30, —, 112 S.Ct. 1011, 1016, 117 L.Ed.2d 181 (1992), the “scope of such a waiver can only be ascertained by reference to underlying congressional policy.” *Franchise Tax Bd. v. United States Postal Service*, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984). The Supreme Court has repeatedly looked to indicia of Congressional intent in order to construe the scope of the unequivocally expressed waiver of immunity in the McCarran Amendment. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564–65, 103 S.Ct. 3201, 3212–13, 77 L.Ed.2d 837 (1983) (examining purposes of the Amendment in holding that it waives Indian sovereign immunity in all states); *Colorado River*, 424 U.S. at 810–812, 96 S.Ct. at 1242–44 (holding that the objectives and legislative history of McCarran Amendment support applying waiver to adjudication of federal reserve water rights held by the United States in trust for Indian Tribes); *United States v. District Court for Eagle County*, 401 U.S. 520, 525, 91 S.Ct. 998, 1002–03, 28 L.Ed.2d 278 (1971) (looking to legislative history to determine how “comprehensive” Congress required the adjudications to be in order to qualify for waiver of immunity).

Thus, we must look to the Amendment's historical context and purposes to evaluate the United States' argument that the McCarran Amendment applies only to “traditional” civil lawsuits. The United States points out that at the time of the McCarran Amendment's passage, Oregon, like most Western states, continued to allow water rights to be adjudicated in traditional civil suits notwithstanding its statutory adjudication scheme. See Or.Rev.Stat. § 539.021(2); 2 Hutchins, *supra* at 63–67. Based on this observation, the United States argues that Congress meant to waive immunity to joinder in these traditional adjudications, but not to participation in statutory adjudications in which administrative agencies play a central role.

[7] This argument ignores that Congress limited its waiver to “comprehensive water right adjudication[s].” *United States v. Idaho*, 508 U.S. at —, 113 S.Ct. at 1894. As the Supreme Court noted in *Colorado River*,

The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights.... As has already been observed, the Colorado Water Rights Determination and Administration Act established such a system for the adjudication and management of rights to the use of the State's waters.

424 U.S. at 819, 96 S.Ct. at 1247. Thus, the Supreme Court considered the statutory scheme adopted by Colorado to be one of the “comprehensive state systems” Congress had in mind when passing the McCarran Amendment. The Colorado system does not rely upon traditional equity lawsuits for comprehensive river adjudications. Rather, like the statutory scheme in Oregon, Colorado's system involves an initial adjudication by nonjudicial officers, known as “Water Referees,” subject to review by a state court. See Colo.Rev.Stat. Ann. §§ 37–92–101 *et seq.* (1974); see also 6 Beck, *supra* at 65–66. As the Supreme Court explained, “[e]ach month, Water Referees in each Division rule on applications for water rights filed within the preceding five months or refer those applications to the Water Judge of their Division. Every six months, the Water Judge passes on referred applications and contested decisions by Referees.” 424 U.S. at 804, 96 S.Ct. at 1240 (citations omitted). Thus, when the Supreme Court held that Colorado's system was the sort of comprehensive adjudication contemplated by the McCarran Amendment, it recognized that Congress had in mind not only traditional suits in equity but also hybrid adjudications taking advantage of the expertise of nonjudicial officials.

[8] In fact, the active participation of administrative agencies is at the core of most of the “comprehensive state systems for adjudication of water rights” contemplated by the McCarran Amendment. While the traditional civil lawsuits may remain viable devices for the comprehensive adjudication of rivers with a small number of claimants, by 1952 it was clear that they were not well-suited for comprehensive adjudication of the rights in large ***767** rivers. See *Pacific Live Stock*, 241 U.S. at 449, 36 S.Ct. at 641–42. Comprehensive adjudication of such river systems became practicable after the creation of the complex statutory procedures in the first half of this century. See 2 Beck, *supra* § 15.01; 2 Hutchins, *supra* at 444–47. A central feature of these statutory procedures is the involvement of administrative agencies to make an initial determination of the hundreds or thousands of claims filed. 2 Beck, *supra* § 15.01; 1 Hutchins, *supra* at 302; 2 *id.* at 448–51. When Congress consented to the joinder of the United States in comprehensive lawsuits, we presume that it had in mind these statutory procedures which made large scale comprehensive adjudications possible.⁵ See *Colorado River*, 424 U.S. at 819, 96 S.Ct. at 1247.

[9] It may be, however, the Oregon's system is aberrational, relying too heavily on the work of the administrative agency to be considered among those comprehensive adjudications to which the McCarran Amendment applies. However, as the State points out, at the time the McCarran Amendment was passed, Oregon's adjudicatory scheme was firmly established in its present form and had been duplicated in Arizona, California and Nevada (the home state of Senator McCarran, author of the Amendment).⁶ State water agencies or referees in four more states played essentially the same role as the Oregon Water Resources Department, except that the proceedings were initiated in court and then transferred to the agency or referee for investigation and preliminary determination.⁷ We agree with the State that whether the case is initiated in court and then referred to an agency for administrative proceedings, or is initiated through an administrative procedure before being reviewed by a court is not a material distinction for the purposes of the McCarran Amendment. Both sorts of systems were in place when Congress enacted the waiver. There is no reason to think that Congress meant its waiver to turn on such a technical distinction. See *Eagle County*, 401 U.S. at 525, 91 S.Ct. at 1002–03. We decline to adopt an interpretation of the McCarran Amendment that would render it inapplicable to

the comprehensive adjudication schemes of so many Western states when it was passed.⁸

B

Comprehensiveness

The United States also argues that even if Oregon's proceedings amount to a “suit” within the meaning of the McCarran Amendment, they are not sufficiently comprehensive to fall under the provision because the rights of some claimants are not subject to attack and because groundwater rights are not decided in the same proceeding.

1

Absent Parties

[10] Under the Oregon statute, some aspects of the water rights determined through the permit process after 1909 or through prior adjudication are considered to be conclusively determined and not subject to contest in the Klamath Basin adjudication. See Or.Rev.Stat. § 537.270 (water right certificate issued through permit process or after statutory adjudication is to be considered “conclusive evidence of the priority and extent of the appropriation therein described”); ***768** *id.* at § 539.100 (party not asserting an undetermined vested right or contesting such a right need not participate in statutory adjudication). The United States contends that this makes the adjudication less than comprehensive.

In *United States v. District Court for Eagle County*, 401 U.S. at 520, 91 S.Ct. at 1000 and its companion case, *United States v. District Court for Water Div. No. 5*, 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971), the Supreme Court considered a similar attack on the Colorado comprehensive adjudication process. Under the statute, Colorado periodically conducted “supplemental water adjudications” to determine the rights of those claiming to have acquired water rights since the last adjudication of the river system. The United States argued that the adjudication was not comprehensive because water rights determined in previous adjudications were not subject to redetermination. The Court in *Eagle County* stated “[w]e think that argument is extremely technical; and we decline to confine 43 U.S.C. § 666 so narrowly.” 401 U.S. at 525, 91 S.Ct. at 1002–03. The Court went on to explain in *Water*

Div. No. 5 that the adjudication was general because, “[t]he present suit ... reaches all claims, perhaps month by month but inclusively in the totality.” 401 U.S. at 529, 91 S.Ct. at 1005.

[11] [12] We reject the government's argument in this case as well. As was true in *Eagle County*, all existing water rights claims in the river system will have been determined when the adjudication is finished. Congress was concerned that the United States not be subjected to piecemeal, private water rights litigation. See *Eagle County*, 401 U.S. at 525, 91 S.Ct. at 1002–03; *Water Div. No. 5*, 401 U.S. at 529, 91 S.Ct. at 1004–05. The comprehensiveness standard requires the consolidation of existing controversies, not the reopening of settled determinations.

The United States and the Tribe argue, however, that Oregon's statutory adjudication will not sufficiently protect their water rights because they will not be allowed to challenge the water rights certificates issued through the permit system. However, the Supreme Court responded to this concern in *Eagle County*, observing that

[t]he absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the [state] court.

401 U.S. at 527, 91 S.Ct. at 1003 (footnote omitted).

2

Groundwater

[13] Because the Klamath Basin adjudication does not attempt to determine the rights of claimants to groundwater in the Basin, the United States argues that the proceedings are not an “adjudication of rights to the use of water of a river system or other source.” 43 U.S.C. § 666(a). Arguing that the ground and surface waters of the region are hydrologically interrelated, the United States contends that the failure to include groundwater claims deprives the adjudication of the comprehensiveness intended by Congress.

The text of the Amendment lends little support to the United States' position. On its face, the statute applies to the “water of a river system or other source.” Groundwater may be included

as an “other source,” but the use of “or” strongly suggests that the adjudication may be limited to *either* a river system *or* some other source of water, like groundwater, but need not cover both. For the United States' argument to succeed, we must read “river system” to include not only the water of the river, but hydrologically-related groundwater systems as well.

[14] In support of this interpretation, the United States refers to cases stating that the Amendment's waiver is limited to “general” or “comprehensive” adjudications. See, e.g., *United States v. Idaho*, 508 U.S. at —, 113 S.Ct. at 1894; *Dugan v. Rank*, 372 U.S. 609, 618, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15 (1963). *769 These cases make clear that the adjudication must include the undetermined claims of all parties with an interest in the relevant water source. However, these cases do not address the proper definition of the relevant water source and do not decide if groundwater must be included in an adjudication of a “river system.” The United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the comprehensive adjudication of a “river system.”

The United States argues instead that the purposes of the Amendment are best served by an interpretation that requires the adjudication of all hydrologically-related water sources. We agree that the McCarran Amendment was motivated in large part by the recognition of the interconnection of water rights among claimants to a common water source and the desire to avoid piecemeal adjudication of such rights. However, we do not believe that Congress intended to carry the requirement of comprehensiveness as far as the United States would have us do.

The Supreme Court addressed the scope of the comprehensiveness requirement in *Eagle County*, where the State of Colorado attempted to adjudicate the water rights of claimants to the Eagle River and its tributaries. 401 U.S. at 521, 91 S.Ct. at 1000. The Eagle River is itself a tributary of the Colorado River. *Id.* The United States argued that because the Eagle was hydrologically related to the Colorado, a comprehensive adjudication under the McCarran Amendment must include an adjudication of the entire Colorado River. The Court rejected this contention as “almost frivolous.” *Id.* at 523, 91 S.Ct. at 1001. “No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The ‘river system’ must be read as embracing one within the particular State's jurisdiction.” *Id.* This discussion suggests that, contrary to the United

States' assertions, the comprehensiveness requirement does not mandate that every hydrologically-related water source be included in the adjudication.

[15] We conclude that while the adjudication must avoid excessively piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources. As one authority has noted:

[s]cientists have long delighted in pointing out to lawyers that all waters are interrelated in one continuous hydrologic cycle. As a result, it has become fashionable to argue that an effective legal regime should govern all forms and uses of water in a consistent and uniform manner. The law is otherwise.

1 Beck, *supra* § 6.02 (footnotes omitted).

One of the ways in which the law has traditionally ignored the exhortation of the scientists is by treating ground and surface water as distinct subjects, often applying separate law to each. While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. *See* 3 Beck, *supra* §§ 20.03–20.04; 2 Wiel, *supra* §§ 1039–42. Under the traditional groundwater doctrines of absolute dominion, the American reasonable use rule, and the correlative rights rule, the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater. *See* 3 Beck, *supra* § 20.07(b)(2). Thus, a major function of the statutory comprehensive adjudications is made unnecessary—there is no need to establish the relative priority of all users' claims in order to define each user's rights. The United States is correct in arguing that an increased recognition of the relationship between ground and surface water has led some states to attempt better coordination between the allocation of surface and groundwater rights, *see* 3 Beck, *supra* § 24.01(b), but that recognition was still emerging at the time the McCarran Amendment was passed.⁹ *See id.*; 2 Hutchins, *supra* at 634–53. While the trend has been toward a greater legal *770 recognition of the connection between ground and surface waters, that recognition is too recent and too incomplete to infer that Congress intended to require comprehensive stream adjudications under the McCarran Amendment to include the adjudication of groundwater rights as well as rights to surface water.

[16] The Tribe and the United States note that the use of groundwater in the Klamath Basin may have a direct effect on the availability of water to fulfill the reserved water rights

guaranteed to them under federal law. They note that the State's distribution of groundwater rights may have the effect of interfering with these federal water rights. The appellants raise legitimate concerns about the relationship between federal reserve water rights in a river and the distribution of water rights in hydrologically related groundwater. However, these concerns go to the merits of the adjudications. As the Supreme Court has noted, in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court. *See Eagle County*, 401 U.S. at 525–26, 91 S.Ct. at 1002–03.

For these reasons, we hold 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. Accordingly, federal sovereign immunity imposes no bar to the United States' participation in that process.

III

Assessing Fees Against the United States

[17] The McCarran Amendment provides that notwithstanding its consent to the joinder of the United States in comprehensive water rights adjudications, “no judgment for costs shall be entered against the United States in any such suit.” 43 U.S.C. § 666(a). The District Court held that the United States was liable for certain filing fees required by Or.Rev.Stat. § 539.081, notwithstanding the McCarran Amendment's “cost” proviso because the statute assessed “fees” rather than taxing “costs.” However, since the district court's decision, the Supreme Court decided *United States v. Idaho*, 508 U.S. at —, 113 S.Ct. at 1893, in which the Court held that the McCarran Amendment did not permit Idaho to require the United States to pay filing fees essentially identical to those at issue in this case. *See id.* at — – —, 113 S.Ct. at 1897–98. On appeal, the State concedes that this decision controls and requires the reversal of the district court's decision on this issue.

IV

Registration Statements

[18] The State argued unsuccessfully below that the United States could be required to file registration statements describing its claims to waters outside of the Klamath Basin, as provided by Or.Rev.Stat. § 539.240. This provision requires those claiming undetermined vested rights or federal reserve rights to file a registration statement of all claims by December 31, 1992. *Id.* The information gathered through the registration process preserves evidence necessary for future comprehensive adjudications. Without detracting from the merits of the State's registration scheme, we are compelled to hold that the United States has not consented to be a part of this process.

In *United States v. Idaho*, the Court held that with the exception of procedural rules imposing costs or fees on the United States, “the McCarran Amendment submits the United States generally to state adjective law.” *Id.* at —, 113 S.Ct. at 1897. Oregon argues that the registration statement requirements are a part of the state adjective law governing the procedure by which comprehensive water rights adjudications are conducted. While the information obtained by the registration system regarding claims not yet at issue in any proceeding may be useful in future comprehensive adjudications, the process cannot accurately be described as part of the state's adjective law for the adjudication of water rights claims. There is no relation between the deadline for filing registration statements and the commencement of the statutory adjudication. The claims thus *771 registered will only be adjudicated “upon the motion of the director or, in the discretion of the director, upon receipt of a petition from one or more appropriators of surface water.” Or.Rev.Stat. § 539.021. It is thus possible that many years will pass before a registered claim is adjudicated, if it is ever adjudicated at all. The connection between registration and adjudication is too tenuous for the registration provisions to be characterized as part of the adjudications to which the United States has consented to be joined.

[19] In the absence of a waiver of sovereign immunity, the State may not require the United States or the Tribe to register water rights claims prior to the adjudication of those claims, nor may it prejudice those claims if no registration statements are filed.

V

The Klamath Tribe's Due Process Claim

[20] The Klamath Tribe claims that requiring it to submit to the Klamath Basin adjudication would deprive it of due process because the state agencies involved in adjudicating their claims have shown a persistent bias against Tribal treaty rights. The district court found that the Tribe had failed to present sufficient evidence of bias to substantiate this claim and entered summary judgment against the Tribe on this issue. We agree and affirm.

[21] [22] The due process clause of the Fourteenth Amendment guarantees the Tribes a fair trial before a fair tribunal, whether it be an administrative agency or a court. *See Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1463–64, 43 L.Ed.2d 712 (1975). In evaluating the Tribe's claim of biased decisionmaking, we must ask whether the situation is one “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Id.* at 47, 95 S.Ct. at 1464.

The Tribe presented evidence to show that the Oregon Department of Justice (ODOJ) has on several occasions argued against the existence of some treaty rights held by the Klamath Tribe.¹⁰ In particular, the Tribe points to *United States v. Adair*, 723 F.2d at 1396, where the ODOJ represented the State of Oregon in a suit instituted by the United States for a declaration of its rights and the rights of the Klamath Tribe to waters in a portion of the Klamath River Basin. In that case, the ODOJ vigorously argued, among other things, that the hunting and fishing rights guaranteed by an 1864 Treaty between the United States and the Tribe did not carry with them an implied reservation of water rights or that, even if they did, those rights were terminated when the federal government terminated supervision of the Tribe in 1954. 723 F.2d at 1408, 1411. We held that the Tribe continued to possess a senior, reserved water right sufficient to support the Tribe's hunting and fishing rights. *Id.* at 1410–11, 1414. The quantification of these rights was left to the State of Oregon's statutory adjudication process. *Id.* at 1399. Now that the State of Oregon has begun a statutory adjudication of the Klamath River Basin, as contemplated by our decision in *Adair*, the Tribe argues that the quantification process is tainted by bias due to the ODOJ's past positions opposing the existence of the Tribe's treaty rights.¹¹

*772 [23] In order to prevail in its claim, the Tribe must show an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims. *See Withrow v. Larkin*, 421 U.S. at 47, 95 S.Ct. at 1464–65. Contrary to the apparent position of the Tribe, it

is not enough to show that the State of Oregon, through the acts of certain departments or officials, has taken positions adverse to the Tribe's claims in this case. While courts have traditionally been sympathetic to the fear that tribal treaty rights will receive "inhospitable treatment" in state courts, the Supreme Court has held that this danger in itself is not enough to warrant reading the McCarran Amendment to exclude Indian water rights from comprehensive state adjudications. *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 566–67, 103 S.Ct. at 3213–14. Nor is this generalized suspicion of inhospitable treatment enough, in itself, to create a due process bar to subjecting tribal water rights to state adjudication.

Even assuming, *arguendo* that prior litigating positions reveal that ODOJ is biased against the Tribe's water rights claims,¹² the Tribe must connect these prior actions to the tribunal that will adjudicate its claims. *See Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464–65; *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir.1989). In order to make this connection, the Tribe asserts that ODOJ will provide legal advice to the Oregon Water Resources Department during its preliminary quantification of the Tribe's water rights. The Tribe acknowledges that the final quantification of water rights will be rendered by a state court, but asserts that the court will make this ruling on the basis of an administrative record developed by OWRD which, it argues, is tainted by its connection with the ODOJ.

We hold that this showing is insufficient to demonstrate an unacceptable probability that the decisionmakers in the Klamath Basin adjudication will be biased against the Tribe's claim. The Tribe has failed to show that the ODOJ will have any significant role to play in the adjudication or any impact on its outcome. The legal issues with respect to the Tribe's rights have already been decided by this court and we must presume that they will be followed by OWRD and the state courts. *See Withrow v. Larkin*, 421 U.S. at 47, 95 S.Ct. at 1464 (courts must entertain a "presumption of honesty and integrity in those serving as adjudicators"). All that is left for the tribunals in the Klamath Basin adjudication is the quantification of those rights, a fact-intensive inquiry that will be undertaken initially by the OWRD. The Tribe has not shown how the ODOJ's prior hostility to certain Treaty rights could affect this factual determination, a determination that is ultimately enforced only after review by state court judges whose integrity has not been questioned by the Tribe.

Because the evidence proffered by the Tribes does not sufficiently show an unacceptable probability of actual bias by the actual decisionmakers in the Klamath Basin adjudication, the district court properly granted summary judgment in favor of the State.

VI

Allottees' Claim

[24] Appellant Klamath Allottees Water Users Association appeals from the district court's denial of its motion to amend the court's summary judgment ruling to extend *773 the relief granted the Tribe to the members of the Association. The Association claimed that its members enjoyed the same sovereign immunity as the Tribe¹³ and that the 1864 Treaty which bars the State from imposing filing fees on the Tribe also exempted the members of the Association.

The Association's appeal comes before this court in an unusual posture. The Association moved to intervene late in the litigation. The Association filed its motion with attached complaint in intervention after the other parties had already filed cross-motions for summary judgment. The district court issued its summary judgment ruling before entertaining the Association's motion to intervene. However, the district court held off entering a final judgment until it could hear the Association's motion. The motion to intervene was granted without objection, after which the Association filed its motion to amend the court's summary judgment ruling. The other parties filed supporting and opposing memoranda.¹⁴ Without explanation, the court denied the Association's motion in a minute order. When the district court entered final judgment, it noted having denied the motion, but did not otherwise indicate that judgment was being entered on the merits of the Association's complaint in intervention. The Association filed a timely notice of appeal.

The Association's motion to amend the summary judgment ruling adopted the summary judgment motion of the Tribe. C.R. 97, at 8. The district court might have considered the Association's motion as a motion for summary judgment and the State's opposition to the motion as a cross-motion for summary judgment against the Association. If this had been the case, the district court's minute order might have been read as denying summary judgment to the Association and

granting it to the State. However, it is not at all clear that this is what the district court meant to do.

While all the parties to the appeal treat the district court's resolution of the Association's motion as a judgment on the merits of its claims, it is difficult to understand how the district court could have made such a determination based upon the state of the record. The record is devoid of certain facts that might be relevant to the merits of the Association's claims. For instance, it is not clear whether members of the Association are also members of the Tribe or are non-Indians who acquired their land from original Indian allottees. *See* Brief of Appellant Klamath Allottees Water Users Association, at 9 n. 9. Nor does the record show whether the allottees came to have title to the allotments in fee as a result of the General Allotment Act, 25 U.S.C. § 331 *et seq.*, or under the Klamath Termination Act, 25 U.S.C. § 564 *et seq.* *See* Reply Brief of Appellant Klamath Allottees Water Users Association, at 1. Such distinctions may be important in the eventual adjudication of the members' rights. In the face of an incomplete record, we are reluctant to reach out to decide the merits of the Association's complaint.

It appears that the district court, having granted the Association's motion for leave to intervene and file a complaint in intervention, merely denied the Association's motion to amend the court's judgment to extend the relief granted the Tribe to the Association's members, leaving the Association's complaint in intervention unadjudicated. Because the district court's order is not a final judgment disposing of the Association's complaint in intervention, the appeal is dismissed for lack of jurisdiction. 28 U.S.C. § 1291.

In Nos. 92–36983, 92–36985 and 92–37001, the district court's summary judgment is REVERSED with respect to its ruling on the imposition of filing fees on the United States and is AFFIRMED in all other respects. The appeal in No. 92–36987 is DISMISSED and the case is REMANDED to the district court for further proceedings.

All Citations

44 F.3d 758, 25 Envtl. L. Rep. 20,531

Footnotes

- 1 This ruling has not been appealed.
- 2 For instance, in *Salt Lake City v. Anderson*, 106 Utah 350, 148 P.2d 346 (1944), a traditional suit in equity to adjudicate rights in the Jordon River grew to over 10,000 parties.
- 3 Failure to register a claim creates a rebuttable presumption that the claim has been abandoned. Or.Rev.Stat. § 539.240(3).
- 4 The Tribe argues that we are required to narrowly construe the McCarran Amendment so as to preclude its joinder in this case in order to avoid the Constitutional questions they raise about the fundamental fairness of Oregon's adjudicative system. This argument is without merit. While “[f]ederal statutes are to be so construed as to avoid serious doubt of *their* constitutionality,” *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961) (emphasis added), we know of no case requiring us to construe a federal statute so as to avoid reaching a constitutional challenge to a completely different *state* statute or procedure.
- 5 Obviously, we do not decide in this case whether the McCarran Amendment waives sovereign immunity for adjudications under the statutes of any state but Oregon.
- 6 *See* Ariz.Code Ann. §§ 75–114—75–122 (1939); Cal.Stat. 1633–39 (§§ 2525–2774) (1943); Nev.Comp.Laws §§ 7905–7923 (1929).
- 7 *See* Mont.Code Ann. §§ 89–848—89–855 (1947); N.M.Stat.Ann. §§ 77–406—77–407 (1941); Utah Code Ann. §§ 100–4–3—100–4–15 (1943); Wash.Rev.Code §§ 7364–7377 (1932).
- 8 The United States also implies that Congress intended that the Western states would amend their statutory adjudication statutes in order to fall within the confines of the narrow interpretation of the statute advocated by the United States. However, there is no indication that Congress believed there to be a problem with the way the Western states were then conducting mass water rights adjudications. To the contrary, the discussions proceeded upon the assumption that

the problem was the United States' refusal to participate in the proceedings already existing. See S.Rep. No. 755, 82d Cong., 1st Sess. 5–6 (1951).

- 9 It appears that in 1952, the doctrine of prior appropriation was applied to percolating groundwater in Idaho, Kansas, Nevada, Oklahoma, and Utah, while riparian doctrines were applied to groundwater in Arizona, California, Colorado, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, and Wyoming. 2 Hutchins, *supra* at 634–53.
- 10 The ODOJ argued against the existence of certain hunting and fishing rights under the 1864 Treaty in *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974), and again in *Kimball v. Callahan*, 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979). In these cases, the position of the Tribes was vindicated. The Tribe also cites *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985), a case in which the Oregon Attorney General defended the state Fish and Wildlife Department in a suit by the Tribes seeking an injunction against state interference with their right to hunt and fish on lands ceded to the state in 1901. However, in that case, the Supreme Court held for the State, finding that no such rights existed. *Id.* at 774, 105 S.Ct. at 3432.
- 11 The Tribe also argues that OWRD is likely to underestimate the Tribe's water rights because the State has a policy of "oversubscribing" rivers. The OWRD is authorized to issue water rights certificates to new users even when it is not clear that there will be any water left for the new users once the senior users' rights have been exercised. See *Benz v. Water Resources Commission*, 94 Or.App. 73, 764 P.2d 594, 598–600 (1988). The Tribe argues that this creates an incentive for the OWRD to minimize the water allocated to senior users in order to assure that water remains for the junior users holding these contingent certificates. The Tribe does not show, however, that any substantial portion of the rivers in the Klamath Basin adjudication are oversubscribed. Nor does it satisfactorily explain why OWRD would prefer the rights of junior users over those of senior users, much less present any evidence that OWRD actually holds such a preference. To the extent such an incentive may exist, the Tribe has not shown that the risk of bias is significant enough to raise a constitutional question.
- 12 The Tribe's showing of even this fact is fairly weak. The Tribe's only evidence is the litigating position taken by the ODOJ in a number of cases, all of which were adjudicated over a decade ago. By the Tribe's own admissions, many of the lawyers participating in these cases are no longer active at ODOJ. Tribe's Brief at 26. Nor has the Tribe shown that any of the attorneys or other ODOJ officials involved in these cases will be involved in whatever role the ODOJ will play in the Klamath Basin adjudication.
- 13 Although the court had ruled against the Tribe on its sovereign immunity claims, the Association wished to assure itself the benefit of any reversal of these claims upon appeal.
- 14 The United States opposed the motion insofar as it argued that the Association's members were entitled to any sovereign immunity. The State opposed the motion in its entirety. The Tribe supported the claims of the Association.



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF THE SOLICITOR

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JUL 25 1995

TO: Regional Director, Bureau of Reclamation,
Mid-Pacific Region

FROM: Regional Solicitor, Pacific Southwest Region

SUBJECT: Certain Legal Rights and Obligations Related
to the U.S. Bureau of Reclamation, Klamath
Project for Use in Preparation of the Klamath
Project Operations Plan (KPOP)

This memorandum describes the general rights to the waters in the Klamath and Lost River drainages affected by the operation of the U.S. Bureau of Reclamation's (Reclamation) Klamath Irrigation Project located within the Upper Klamath and Lost River Basins in Oregon and California. In addition, the obligations of Reclamation to the holders of these rights are discussed. The rights that are treated in this memorandum include those of the Klamath Project water users (those who hold contracts with the United States to receive water from the project), the Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake National Wildlife Refuges (NWR) managed by the U.S. Fish and Wildlife Service (these refuges are located within the exterior boundaries of the Klamath Project), and the Klamath, Yurok, and Hoopa Tribes (they have treaty-based or federally reserved fishing and water rights that are or may be affected by project operations). None of the above water rights has been quantified.

Rights

Klamath Project Water Users

The Klamath Project water users obtain their supply of water for irrigation purposes from the project facilities pursuant to various contracts with Reclamation entered into pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 371 et seq., as amended and supplemented. The contracts are between Reclamation and a water district or Reclamation and an individual water user. These contracts provide, in general, that the water user is to receive enough water to satisfy the beneficial use for

¹ The existence and nature of the Klamath Tribes' reserved water rights for hunting, fishing, and gathering were declared in United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984).

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the irrigation of a specified acreage. Certain of the contracts specify the beneficial use amount on a per acre basis.

The underlying water rights for the project, upon which the water supply stated in each of the contracts discussed above depends, were obtained by Reclamation, in accordance with state law, in 1905, when Reclamation filed a notice of intent to appropriate all of the available water in the Klamath River and Lost River and their tributaries in Oregon. Similar filings were made for the waters originating in California, within the Lost River and Clear Lake drainages. Subsequent to these filings, Reclamation constructed project facilities through which water is delivered to the project water users. The project's 1905 water rights are junior to the reserved water rights of the tribes but senior to the reserved water rights of the refuges, as discussed below.

Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. 43 U.S.C. § 383; California v. United States, 438 U.S. 645, 678 (1978); appeal on remand, 694 F.2d 117 (1982). The beneficial ownership of a project water right is in the water users who put the water to beneficial use. Nevada v. United States, 463 U.S. 110 (1983). Under law of most western states a water right is obtained through appropriation followed by application within a reasonable time to beneficial use. Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Oregon law (as well as California law) is similar to the laws of most other western states in that actual application of the water to the land is required to perfect a water right for agricultural use.³

² Oregon statutes concerning the appropriation of water before February 24, 1909, the effective date of the Oregon Water Rights Act of 1909, provided that the extent of the appropriation was determined by the actual capacity of the completed diversion structure, assuming that the requirement to post a notice of intent to appropriate together with application of water to beneficial use within a reasonable time had occurred. See In re Waters of the Tualatin River and its Tributaries, 366 P.2d 174 (Or. 1961). The laws for appropriation of water in California that were in effect in 1905 were similar to those in Oregon. Cal. Civil Code of 1872, §§ 1410-22 (Deering 1977). The effective date of the California Water Commission Act, which established California's current appropriation scheme, is December 19, 1914.

³ See ORS §§ 539.010 et seq.; State ex rel. v. Hibbard, 570 P.2d 1190, 1194 (Or. Ct. App. 1977); Alexander v. Central Oregon Irrigation District, 528 P.2d 582 (Or. Ct. App. 1974), and Cal.

Oregon also recognizes that water for irrigation purposes is appurtenant to the land for which it is appropriated and applied, but is not inseparable from the land. In re Deschutes River and Tributaries, 286 P. 563 (Or. 1930); see also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir.), cert. denied, 464 U.S. 863 (1983). Federal law concerning Reclamation projects 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." 43 U.S.C. § 372. Beneficial use is determined in accordance with state law to the extent not inconsistent with congressional directives. See Alpine Land & Reservoir Co., 697 F.2d at 853-854; see also California v. United States, 438 U.S. at 678.

Wildlife Refuges

There are two National Wildlife Refuges that are particularly dependent on project operations: Lower Klamath and Tule Lake NWRs.⁴ The Lower Klamath NWR consists of 51,713 acres which straddle the Oregon-California border. This NWR was created by Executive Order No. 924 (Aug. 8, 1908) "as a preserve and breeding ground for native birds." The boundaries of the Lower Klamath NWR were altered by Executive Order No. 2200 (May 14, 1915). The Tule Lake NWR is a 39,990 acre marsh area located in northern California just south of the Oregon border. Tule Lake was created by Executive Order No. 4975 (Oct. 4, 1928) also "as a refuge and breeding ground for birds."⁵

Each refuge has a federal reserved water right to the amount of water, unappropriated at the time of creation of the refuge, necessary to fulfill the primary purposes of the refuge. See United States v. New Mexico, 438 U.S. 696 (1978). The priority date for the reserved water right of each refuge is the date of the executive order creating that refuge. See Cappaert v. United

Water Code § 1240; Joerger v. Pacific Gas & Elec. Co., 276 P. 1017 (Cal. 1929); Madera Irr. Dist. v. All Persons, 306 P.2d 886 (Cal. 1957).

⁴ There are two other National Wildlife Refuges within the exterior boundaries of the project that are also dependent on project operations. The Upper Klamath NWR was created in 1928 and is located at the northern portion of Upper Klamath Lake. It encompasses 14,965 acres of marsh and open water. The Clear Lake NWR was created in 1911 and encompasses 20,000 acres of water surface and upland area within the Clear Lake drainage in the Lost River Basin.

⁵ The interrelation of the Klamath Project irrigation uses and the NWR purposes are further delineated in the Kuchel Act, 16 U.S.C. §§ 695k-695r.

States, 426 U.S. 128, 138 (1976). In addition, certain lands within the Lower Klamath and Tule Lake refuges that are irrigated have a priority date of 1905 based on the Klamath Project water rights. Finally, the refuges receive significant quantities of return flows and other project waters which, although initially used for irrigation purposes, are beneficially reused for refuge purposes.

Klamath Indian Tribes

The Klamath Indian Tribes have treaty-based rights. The exercise of certain of these rights are affected by project operations. The Tribes' primary interest is in the operation of Upper Klamath Lake because it serves as habitat for fish protected by their treaty rights, including two endangered species of fish, the Lost River and shortnose suckers. These fish are a traditional food source for the Tribes. Changing water elevation in the lake and recurring water quality problems impact the suckers.

A treaty entered into in 1864 reserves to the Klamath Tribes fishing, hunting, and gathering rights on lands that were formerly part of the original Klamath Indian Reservation in Oregon.⁶ The reservation abutted Upper Klamath Lake and included several of its tributaries, notably the Williamson River. Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107. The treaty reserves to the Tribes a federal Indian reserved water right to support their hunting, fishing, and gathering rights.⁷ United States v. Adair, 723 F.2d 1394 (9th Cir.), cert. denied, 444 U.S. 1252 (1984). The Tribes' water

⁶ In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564x). Under this Act, reservation lands were disposed to private parties, individual Indians, the Forest Service and the Fish and Wildlife Service, but the Tribes' hunting, fishing, and gathering rights, and supporting water rights, were left intact. United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir.), cert. denied, 444 U.S. 826 (1979); Kimball v. Callahan, 493 F.2d 564, 568-69 (9th Cir.), cert. denied, 419 U.S. 1019 (1974). The Klamath Tribes were later restored as a federally recognized tribe under the Klamath Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849. ←

⁷ The Tribes' water right is not dependent on state law, but rather is controlled by federal law. However, in an adjudication of water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666, this federal right would be subject to quantification by a state court. Adair, 723 F.2d at 1411 n.19.

Tribes' water right includes "the right to prevent other appropriators from depleting the streams['] waters below a protected level in any area where the non-consumptive right applies." Adair, 723 F.2d at 1411; accord Joint Board of Control v. United States, 832 F.2d 1127, 1131-32 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988); Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985).

The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of fish. See United States v. Anderson, 591 F.Supp. 1, 5-6 (E.D. Wash. 1982), aff'd in part & rev'd in part on other grounds, 736 F.2d 1358 (9th Cir. 1984); see also United States v. Gila Valley Irrigation Dist., 804 F.Supp. 1, 7 (D. Ariz. 1992), aff'd in part & vacated in part, 31 F.3d 1428 (9th Cir. 1994), on remand Globe Equity No. 59, Phase IV, slip op. (April 14, 1995). The Tribes' water right attaches to bodies of water located within the original boundaries of the Klamath Indian Reservation. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support a tribal fishery within the original reservation. Cf. Arizona v. California, 373 U.S. 546, 595 n.97, 600, decree entered, 376 U.S. 340, 344 (1964) (awarding reserved water right in off-reservation river). The standard to be applied in determining the quantity of water secured by this right has not been determined as of the date of this memorandum. The Tribes' water right is aboriginal in origin and thus has a priority date of time immemorial. Adair, 723 F.2d at 1415.

Yurok and Hoopa Valley Indian Tribes

The Yurok and Hoopa Valley Tribes have federal Indian reserved fishing rights to take anadromous fish within their reservations in California. Memorandum from the Solicitor to the Secretary, Fishing Rights of the Yurok and Hoopa Valley Tribes, M-36979 (Oct. 4, 1993) (Sol. Op.). These rights were secured to the Yurok and Hoopa Indians by a series of nineteenth century executive orders and confirmed to the Yurok and Hoopa Tribes by

⁸ In the pending Snake River Basin Adjudication in Idaho, the United States has made claims for off-reservation instream flow water rights derived from Indian fishing rights to anadromous fish. The quantity of flow claimed is that amount required to provide adequate flows to maintain fisheries habitat in the stream reach on a monthly basis.

the 1988 Hoopa-Yurok Settlement Act (HYSA), 25 U.S.C. § 1300i et seq.

In 1855, the President, by Executive Proclamation, established the Klamath Reservation in California.¹⁰ I C. Kappler, Indian Affairs: Laws and Treaties 816-817 (1904). The Hoopa Valley Reservation was formally set aside for Indian purposes by executive order in 1876, and the reservation was extended by another executive order in 1891 to encompass the Klamath Reservation and the connecting strip of land in between.¹¹ Id. at 815; see People v. McCovey, 685 P.2d 687, 689 (Cal. 1984); see also Donnelly v. United States, 228 U.S. 243, 253-259 (1912); Blake v. Arnett, 663 F.2d 906, 911 (9th Cir. 1981); Esler v. Gill Net Number One, 54 Cal. Rptr. 568, 571-72 (1966). The HYSA partitioned the extended reservation into the present Hoopa Valley and Yurok Reservations and declared the assets of each reservation held in trust by the United States for the benefit of the respective Tribes. 25 U.S.C. § 1300i-1(b).

The Yurok and Hoopa Valley Tribes' fishing rights entitle them to take fish for ceremonial, subsistence, and commercial purposes. United States v. Eberhardt, 789 F.2d 1353, 1359 (9th Cir. 1986). Their fishing rights "include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living." Sol. Op. at 3.

The executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations. See Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.), cert. denied, 454 U.S. 1092 (1981); Anderson, 591 F.Supp. at 5-6. As with the Klamath Tribes, the Yurok and Hoopa Tribes' water rights include the right to prevent other appropriators from depleting the streams' waters below a protected level. See Joint Board of Control, 832 F.2d at 1131-32; Adair, 723 F.2d at 1411; see also Kittitas Reclamation District, 763 F.2d at 1033. The Tribes' rights include the right to certain conditions of water quality and flow

⁹ For the purpose of determining the existence of reserved water rights, there is no consequence to the fact that the Tribes' rights are derived from executive orders rather than treaties. Arizona v. California, 373 U.S. at 598.

¹⁰ The executive order establishing the Klamath Indian Reservation was issued pursuant to the Act of March 3, 1853, 10 Stat. 238, authorizing the President "to make . . . reservations in the State of California for Indian purposes."

¹¹ These executive orders were issued pursuant to the Act of April 8, 1864, 13 Stat. 39.

to support all life stages of fish. See Anderson, 591 F.Supp. at 5-6; see also Gila Valley Irrigation District, 804 F.Supp. at 7. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support the Tribes' on-reservation fisheries. Cf. Arizona v. California, 373 U.S. at 595 n.97, 600 (awarding reserved water right in off-reservation river). The exact standard to determine the amount of water secured by these rights has not been determined as of the date of this memorandum. The priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier.

Obligations

Klamath Project Water Users

Reclamation has an obligation to deliver water to the project water users in accordance with the project water rights and the contracts between Reclamation and the water user (which may be through a water district) subject to the availability of water. ~~Reclamation must protect the rights of the users of project water, see Filing of Claims for Water Rights in General Stream Adjudications, M-36966, 97 I.D. 21 (July 6, 1989), and cannot "ignore . . . the obligations that necessarily devolve upon it from having mere title to water rights for the [project], when the beneficial ownership of these water rights resides elsewhere."~~ Nevada v. United States, 463 U.S. at 127. Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act. Water lawfully stored in the project's reservoirs can be used for domestic and irrigation purposes to the extent the water is applied to beneficial use within the project. ~~Reclamation cannot store or divert water for project purposes that is needed to satisfy prior existing rights.~~

Refuges

Reclamation has an obligation to ensure that the refuges receive adequate water to fulfill their federal reserved water rights (i.e., the amount of water necessary to fulfill the primary purposes of the refuges) when in priority and when water is available. In addition, Reclamation can continue to provide available project water for beneficial reuse by the refuges to the extent of past and current usage and consistent with project purposes.

The Kuchel Act (see footnote 5) requires that the refuge lands be used primarily for waterfowl purposes but with full consideration given to optimum agricultural use so far as agricultural use is consistent with the refuge purposes. 16 U.S.C. § 6951. In addition, the pattern of agricultural leasing existing in 1964 is to be continued on specified lands within the refuges as

consistent with proper waterfowl management. *Id.* § 695n. Thus, it is possible that certain irrigated lands within the refuge boundaries would not be cultivated in the usual manner if that would be inconsistent with the purposes of the refuges. If such change in cultivation resulted in less water being used for irrigation within the project, then more water may be available for the refuges, pursuant to a change in the water right or otherwise, subject to prior existing rights and water availability.

The Tribes

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is one held by all federal agencies. Pyramid Lake Paiute Tribe v. Department of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). In general, the trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. See Mitchell v. United States, 463 U.S. 206, 224-226 (1982); Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 425-426 (1991); Joint Board of Control of the Flathead, Mission and Jocko Irr. Dist. v. United States, 862 F.2d 195 (1988).

Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources.

With respect to the Tribes' fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation. See Parravano v. Babbitt, 861 F.Supp. 914, 924 (N.D. Cal. 1994), appeal pending. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished. In doing so, Reclamation, in formulating any operating plan, must minimize unnecessary waste and take such other steps within its legal and contractual authority as are necessary to protect tribal rights. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 255-256 (1973). In relation to a different Reclamation project, a court directed Reclamation, in formulating an operating plan, to provide, among other things, an effective means to measure water use, to end delivery of water to unentitled lands, and to assure compliance with such measures by project water users. *Id.* at. 258.

Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq., requires Reclamation to review its programs and utilize them in furtherance of the purposes of the ESA. 16 U.S.C. § 1536(a)(1). Reclamation has an obligation not to engage in any action that is likely to jeopardize the continued existence of a listed species. In addition, Reclamation must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (with respect to anadromous species) to insure that any action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat of such species.¹² Id. § 1536(a)(2). If as a result of such consultation, FWS or NMFS, as appropriate, finds that the action will result in the incidental taking of a listed species but is not likely to jeopardize the continued existence of the species, or that there is a reasonable and prudent alternative to the proposed action that will avoid such jeopardy, then FWS or NMFS will set forth the impact of such incidental taking, the reasonable and prudent measures necessary to minimize such impact, and the terms and conditions that Reclamation must comply with to implement such measures. Id. § 1536(b)(4).

Two species of sucker fish that occupy Upper Klamath Lake and its tributaries (as well as other water bodies within and adjacent to the project) have been listed as endangered under the ESA and Reclamation has consulted with the FWS with respect to the effects of project operations on these species. The FWS issued a Biological Opinion in 1992 (Long Term Biological Opinion) that set certain mandatory lake level elevations for Upper Klamath Lake necessary to avoid jeopardizing the species.

The coastal steelhead has been proposed for listing by NMFS. 60 Fed. Reg. 14253 (March 16, 1995). Reclamation has, through the conferencing provisions of the ESA, Id. § 1536(a)(4), determined that the 1995 operations of the Klamath Project will not jeopardize the continued existence of the steelhead. NMFS has concurred in this determination.¹³

Conclusion

None of the rights discussed above are quantified (except see footnote 1). Even so, Reclamation is not free to disregard these

¹² Critical habitat has not been designated for the Lost River and shortnose suckers.

¹³ A petition to list the chinook salmon has been received by NMFS. 60 Fed. Reg. 30263 (June 8, 1995). NMFS has proposed to list the coho salmon. ____ Fed. Reg. (____ July ____, 1995):

rights, and its discretion to determine the necessary means to protect and fulfill each of these rights is limited. Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights. Reclamation must also, consistent with its statutory, contractual and trust obligations, fulfill the rights of the project water users and the refuges.

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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 18, 1996

Martha Pagel, Director
Water Resources Department
158 12th Street NE
Salem, OR 97310

Re: Klamath Adjudication
DOJ File No. 690-002-G0037-86-0010

Dear Ms. Pagel:

You have asked for a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication. The questions follow the Ninth Circuit Court of Appeals decision in *US v. Oregon* 44 F.3d 758 (9th Cir. 1994), *cert denied sub nom Tribe v. State of Oregon*, ___ US ___, 116 SCt 378, 133 L Ed 2d 302 (October 30, 1995). The case affirmed Oregon's authority, under the McCarran Amendment, to adjudicate federal and tribal water rights claims, and cleared the path for the adjudication to begin.¹⁷

The adjudication will resolve three general categories of claims in the Basin: the claims of private users holding individual water rights; the claims of Klamath Project irrigation districts holding rights developed under the authority of the federal Reclamation Act and Oregon law; and the claims of federal agencies and tribes, holding federal reserved water rights. The Department has already received claims from private users in the Basin. The claiming period for this category of claims closed February 1, 1991. The Department may now open the claiming period for Klamath Project and federal reserved claims. All

¹⁷ The Ninth Circuit case did not resolve the claims of the Klamath Allottees Association, which asserted that individual tribal allottees were not required to pay filing fees. We believe the adjudication could continue even while those claims are being resolved, since the allottees' challenge to the state's underlying jurisdiction was conclusively resolved by the court's opinion.

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claims must be filed before the "open inspection period" (pursuant to ORS 539.090) since all claims must be available for inspection by all other parties to the proceeding at one time. After the open inspection period, the opportunity for contests, and the preparation of the Director's determination, the matter will be referred to the Klamath County Circuit Court for entry of the final decree.

Regardless of the legal basis of the claims, the state will adjudicate all claims under Oregon's adjudication law (ORS chapter 539). The adjudication will establish the relative priority dates as well as the nature and scope (e.g., allowed rate, duty, use, place of use and point of diversion) of all claims. Once adjudicated, the state will then regulate water use as between the rights. *Pacific Live Stock Company v. Lewis*, 241 US 440, 36 S Ct 637, 60 LEd 2d 1084 (1916). The state has authority under the McCarran Amendment (43 USC § 666) and *US v. Oregon* to adjudicate these claims regardless of their legal basis (i.e., state or federal law) and to issue water right certificates as evidence of those rights.

I. CLASSES OF CLAIMS

A. Private Water Rights

The unadjudicated rights of private appropriators are derived from state law, primarily the common law of prior appropriation based on the use of water initiated prior to February 24, 1909.² (Technically, Klamath Project water rights might be viewed as private water rights, held by non-federal entities, but these claims are discussed separately, below.) In addition, private individuals occupying property that was formerly Klamath Indian Reservation or federal forest land may be entitled to claim "Walton" rights for those lands. They have acquired a quasi-federal reserved right with the acquisition of the land to which the federal reserved right was appurtenant. See *Colville Confederated Tribes v. Walton* 647 F2d 42, 50-51 (9th Cir 1981).

² Post-1909 water rights are acquired after an application for a water right has been evaluated under public interest standards, a permit granted, the use developed ("perfected"), and a certificate issued. Persons holding these rights have the right to be parties to the adjudication, and are allowed to contest the claims of others whose rights are being adjudicated. However, these post-1909 water right holders need not participate in the adjudication to re-establish or protect their rights.

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B. Klamath Project Water Rights

Water rights associated with the irrigation of the Klamath Project are based upon the federal Reclamation Act of 1902 (32 Stat 388) and a 1905 Oregon statute (1905 Or Laws ch 228) intended to assist the federal government in developing irrigation projects. The 1905 Oregon statute authorized the federal government to tie up unappropriated water of a river system for future irrigation projects by filing a Notice with the state identifying its intention to develop a particular project. The United States' Notice with respect to the Klamath Project specified that:

The United States intends to use the above described waters [of the Klamath River Basin] in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act. (Notice signed by T.H. Humpherys, Engineer of the U.S. Reclamation Service, dated May 17, 1905.)

The water was "deemed appropriated" under Oregon law when the United States made its filing. *In Re Waters of the Umatilla River* 88 Or 376, 385 (1918). The Reclamation Act, authorized the Secretary of the Interior to "locate and construct . . . irrigation works for the storage, diversion, and development of waters". 32 Stat. 388 § 2. The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation. A memo prepared by David Nawi, regional solicitor for the Department of Interior dated July 25, 1995 (Nawi memo), recognizes that whatever claims the Bureau will assert in the adjudication will be based on this authority.

Apparently, a dispute has emerged about who will actually own these rights. The Bureau may claim ownership of the water right under the Reclamation Act and its 1905 Notice. However, the United States Supreme Court has consistently held that water rights developed under a federal Reclamation Act project, (such as the Klamath Project) do not belong to the Bureau. "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract . . . the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works." *Nevada v. United States*, 463 US 110, 125, 103 SCt 2906, 2916, 77 LEd 2d 509 (1983) (quoting *Nebraska v. Wyoming*, 325 US 589, 65 SCt 1332, 89 LEd 2d 1815 (1945)). See also *Ickes v. Fox*, 300 US 82, 57 SCt 412, 81 LEd 2d 412 (1937). The Bureau might hold the storage rights associated with the Klamath Project, since the Bureau may own the land covered by

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the reservoirs. However, a final determination of the ownership question will require further factual determination.

More likely, these water rights are held by the irrigation districts or perhaps by individual district members. Whether the right is owned by the district or its members is based upon the contractual arrangement between the districts and its members. See *In Re Waters of Willow Creek* 119 Or 155 (1925).

C. Federal Reserved Water Rights

The class of claims which gave rise to the *US v. Oregon* law suit is that associated with federal agencies under *Winters v. United States*, 207 US 564, 28 SCt 207, 52 LEd 2d 340 (1908). *Winters* announced what has become known as the reserved rights doctrine. Under the reserved rights doctrine, when land is set aside from the public domain, enough of the then existing unappropriated water is reserved to satisfy the primary purpose(s) of the reservation. *United States v. New Mexico*, 438 US 696, 98 SCt 3012, 57 LEd 2d 1052 (1978); *Cappaert v. United States*, 426 US 128, 96 SCt 2062, 48 LEd 2d 523 (1976). The doctrine creates water rights impliedly, rather than expressly, and is an exception to Congress' explicit deference to state water laws in other areas. *United States v. New Mexico*, 438 US at 715. See also *San Carlos Apache Tribe v. Arizona*, 668 F2d 1093 (9th Cir 1982) and *Colville Federated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981).

For the Klamath Tribes, the reserved right purposes have been identified in *US v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983): "[T]he right to hunt, fish and gather * * * [and] convert[ing] the Indians to an agricultural way of life * * * qualify as primary purposes of the 1864 treaty." The reserved rights of other federal reservations, (national forests and wildlife refuges and the Crater Lake National Park, for example) will similarly be established for, and at the level necessary to accomplish their primary purpose(s), but "no more". *Cappaert* at 141.

The purpose of the foregoing discussion is not to pre-judge any of the claims. All claimants will be expected to establish the legal and factual basis for their claims. This description is intended to merely give a glimpse of the nature and complexity of the claims likely to be asserted by the various claimants. Once the rights have been adjudicated, the state will regulate between users based on priority date, regardless of how the right was created.

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II. WATER MANAGEMENT PENDING COMPLETION OF THE ADJUDICATION

While the law is relatively clear with respect to water management after the adjudication is completed, recent assertions by the federal government have raised questions about how water must be used while the adjudication is in progress. Historically, the Bureau has managed the Klamath Project by diverting live flow from the Klamath River and water stored in the Upper Klamath Lake for irrigation in the Project, consistent with the Notice the United States filed in 1905. The Bureau has operated the storage projects consistent with irrigation use. Now the Bureau is asserting an obligation to change its management of the storage projects to benefit downstream fishery and tribal interests, rather than irrigation uses.

A. State Regulation

While the state has the authority under the McCarran Amendment to both adjudicate and then administer, i.e., regulate between, water rights, it is less clear how water must be managed pending completion of the adjudication. Oregon has taken the position that it regulates neither in favor of nor against unadjudicated water rights. Accord *Reakowski v. Department of Ecology*, 858 P2d 232 (Wash. 1993); *South Delta Water Agency v. U.S., Dept. of Int.* 767 F 2d 531 (1985) (quantification of federal water rights must occur before authority to administer those rights conferred under McCarran Amendment).³⁷

B. Federal Regulation

Because the state will not regulate unadjudicated rights, the federal government conceivably could. The basis of the proposed Klamath Project Operations Plan (KPOP), discussed below, is that the federal government asserts it has the authority to regulate water uses in the Basin, at least among the federal claimants, pending completion of the adjudication. I conclude that there is no such federal authority for three reasons, set forth below.

1. There is no federal regulatory authority or system. The Nawi memo does not identify any authority which authorizes the Bureau, or any federal agency, to regulate water uses under the prior appropriation doctrine. While the western states have developed elaborate systems to ensure the legal distribution of water among competing claimants, there is no parallel federal system. The purpose of the McCarran Amendment was to require

³⁷ Of course, we presume that all users exercise their rights within their legal limits, even though the state will not shut off unadjudicated rights (nor shut off any other user to satisfy the claim of an unadjudicated right).

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federal and tribal participation in the states' water rights systems rather than to create a duplicative federal system.

2. The rights have not been determined. Until the completion of the Klamath Basin Adjudication, none of the federal, Klamath Project or private claims have been quantified. In *South Delta Water Agency*, the United States asserted and successfully established the rule of law that no regulation of federal rights may occur until those rights have been adjudicated pursuant to the McCarran Amendment. The rule is based on the legal truism that regulation in favor of a water right necessarily requires a determination of what that right is. Any attempt to regulate unquantified rights creates both practical and legal problems. For example, since the California Tribes' claims are unquantified, there is no way to calculate the amount of water to which the tribes would be entitled. The Nawi memo concedes that there is not yet even a standard by which the tribal reserved rights can be quantified."

Distribution of water to the wildlife refuges is also problematic. First, I understand that some land acquired for use as the wildlife refuges was acquired from the states of Oregon and California. As a technical matter, only land "set aside from the public domain" may acquire a reserved right, not formerly state or privately owned land. Second, if the United States does not agree with the 1950 Oregon AG opinion cited in footnote 6, at the time the refuges were created, all water in the basin was "deemed appropriated" by the Klamath Project, and no unappropriated water could be reserved for the refuges or any other use.

Third, the Nawi memo assumes that the refuges are entitled to return flows from project water, or perhaps that the refuges can use water diverted for project use interchangeably for refuge or irrigation uses. Under the Oregon law governing the irrigation rights, the return flows of water diverted for irrigation purposes, but still within the district's boundaries, are still under the control and subject to appropriation by the districts for the underlying (that is, irrigation) purposes. *Jones v. Warm Springs Irrigation District*, 162 Or 186, 91 P.2d 542 (1939); *Cleaver v. Judd*, 238 Or 266, 393 P.2d 193 (1964).

" Even if the adjudication had been completed, under *Adair*, a tribal reserved instream flow claim is only for the amount of water to support the tribal fishery as "currently exercised," 723 F.2d at 1414, not as it may have been at the time the reservation was created. Thus, I do not believe that the tribal claim could be used as the basis to "restore" a fishery to what it may have been in the early part of the century. The fishing rights of the California tribes as currently exercised necessarily cannot require a change in the way the Klamath Project and other unadjudicated rights have historically been used.

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While return flows may be subject to appropriation by others, for example the refuges, those claims will always be inferior to the claims of the original appropriator. An appropriator who has acquired a right to return flows is at the mercy of the original appropriator, who may decide (or be ordered by the state) not to divert water at a rate that creates return flows. (The presence of return flows may be an indication that more water is being diverted than is necessary to satisfy the underlying beneficial use, and may therefore constitute "waste.")

3. Not all rights are subject to federal regulation. To be fair and effective, any system of regulation between rights in a prior appropriation system must necessarily include all holders of water rights. The prior appropriation system of water law requires that in times of shortage, the senior-most user (the user with the oldest, or most senior, priority date) may place a "call" on the water source. Then, the junior-most users, in reverse order of priority date, must cease to use any water until all senior users are completely satisfied. To work, every user must be subject to the system. The Bureau identifies no way that it can shut off junior users who are not under direct federal control, to satisfy the calls of senior appropriators. Only the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system.

There are a number of rights junior to the Klamath Project rights, both in California and Oregon. For example, I understand that the Central Valley Project (CVP) in California diverts from the Trinity River (a tributary to the lower Klamath River) an amount of water equal to the flow of the upper Klamath River. The CVP was authorized under the provisions of the Emergency Relief Appropriation Act of 1935, ch. 48, § 4, 49 Stat. 115, and reauthorized pursuant to the Rivers and Harbors Act of August 26, 1937, ch. 832, 50 Stat. 844, 850. Consequently, the CVP priority date is significantly junior to Klamath Project water rights. Presumably, there are other non-federal users in California and Oregon whose priority dates are junior to (and thus would be required to provide water to senior users before) the Klamath Project. California and Oregon will regulate users of the Klamath River based on priority date, not on the location of the state line, once the rights are established by court decree. ORS 540.045(3).

C. Bureau Reallocation of Klamath Project Water

A related and troubling issue has arisen because the Bureau is taking the position that "it must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights." Nawi Memo at 10. Implementing this advice, a draft of the Klamath Project Operations Plan (KPOP) purports to authorize the Bureau (at

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least pending completion of the adjudication) to reallocate water from irrigation uses to other, unquantified and unadjudicated uses for the protection of fish and satisfaction of California tribal claims.

I do not dispute that the California tribes may have reserved water rights for fisheries and other purposes. However, the Nawi memo does not identify either how the amount of water the tribes are entitled to could be determined, or why a tribal "call" on the river could only be satisfied from Klamath Project water rather than by standard application of the prior appropriation system by regulating the junior-most users first.

The KPOP aims to protect the downstream anadromous fish which have been proposed for listing under the federal Endangered Species Act (ESA). Until a listing is made, action under the ESA seems premature. Also, while the Nawi memo argues the Bureau is required to exercise its statutory authority to preserve endangered fish, it does not identify the source of that authority. The ESA does not confer additional authority on the Bureau to protect the fish; rather, it requires the Bureau (and every federal agency) to exercise the authority it already possesses in a certain way. I am unaware of any independent grant of statutory authority to the Bureau which would allow the transfer of water from the Klamath Project to protect endangered fish. The Bureau exercised its statutory authority when it filed for all unappropriated water necessary to develop the Klamath Project pursuant to state statute and the 1902 Reclamation Act. It has identified no independent authority to reallocate water legally obligated to that original purpose.

The United States Supreme Court specifically rejected a United States' contention that it had the authority to unilaterally reallocate state-law based water rights acquired under the Reclamation Act to endangered fish protection or tribal treaty purposes. In *Nevada v. United States*, 463 US 110, 103 S Ct 2906, 77 L Ed 2d 509 (1983) the United States sought to reallocate water from irrigators within a federal project for the benefit of endangered fish and a tribal fishery. The Court rejected the United States' position:

We conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Nevada v. United States, 463 US at 1126, 103 SCt at 2916.

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The Klamath Project water rights have not been adjudicated, but I see nothing in the rationale of *Nevada* which would justify a view that the United States could reallocate water rights acquired under the Reclamation Act pending completion of a state adjudication. Rather, the court rejected inherent United States' authority to ignore the limitations of the water rights it held, stressing the disruption that would otherwise result:⁵¹

We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West.

Id., 463 US at 121, 103 SCt at 2914.

Thus, while I recognize the United States' obligations to both Indian Tribes and endangered species, I do not see how a general governmental obligation can be converted to specific Bureau authority to reallocate water stored under a right acquired for irrigation in the Klamath Project to either of these other uses, absent specific federal authorization for the new use and compliance with state law.

Several cases analyzing Bureau efforts to satisfy endangered fishery protection and tribal trust responsibilities from Bureau projects illustrate this analysis. In *Carson-Truckee Water Conservancy District v. Clark*, 741 F2d 257 (1983), the Ninth Circuit held that the Bureau could operate the Stampede Reservoir (located in California) for the purpose of maintaining endangered fish in the Pyramid Lake (located in Nevada) and to satisfy its trust obligations to the Pyramid Lake tribe. However, those uses were allowed because the reservoir had been specifically authorized for the purpose of protecting fish and wildlife and the Bureau water was legally stored in the reservoir under a permit from the state of California for those purposes. No state water rights (from either state) had been acquired to use the water for irrigation, municipal or industrial purposes, although the authorizing act

⁵¹ The Bureau may be able to reach the same result by "transferring" the water right from irrigation use to fishery purposes. The state allowed the use of water stored for irrigation purposes in McKay reservoir (under the authority of the Reclamation Act and the 1905 Oregon law) to be transferred to fishery and tribal purposes upon compliance with state transfer law. The Bureau in that case had separate authority under the federal Umatilla Basin Project Act to allow the use of the Umatilla Project for non-irrigation uses. A transfer can occur only after the right is decreed, however. ORS 540.505(4).

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would have allowed water rights for those purposes. The Court held the Bureau could not be forced to provide water to uses (municipal and industrial) for which neither it nor the districts held a right.

Here, however, the Klamath Project has acquired vested rights under state law for all unappropriated water as of 1905 necessary to satisfy the Klamath Project beneficial uses.⁴ While that right will be quantified in the adjudication, the Nawi memo recognizes that the Klamath Project's claim for both the storage of water in the Klamath Lake and for diversion of live flow into the Klamath Project system is pursuant to irrigation rights developed under the Reclamation Act and state law.

O'Neill v. United States, 50 F.3d 677 (9th Cir 1995) further illustrates this point. In *O'Neill* the court noted that Congress amended the Central Valley Project Act by means of the Central Valley Project Improvement Act (CVPIA), Pub.L. No. 102-575, 106 Stat. 4706 *et seq.*, to require the Bureau to satisfy fishery needs. The CVPIA created the specific statutory authority necessary to allow the Bureau to provide water for endangered fish. By contrast, in the Klamath Project situation, the Nawi memo does not identify, nor am I aware of, any corresponding federal law to authorize these new uses of water stored in the Klamath Lake to which the Klamath Project irrigation districts are entitled.

The KPOP must be based on legal authority (even if unadjudicated at present) which the Bureau presently has. I am unaware, and the Nawi memo does not identify, what authority that might be.

⁴ Technically, the United States acquired absolutely all unappropriated water of the Basin by its filing in 1905, so long as it was developed for irrigation purposes pursuant to the Reclamation Act and the 1905 Oregon statute. That reservation has not ever been technically relinquished, but I assume that the United States does not intend to disagree with the 1950 Oregon Attorney General Opinion, 25 Op Atty Gen 62, that determined that water which was not developed by at least 1950 was available for appropriation by others. Should the United States take the position that it still had all water unappropriated as of 1905 tied up under its 1905 filing for purposes of continuing the development of irrigation in the Klamath project, there would be no water available to reserve for purposes of the wildlife refuges, developed after 1905, nor for any other post-1905 federal reserved or other water right.

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CONCLUSION

Water rights for the Klamath Project were acquired for irrigation purposes. No state or federal authority has reallocated this irrigation right to other uses. The specific nature and scope of Klamath Project, federal reserved and private water rights will be determined in the Klamath Basin Adjudication.

Additional Questions to Be Answered in Separate Advice

In meeting with officials from the State of California, we have also identified a number of other issues relating to overlapping or ambiguous jurisdiction between the two states. Those questions will be the subject of separate advice.

Sincerely,



Stephen E.A. Sanders
Assistant Attorney General
Natural Resources Section

SEAS:seas/sear0218.let



IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region

2800 Cottage Way

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Sacramento, California 95825-1890

JAN 9 1997

Memorandum

To: Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, OR
 Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA
 Area Director, Portland Area Office, Bureau of Indian Affairs, Portland, OR
 Area Director, Sacramento Area Office, Bureau of Indian Affairs, Sacramento, CA

From: Regional Solicitor *Daniel Kauri*
 Pacific Southwest Region
 Regional Solicitor *Lynn Peterson*
 Pacific Northwest Region

Subject: Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project

As requested, we have reviewed the March 18, 1996, letter from Stephen Sanders, Assistant Attorney General, Natural Resources Section, to Martha Pagel, Director, Oregon Water Resources Department (OWRD) (March 18 letter). The March 18 letter responds to a request of the Director of the OWRD for "a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication." We are responding jointly because the March 18 letter addresses issues of concern to agencies within the responsibility of both the Pacific Southwest and the Pacific Northwest Regions of the Solicitor's Office.

The issues raised in the March 18 letter arise in the context of actions by the Secretary of the Interior (Secretary), acting through the Bureau of Reclamation (Reclamation), to manage and operate the Klamath Project (Project) and particularly to develop a Project operations plan. In so doing, Reclamation and other Federal agencies with responsibility related to water and wildlife resources, including Indian trust resources, in the Klamath Basin (Fish and Wildlife Service, Bureau of Indian Affairs, and National Marine Fisheries Service) are engaged in a process of consultation with and consideration of the interests of diverse groups,

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including agricultural water users, Indian tribes, and wildlife interests, regarding Project operations and the development of a plan intended to govern operations pending completion of the Klamath Basin adjudication presently being conducted by the State of Oregon.¹

The March 18 letter raises issues regarding the authority of the Secretary to manage the Klamath Project pending completion of the adjudication, as well as issues regarding the United States' water rights, including tribal water rights the United States holds in trust, in the Klamath Basin. The March 18 letter is in wide circulation and may be read as calling into question the legal basis of various federal actions to manage the Project, including the development of an operations plan. Our conclusions regarding a number of the issues differ from those contained in the March 18 letter. For these reasons, we think it important to set out in general terms our views on the major issues for our client agencies and interested parties.

This memorandum reaffirms long-standing positions of the United States regarding management of water projects for irrigation, wildlife protection, and Indian rights, and builds on the July 25, 1995, memorandum from the Regional Solicitor, Pacific Southwest Region, to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25 memorandum).² This memorandum does not attempt to provide a complete legal analysis of all the issues raised by the March 18 letter. Further legal analysis will be presented, as needed, in connection with the adjudication or otherwise.

¹ Upon completion of the adjudication and pursuant to section 8 of the Reclamation Act of 1902, the Project will be operated in accordance with the outcome of the adjudication, as well as with other applicable requirements, and the operations plan will be revised as appropriate. As discussed throughout this memorandum, many of the issues raised in the March 18 letter arise as a result of Reclamation's need to meet its obligations and responsibilities in operating the Project, the absence of a completed adjudication of the Klamath Basin, and the lack of any other action by the State of Oregon to administer junior water rights in relation to senior unadjudicated water rights in the Basin.

² The March 18 letter contains several references to the July 25 memorandum, which describes the general rights to the waters of the Klamath and Lost River drainages affected by the operation of the Klamath Project and the obligations of the Bureau of Reclamation to the holders of these rights. We adhere to the conclusions set forth in the July 25 memorandum. This memorandum addresses additional issues not raised in the July 25 memorandum.

I. Management of the Klamath Project.

The March 18 letter states that the United States, through development of an operations plan by Reclamation, is asserting that it has the authority to regulate water uses in the Klamath Basin where no such authority exists. March 18 letter, pages 5-7. The United States is not, however, seeking in the operations plan to preempt or supplant the State's role in adjudicating and administering water uses; rather, it is carrying out the responsibilities federal law places on it in managing the Klamath Project.³

An operations plan is being developed through an open process, including consultation with affected government and other interests and an opportunity for public comment, to arrive at an informed decision regarding Reclamation's operation of the Project pending completion of the adjudication. Reclamation is using this process to review Project operations to assure that they are consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act (ESA) and other requirements mandated by law and within the authority of the Secretary.⁴

The March 18 letter states that it is unclear how water must be managed pending completion of the adjudication and declares that the state will not regulate or administer unadjudicated water rights or water uses. March 18 letter, page 5. The March 18 letter also asserts that the federal government lacks authority to manage any water uses in the basin, even those involving water

³ The March 18 letter refers to the project operations plan as the Klamath Project Operations Plan or "KPOP." KPOP is no longer the label applied to the operations plan now being developed which will address project management pending completion of the Klamath Basin adjudication being conducted by the State of Oregon. Our analysis of the underlying authorities is applicable to whatever operations plan is ultimately adopted.

⁴ The March 18 letter bases its analysis and conclusions on the proposition that the 1905 water rights filing by the United States for development of the Klamath Project is limited to irrigation uses. ("The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation." March 18 letter, page 3.) This memorandum focuses on the issue of authority raised in the March 18 letter. The nature of the Project water rights will be addressed at the appropriate time in the pending adjudication.

rights and uses subject to federal law. For the reasons set out below, we have a different view.

The Secretary, through Reclamation, must manage and operate reclamation projects developed pursuant to the Reclamation Act of 1902 (43 U.S.C. § 372 et seq., Act of June 17, 1902, 32 Stat. 388) and its amendments and supplements. Specifically, section 10 of the Reclamation Act, 43 U.S.C. § 373, expressly directs the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" to carry out the reclamation laws. See United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 212 (9th Cir. 1989). Districts and water users within the project must comply with such actions taken pursuant to section 10 and pursuant to contracts between Reclamation and the districts and water users. Id.; Pyramid Lake Paiute Tribe v. Hodel, 878 F.2d 1215 (9th Cir. 1989); Truckee-Carson Irrigation District v. Secretary of Department of Interior, 742 F.2d 527 (9th Cir. 1984), cert. denied, 472 U.S. 1007 (1985). The operations plan process and resulting plan are clearly authorized by section 10 of the Reclamation Act of 1902. See July 25 memorandum for further discussion.⁵

The federal courts have not hesitated to order the Secretary to fulfill his tribal trust obligations and to comply with the ESA in operating reclamation projects. See Pyramid Lake Paiute Tribe v. Morton, 353 F.Supp. 252, 255-56 (D.D.C. 1973). The Secretary, through Reclamation, must operate reclamation projects consistent with vested, fairly implied senior Indian water rights. Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir.), cert. denied, 474 U.S. 1032 (1985) (district court did not abuse its discretion in ordering Reclamation to make water available to protect unquantified, unadjudicated treaty-reserved fisheries related water rights); Pyramid Lake Paiute Tribe v. Morton, supra (Secretary of the Interior "was obliged to formulate a closely developed regulation that would preserve water for the Tribe . . . [and] to assert his statutory and contractual authority to the fullest extent possible to accomplish the result." Id. at 256). Cf. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486

⁵ See also Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977) (water obtained from a federal reclamation project is not there for the taking by the landowner, but for the giving by the United States, and terms upon which water can be put to use, and manner in which rights to use can be acquired, are only for the United States to fix, and if such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States).

U.S. 1007 (1988) (prior to allocating water from a federal irrigation project among project water users, the Department had to adequately protect the tribe's senior instream flow water rights). See also Parravano v. Babbitt, 861 F.Supp. 914 (N.D. Cal. 1994), aff'd, 70 F.3d 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996) (Secretary of Commerce properly considered the tribe's federally reserved fishing rights in issuing emergency regulations reducing harvest limits of Klamath River salmon):

Moreover, a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights. Although the Klamath Tribes' water rights have not yet been quantified in an adjudication, the existence of the Klamath Tribes' rights to the water needed to protect their treaty-reserved hunting and fishing rights (with a priority date of time immemorial) and for agricultural uses has been confirmed by the Ninth Circuit Court of Appeals. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). The Yurok and Hoopa Valley Tribes in California hold unadjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855. See, e.g., United States v. Adair, supra; Arizona v. California, 373 U.S. 546, 600 (1963); United States v. Winans, 198 U.S. 371 (1905). Cf. Solicitor's Opinion, M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 4, 1993).⁶

While the March 18 letter asserts that "[o]nly the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system," March 18 letter, page 7, both federal and state courts have jurisdiction in appropriate cases to establish and enforce the priority system. See, e.g., Cappaert v. United States, 426 U.S. 126 (1976) and Winters v. United States, 207 U.S. 564 (1908). In addition, nothing in the McCarran Amendment, 43 U.S.C. § 666, prohibits the United States from managing and operating its reclamation projects. The priority water rights system is one of the bases upon which reclamation projects are operated. While Reclamation does not adjudicate water rights, the absence of a completed adjudication and Reclamation's legal obligation to manage the project in accordance with law require that Reclamation use its best efforts to operate the project consistent with existing water rights.

⁶ Although tacitly recognizing the fisheries reserved water rights of the Klamath Tribes and the Yurok and Hoopa Valley Tribes, the March 18 letter questions without answering the extent of the Klamath tribal right, and implies that the Yurok and Hoopa Valley Tribes' rights are "paper" rights with no enforceability. March 18 letter, pages 6-7, fn. 4. As discussed above, and in the July 25 memorandum, pages 4-5, in our view the tribes' rights are senior and enforceable against junior uses, and adjustments may be required in how the Klamath Project is operated to be consistent with the tribes' rights.

The March 18 letter further asserts that regulation in favor of senior tribal, federal, and project water rights may not occur until those rights have been adjudicated and cites South Delta Water Agency v. U.S. Department of the Interior, 767 F.2d 531 (9th Cir. 1985), as supporting the proposition. March 18 letter, pages 5-6. However, that case does not address the issue. The Ninth Circuit merely held that, contrary to the State of California's argument, suit cannot be brought pursuant to the McCarran Amendment against the United States for the administration of water rights without a prior general stream adjudication having determined those rights.

The State of Oregon has declined to administer junior rights to protect senior tribal, project, and other federal rights on the grounds that such rights are unknown until the adjudication is complete. However, in the absence of a completed adjudication or other determination of the senior water rights, the project must be operated based on the best available information. For example, the Project irrigation water rights can be reasonably estimated. Similarly, although the tribal instream flow and lake rights are complex, they also may be reasonably estimated; and even though unadjudicated, they are vested, senior rights, and Reclamation must operate the project consistent with those rights. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States, *supra*, at 1131-32. ("The priority date of time immemorial obviously predates all competing rights" and to ignore this would violate "the fundamental principles of the appropriative system of water rights.")

The March 18 letter also states that users junior to the Klamath Project should provide water to senior rights holders before the Project does so. March 18 letter, page 7. We agree that to do so best comports with the priority system of water rights administration. But the March 18 letter does not address the situation, as in this case, where the State is not protecting senior water rights. Moreover, the March 18 letter offers no avenue or mechanism for effecting calls on junior users. It adopts a hands-off position even though the State is in a better position to deal with junior nonfederal water users.⁷ In such a situation, the Secretary must exercise what authority he has in managing the Project to protect senior water rights and meet requirements of federal law.

⁷ The March 18 letter sets forth at page 5 Oregon's position that it "neither regulates in favor of nor against unadjudicated water rights." The letter fails, however, to discuss whether the State has authority to regulate junior water rights in relation to senior unadjudicated rights prior to completion of the adjudication, and if so, whether the State should exercise that authority in the Klamath Basin. This has contributed to the demand for Reclamation to prepare an operations plan.

We disagree with the assertions in the March 18 letter regarding the water rights for the national wildlife refuges.⁸ March 18 letter, pages 5-6. Among others, bases for the refuge water rights include state-based rights perfected by applying project water or return flows to beneficial use, and federal reserved rights to the water unappropriated at the time of the refuges' creation and needed to carry out the refuges' purposes. See Arizona v. California, supra, at 598.

In sum, the operations plan is not an attempt to regulate water uses in the Klamath Basin. Rather, it reflects Reclamation's effort to exercise its authority to manage the project consistent with all of its obligations, including senior Indian water rights, contractual obligations and ESA requirements. See Pyramid Lake Paiute Tribes v. Morton, supra; United States v. Alpine Land and Reservoir Co., supra.⁹

II. The Project Operations Plan is not a "Reallocation" of Klamath Project Water

The March 18 letter states that obligations to Indian tribes and listed species do not provide authority to "reallocate" water

⁸ Although the distinction may not be at issue here, we also disagree with the view expressed at page 6 of the March 18 letter that "[as] a technical matter, only 'land set aside from the public domain' may acquire a reserved right" and not land acquired by the United States. See Memorandum, Department of Justice, Office of Legal Counsel, June 16, 1982, at pages 77-78. In that opinion, the issue of reserved rights for acquired lands was directly addressed:

Much of the language used by the Court to describe the scope of the reservation doctrine, in fact, is broad enough to cover all lands set aside for a particular federal purpose, regardless of the prior ownership of the land. . . . [I]n [United States v. New Mexico], the Court did not suggest that the reserved rights doctrine applies only to lands that may be formally reserved from the public domain; it recognized rather that the doctrine applies to any land that has been set aside as a national forest (which could be reserved or acquired lands). See 438 U.S. at 698-99.

Id. at 78.

⁹ For the Newlands Project, discussed in United States v. Alpine Land and Reservoir Co., supra, the initial project operation criteria and procedures (OCAP) were issued prior to a final adjudication of water rights in the Newlands Project, while the final OCAP were adopted after the final decree was affirmed. The Alpine decision upheld the final OCAP.

absent specific federal authority for the new use and compliance with state law. March 18 letter, page 9; see also pages 3, 5, 8, 10, 11. Once again, we believe the March 18 letter mischaracterizes the nature of the issue. The lack of a completed water rights adjudication does not legitimize uses of water that would not otherwise be authorized. Reclamation's actions are intended to result in management and operation of the Klamath Project in a manner which is consistent with and carries out all its legal obligations and responsibilities. Operation of the project to reflect Reclamation's obligations is not a reallocation of water.

The March 18 letter cites several cases to support the proposition that Project water stored under a water right "acquired for irrigation" cannot be used to meet the United States' obligations to Indian tribes and under the ESA. March 18 letter, pages 9-10. In our view, the cases cited either do not apply to the situation at hand or do not support the proposition that the United States may ignore Indian water rights or its obligations under the ESA.

In Nevada v. United States, 463 U.S. 110 (1983), the Supreme Court simply held that the United States could not ignore the limits of decreed federal reserved or other water rights where all the water rights, including the Indian rights, had already been fully adjudicated. Nevada does not address the issue of whether project operations must be consistent with existing senior water rights or the ESA where none of the water rights have been fully adjudicated.

In Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985), the court found that the Secretary's decision to operate Stampede Dam solely for the purpose of conserving an endangered species of fish was not arbitrary. Although the court explicitly found that it need not address tribal water rights to reach its decision, the court stated that any asserted obligation of the Secretary to enter into contracts for the sale of project water for municipal and industrial purposes pursuant to the project's authorizing legislation should be considered only when his superseding obligations to the Tribe and under the ESA have been fulfilled. (This case concerned the same Reclamation project that was the subject of Nevada v. United States. However, the water rights connected with Stampede Dam are not adjudicated.)

Likewise, in O'Neill v. United States, 50 F.3d 677 (9th Cir.), cert. denied, U.S. 116 S. Ct. 672 (1995), the court held that the United States was not liable for not furnishing the full contractual amount of water to water users when that amount could not be delivered consistent with the requirements of the ESA and the Central Valley Project Improvement Act, Pub. L. No. 102-575. The court found that the provisions in the contract which precluded

federal liability for water shortage were broad enough to include the "mandates of valid legislation."¹⁰

Reclamation is mandated by the ESA to avoid jeopardizing the continued existence of listed species and to conserve listed species.¹¹ In addition, individual water users and water districts, as well as Reclamation, are subject to the prohibition in section 9 of the ESA on taking listed species. See, e.g., United States v. Glenn-Colusa Irrigation District, 788 F.Supp. 1126 (E.D. Cal. 1992).

As a final matter, the March 18 letter seems to assume that once the Klamath Basin adjudication is completed and the State begins administering the water rights, the Secretary will no longer need to manage the Project. See, e.g., March 18 letter, pages 2, 4-5. The cases make clear, however, that the Secretary's authority and responsibilities under federal law to manage the Project will continue, concurrent with the requirement to operate the Project consistent with adjudicated water rights. See Pyramid Lake Paiute Tribes v. Morton, supra and United States v. Alpine Land and Reservoir Co., supra, cases which involved previously adjudicated project water rights.

III. The Klamath Basin Adjudication

The March 18 letter addresses the three general categories of claims the author believes will be resolved in the Klamath Basin adjudication. We do not propose to address these issues now. The United States will make appropriate arguments and set forth in full the federal position regarding these issues in the course of the adjudication. We do, however, make the observations set out below with respect to certain points raised in the March 18 letter concerning the adjudication.¹²

¹⁰ Similar shortage provisions are found in Klamath Project contracts.

¹¹ Reclamation is also obligated to confer with the Fish and Wildlife Service or the National Marine Fisheries Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed, and is authorized to take conservation measures to minimize impacts on the proposed species. ESA, section 7(a)(4), 16 U.S.C. § 1536(a)(4), and section 5(a), 16 U.S.C. § 1534(a).

¹² The March 18 letter was written by an Assistant Attorney General of the State of Oregon who we understand will advise the decision maker in the administrative phase of the adjudication. Several aspects of his letter raise a concern that he appears to have taken positions on issues to be determined in the adjudication before the parties have had opportunity to brief and litigate them.

The March 18 letter states that Klamath Project water rights "likely . . . are held by the irrigation districts or perhaps by individual district members" rather than by the United States. March 18 letter, page 4. It is well established, however, that the United States through the Bureau of Reclamation holds the legal title to the water rights for the project. Nevada v. United States, supra; Ide v. United States, 263 U.S. 497 (1924); United States v. Humboldt Lovelock Irr. Light & Power Co., 97 F.2d 38 (9th Cir. 1938), cert. denied, 305 U.S. 636 (1938); United States v. Tilley, 124 F.2d 850 (8th Cir. 1942); see also Solicitor's Opinion, M-36966, 97 I.D. 21, Filings of Claims for Water Rights in General Stream Adjudications (July 6, 1989); Solicitor's Opinion, M-36967, 97 I.D. 32, Authority to Provide Water to Stillwater Wildlife Management Area (July 10, 1989). In 1905, the United States, through the Secretary of the Interior, pursuant to the Reclamation Act of 1902 and Oregon law, initiated the appropriation of the amount of water necessary to develop the Klamath Project.

The United States Supreme Court has long held that individual water users who have entered into contracts with the United States to receive project water, hold a beneficial interest in that portion of the project water right actually put to beneficial use. Nevada v. United States, supra; Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Unlike the United States and individual water users, in the typical case irrigation districts hold neither a legal nor beneficial interest in the water right. They have no property interest in the water, nor have they in their own right diverted the water to storage. Truckee-Carson Irrigation District v. Secretary of the Interior, supra. Moreover, the districts have not put the water to beneficial use and thus do not hold an interest in the water right.

In light of the foregoing, Reclamation is the proper entity to file claims on and hold the water rights for the Klamath Project, 97 I.D. 21, recognizing the beneficial interest of individual water users entitled to use project water for beneficial uses, provided that the use comports with the terms of applicable Reclamation contracts and state and federal law.

Although the March 18 letter does not discuss the subject, there are federally owned lands within the project boundaries that receive project water. The United States is the proper party to file for those water rights in this situation, where the United States holds both the legal and beneficial interests in the lands and the water.

Finally, the United States has control of the project return flows within the boundaries of the project, has the right to use the return flows, and has the right to continue such use. Ide v. United States, supra. Contrary to assertions in the March 18 letter, the United States Supreme Court did not hold in Ide that use of recaptured water had to be the original use; the Court

merely held that the recaptured water had to be beneficially used. Thus, we do not believe that Ide or subsequent cases preclude the United States from using return flows for uses other than irrigation and domestic purposes.

Similarly, Jones v. Warm Springs Irrigation District, 91 P.2d 542 (Or. 1939), is not applicable to circumstances where water remains within the project boundaries and control of the appropriator; that case concerned return flow deemed to be abandoned because there had been no indication of an attempt to recapture. Finally, the Oregon Supreme Court in Cleaver v. Judd, 393 P.2d 193 (Or. 1964), recognized that under Oregon law an appropriator is justified in recapturing waste, seepage, and occasional surface water runoff.

IV. CONCLUSION

Pending completion of the adjudication, Reclamation is authorized and obligated to manage and operate the Klamath Project consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act and other requirements mandated by law and within the authority of the Secretary. These obligations may be clarified or otherwise affected by the pending adjudication; however, Reclamation will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication.

Klamath Project 1997 Annual Operations Plan

Introduction This is the 1997 Annual Operations Plan (1997 Plan) for the Bureau of Reclamation's Klamath Project, which is located within the Upper Klamath River Basin, Oregon and California. The 1997 Plan describes operations under three potential hydrologic conditions: at current forecast, wetter than forecast, drier than forecast.

Each year, Reclamation issues a Klamath Project annual operations plan. During the last two years, Reclamation has received additional information that has aided development of plans to guide Project operation prior to completion of the Oregon water rights adjudication.

Guiding Authorities The Bureau of Reclamation operates the Klamath Project pursuant to the authority of the Reclamation Act of 1902, as amended and supplemented. In so doing, it must meet trust obligations to the Klamath Basin Tribes, assure that its operations are not likely to jeopardize the continued existence of species listed under the Endangered Species Act (ESA), fulfill its contractual obligations to water users within the Project, and act in a manner consistent with obligations under the Migratory Bird Treaty Act and other federal laws that govern the protection of wildlife areas in the Basin.

Guiding Principles and Objectives Certain legal rights and obligations relating to the operations of the Klamath Project were described in a July 25, 1995, memorandum from the Regional Solicitor, Pacific Southwest region, and form the legal framework for the development and implementation of the 1997 Plan. In addition, the Pacific Northwest and Pacific Southwest Regional Solicitors prepared a memorandum (January 9, 1997) which further addressed legal principles applicable to Klamath Project Operations. The guiding principles and objectives include:

Meeting the Requirements of the Endangered Species Act The Lost River and shortnose suckers, and bald eagles are listed under the ESA. The National Marine Fisheries Service is expected to make a listing decision on Coho salmon and has proposed steelhead in the Klamath River for listing. Reclamation will manage water supplies to improve habitat, and provide for the rearing and migration of fish. Additionally, to meet ESA conservation obligations, Reclamation is participating in significant habitat and basin restoration efforts, and conducting, funding, and participating in extensive research efforts to better understand the condition and needs of the species.

Exhibit 7, Page 1 of 8

Federal Trust Responsibility to Federally Recognized Tribes Within the Klamath River Basin The trust responsibility to the Klamath Basin Tribes is shared by all federal agencies with activities in the Klamath Basin. Fishery and other resources in the Klamath River, Upper Klamath Lake, and nearby lakes and streams are important tribal trust resources to the Klamath Basin Tribes. Reclamation's 1997

Plan provides flow regimes and lake levels for tribal trust resources.

Providing Deliveries of Project Water Reclamation has contractual obligations to Project water users to provide water primarily for domestic and irrigation uses. The contracts for the majority of the Project area define this obligation as the amount of water necessary to meet the reasonable beneficial use of water for irrigation. Approximately 220,000 acres of agricultural lands are served by the Klamath Project. Objectives for water management include the efficient delivery and use of water in the growing of agricultural products.

Conserving Wetland and Wildlife Values Water is provided to meet the needs of several National Wildlife Refuges (NWR) within the Upper Klamath River Basin managed by the Fish and Wildlife Service and the states under various Acts, including the Migratory Bird Treaty Act, to provide suitable habitat for migratory birds and bald eagles.

Water Operations Planning Process A long range planning process for Klamath Project operations has begun and will extend into the future. Reclamation has prepared this 1997 Plan to serve as a planning aid for interested parties.

The State of Oregon is proceeding to adjudicate the water rights of the Klamath Basin. To facilitate coordination with the adjudication, Reclamation currently envisions a three-staged approach to the long range planning process for the project:

1. This 1997 Plan and a 1998 Annual Operations Plan will describe yearly operations.
2. An interim operations plan will be developed and implemented as quickly as possible to guide project operations through completion of the adjudication. The Interim Plan will be a multi-year plan, and upon completion will supersede the need for Annual Operations Plans.
3. Following the adjudication, the interim plan will be revised as necessary and will be implemented as the long range plan.

Input Reclamation will continue to seek information from and consult with various groups and individuals concerning the 1997 operations. These groups will include, among others: tribal governments, water users, PacifiCorp, other Interior and Federal agencies, local government agencies, state agencies, and the public. Exhibit 7, Page 2 of 8

1997 Operations Reclamation has prepared a 1997 Klamath Project operations plan for Upper Klamath Lake levels, Klamath River flows at Iron Gate Dam, and project agricultural and refuge deliveries. Reclamation used the spreadsheet planning model (KPOPSIM) which depicts water distribution among various uses. The model has been

presented for preliminary review and comment, and will undergo further review and refinement. The model is based on the last 35 years of hydrologic record, and uses expected comparable preceding year types to predict outcomes. The Natural Resources Conservation Service April 1 streamflow forecast was used to determine the expected April through September inflow volume to Upper Klamath Lake.

Expected operations were derived by developing lake level and streamflow conditions, as summarized on pages 4 and 5, and then determining supplies available for delivery to agriculture and the NWR. Agriculture and refuge requirements are based on estimates of beneficial use in comparison to years with similar early season precipitation.

Operations Forecast Based on present hydrological forecasts, Project operations will be as shown in the “50% Exceedance” columns of Table 1. Under this operation, adequate water supplies for anticipated agricultural and NWR uses are expected to be available.

Drier Than Forecast If drier than expected conditions result from uncontrolled snowpack runoff conditions and/or drier and warmer than normal weather conditions, Project operations would be as shown in the “70% Exceedance” columns of the table. Under this operation, Reclamation will provide the minimum levels specified in the table. At the 70% runoff volume, adequate agricultural and National Wildlife Refuge water supplies are expected. When Reclamation anticipates drier than forecast conditions, it will seek voluntary conservation measures and explore other conservation options, such as using water stored in the Lost River basin.

Should conditions become drier than the 70% exceedance forecast, supply shortages could be expected to occur for Refuges and Klamath Project water contractors. Mitigative measures such as the use of acquired water, voluntary diversion reduction, and/or use of Lost River supplies within the Lost River drainage may be employed to reduce possible shortages. In this event, Reclamation will work cooperatively with other agencies and stakeholders to help minimize the impacts of shortages and develop and implement appropriate mitigative strategies.

Wetter Than Forecast In the event that weather conditions are significantly wetter than normal, Project operations will be as shown in the conditions wetter than “50% Exceedance” column of the table. Under this operation, additional water for fish and wildlife, and adequate water supplies for agriculture and NWR uses are expected to be available. Exhibit 7, Page 3 of 8

Table 1--Klamath Project - 1997 Operations

Date	Klamath River Flows below Iron Gate Dam (Average CFS)			Upper Klamath Lake Minimum Elevations			
	Drier Than Forecast (70% Exceedance) Minimum Flows	Operations Forecast (50% Exceedance) Target Flows	Wetter Than Forecast (Conditions Wetter than 50% Exceedance) Target Flows	Date	Drier Than Forecast (70% Exceedance)	Operations Forecast (50% Exceedance)	Wetter Than Forecast (Conditions Wetter than 50% Exceedance)
April 16-30	1300	1300	1300				
May 1-15	1700	1900	2000				
May 16-31	1500	1800	2000	May 31	4142.6	4142.6	4142.6
June 1-15	1300	1400	1500				
June 16-30	1100	1400	1500				
July 1-15	800	850	1000	July 15	4141.6	4141.6	4141.6
July 16-31	800	850	1000				
August	1000	1000	1000				
September	1000	1000	1000	Sept. 30	4139.0	4139.0 Target for 4139.5	4139.5 Target for 4140.0
October	1300	1300	1300				
November	1300	1300	1300				
December	1300	1300	1300	Dec. 31	4140	4140	4140

Basis for Klamath Project 1997 Operations The following basis is provided for Klamath River flows and Upper Klamath Lake elevations for 1997 operations:

Klamath River Flows

October 1 to April 30 (1300 cfs)--Provides flows for inmigration, spawning, egg incubation, and juvenile rearing. Any reduction in flows below 1300 cfs is expected to result in some decrease in various life history stage survivals.

May 1 to May 31 (2000 - 1500 cfs)--High flows during this month benefit juvenile emigration, juvenile rearing, spring chinook, winter steelhead, summer steelhead, green sturgeon, and lamprey inmigration and spawning.

June 1 to July 31 (1500-800 cfs)--These flows provide benefits to juvenile salmon emigrating to the ocean and rearing habitat for several anadromous fish species. Gradually ramping down from May peak flows is based on the pattern of the average historic pre-project hydrograph. Juvenile emigration, juvenile rearing, adult sturgeon immigration and spawning, lamprey spawning, summer steelhead and spring chinook immigration and holding, and winter steelhead incubation are uses of the river during this period.

August 1 to August 31 (1000 cfs)--Flows are ramped up from summer minimums to provide for immigration and holding of fall chinook, spring chinook and summer steelhead. These flows help protect juvenile fish rearing in the river. Sturgeon spawning can occur.

September 1 to September 30 (1000 cfs)--Flows provide for immigration and holding of fall chinook, coho, spring chinook, and summer steelhead. Fall chinook, and green sturgeon spawning can occur. Juvenile rearing occurs. Water temperatures normally decreasing.

Upper Klamath Lake Levels

May 31 (4142.6)--Provide water depth for sucker spawning at shoreline springs. Most springs used for spawning are fully inundated at this depth. This elevation inundates much of the shoreline emergent vegetation which provides habitat for larval suckers.

July 15 (4141.6)--Provides connectivity with the shoreline emergent vegetation and shoreline habitat used by juvenile suckers. Year class establishment occurred 5 of 6 years where this elevation was met or exceeded. Median elevation of 9 years where shortnose and Lost River sucker year classes were established. Over 95% of full pool adult sucker habitat available.

September 30 (4139.0)--Provides habitat greater than 3-feet deep for juvenile and adult suckers. Provides some connectivity with most shoreline marsh around the lake. Access to all freshwater inflow areas is provided. Target elevations provide improved habitat conditions.

December 31 (4140.0)--Provides lake elevations to minimize the risk of low dissolved oxygen levels and potential fish die-offs during ice-cover conditions.

1998 Operations Planning Reclamation will develop an initial plan for 1998 Klamath Project operations no later than December 1, 1997. The 1997 Operations Plan includes biological measures for fish and wildlife resources that are important tribal trust resources. The 1997 Plan represents a positive step toward helping to restore fish and wildlife species whose restoration is dependant upon improving habitat. Reclamation expects the 1998 plan to continue this progress. Reclamation will work with other Department of the Interior agencies, the States, and other parties to augment available supplies of water by taking action to implement a comprehensive water supply initiative. Reclamation and Department of the Interior will consider the contributions that could come from this water supply initiative and the need for continued progress in addressing habitat issues prior to making commitments that would affect water management in 1998.

H:\PUBLIC\Klamath Project Operation Plan\1997PLAN\FINAL97.OPS
September 20, 2016

APR 30 1997 ISF

KLAMATH ADJUDICATION State of Oregon
 Water Resources Department
STATEMENT AND PROOF OF CLAIM
TO THE USE OF SURFACE WATERS OF THE KLAMATH RIVER AND ITS TRIBUTARIES
FEDERAL OR INDIAN RESERVED WATER RIGHT

Claimant: United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath Tribes

Mailing Address: 911 NE 11th Avenue Portland OR 97232

Contact Person: Barbara Scott-Brier, Office of the Solicitor, Pacific Northwest Region, U.S. Dept. of the Interior, 500 N.E. Multnomah Street, Suite 607, Portland, OR. 97232, 503-231-2139 (telefax 503-231-2166).

Service: All notices and service of contests or other matters regarding this water right shall also be made on the United States' Attorney General's representative, David Harder, U.S. Dept. of Justice, 999 18th Street, Suite 945 - North Tower, Denver, CO. 80202 (telefax 303-312-7331)

Name of Federal Reservation: The current Klamath Indian Reservation, the former Klamath Indian Reservation, and areas that are necessary for the protection of and continued and future enjoyment of the Klamath Tribes' treaty protected hunting, fishing and gathering rights.

THE UNITED STATES OF AMERICA CLAIMS A FEDERAL RESERVED WATER RIGHT AS DESCRIBED BELOW

1. Sources of Water: Klamath River (KL_1)

Tributary to: Pacific Ocean

2. Water is claimed for the following uses for the federal reservation:

The following table provides monthly instream water claims which are necessary to preserve and protect the Klamath Tribes' fishing rights. The instream flow claims are expressed in cfs for physical habitat for fish, developed using the IFIM process approved in OAR 690-28-027(2)(a). These claims will provide conditions to ensure adequate migratory passage of anadromous salmonid fishes into and out of the Upper Klamath River Basin. The claims are for the natural flow up to the designated monthly value.

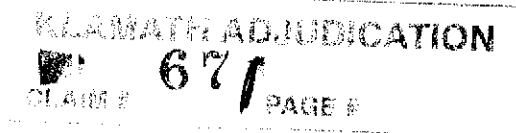
Nature of Use	From - To	Designated monthly value (cfs)
Physical Habitat	January 1-31	700
	February 1-29	700
	March 1-31	700
	April 1-30	700
	May 1-31	700
	June 1-30	700
	July 1-31	700
	August 1-31	700
	September 1-30	700
	October 1-31	700
	November 1-30	700
	December 1-31	700

3. Total amount of water claimed: See Item 2 above.

3.1 Out-of-stream use(s): No out-of-stream uses are claimed.

3.2 In-stream use(s): See Item 2 above.

4. Priority Date: Time Immemorial
5. Date of creation of the federal reservation: October 14, 1864
6. Basis of right claimed: Indian Reserved Water Right, Aboriginal Water Right, Treaty of October 14, 1864.
7. Purpose(s) of Reservation: For the purposes encompassed by the Treaty of October 14, 1864, between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, 16 Stat. 707.
8. Place of use:
Stream Name: Klamath River (KL_1)
From mile/feature: J. C. Boyle Reservoir
to mile/feature: OR/CA Border
9. Point of diversion: No diversion is claimed.
10. County(ies) of place of use: Klamath
11. Other water rights claimed for this federal reservation: The BIA as Trustee on behalf of the Klamath Tribes is claiming water rights in Klamath Marsh and its tributary streams, Klamath Lake and its tributary streams, and the Klamath River and its tributary streams to support the Tribe's fishing, hunting and gathering rights. Other water right claims include, among others, those for domestic, commercial, municipal and industrial uses; religious and cultural uses; and agricultural uses.
12. Remarks: This is a claim for future use. The physical habitat claim has been developed using the Instream Flow Incremental Methodology, which is recognized as an acceptable methodology under OAR 690-28-027(2)(a). The species of fish and wildlife to be supported by this claim are provided in the Bureau of Indian Affairs Appendix, Attachment G.



THIS FORM IS AN ATTACHMENT TO A LETTER FORWARDING THE CLAIM OF THE UNITED STATES ON BEHALF OF THE U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS. THE SIGNATURE AND AFFIRMATION OF SUCH LETTER CONSTITUTES THE SIGNATURE OF THE AUTHORIZED AGENT REPRESENTING THE UNITED STATES OF AMERICA REQUIRED FOR SUCH CLAIM.

ATTACH THE FOLLOWING EXHIBITS TO THIS CLAIM FORM:

- A. Map of water use, including point(s) of diversion and place(s) of use: see attached maps
- B. Legal description of the reservation: see Bureau of Indian Affairs Appendix
- C. List of documents creating the reservation: see Bureau of Indian Affairs Appendix
- D. Description of the legal status of the land prior to creation of the federal reservation: see Bureau of Indian Affairs Appendix
- E. Development history of the water use (Describe history of water use, including timing of development and chain of title) : see Bureau of Indian Affairs Appendix
- F. Description of diversion facility: Not Applicable
- G. Additional supporting documentation: see Bureau of Indian Affairs Appendix

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KLAMATH ADJUDICATION

671

CLAIM #

PAGE #

UPPER REACH BOUNDARY

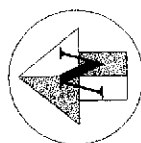
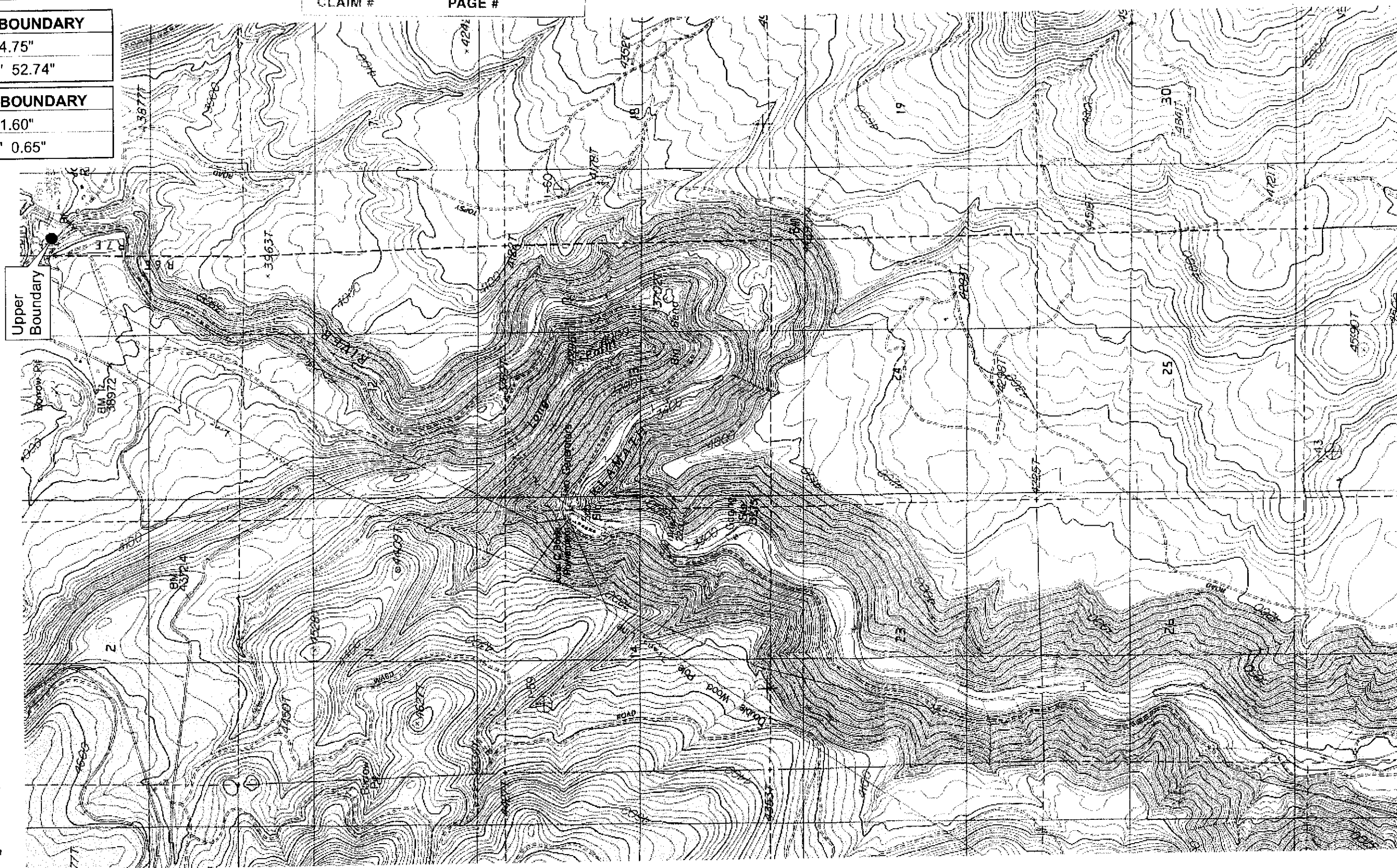
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Longitude: 122° 02' 52.74"

LOWER REACH BOUNDARY

Latitude: 42° 00' 21.60"

Longitude: 122° 11' 0.65"



Source: USGS 7.5 Minute
Quad: Chicken Hills, Mule Hill.

Vertical Datum: National
Geodetic Vertical Datum of
1929.
Horizontal Datum: 1927 North
American Datum.

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KLAMATH ADJUDICATION

CLAIM # 671 PAGE #

STIPDX-007335

UPPER REACH BOUNDARY

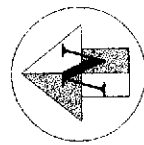
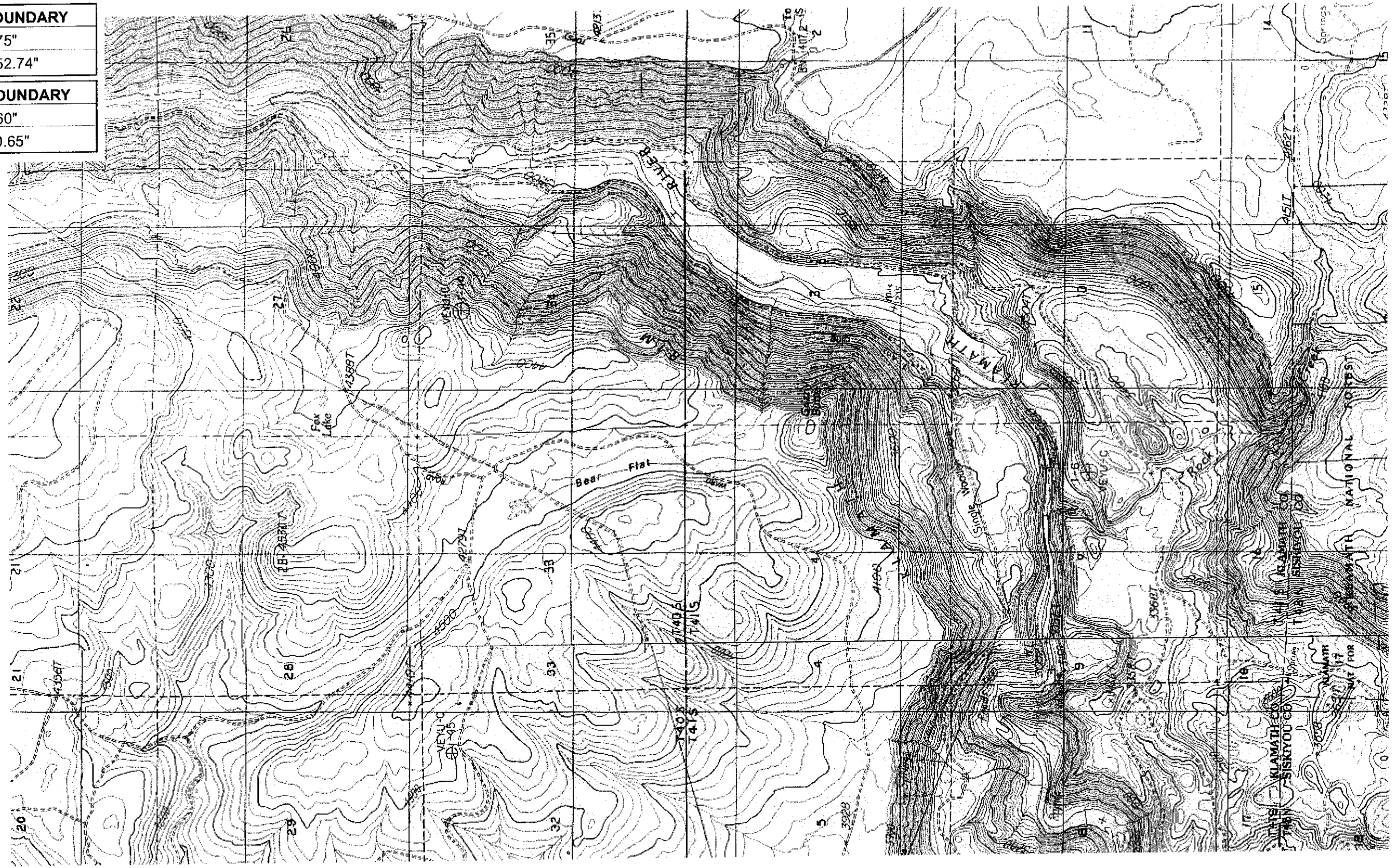
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Longitude: 122° 02' 52.74"

LOWER REACH BOUNDARY

Latitude: 42° 00' 21.60"

Longitude: 122° 11' 0.65"



Source: USGS 7.5 Minute Quad: Chicken Hills, Mule Hill.

Vertical Datum: National Geodetic Vertical Datum of 1929.

Horizontal Datum: 1927 North American Datum.

OWRD EXHIBIT 49

Page 4
Claim 671

Reach boundaries: John C. Boyle Reservoir to Oregon/California boundary.
Plate 2 of 3.

Klamath Basin Water Rights Claim Map

Department of the Interior Bureau of Indian Affairs

Reach Name: **Klamath River #1**

Scale: 1:24,000

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Exhibit 8, Page 4 of 55

KLAMATH ADJUDICATION

97 715 0005

CLAIM # 671 PAGE #

UPPER REACH BOUNDARY

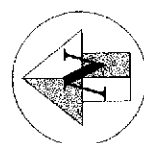
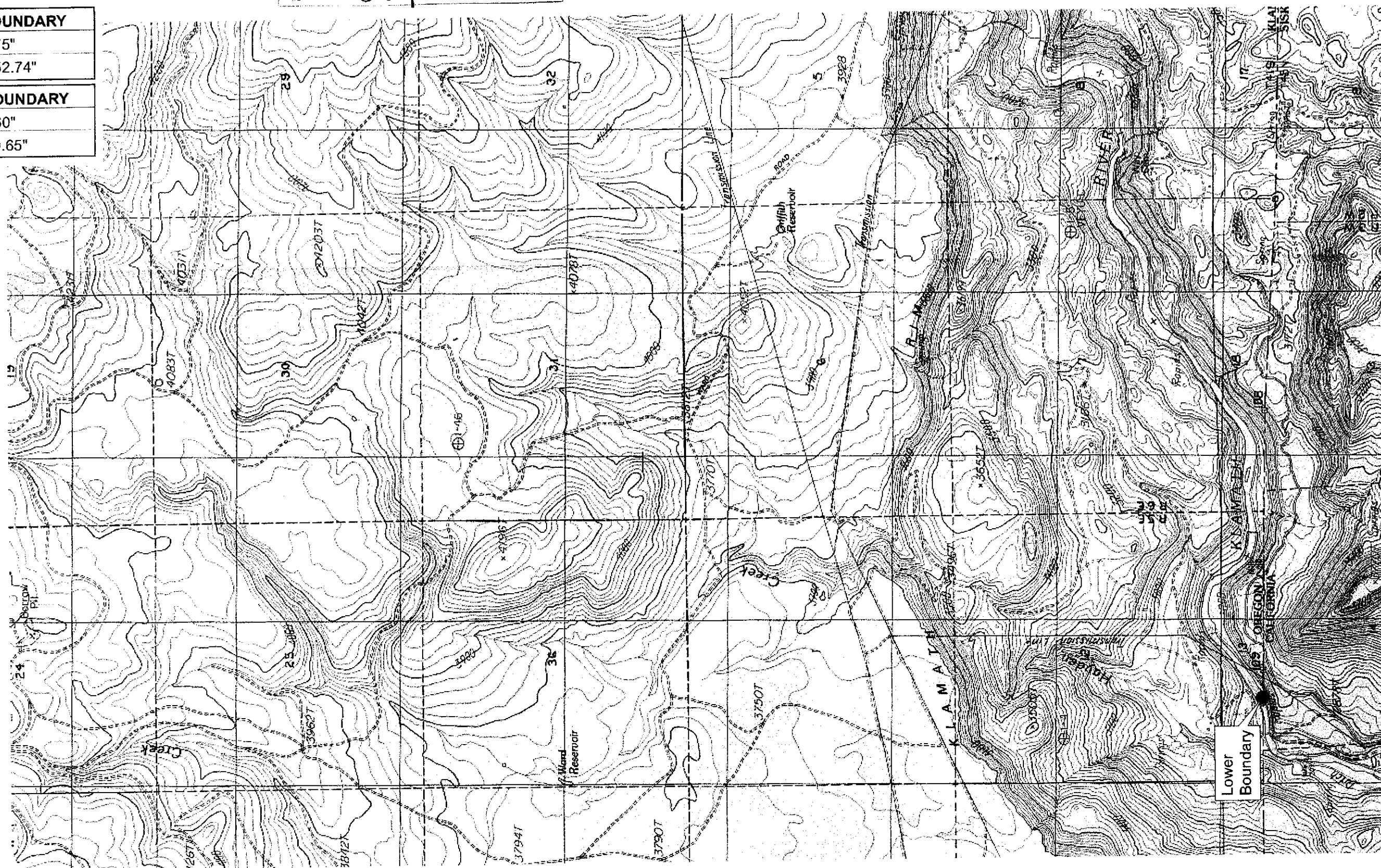
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Longitude: 122° 02' 52.74"

LOWER REACH BOUNDARY

Latitude: 42° 00' 21.60"

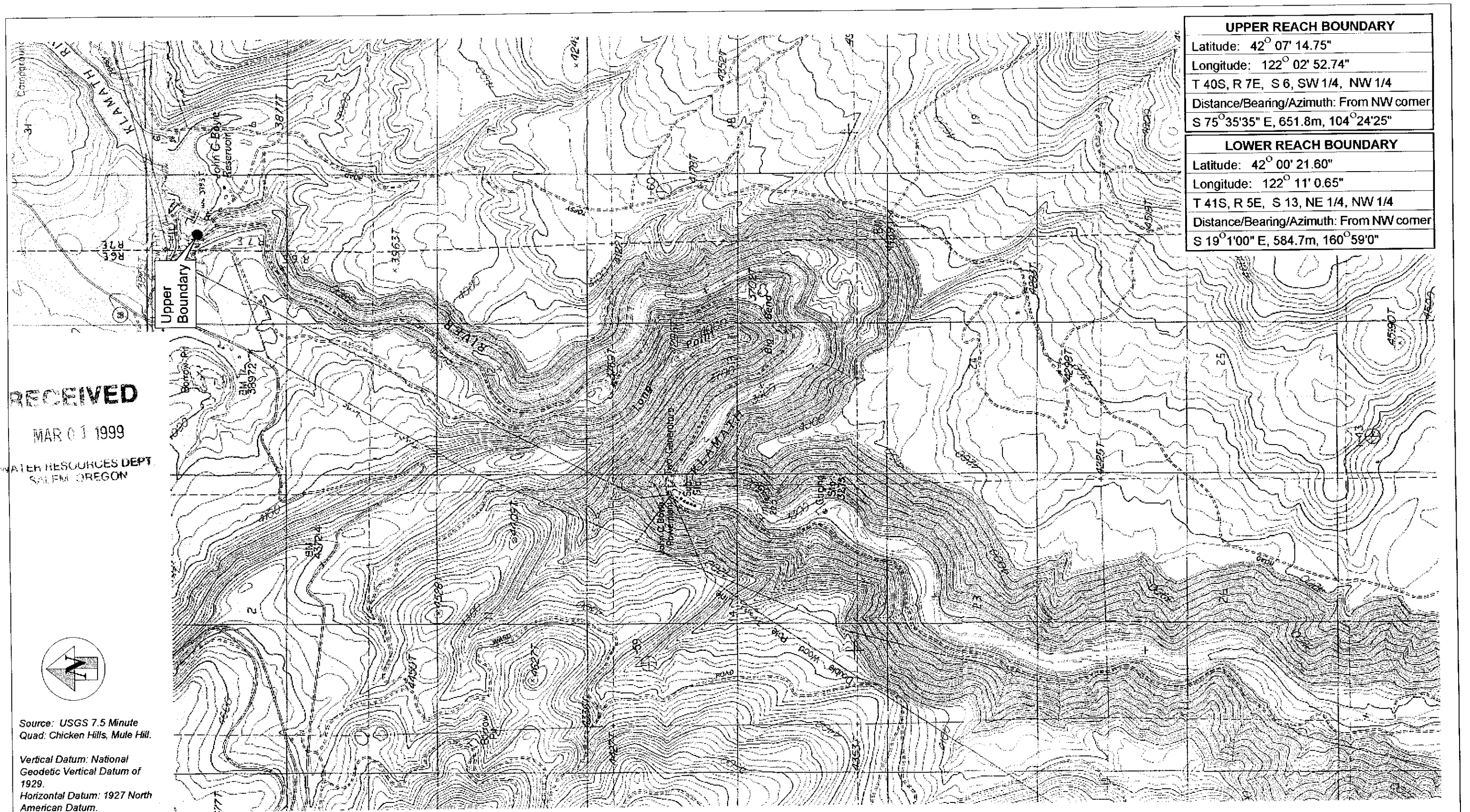
Longitude: 122° 11' 0.65"



Source: USGS 7.5 Minute
Quad: Chicken Hills, Mule Hill.

Vertical Datum: National
Geodetic Vertical Datum of
1929.

Horizontal Datum: 1927 North
American Datum.



UPPER REACH BOUNDARY

Latitude: 42° 07' 14.75"

Longitude: 122° 02' 52.74"

T 40S, R 7E, S 6, SW 1/4, NW 1/4

Distance/Bearing/Azimuth: From NW corner

S 75° 35' 35" E, 651.8m, 104° 24' 25"

LOWER REACH BOUNDARY

Latitude: 42° 00' 21.60"

Longitude: 122° 11' 0.65"

T 41S, R 5E, S 13, NE 1/4, NW 1/4

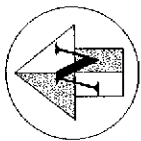
Distance/Bearing/Azimuth: From NW corner

S 19° 1' 00" E, 584.7m, 160° 59' 0"

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MAR 01 1999

WATER RESOURCES DEPT.
SALEM OREGON



Source: USGS 7.5 Minute
Quad: Chicken Hills, Mule Hill.

Vertical Datum: National Geodetic Vertical Datum of 1929.

Horizontal Datum: 1927 North American Datum.

KLAMATH ADJUDICATION

CLAIM # **671** PAGE # **06**

OWRD EXHIBIT 49

Page 6
Claim 671

Reach boundaries: John C. Boyle Reservoir to Oregon/California boundary.
Plate 1 of 3.

Klamath Basin Water Rights Claim Map

Department of the Interior Bureau of Indian Affairs

Reach Name: Klamath River #1

Scale: 1:24,000

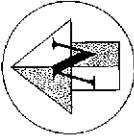
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UPPER REACH BOUNDARY
Latitude: 42° 07' 14.75"
Longitude: 122° 02' 52.74"
T 40S, R 7E, S 6, SW 1/4, NW 1/4
Distance/Bearing/Azimuth: From NW corner S 75°35'35" E, 651.8m, 104°24'25"
LOWER REACH BOUNDARY
Latitude: 42° 00' 21.60"
Longitude: 122° 11' 0.65"
T 41S, R 5E, S 13, NE 1/4, NW 1/4
Distance/Bearing/Azimuth: From NW corner S 19°1'00" E, 584.7m, 160°59'0"

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MAR 01 1999

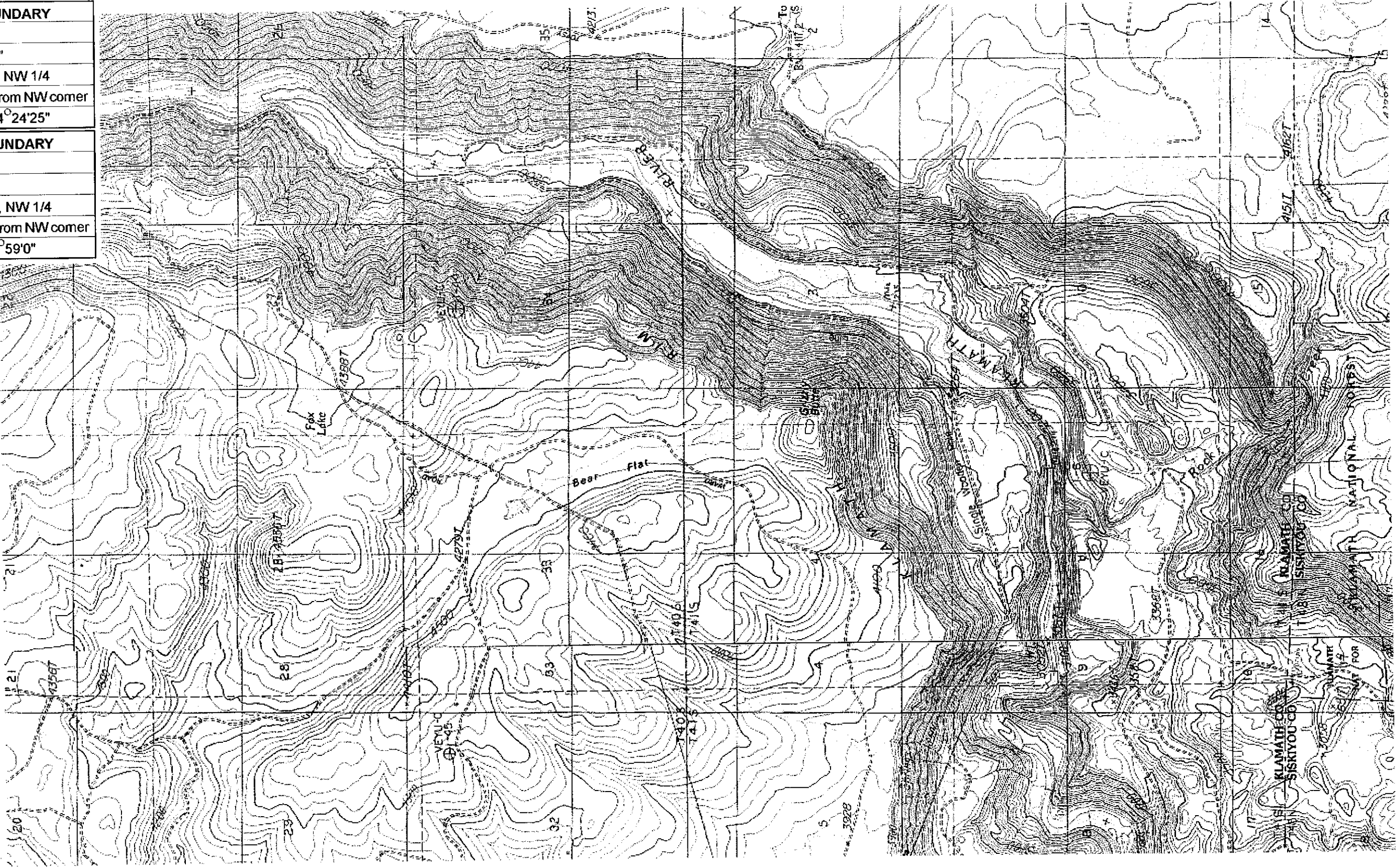
WATER RESOURCES DEPT.
SALEM, OREGON



Source: USGS 7.5 Minute
Quad: Chicken Hills, Mule Hill.

Vertical Datum: National
Geodetic Vertical Datum of
1929.

Horizontal Datum: 1927 North
American Datum.



KLAMATH ADJUDICATION

CLAIM 671 PAGE # 07

OWRD EXHIBIT 49

Page 7
Claim 671

Reach boundaries: John C. Boyle Reservoir to Oregon/California boundary.
Plate 2 of 3.

Klamath Basin Water Rights Claim Map

Department of the Interior Bureau of Indian Affairs

Reach Name: Klamath River #1

Scale: 1:24,000

UPPER REACH BOUNDARY

Latitude: 42° 07' 14.75"

Longitude: 122° 02' 52.74"

T 40S, R 7E, S 6, SW 1/4, NW 1/4

Distance/Bearing/Azimuth: From NW corner

S 75°35'35" E, 651.8m, 104°24'25"

LOWER REACH BOUNDARY

Latitude: 42° 00' 21.60"

Longitude: 122° 11' 0.65"

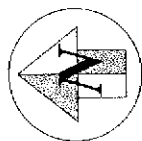
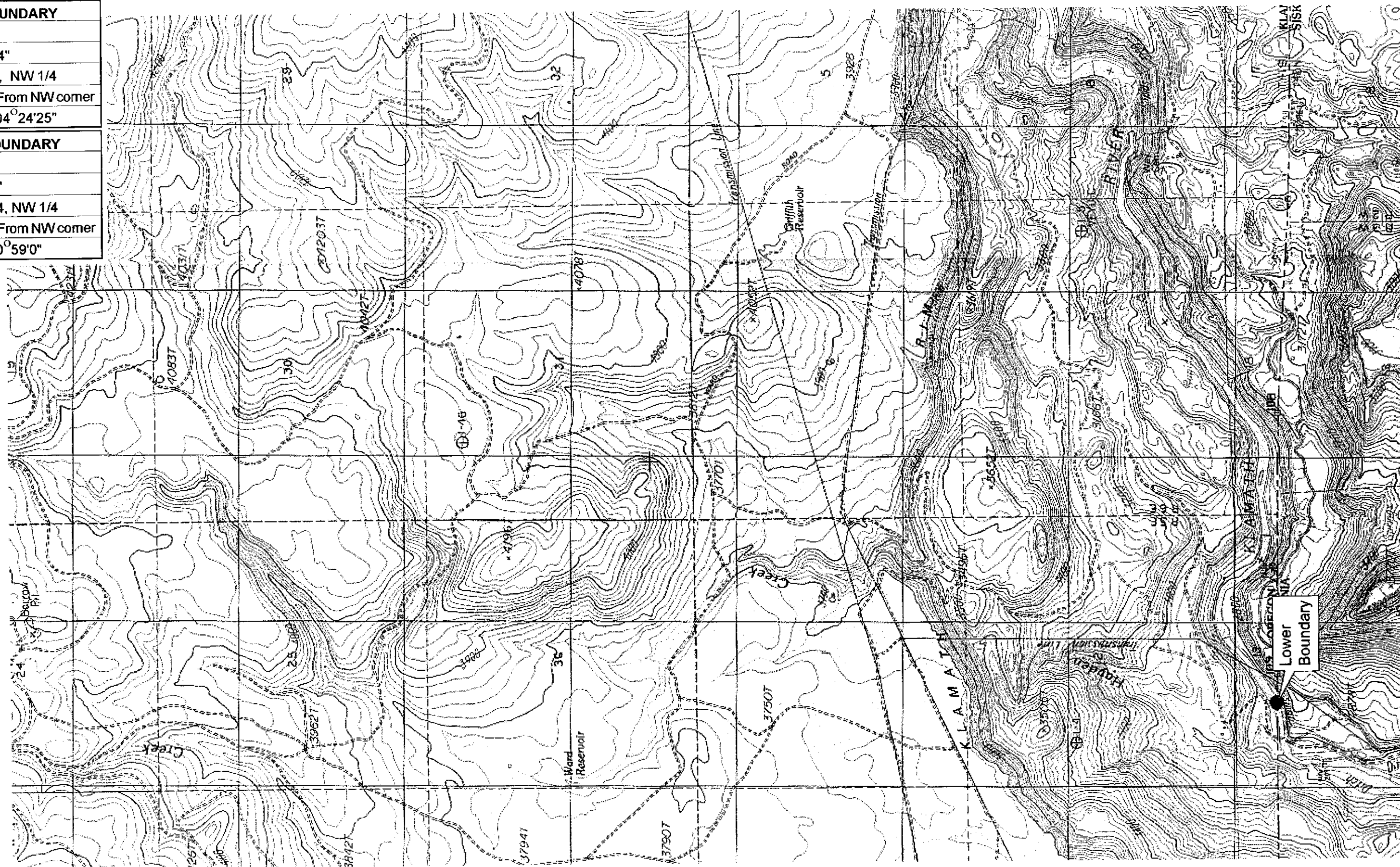
T 41S, R 5E, S 13, NE 1/4, NW 1/4

Distance/Bearing/Azimuth: From NW corner

S 19°1'00" E, 584.7m, 160°59'0"

RECEIVED

MAR 01 1999

WATER RESOURCES DEPT
SALEM, OREGONSource: USGS 7.5 Minute
Quad: Chicken Hills, Mule Hill.Vertical Datum: National
Geodetic Vertical Datum of
1929.Horizontal Datum: 1927 North
American Datum.**KLAMATH ADJUDICATION****CLAIM # 671** PAGE #**08**

OWRD EXHIBIT 49

Page 8
Claim 671Reach boundaries: John C. Boyle Reservoir to Oregon/California boundary.
Plate 3 of 3.**Klamath Basin Water Rights Claim Map**

Department of the Interior Bureau of Indian Affairs

Reach Name: **Klamath River #1**

Scale: 1:24,000

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Exhibit 8, Page 8 of 55

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APR 30 1997 ISF

KLAMATH ADJUDICATION

State of Oregon
Water Resources DepartmentWATER RESOURCES DEPT.
SALEM, OREGONCLAIM # 672 PAGE # STATEMENT AND PROOF OF CLAIM
TO THE USE OF SURFACE WATERS OF THE KLAMATH RIVER AND ITS TRIBUTARIES
FEDERAL OR INDIAN RESERVED WATER RIGHTClaimant: United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath TribesMailing Address: 911 NE 11th Avenue Portland OR 97232Contact Person: Barbara Scott-Brier, Office of the Solicitor, Pacific Northwest Region, U.S. Dept. of the Interior, 500 N.E. Multnomah Street, Suite 607, Portland, OR. 97232, 503-231-2139 (telefax 503-231-2166).

Service: All notices and service of contests or other matters regarding this water right shall also be made on the United States' Attorney General's representative, David Harder, U.S. Dept. of Justice, 999 18th Street, Suite 945 - North Tower, Denver, CO. 80202 (telefax 303-312-7331)

Name of Federal Reservation: The current Klamath Indian Reservation, the former Klamath Indian Reservation, and areas that are necessary for the protection of and continued and future enjoyment of the Klamath Tribes' treaty protected hunting, fishing and gathering rights.

THE UNITED STATES OF AMERICA CLAIMS A FEDERAL RESERVED WATER RIGHT AS DESCRIBED BELOW

1. Sources of Water: Klamath River (KL_2)Tributary to: Pacific Ocean

2. Water is claimed for the following uses for the federal reservation:

The following table provides monthly instream water claims which are necessary to preserve and protect the Klamath Tribes' fishing rights. The instream flow claims are expressed in cfs for physical habitat for fish, developed using the IFIM process approved in OAR 690-28-027(2)(a). These claims will provide conditions to ensure adequate migratory passage of anadromous salmonid fishes into and out of the Upper Klamath River Basin. The claims are for the natural flow up to the designated monthly value.

Nature of Use	From - To	Designated monthly value (cfs)
Physical Habitat	January 1-31	700
	February 1-29	700
	March 1-31	700
	April 1-30	700
	May 1-31	700
	June 1-30	700
	July 1-31	700
	August 1-31	700
	September 1-30	700
	October 1-31	700
	November 1-30	700
	December 1-31	700

3. Total amount of water claimed: See Item 2 above.3.1 Out-of-stream use(s): No out-of-stream uses are claimed.3.2 In-stream use(s): See Item 2 above.

4. Priority Date: Time Immemorial
5. Date of creation of the federal reservation: October 14, 1864
6. Basis of right claimed: Indian Reserved Water Right, Aboriginal Water Right, Treaty of October 14, 1864.
7. Purpose(s) of Reservation: For the purposes encompassed by the Treaty of October 14, 1864, between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, 16 Stat. 707.
8. Place of use:
- Stream Name: Klamath River (KL 2)
- From mile/feature: Keno Dam
- to mile/feature: J. C. Boyle Reservoir
9. Point of diversion: No diversion is claimed.
10. County(ies) of place of use: Klamath
11. Other water rights claimed for this federal reservation: The BIA as Trustee on behalf of the Klamath Tribes is claiming water rights in Klamath Marsh and its tributary streams, Klamath Lake and its tributary streams, and the Klamath River and its tributary streams to support the Tribe's fishing, hunting and gathering rights. Other water right claims include, among others, those for domestic, commercial, municipal and industrial uses; religious and cultural uses; and agricultural uses.
12. Remarks: This is a claim for future use. The physical habitat claim has been developed using the Instream Flow Incremental Methodology, which is recognized as an acceptable methodology under OAR 690-28-027(2)(a). The species of fish and wildlife to be supported by this claim are provided in the Bureau of Indian Affairs Appendix, Attachment G.

KLAMATH ADMINISTRATION

6/2/01

THIS FORM IS AN ATTACHMENT TO A LETTER FORWARDING THE CLAIM OF THE UNITED STATES ON BEHALF OF THE U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS. THE SIGNATURE AND AFFIRMATION OF SUCH LETTER CONSTITUTES THE SIGNATURE OF THE AUTHORIZED AGENT REPRESENTING THE UNITED STATES OF AMERICA REQUIRED FOR SUCH CLAIM.

ATTACH THE FOLLOWING EXHIBITS TO THIS CLAIM FORM:

- A. Map of water use, including point(s) of diversion and place(s) of use: see attached maps
- B. Legal description of the reservation: see Bureau of Indian Affairs Appendix
- C. List of documents creating the reservation: see Bureau of Indian Affairs Appendix
- D. Description of the legal status of the land prior to creation of the federal reservation: see Bureau of Indian Affairs Appendix
- E. Development history of the water use (Describe history of water use, including timing of development and chain of title) : see Bureau of Indian Affairs Appendix
- F. Description of diversion facility: Not Applicable
- G. Additional supporting documentation: see Bureau of Indian Affairs Appendix

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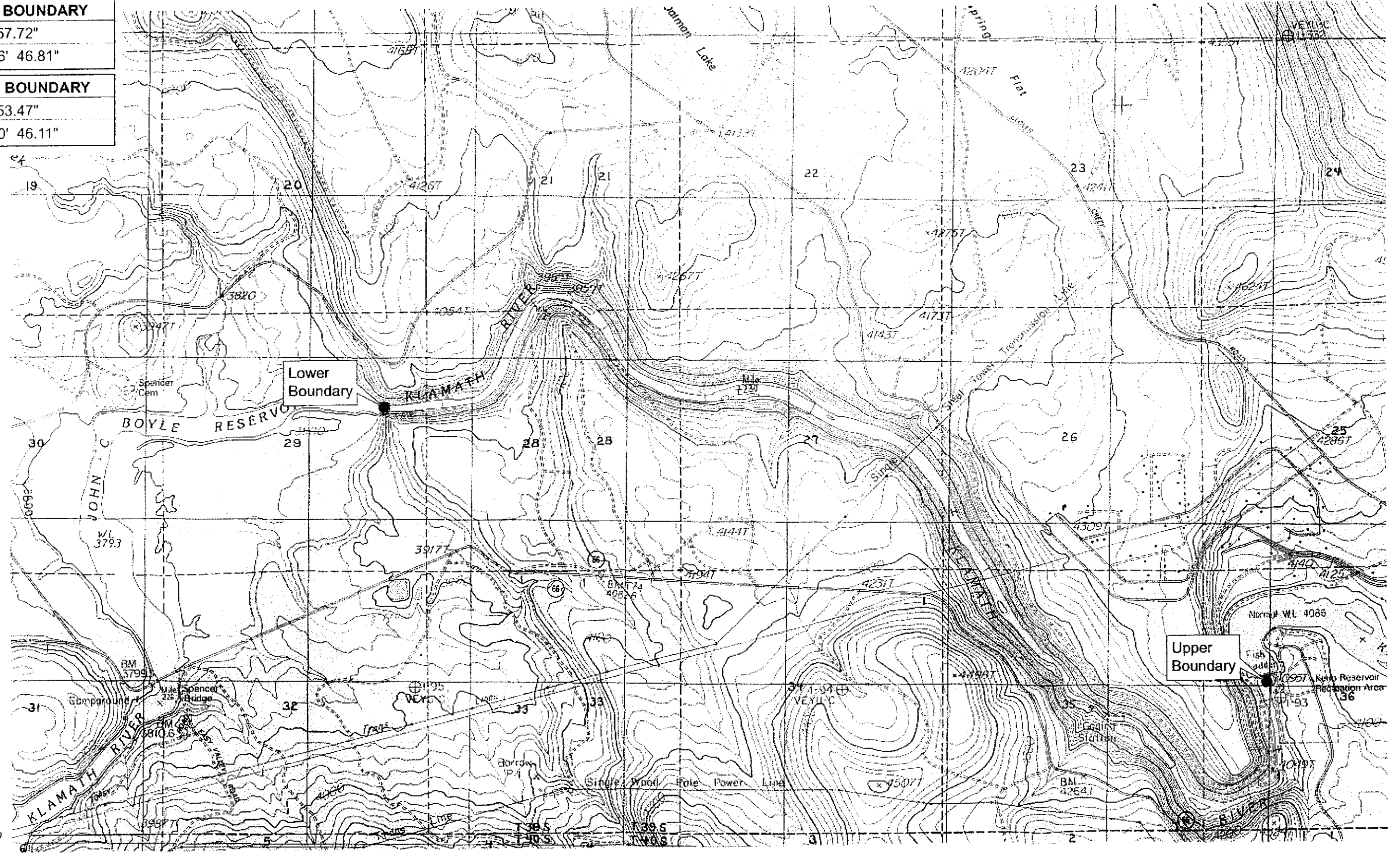
PAGE #

UPPER REACH BOUNDARY

Latitude: 42° 07' 57.72"
Longitude: 121° 56' 46.81"

LOWER REACH BOUNDARY

Latitude: 42° 08' 53.47"
Longitude: 122° 00' 46.11"



Source: USGS 7.5 Minute
Quad: Keno, Spencer Creek.

Vertical Datum: National
Geodetic Vertical Datum of
1929.

Horizontal Datum: 1927 North
American Datum.

OWRD EXHIBIT 50

Page 3
Claim 672

Reach boundaries: Keno Dam to John C. Boyle Reservoir.
Plate 1 of 1.

Klamath Basin Water Rights Claim Map

Department of the Interior Bureau of Indian Affairs

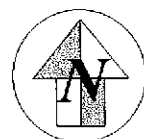
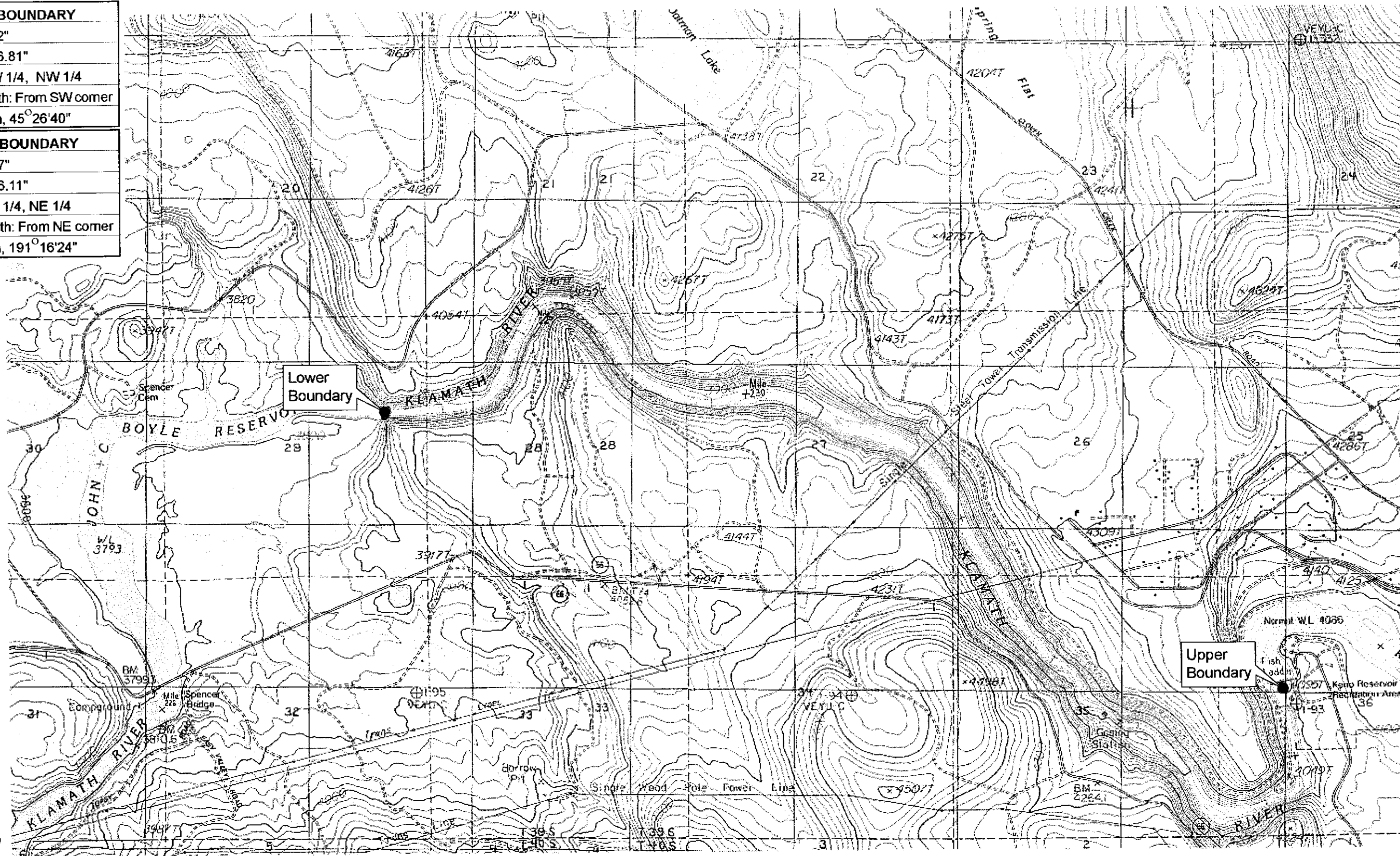
Reach Name: **Klamath River #2**

Scale: 1:24,000

UPPER REACH BOUNDARY	
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Longitude:	121° 56' 46.81"
T 39S, R 7E, S 36, SW 1/4, NW 1/4	
Distance/Bearing/Azimuth: From SW corner	
W 45° 26' 40" E, 702.8m, 45° 26' 40"	
LOWER REACH BOUNDARY	
Latitude:	42° 08' 53.47"
Longitude:	122° 00' 46.11"
T 39S, R 7E, S 29, SE 1/4, NE 1/4	
Distance/Bearing/Azimuth: From NE corner	
S 11° 16' 24" W, 786.4m, 191° 16' 24"	

RECEIVED

MAR 01 1999

WATER RESOURCES DEPT.
S. W. OREGONSource: USGS 7.5 Minute
Quad: Keno, Spencer Creek.Vertical Datum: National
Geodetic Vertical Datum of
1929.Horizontal Datum: 1927 North
American Datum.

KLAMATH ADJUDICATION

CLAIM # 672 PAGE #

04

OWRD EXHIBIT 50

Page 4
Claim 672Reach boundaries: Keno Dam to John C. Boyle Reservoir.
Plate 1 of 1.

Klamath Basin Water Rights Claim Map

Department of the Interior Bureau of Indian Affairs

Reach Name: Klamath River #2

Scale: 1:24,000

f:\60177.26\master\graphics\1117gis3.fh5

Exhibit 8, Page 12 of 55

APR 30 1997

KLAMATH ADJUDICATION

State of Oregon

Water Resources Department

WATER RESOURCES DEPT.

SALEM, OREGON

CLAIM 673

STATEMENT AND PROOF OF CLAIM
TO THE USE OF SURFACE WATERS OF THE KLAMATH RIVER AND ITS TRIBUTARIES
FEDERAL OR INDIAN RESERVED WATER RIGHT

Claimant: United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath Tribes

Mailing Address: 911 NE 11th Avenue Portland OR 97232

Contact Person: Barbara Scott-Brier, Office of the Solicitor, Pacific Northwest Region, U.S. Dept. of the Interior, 500 N.E. Multnomah Street, Suite 607, Portland, OR. 97232, 503-231-2139 (telefax 503-231-2166).

Service: All notices and service of contests or other matters regarding this water right shall also be made on the United States' Attorney General's representative, David Harder, U.S. Dept. of Justice, 999 18th Street, Suite 945 - North Tower, Denver, CO. 80202 (telefax 303-312-7331)

Name of Federal Reservation: The current Klamath Indian Reservation, the former Klamath Indian Reservation, and areas that are necessary for the protection of and continued and future enjoyment of the Klamath Tribes' treaty protected hunting, fishing and gathering rights.

THE UNITED STATES OF AMERICA CLAIMS A FEDERAL RESERVED WATER RIGHT AS DESCRIBED BELOW

1. Sources of Water: Klamath River (KL_3)

Tributary to: Pacific Ocean

2. Water is claimed for the following uses for the federal reservation:

The following table provides monthly instream water claims which are necessary to preserve and protect the Klamath Tribes' fishing rights. The instream flow claims are expressed in cfs for physical habitat for fish, developed using the IFIM process approved in OAR 690-28-027(2)(a). These claims will provide conditions to ensure adequate migratory passage of anadromous salmonid fishes into and out of the Upper Klamath River Basin. The claims are for the natural flow up to the designated monthly value.

Nature of Use	From - To	Designated monthly value (cfs)
Physical Habitat	January 1-31	700
	February 1-29	700
	March 1-31	700
	April 1-30	700
	May 1-31	700
	June 1-30	700
	July 1-31	700
	August 1-31	700
	September 1-30	700
	October 1-31	700
	November 1-30	700
	December 1-31	700

3. Total amount of water claimed: See Item 2 above.

3.1 Out-of-stream use(s): No out-of-stream uses are claimed.

3.2 In-stream use(s): See Item 2 above.

4. Priority Date: Time Immemorial
5. Date of creation of the federal reservation: October 14, 1864
6. Basis of right claimed: Indian Reserved Water Right, Aboriginal Water Right, Treaty of October 14, 1864.
7. Purpose(s) of Reservation: For the purposes encompassed by the Treaty of October 14, 1864, between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, 16 Stat. 707.
8. Place of use:
 Stream Name: Klamath River (KL_3)
 From mile/feature: Upper Klamath Lake
 to mile/feature: Lake Ewauna
9. Point of diversion: No diversion is claimed.
10. County(ies) of place of use: Klamath
11. Other water rights claimed for this federal reservation: The BIA as Trustee on behalf of the Klamath Tribes is claiming water rights in Klamath Marsh and its tributary streams, Klamath Lake and its tributary streams, and the Klamath River and its tributary streams to support the Tribe's fishing, hunting and gathering rights. Other water right claims include, among others, those for domestic, commercial, municipal and industrial uses; religious and cultural uses; and agricultural uses.
12. Remarks: This is a claim for future use. The physical habitat claim has been developed using the Instream Flow Incremental Methodology, which is recognized as an acceptable methodology under OAR 690-28-027(2)(a). The species of fish and wildlife to be supported by this claim are provided in the Bureau of Indian Affairs Appendix, Attachment G.

KLAMATH ADJUDICATION
 CLAIM 673 PAGE 1

THIS FORM IS AN ATTACHMENT TO A LETTER FORWARDING THE CLAIM OF THE UNITED STATES ON BEHALF OF THE U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS. THE SIGNATURE AND AFFIRMATION OF SUCH LETTER CONSTITUTES THE SIGNATURE OF THE AUTHORIZED AGENT REPRESENTING THE UNITED STATES OF AMERICA REQUIRED FOR SUCH CLAIM.

ATTACH THE FOLLOWING EXHIBITS TO THIS CLAIM FORM:

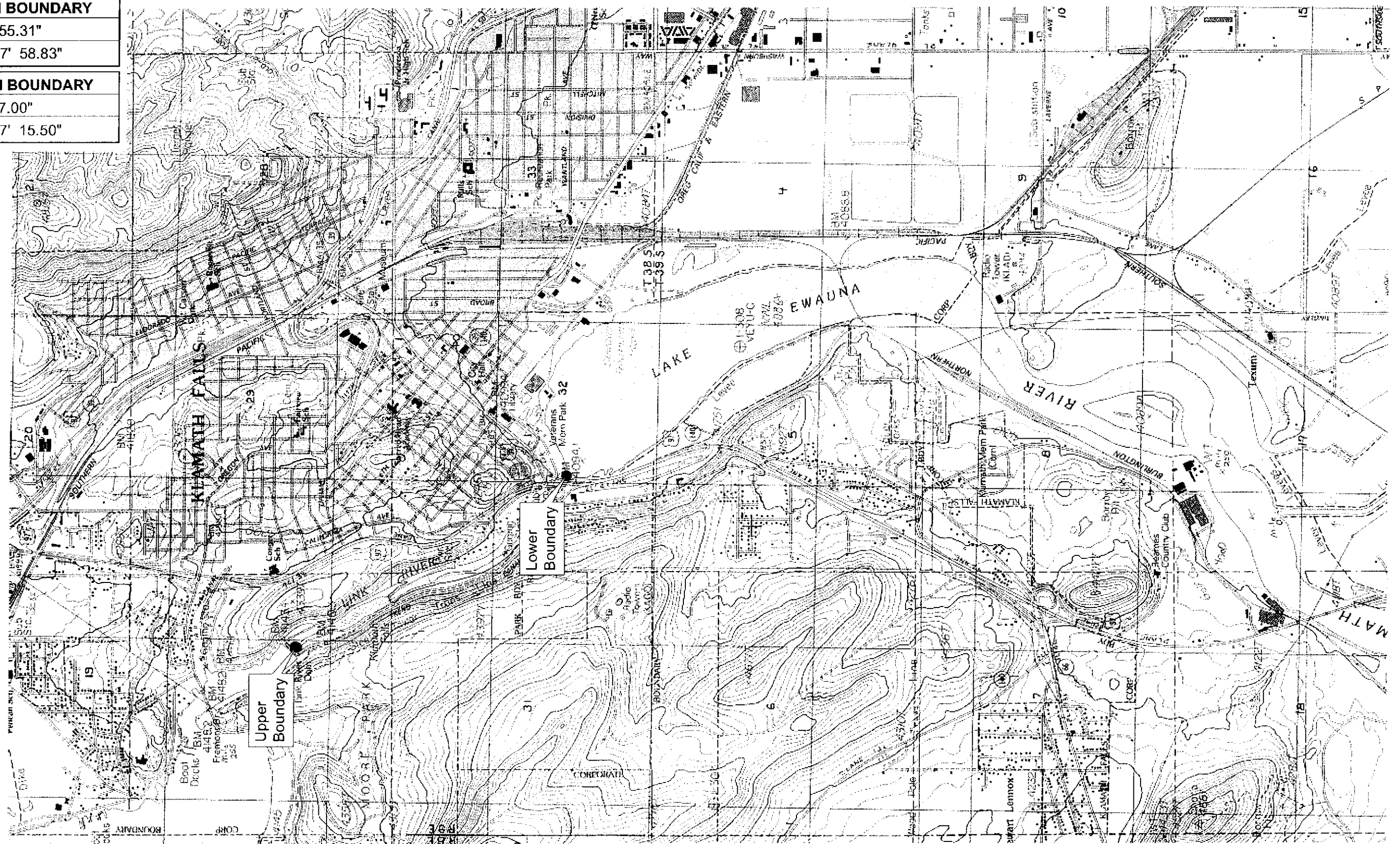
- A. Map of water use, including point(s) of diversion and place(s) of use: see attached maps
- B. Legal description of the reservation: see Bureau of Indian Affairs Appendix
- C. List of documents creating the reservation: see Bureau of Indian Affairs Appendix
- D. Description of the legal status of the land prior to creation of the federal reservation: see Bureau of Indian Affairs Appendix
- E. Development history of the water use (Describe history of water use, including timing of development and chain of title) : see Bureau of Indian Affairs Appendix
- F. Description of diversion facility: Not Applicable
- G. Additional supporting documentation: see Bureau of Indian Affairs Appendix

UPPER REACH BOUNDARY

Latitude: 42° 13' 55.31"
Longitude: 121° 47' 58.83"

LOWER REACH BOUNDARY

Latitude: 42° 13' 7.00"
Longitude: 121° 47' 15.50"



Source: USGS 7.5 Minute Quad: Klamath Falls.

Vertical Datum: National Geodetic Vertical Datum of 1929.

Horizontal Datum: 1927 North American Datum.

Reach boundaries: Link River (Upper Klamath Lake to Lake Ewauna).
Plate 1 of 1.

Klamath Basin Water Rights Claim Map

Department of the Interior Bureau of Indian Affairs

Reach Name: **Klamath River #3**

Scale: 1:24,000

UPPER REACH BOUNDARY

Latitude: 42° 13' 55.31"

Longitude: 121° 47' 58.83"

T 38S, R 9E, S 30, NW 1/4, SE 1/4

Distance/Bearing/Azimuth: From SE corner

N 53° 51' 37" W, 537.3m, 306° 8' 23"

LOWER REACH BOUNDARY

Latitude: 42° 13' 7.00"

Longitude: 121° 47' 15.50"

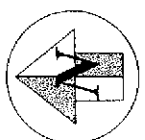
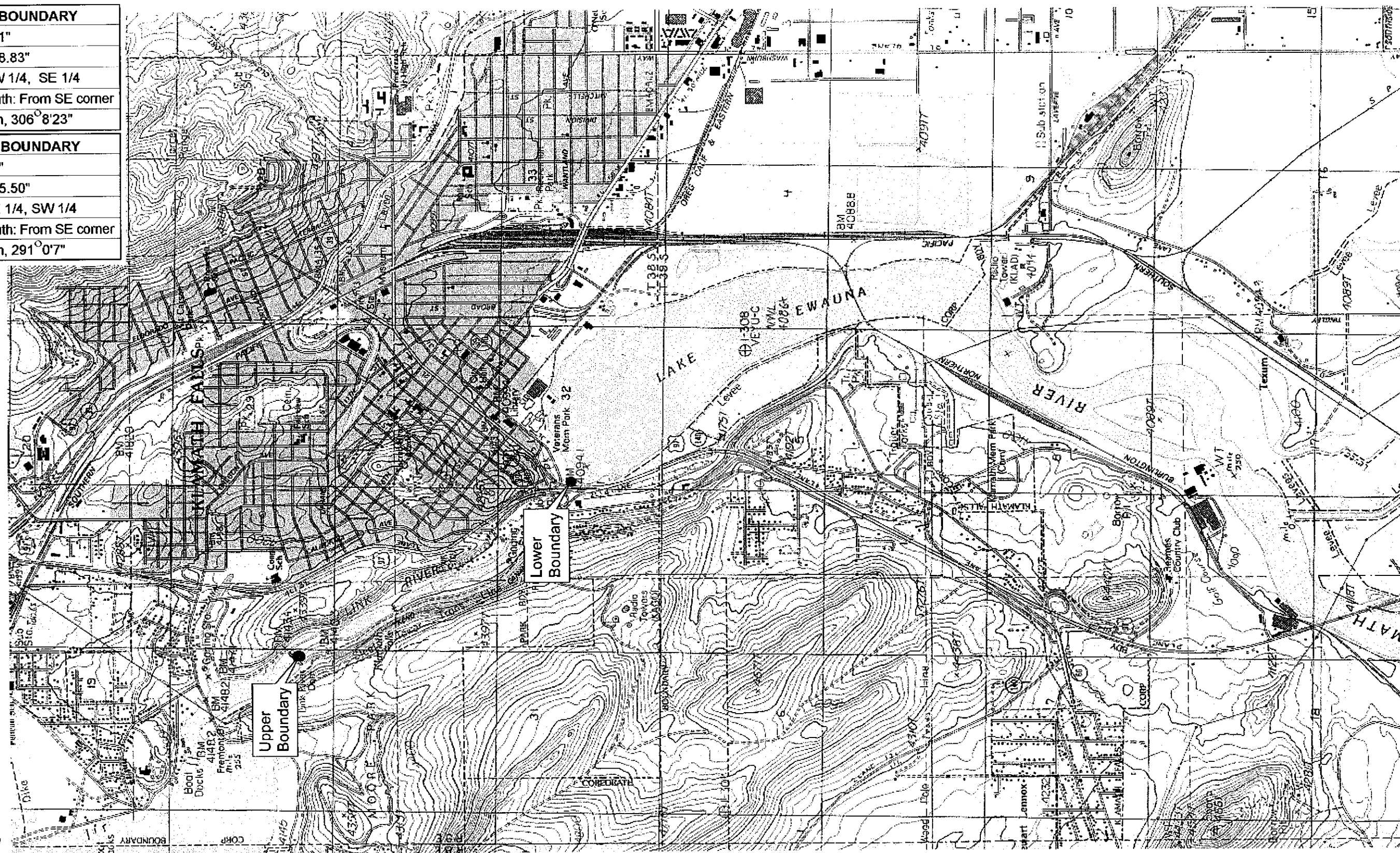
T 38S, R 9E, S 32, NE 1/4, SW 1/4

Distance/Bearing/Azimuth: From SE corner

N 68° 59' 53" W, 581.6m, 291° 0' 7"

RECEIVED

MAR 01 1999

WATER RESOURCES DEPT
311 PM OREGONSource: USGS 7.5 Minute
Quad: Klamath Falls.Vertical Datum: National
Geodetic Vertical Datum of
1929.Horizontal Datum: 1927 North
American Datum.**KLAMATH ADJUDICATION**CLAIM **673** PAGE #**04**

OWRD EXHIBIT 51

Reach boundaries: Link River (Upper Klamath Lake to Lake Ewauna).
Page 4 Plate 1 of 1.
Claim 673**Klamath Basin Water Rights Claim Map**

Department of the Interior Bureau of Indian Affairs

Reach Name: **Klamath River #3**

Scale: 1:24,000

003E00020001

OWRD EXHIBIT 1

**Document 9
Claim 294**

**WATER RESOURCES DEPT.
SALEM, OREGON**

KLAMATH ADJUDICATION

CLAIM #294 PAGE #

**State of Oregon
Water Resources Department**

STATEMENT AND PROOF OF CLAIM **SALEM, OREGON**
TO USE OF WATERS OF THE KLAMATH RIVER AND ITS TRIBUTARIES
STORE THE

Claimant: United States of America (Bureau of Reclamation & Fish & Wildlife Service)
Mailing address: Klamath Basin Area Office, 6600 Washburn Way

Klamath Falls	street	
City or town	Oregon	97603
	State	Zip

Contact person: Stephen Palmer, Office of the Solicitor, Pacific Southwest Region, U.S. Dept. Of the Interior,
2800 Cottage Way, Sacramento, CA 95825 Telephone (916) 979-2140 FAX (916) 979-2164

Service: All notices and service of contests or other matters regarding this water rights shall also be made on the United States' Attorney General's representative, Gary Randall, U.S. Dept. Of Justice, P.O. Box 663, Washington, D.C. 20044-0663 (Overnight mail, 601 Pennsylvania Avenue, Room 848, Washington, D.C. 20004) FAX (202) 305-0506.

**I, the undersigned am a water user within the Klamath River Basin and:
(Check A or B:)**

- A. I wish to claim a water use vested prior to February 24, 1909, or a federal reserved water right, or a right derived from a federal reserved water right: (Yes/No) Yes
- B. I wish to participate in the proceedings for the purpose of contesting the claims of others (Yes/No). Water right permit # Certificate #

If yes to B and you have no claim under A, go to back page for signature.

I CLAIM A RIGHT AS DESCRIBED BELOW:

1. Sources of Water See attachment (Item No. 1)
Tributary to See attachment (Item No. 1)
2. Purpose(s) for which water is used or claimed See attachment (Item No. 2)
irrigation, power, mining, domestic, stock, etc.
If for irrigation, crop(s) See attachment (Item No. 2)
If for livestock, number of head See attachment (Item No. 2)
3. Amount of water used or necessary for each claimed use: See attachment (Item No. 3)
cubic feet per second
4. Date of the initiation of the water right See attachment (Item No. 4)

KLAMATH ADJUDICATION

AIM 294 PAGE #

What is basis of the right? See attachment (Item No. 4)
appropriation or claim prior to 1909, federal reservation

5. Describe the water diversion and distribution system for both the original distribution system and any enlargements:

A) Ditch: See attachment (Item No. 5)

Material _____
Top width _____ dirt, concrete, etc. Bottom width _____ Depth _____
Grade or fall per 1000 feet _____ Capacity _____
cubic feet per second

B) Pipeline:

Size at intake _____ Size and distance at changes _____
Total fall between intake and place of use _____ Capacity _____
feet cubic feet per second

C) Pump:

Make _____ Type _____
No. _____ Intake size _____ Discharge size _____
Suction head _____ Discharge head _____
Rating: G.P.M. _____ R.P.M. _____ Pressure _____

D) Motor:

Type _____ Make _____
H.P. Rating _____ R.P.M. _____

E) Connection:

Direct connected unit _____
If belt driven: Size of drive pulley _____ Driven pulley _____

F) Distribution System:

Main line: Size _____ Length _____ Kind of pipe _____
Lateral Lines: Size _____ Length _____ Kind of pipe _____

Size _____ Length _____ Kind of pipe _____ CLAIM 294 PAGE #

G) Sprinkler Heads:

Make _____ Size of nozzles _____

Number of heads used _____ Capacity of each _____ G.P.M.

Operating pressure _____ lbs.

6. Area of land which your distribution irrigation system, as originally constructed, was intended to irrigate: 300,000 acres.

7. Location of the area irrigated, or place of use if other than for irrigation:

See Attachment (Item No. 3 and No. 7)

County of Klamath, Siskiyou, and Modoc

<u>Township</u>	<u>Range</u>	<u>Section</u>	<u>1/4, 1/4 Section</u>	<u>No. of acres irrigated</u>

Total Acres _____

The lands may have been surveyed and may be shown on a plat of the Water Resources Department, which you may examine at the time of submitting your claim. Your answer to this question should conform to those maps, unless you object to those and submit maps showing new information. (See item 10.) No proof will be accepted which does not answer this question in detail. Attach separate sheet if necessary.

8. Location of the point of diversion: See attachment (Item No. 3)

____ 1/4 ____ 1/4, Section ____, T. ____ S, R ____ E.

9. If the water use is for power, please state: NO

A) Gross Head _____ feet

B) Developed THP _____

C) Describe the type of water wheel or turbine and generator used: _____

D) If there is a water power claim, please state the filing number:

E) Where is water returned to stream? _____

10. When does the irrigation season begin and end, and if water is used for other purposes, during what months is it used? See attachment (Item No. 3) and information submitted with diversion/use claim

11. Do you accept the maps which were prepared by the Water Resources Department as they relate to your claim? Do they show correctly the location of the diversion point, the ditch, or pipe line and the lands irrigated, or other uses as shown? See attached map showing location of the reservoirs and other facilities.

NOTE: In case there is objection to the official plat or a part of the plat the parties objecting must, when giving proof, file a written statement of the reasons, and must, within ninety days, file with the water Resources Department a map covering the part objected to, with affidavit of surveyor, engineer or certified water rights examiner. Such map should preferably be on a scale of four inches to the mile and should have marked, within each 40-acre legal subdivision, the area of land which is irrigated. Such map should correspond in size to 8 1/2 x 11 inches so as to be easily filed with the claim.

12. Description of your land as it appears in your deed. (Attach separate sheet if necessary.)
See attachment (Item No. 12)

13. What additional evidence have you attached or submitted?

1. Exhibit A - Three waivers approved by the Water Resources Department dated March 17, 1997.
2. Exhibit B - Reservoir Allocation Sheet for Upper Klamath Lake
3. Exhibit C - Reservoir Allocation Sheet for Gerber Reservoir
4. Exhibit D - Reservoir Allocation Sheet for Clear Lake Reservoir
5. Exhibit E - Facilities location map.
6. Exhibit F - Memorandum describing the methodology used to arrive at new area-capacity data for Upper Klamath Lake

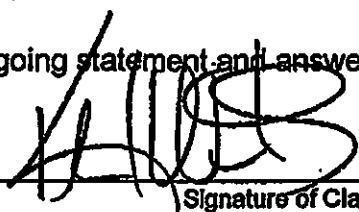
14. Remarks: See attachment (Item No. 14)

(If the space provided is insufficient to properly answer any question, attach a separate sheet or sheets. A corporation supplying water for irrigation to lands not its own should attach to its proof a complete list of the persons owning the lands with the correct description of the lands owned by each such person in each smallest legal subdivision. Persons claiming rights derived from a federal reserved right should attach copies of the reservation documents. Certified copies of records and such evidence as the claimant may desire to submit should be attached to this proof and marked for identification as exhibit "A", "B", "C", etc...)

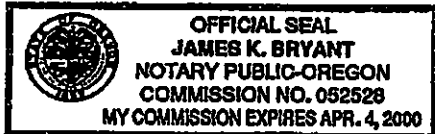
KLAMATH ADJUDICATION

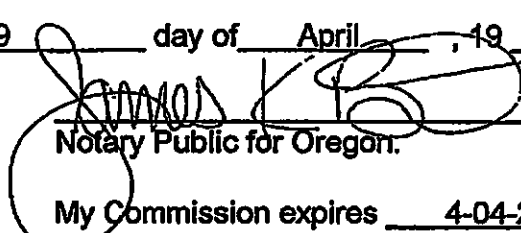
I certify that the water use described in this claim has been used continuously without a five year interruption within the past fifteen years.

I hereby certify upon oath that the foregoing statement and answers are true to the best of my knowledge and belief.


Signature of Claimant, or Agent making proof

Subscribed and sworn to before me this 29 day of April, 19 97




Notary Public for Oregon.

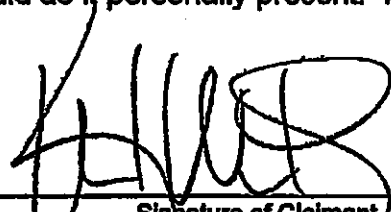
My Commission expires 4-04-2000

AUTHORIZATION OF AGENT

I, Karl Wirkus, Klamath Basin Area Office Manager of Mid-Pacific Region, U.S. Bureau of Reclamation, Klamath Falls State of Oregon, do make and appoint Stephen Palmer, Office of the Solicitor, Pacific Southwest Region and Gary Randall, U.S. Department Of Justice, my agents and attorneys for me and in my name, place and stead, to make and submit this Statement and Proof of Claim.*

I designate this agent as the proper party upon whom lawful and valid service may be made of all process and notices in any contest commenced by or against me, in this matter. This agent is duly authorized to appear in any and all such contests as my true and lawful agent and attorney. I grant to my attorney full power and authority to do and perform all and every act necessary and requisite to be done in the premises, as fully as I might or could do if personally present. I ratify and confirm all my agent shall lawfully do by virtue of this power.

*Claimant should cross out the second paragraph of the Authorization if he does not desire the agent to appear for him in the proceeding after the filing of this claim.


Signature of Claimant
Karl Wirkus, Area Manager
Klamath Basin Area Office

Fees paid: Irrigation _____ acres, \$ _____
Power _____ H.P., \$ _____
Other use _____, \$ _____

Filed _____, 19 _____

For Water Resources Department

Receipt No. _____ Total, \$ _____

Attachment to
Statement and Proof of Claim (Storage)
United States of America (Bureau of Reclamation & Fish & Wildlife Service)

Item Number 1

The entire drainage of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath River¹ and all of the lakes, streams, and rivers supplying water thereto or receiving water therefrom, including the following and all their tributaries; Upper Klamath Lake, Lower Klamath Lake, Tule or Rhett Lake, Little Klamath Lake, Lake Ewauna, Miller Lake, Dry Lake, Sprague River, Sycan River, Williamson River, Crooked River, Wood River, Link River, Seven Mile Creek, Klamath River, Three Mile Creek, Cherry Creek, Rock Creek, Four Mile Creek, and the slough or stream connecting Lower or Little Klamath Lake with Klamath River

Item Number 2

The purposes for which water is used and claimed, as stated in the May 19, 1905 "Notice of Intention to Utilize all Waters of the Klamath Basin," are those provided for by the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act, as amended and supplemented, including irrigation, reclamation, domestic and other authorized uses. In addition, if any of the lands identified in Item 7 (attached hereto) are not entitled to Project water, Reclamation would use the water for any authorized purpose.

List of Crops grown within the Klamath Project; Barley, Oats, Rye, Wheat, Potatoes, Sugar Beets, Onions, Alfalfa, Grass Hay, Irrigated Pasture, Marsh vegetation and family gardens (Vegetables)

Livestock Use; Incidental watering of livestock associated with irrigation practices.

¹ Other sources of water for the Project are; Lost River, Alkali Lake, Clear Lake, Spencer Creek, Miller Creek, Prairie Creek, Barnes Valley Creek, and Buck Creek. Some of these sources have been previously adjudicated.

Regulating Reservoirs			
Name	Location	Capacity (acre-feet)	Period of Use
Harpold Reservoir	NW¼SE¼ Section 19, T 39 S, R 11 E WM	200	April 1 through October 31
Malone Reservoir	SE¼SW¼ Section 18, T 41 S, R 14 E WM	500	April 1 through October 31
Miller Creek Diversion Dam	NE¼NE¼ Section 5, T 40 S, R 14 E WM	2	April 1 through October 31
Lower Klamath Lake areas ⁶	Various Locations	Unknown	January 1 through December 31
Miller Lake ⁶	Por. Sections 3-5, 8-11, 14-16, T 41 S, R 8 E WM	Unknown	January 1 through December 31
Nuss Lake	Por. Section 27 & 28, T 39 S, R 10 E WM	1,000	January 1 through December 31

Item Number 4

On May 19, 1905, a "Notice of Intention to Utilize All Waters of the Klamath Basin" was filed by the Reclamation Service, Predecessor to the Bureau of Reclamation, in the office of the State Engineer of Oregon. It is recorded in "Water Filings" at Page 1. The notice is as follows:

NOTICE

Notice is hereby given that the United States intends to utilize certain specified waters, as follows, to-wit:

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, including the following and all their tributaries:

Upper Klamath Lake, Lower Klamath Lake, Tule or Rhett Lake, Little Klamath Lake, Lake Ewauna, White Lake, Miller Lake, Swan Lake, Alkali Lake, Dry Lake, Sprague River, Sycan River, Williamson River, Crooked River, Wood River, Link River, Seven Mile Creek, Klamath River, Three Mile Creek, Cherry Creek, Rock Creek, Four Mile Creek, and the slough or stream connecting Lower or Little Klamath Lake with Klamath River, Clear Lake, Spencer Creek, Lost River, Miller Creek, Prairie Creek, Barnes Valley Creek, and Buck Creek.

⁶ See the U.S. Fish & Wildlife Service claims for Lower Klamath NWR and attached maps.

"It is the intention of the United States to completely utilize all the waters of the Klamath Basin in Oregon, and to this end this notice includes all lakes, springs, streams, marshes, and all other available waters lying or flowing therein.

"That the United States intends to use the above-described waters in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act.

"This notice is given under the provisions of Section Two (2) of an act passed by the Legislature of the State of Oregon, filed in the office of the Secretary of State, February 22, 1905, and constituting Chapter 288 of the General Laws of Oregon 1905, as compiled by the Secretary of State.

"This notice is given by T.H. Humphreys, Engineer of the United States Reclamation Service thereto duly authorized by the Secretary of the Interior of the United States.

"Dated at Klamath Falls, Oregon, this 17th day of May, 1905.

*T.H. Humphreys
Engineer of the U.S. Reclamation Service*

*State of Oregon)
County of Klamath) SS*

I, T.H. Humphreys, being first duly sworn, depose and say that I am a proper officer of the United States authorized by law to construct works for the utilization of water in the State of Oregon; that I have signed and executed the above notice being duly authorized thereto by the Secretary of the Interior of the United States.

*T.H. Humphreys
Engineer of the U.S. Reclamation Service*

(Seal) Subscribed and sworn to before me this 17th day of May, 1905.

*D.V. Kuykendall
Notary Public for Oregon"*

This notice was published in the Klamath Falls Express of Klamath Falls, Oregon on June 15, 22, 29, and July 6, 1905.

The Reclamation Service of the United States filed detailed plans and specifications covering the construction of the Klamath Irrigation Project with the State Engineer, of Oregon, on May 6, 1908, and on May 8, 1909, filed with the State Engineer proof of authorization of the construction of the works therein set forth.

Chapter 5, General Laws of Oregon, 1905, was enacted. It provides:

"Section 1. That for the purpose of aiding in the operations of irrigation and reclamation, conducted by the Reclamation Service of the United States, established by the act of Congress, approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act, the United States is hereby authorized to lower the water level of Upper Klamath Lake, situate in Klamath County, Oregon, and to lower the water level of, or to drain any or all of the following lakes: Lower or Little Klamath Lake, and the Tule or Rhett Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon; and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

"Section 2. That there be and hereby is ceded to the United States all the right, title, interest, or claim of this State to any land uncovered by the lowering of the water levels, or by the drainage of any or all of said lakes not already disposed of by the State; and the lands hereby ceded may be disposed of by the United States, free of any claim on the part of this State in any manner that may be deemed advisable by its authorized agencies, in pursuance of the provisions of said Reclamation Act."

Basis of the right;

Appropriation prior to 1909 pursuant to;

- General Laws of Oregon, 1905, Approved January 20, 1905;
- Cal. Stats. 1905, Approved February 3, 1905;
- Act of February 9, 1905, Chapter 567, 33 Stat. 714;
- Act of February 22, 1905, Chapter 5, Title 43, L.O.L., Section 2 (Section 6588, L. O. L.)
- Act of June 17, 1902, ch. 1093, 32 Stat. 388 as amended and supplemented; and
- Other Federal statutes that relate to general project authorization and operation and maintenance.

Item Number 5

Storage Dams

Refer to the attached map showing the locations of the various facilities. (Exhibit E)

Link River Dam - The dam is a reinforced concrete slab structure with a height of 22 feet and a crest length of 435 feet. The total reservoir capacity at elevation 4,143.3 is 629,780 acre-feet with an active storage capacity of 486,830 acre-feet. The maximum water surface area of Upper Klamath Lake is 77,593 acres.

Gerber Dam - The Reservoir has a total capacity of 94,300 acre-feet with an active storage capacity of 92,300 acre-feet and surface area of 3,800 acres. This reservoir is one of the major sources of water for the Langell Valley and Horsefly Irrigation Districts. The spillway crest elevation is 4,835.4 feet and has a capacity of 10,000 cfs at elevation 4,841.9 feet. The outlet structure consists of three steel pipes through the base of the dam that are controlled by high pressure slide gates. The capacity of the outlet is 1,000 cfs.

Attachment to Statement and Proof of Claim (Storage)
Page 5

Clear Lake Dam - The Reservoir is located on the Lost River about 19 miles southeast of Malin, Oregon, and 20 miles east of Tule Lake, California. The reservoir provides a total capacity of 526,780 acre-feet, with a maximum surface area of 25,800 acres. Due to the extremely high seepage and evaporation loss of the reservoir, the reservoir has a firm annual yield of 12,000 acre-feet. The spillway is an uncontrolled overflow side-channel weir with a crest elevation of 4,552 feet and capacity of 5,650 cfs. The outlet structure is a concrete conduit through the base of the dam controlled by two 4- and 5-ft slide gates at upstream ends. The outlet structure has a capacity of 1,000 cfs.

Regulating Reservoirs and Sumps

Anderson-Rose Diversion Dam is located on the Lost River about 3 miles southeast of Merrill, Oregon. This diversion dam diverts water to serve the lands within the Tulelake Irrigation District. The crest elevation of the dam is 4,064 feet and has a diversion capacity of 800 cfs.

Tulelake Sump is located in California at the terminus of the Lost River. Return flows from project operations find their way to the sump and are then rediverted for use within the refuge lease areas. Excess water is pumped by Plant D thru Sheeply Ridge to Lower Klamath Lake.

Lost River Diversion Dam/Wilson Reservoir -Lost River Diversion Dam is on the Lost River about 4 miles below Olene, Oregon. The purpose of this dam is to divert excess water to the Klamath River through the Lost River Diversion Channel and reduce downstream flow to Lost River in order to control flooding of the reclaimed portions of the Tulelake bed.

Spring Lake is centrally located on the project just north of the Klamath Hills. Return flows from project operations accrue to this lake and are then pumped to the Lost River when they exceed the maximum levels for the lake.

Keno Reservoir is located between the Keno Dam and the southern end of the Link River near Lake Ewanua. The Klamath River through this area acts as a storage facility and the level of the river is regulated to provide irrigation water to adjacent users.

Harpold Dam and Reservoir is located on the Lost River about 4 miles west of Bonanza. This dam has a sill elevation of 4,102.9 feet. The flash board control has an elevation of 4,108 feet. This dam is owned by Horsefly Irrigation District.

Malone Diversion Dam is located on the Lost River about 11 miles downstream from Clear Lake Dam. This diversion dam diverts water to lands in Langell Valley. Crest elevation is 4,160.3 feet. The diversion capacity is 220 cfs.

Miller Creek Diversion Dam is located on Miller Creek about 8 miles below Gerber Dam. This diversion dam diverts water to lands in Langell Valley. The dam has a crest elevation of 4,227 feet.

The diversion capacity is 190 cfs.

Lower Klamath Lake Areas are located within the Lower Klamath National Wildlife Refuge. These areas store water in marsh areas that are managed by the Fish & Wildlife Service.

Miller Lake is located just West of the Klamath Drainage District. This natural lake impounds run-off during the spring that is later consumptively used by marsh type vegetation. Some of the water eventually finds its way to the Klamath Straits Drain and thence to the Klamath River.

Nuss Lake acts as a natural sump where project return flows collect. It is located near the Olene Gap area.

For a complete description of the diversion and distribution system see the diversion/use claim

Item Number 7

In the event that lands identified in this table and in the attached maps are not entitled to Project water, Reclamation would use the water for any authorized purpose.

Township and Range	Acreage Irrigated Claim Includes Incidental uses	Inchoate Claim
California Lands		
T48N, R3E	5,121.60	0.00
T48N, R4E	11,119.10	62.90
T48N, R5E	9,440.80	70.40
T47N, R3E	2,358.80	0.00
T47N, R4E	3,264.00	33.70
T47N, R5E	13,880.40	160.20
T47N, R6E	972.70	13.60
T46N, R4E	0.00	0.00
T46N, R5E	7,478.40	8.10
T46N, R6E	1,111.20	14.30
Subtotal California Lands	54,747.00	363.20
Oregon Lands		
T37S, R8E	1,074.60	22.90
T37S, R9E	1,020.40	36.20
T38S, R8E	6,049.50	531.00
T38S, R9E	354.10	579.80
T39S, R8E	1,994.20	833.40

Attachment to Statement and Proof of Claim (Storage)

Page 7

Township and Range	Acreage Irrigated Claim Includes Incidental uses	Inchoate Claim
T39S, R9E	10,292.00	3,901.00
T39S, R10E	7,746.40	1,242.20
T39S, R11.5E	5,909.90	568.60
T39S, R11E	173.70	152.90
T40S, R8E	5,584.90	608.90
T40S, R9E	13,603.60	990.20
T40S, R10E	8,114.30	994.70
T40S, R11E	4,616.30	374.20
T40S, R12E	1,961.60	61.50
T41S, R8E	2,235.20	2,473.20
T41S, R9E	3,557.50	249.40
T41S, R10E	4,295.60	681.20
T41S, R11E	8,593.80	280.50
T41S, R12E	10,232.80	712.90
T41S, R13E	190.90	1.10
Subtotal Oregon Lands	97,601.30	15,295.80
U.S. Fish & Wildlife Service Lands ⁷		
California and Oregon	50,647.00	0.00
Subtotal U.S. Fish & Wildlife Lands	50,647.00	0.00
Total	<u>202,995.30</u>	<u>15,659.00</u>

Item Number 12

Link River Dam Legal Description-All that portion of Lots Four (4) and Seven (7) of Section Thirty (30), Township thirty-eight (38) south, range nine (9) east, Willamette Meridian, situated within the so-called Link River Dam Site, said dam site being described as:

Commencing at a point which bears south 89° 42.5' west twenty-two hundred and twenty-nine (2229) feet from the quarter-section corner common to sections twenty-nine (29) and thirty (30), township thirty-eight (38) south, range nine (9) east, Willamette Meridian, and running thence south

⁷ See the U.S. Fish & Wildlife Service claims for Lower Klamath NMR and attached maps

Attachment to Statement and Proof of Claim (Storage)
Page 8

29°23.5' east five hundred and forty-four (544) feet; and thence south 47°11.5' east two hundred eighty and 21/100 (280.21) feet to the westerly corner of said dam site, which is the true point of beginning of the description of said dam site; thence south 45°33.5' east two hundred (200) feet to the southerly corner of said dam site (said corner being distant south 16°49'30" east one hundred fourteen and 13/100 (114.13) feet from the intersection of the east face of the west abutment of Link River Dam with the upstream face of said dam); thence north 44°26.5' east, parallel to and distant one hundred (100) feet from the upstream face of the Link River Dam five hundred and forty (54) feet to the easterly corner of said dam site; thence north 45°33.5' west two hundred (200) feet to the northerly corner of said dam site; thence south 44°26.5' west five hundred forty (540) feet to the aforesaid true point of beginning of the description of said dam site.

EXCEPTING therefrom, however, that certain strip of land occupied by the Keno Canal and its right of way, as described in that certain deed from C.S. Moore and Mary L. Moore, his wife, and R.S. Moore and Clara A. Moore, his wife, to the United States of America, dated November 20, 1912, and recorded January 4, 1913, in Volume 38 of Deeds, at page 352, et seq., Records of Klamath County, Oregon; title to said strip of land and right of way now being in the United States.

EXCEPTING therefrom also the right of way for the Ankeny Canal, as described in that certain deed from Klamath Falls Irrigating Company to the United States of America, dated the 28th day of July, 1906, and recorded in Book 20 of Deeds at pages 500-501, Records of Klamath County, Oregon, title to said right of way now being in the United States.

EXCEPTING therefrom also any and all property, privileges, franchises and easements accrued or to accrue to the first parties and/or the California Oregon Power Company by virtue of the provisions of that certain agreement dated July 10, 1923, between the United States of America and The California Oregon Power Company, and any conveyance to be made by the United States pursuant to the provisions thereof.

Item Number 14 - Remarks

Coordination of Claim - Due to the United States' inability to access evidence not in its possession prior to the claim filing deadline, the United States reserves the right to incorporate the evidence supporting the claim or claims being filed by the water districts or individual water users within the Klamath Project to the extent such evidence is not inconsistent with the claims filed by the United States or the position asserted by the United States, provided that the United States reserves the right to claim the maximum acreage and any priority date supported by the best evidence. These reservations are made without intent to enlarge the quantity of water claimed by the United States and without prejudice to the United States' right to object to the claim or claims being filed by the water districts or individual water users.

Contracts for Delivery of Water - The United States, through the Bureau of Reclamation, provides water to various project water users and landowners who have contracted with the United States for delivery of water. The Bureau of Reclamation maintains a copy of each such contract.

Attachment to Statement and Proof of Claim (Storage)
Page 9

RESERVOIR CAPACITY ALLOCATIONS

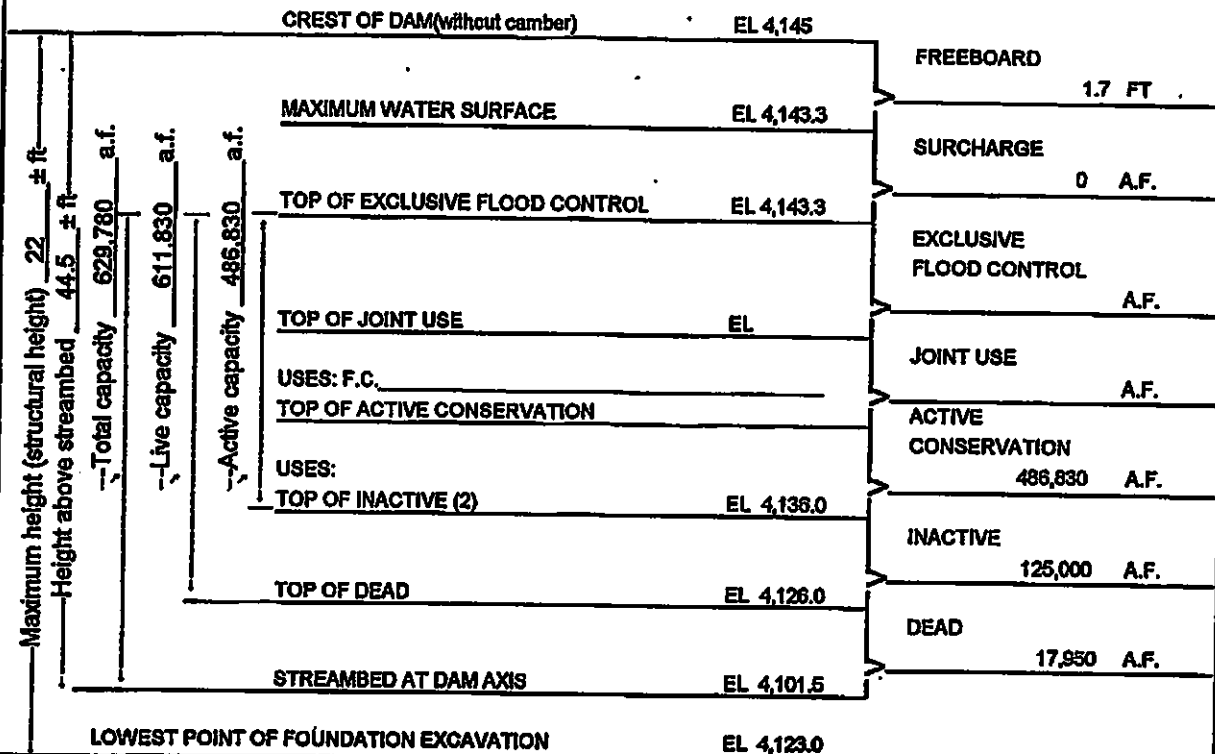
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KLAMATH ADJUDICATION

294

PAGE #

TYPE OF DAM	REINFORCED CONCRETE SLAB	REGION	MID PACIFIC	STATE	OREGON
OPERATED BY	BUREAU OF RECLAMATION		UPPER KLAMATH LAKE : RESERVOIR		
CREST LENGTH = 435 FT;	CREST WIDTH = 5 FT	LINK RIVER : DAM			
VOLUME OF DAM	2,200 CU YD	KLAMATH BASIN AREA : OFFICE			
CONSTRUCTION PERIOD	1924-1925	MAIN : DIVISION			
STREAM	LINK RIVER (1)	: UNIT			
RES AREA	77,593 ACRES AT EL. 4,143.3	DAM IS OPERATIONAL : STATUS OF DAM			
ORIGINATED BY:	APPROVED BY:				
JKB (Initials)	KO-400 (Code)	APRIL 1, 1997 (Date)	(Initials)	(Code)	(Date)



- (1) Includes _____ a.f. allowance for _____ year sediment deposition between streambed and El _____ of which _____ a.f. is above El _____.
- (2) Established by U.S. Fish & Wildlife Service Biological Opinion Dated _____.

REFERENCES AND COMMENTS:

- (1) Dam is on the Link River which is part of the Klamath River System
- (2) Reservoir elevation-capacity table was updated in 1997. A new bathymetric survey of the lake was made utilizing GIS/GPS technology during the fall of 1996. Information is summarized in a memorandum to the file dated _____.

EXHIBIT B

7-1686 (12-94)
Bureau of Reclamation

TYPE OF DAM	CONCRETE - MEDIUM THICK ARCH	REGION	MID PACIFIC	STATE	OREGON
OPERATED BY	BUREAU OF RECLAMATION		GERBER :RESERVOIR		
CREST LENGTH = 478 FT; CREST WIDTH = 5 FT		GERBER :DAM			
VOLUME OF DAM	11,900 CU YD	KLAMATH BASIN AREA :OFFICE			
CONSTRUCTION PERIOD	1924-1925	LANGELL VALLEY :DIVISION			
STREAM	MILLER CREEK	:UNIT			
RES AREA	3,830 ACRES AT EL. 4,835.4	DAM IS OPERATIONAL : STATUS OF DAM			
ORIGINATED BY:		APPROVED BY:			
JKB	KO-400	March 1, 1997			
(Initials)	(Code)	(Date)	(Initials)	(Code)	(Date)

CREST OF DAM (without camber)		EL 4,841.8 (b)	FREEBOARD		FT
MAXIMUM WATER SURFACE		EL 4,844.5 (c)	SURCHARGE		36,000 A.F.
TOP OF EXCLUSIVE FLOOD CONTROL		EL	EXCLUSIVE FLOOD CONTROL		0 A.F.
TOP OF JOINT USE		EL	JOINT USE		0 A.F.
USES: F.C.			ACTIVE CONSERVATION		92,300 A.F.
TOP OF ACTIVE CONSERVATION		Spillway EL 4,835.4	INACTIVE		2,000 A.F.
USES: Protection of Endangered Suckers in Reservoir			DEAD		Not Evaluated A.F.
TOP OF INACTIVE (2)		EL 4,799.6			
TOP OF DEAD		EL 4,773.8			
STREAMBED AT DAM AXIS		EL 4,772 (d)			
LOWEST POINT OF FOUNDATION EXCAVATION		EL 4,757.4			

- (1) Includes _____ a.f. allowance for _____ year sediment deposition between streambed and El _____ of which _____ a.f. is above El _____.
- (2) Established by U.S. Fish & Wildlife Service Biological Opinion Dated July 22, 1992. (e)

REFERENCES AND COMMENTS:

- (a) Gerber Dam, Klamath Project, Oregon - Details of Design and Construction, by A.L. Darr, Western Construction News, March 10, 1926.
- (b) Top of parapet is at elevation 4,845.4 and is used as freeboard.
- (c) Maximum water surface resulting from routing of inflow design flow approved by letter dated April 4, 1988, to Mid-Pacific Regional Director from Chief, Division of Project Investigations. Surcharge volume derived by straight-line extrapolation of capacity curve shown on drawing No. 12-201-4378.
- (d) Elevation of outlet works inlet channel at streambed. Drawing No. 12-C-84.
- (e) "Reclamation shall make no water deliveries from Gerber Reservoir when surface elevations are 4799.6 feet or less to maintain adequate water quantity and quality for summer and winter survival of shortnose suckers. Reclamation will monitor water quality on a weekly basis when this elevation is reached and provide aeration if necessary."

EXHIBIT C

TYPE OF DAM	EARTH AND ROCKFILL	REGION	MID PACIFIC	STATE	CALIFORNIA
OPERATED BY	BUREAU OF RECLAMATION		CLEAR LAKE :RESERVOIR		
CREST LENGTH = 840 FT;	CREST WIDTH = 20 FT		CLEAR LAKE :DAM		
VOLUME OF DAM	63,400 CU YD		KLAMATH BASIN AREA :OFFICE		
CONSTRUCTION PERIOD	1908-1910		LANGELL VALLEY :DIVISION		
STREAM	LOST RIVER		:UNIT		
RES AREA	25,800 ACRES AT EL. 4,543.0 (c)		DAM IS OPERATIONAL : STATUS OF DAM		
ORIGINATED BY:			APPROVED BY:		
JKB KO-400 March 1, 1997 (Initials) (Code) (Date)			(Initials) (Code) (Date)		

CREST OF DAM (without camber)		EL 4,552.0 (b)	FREEBOARD	6.3	FT
MAXIMUM WATER SURFACE		EL 4,545.7	SURCHARGE	70,720	A.F.
TOP OF EXCLUSIVE FLOOD CONTROL		EL 4,543.0 (e)	EXCLUSIVE FLOOD CONTROL	139,250	A.F.
TOP OF JOINT USE		EL 4,537.4	JOINT USE	23,810 (a)	A.F.
USES: F.C.			ACTIVE CONSERVATION	304,790	A.F.
TOP OF ACTIVE CONSERVATION		EL 4,536.4	INACTIVE	45,480	A.F.
USES: Protection of Endangered Suckers in Reservoir			DEAD	13,450	A.F.
TOP OF INACTIVE (2)		EL 4,521.0 (f)			
TOP OF DEAD		EL 4,515.6			
STREAMBED AT DAM AXIS		EL 4,513.0			
LOWEST POINT OF FOUNDATION EXCAVATION		EL 4,510.0			

(1) Includes _____ a.f. allowance for _____ year sediment deposition between streambed and El _____ of which _____ a.f. is above El _____.

(2) Established by U.S. Fish & Wildlife Service Biological Opinion Dated August 11, 1994. (e)

REFERENCES AND COMMENTS:

(a) Flood control is for project benefit only.

(b) Crest elevation includes a 3-foot raise in 1938.

(c) Drawing No. 12-201-4376, Area Capacity Curves.

(d) Reference: Area-Capacity tables in SOP for Clear Lake Dam and Reservoir, Revised 9/27/74.

(e) New spillway constructed in 1974 under Specifications 200C-389.

(f) BO Wording "Operate Clear Lake Reservoir to assure a minimum surface elevation of 4,521.0 feet on October 1 of each year, as specified in the Bureau of Reclamation's biological assessment dated January 20, 1994 (USDI 1994).

(g) Storage limitation in place of 350,000 acre-feet on October 1. SOD

EXHIBIT D

KLAMATH ADJUDICATION**CLAIM #294** PAGE #**Item Number 3**

Storage Reservoirs			
Name	Location	Storage (acre-feet)	Storage period
Upper Klamath Lake Link River Dam	NW¼SE¼ Section 30, T 38 S, R 9 E WM	486,828 acre-feet between el 4143.3 and 4136.0 ²	January 1 through December 31
Gerber Reservoir ³ Gerber Dam	NE¼SW¼ Section 12, T 39 S, R 13 E WM	94,300 acre-feet ⁴	January 1 through December 31
Clear Lake Reservoir ⁵ Clear Lake Dam	NW¼SE¼ Section 8, T 47 N, R 8 E MDM	526,780 acre-feet ⁵	January 1 through December 31

Regulating Reservoirs			
Name	Location	Capacity (acre-feet)	Period of Use
Anderson Rose Reservoir	SE¼SE¼ Section 7, T 41 S, R 11 E WM	300	April 1 through November 30
Tulelake Sump	Por. Sections 3-5, 8-10, 15-22, 27-30, and 32-34, T 47 N, R 4 E MDM	55,000	January 1 through December 31
Wilson Reservoir	SE¼SW¼ Section 29, T 39 S, R 10 E WM	2,300	January 1 through December 31
Spring Lake	Por. Sections 10 & 15 T 40 S, R 9 E WM	2,000	January 1 through December 31
Keno Reservoir (Includes Klamath River and Lake Ewauna)	NE¼SW¼ Section 36, T 39 S, R 7 E WM	5,000	January 1 through December 31

² See Reservoir Allocation Sheet (Exhibit B) for Storage claimed below elev. 4136.0

³ Lost River Basin reservoirs

⁴ See Reservoir Allocation Sheet for Gerber (Exhibit C)

⁵ See Reservoir Allocation Sheet for Clear Lake (Exhibit D)

State of Oregon

Water Resources Department

AMENDED STATEMENT AND PROOF OF CLAIM

Claim #376

TO THE USE OF SURFACE WATERS OF THE KLAMATH RIVER AND ITS TRIBUTARIES

FEDERAL OR INDIAN RESERVED WATER RIGHT

Claimant: UNITED STATES OF AMERICA, BUREAU OF LAND MANAGEMENT

Mailing address: P.O. Box 2965
STREET OR POST OFFICE BOX

Portland Oregon 97208
CITY OR TOWN STATE ZIP

Contact Person: Barbara Scott-Brier, Office of the Solicitor, Pacific Northwest region, U.S. Department of the Interior, 500 N.E. Multnomah Street, Suite 607, Portland, OR. 97232.
 Telephone: (503) 231-2139 (telefax 503-231-2166)

Service: All notices and service of contests or other matters regarding this water right shall also be made on the United States' Attorney General's representative, Geoff Garver, U.S. Department of Justice, P.O. Box 663, Washington D.C. 20044-0663 (Overnight mail: 601 Pennsylvania Avenue -- Room 848, Washington, D.C. 20004) (Telefax 202-305-0506)

Name of federal reservation: Wild and Scenic River (reach of Klamath River)

THE UNITED STATES OF AMERICA CLAIMS A FEDERAL RESERVED WATER RIGHT AS DESCRIBED BELOW

(Attach additional sheets as necessary)

1. Source(s) of water Klamath River
 Tributary to Pacific Ocean

2. Water is claimed for the following uses for the federal reservation:

(Provide period of use and flow in cubic feet per second or gallons per minute, volume in acre feet and water level were applicable)

Nature of Use	From - To	Cfs, af or water level
2.1 Recreation (boating and scenic enjoyment)	Memorial Day-Sept 30	1500 cfs
2.2 Fish life and fish habitat	April 1 to June 15	625 cfs
2.3 Fish life and fish habitat	June 16 - March 31	525 cfs

3. Total amount of water claimed 1500 cfs (recreation) and 625-525 cfs (fish) [non-additive]

3.1 Out-of-stream use(s) _____

3.2 In-stream use(s) 1500 cfs (recreation) and 625-525 cfs (fish habitat) [non-additive]

4. Priority date September 22, 1994

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5. Date of creation of the federal reservation September 22, 1994

OCT 01 1999

6. Basis of right claimed Federal Reserved Right

WATER RESOURCES DEPT
SALEM, OREGON

FEDERAL RESERVED CLAIM or SUCCESSOR CLAIM (WALTON)

7. Purpose(s) of Reservation For the purposes encompassed by the Federal Wild and Scenic Rivers Act, Public Law 90-542 (October 2, 1968), 16 U.S.C. Sections 1271 et. seq. and amendments thereto; Public Law 99-590 (October 30, 1986); Public Law 100-557 (October 28, 1988); and Notice of the Office of the Secretary, Department of the Interior (September 22, 1994), Federal Register of October 19, 1994 (page 52801).

8. Place of use (Where claim is for in-stream flow, describe stream reach by river mile, geographic feature or GPS coordinate (UTM).)

Quarter/Quarter _____ Section _____, Township _____, Range _____, Meridian _____

Stream name Klamath River, from mile/feature 220.4 to mile/feature 209.3

9. Point(s) of diversion: Not Applicable

Quarter/Quarter _____ Section _____, Township _____, Range _____, Meridian _____

10. County(ies) of place of use Klamath

11. Other water rights claimed for this federal reservation None

12. Remarks The only changes from the original claim are found in items 2 and 3 of this amended claim

THIS FORM IS AN ATTACHMENT TO A LETTER FORWARDING THE CLAIM OF THE UNITED STATES ON BEHALF OF THE U.S. DEPARTMENT OF THE INTERIOR. THE SIGNATURE AND AFFIRMATION OF SUCH LETTER CONSTITUTES THE SIGNATURE OF THE AUTHORIZED AGENT REPRESENTING THE UNITED STATES OF AMERICA REQUIRED FOR SUCH CLAIM.

ATTACH THE FOLLOWING EXHIBITS TO THIS CLAIM FORM:

KLAMATH ADJUDICATION

CLAIM # 376 PAGE # 125

- A. Map of water use, including point(s) of diversion and place(s) of use;
- B. Legal description of the reservation;
- C. List of documents creating the reservation;
- D. Description of the legal status of the land prior to creation of the federal reservation;
- E. Development history of the water use (Describe history of water use, including timing of development and chain of title.);
- F. Description of diversion facility; and
- G. Additional supporting documentation.

EXHIBITS:

EXHIBIT A. Map of water use, including point(s) of diversion and places of use:

See attached designated Wild and Scenic River map.

EXHIBIT B. Legal description of the reservation:

See #8 on claim form.

EXHIBIT C: List of documents creating the reservation:

Federal Wild and Scenic Rivers Act, Public Law 90-542 (October 2, 1968), 16 U.S.C. Sections 1271 et. seq. and amendments thereto;

Public Law 99-590 (October 30, 1986);

Public Law 100-557 (October 28, 1988);

Notice of the Office of the Secretary, U.S. Department of the Interior (September 22, 1994)

Federal Register of October 19, 1994 (page 52801).

See *Bureau of Land Management Appendix App-6* (previously filed with the original claim and incorporated herein).

EXHIBIT D: Description of the legal status of the land prior to creation of the federal reservation:

Approximately 75% of the lands appurtenant to the applicable reach of river are federally owned and approximately 25% are privately owned.

EXHIBIT E: Development history of the water use:

Federal reserved water rights pertain to both present and future uses.

EXHIBIT F: Description of diversion facility:

Not applicable.

EXHIBIT G: Additional supporting documentation:

See attached EXHIBIT G:

- Affidavit of Steve Swanson

- Affidavit of Carl Reese

- ANALYSIS OF STREAM FLOW IN THE UPPER KLAMATH RIVER, OREGON, WILD AND SCENIC RIVER CORRIDOR

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SALEM, OREGON**

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**EXHIBIT G:
ADDITIONAL SUPPORTING DOCUMENTATION**

OCT 01 1999
WATER RESOURCES DEPT.
SALEM, OREGON

LIST OF CONTENTS:

Affidavit of Steve Swanson

Affidavit of Carl Reese

ANALYSIS OF STREAM FLOW IN THE UPPER KLAMATH RIVER, OREGON, WILD AND SCENIC
RIVER CORRIDOR

KLAMATH ADJUDICATION
CLAIM # 376 PAGE # 127

OCT 01 1999

**BEFORE THE WATER RESOURCES DIRECTOR OF OREGON
KLAMATH, JACKSON, AND LAKE COUNTIES**

WATER RESOURCES DEPT.
SALEM, OREGON

IN THE MATTER OF THE DETERMINATION OF THE)
RELATIVE RIGHTS TO THE USE OF THE WATERS) AFFIDAVIT OF
OF THE KLAMATH RIVER AND ITS TRIBUTARIES) STEVE SWANSON

Affidavit

KLAMATH ADJUDICATION

I, Steve Swanson, first being sworn on oath, depose and state:

CLAIM # **376** PAGE # **128**

1. I am a resident of Denver, Colorado, and am employed by the Bureau of Land Management (BLM) as a physical scientist at the National Applied Resource Science Center (NARSC) in Denver, Colorado. NARSC provides natural resource scientific expertise to all BLM field offices bureau wide.
2. I have been employed in this position since 1989.
3. I earned a Bachelors Degree in Petroleum Engineering (1980) and a Masters Degree in Environmental Engineering(1988) from Colorado School of Mines in Golden, Colorado.
4. During my tenure as a Physical Scientist, I have specialized in riverine analysis. I have been, and continue to be, responsible for expert scientific support to all BLM field offices bureau wide involving instream flow analysis. These responsibilities include, reviewing field office results of instream flow studies for scientific validity, advising and training field office personnel in the proper methods for instream flow analysis, leading instream flow projects(data collection, data reduction, modeling, results interpretation, writing and publishing), and developing new techniques for instream flow work.
5. In my role as a Physical Scientist for NARSC, I have become familiar with all the scientific methods and techniques used in the preparation of the United States

water rights claim for the Wild and Scenic portion of the Klamath River.

6. In my role as a Physical Scientist for NARSC, I completed the following tasks for the BLM's Klamath River water right claim:

- a. Field data review and data modifications;
- b. Constructed all input files for the Physical Habitat Simulation (PHABSIM) model; and
- c. Calibrated and ran the hydraulics portion of the PHABSIM model and verified the results for use in the biological portion of the model.

7. I prepared Part 1 of the report entitled ANALYSIS OF STREAM FLOW IN THE UPPER KLAMATH RIVER, OREGON, WILD AND SCENIC RIVER CORRIDOR. I agree with the conclusion reached in the report.

Further affiant saith not. DATED this 24 day of September 1999.



Steve Swanson, Physical Scientist
Bureau of Land Management

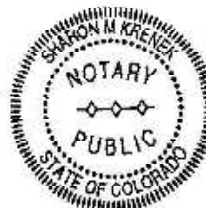
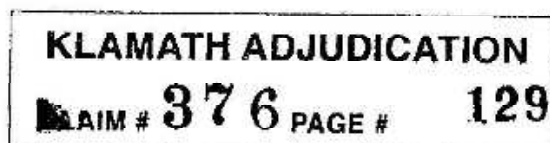
STATE OF COLORADO

COUNTY OF Jefferson

The affiant, Steve Swanson, being first duly sworn by me, hereby declares that he has read the foregoing Affidavit and that the information therein is true and correct to the best of his knowledge and belief.

Subscribed and sworn to me by affiant Steve Swanson this 24 day of September 1999.


NOTARY PUBLIC
MY COMMISSION EXPIRES: 8/18/2002



MY COMMISSION EXPIRES:
August 18, 2002

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WATER RESOURCES DEPT.
SALEM, OREGON

OCT 01 1999

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON
KLAMATH, JACKSON, AND LAKE COUNTIES

WATER RESOURCES DEPT.
SALEM, OREGON

IN THE MATTER OF THE DETERMINATION)
OF THE RELATIVE RIGHTS TO THE USE OF)
THE WATERS OF THE KLAMATH RIVER AND ITS)
TRIBUTARIES _____)

AFFIDAVIT OF
CARL D. REESE

Affidavit

I, Carl D. Reese, first being sworn on oath, depose and state:

1. I am a resident of Keno, Oregon, and am employed as a fisheries biologist for the Klamath Falls Resource Area, Lakeview District of the Bureau of Land Management (BLM).
2. I have been employed by the BLM since February 1999. I have been working in fisheries since 1993. Previous to my work with the BLM, I worked for a year for Great Lakes Indian Fish & Wildlife Commission in Onamia, Minnesota as fisheries biologist. I also worked for two years on a graduate appointment as a fisheries biologist at the U.S. Forest Service, Redwood Sciences Lab in Arcata, California, and have several years experience as a scientific aide in fisheries for the California Department of Fish and Game.
3. In 1992, I graduated *cum laude* from Arizona State University with a Bachelor of Science degree in Biology. I have completed the coursework for a Master's degree in Fisheries at Humboldt State University and I am finalizing my thesis at this time. I expect to graduate in December 1999.
4. During my career as a fisheries biologist, I have gained experience in analyzing biological data from fish populations and gained an understanding of their relationship to water flow.
5. In addition to a good understanding of the habitat needs of fish populations, I have received training to conduct Instream Flow Incremental Methodology (IFIM) using Physical Habitat Simulation (PHABSIM). I have received the following training:

Introduction to IFIM methodology: Course included field techniques, hydraulic modeling, and habitat simulation with emphasis in PHABSIM/RHABSIM. This was an upper division university course at Humboldt State University in 1995. The course was two semester units and was taught by Tom Payne of Tom Payne and Associates.

KLAMATH ADJUDICATION
CLAIM # **376** PAGE # **130**

Theory and Application of the Physical Habitat Simulation System:
Advanced training in PHABSIM. This course was taught at Utah State University by Dr. Tom Hardy from June 7-11, 1999.

6. Steve Swanson and I performed the PHABSIM analysis for the BLM's Wild and Scenic Rivers claim and I wrote part 2 of the report entitled ANALYSIS OF STREAMFLOW IN THE UPPER KLAMATH RIVER, OREGON, WILD AND SCENIC RIVER CORRIDOR, which summarized our analysis. I agree with the conclusion reached in the report.

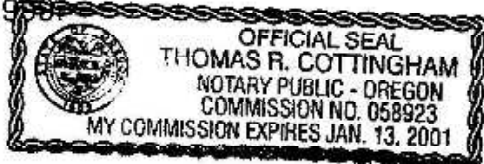
Further affiant saith not. DATED this 27 day of September 1999.

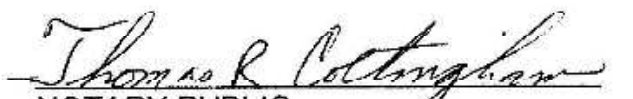

Carl D. Reese, Fisheries Biologist
Bureau of Land Management

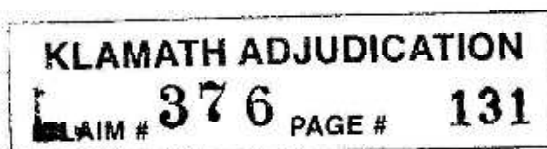
STATE OF OREGON
COUNTY OF KLAMATH

The affiant, Carl Reese, being first duly sworn by me, hereby declares that he has read the foregoing Affidavit and that the information therein is true and correct to the best of his knowledge and belief.

Subscribed and sworn to me by affiant Carl Reese this 27th day of September 1999.




NOTARY PUBLIC
My commission expires: JAN-13, 2001



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ANALYSIS OF STREAM FLOW IN THE UPPER KLAMATH RIVER, OREGON, WILD AND SCENIC RIVER CORRIDOR

Steve Swanson and Carl Reese
Bureau of Land Management

BACKGROUND

This analysis estimates weighted usable area (WUA) to determine minimum flows in the designated wild and scenic corridor in the upper Klamath River for purposes of the Bureau of Land Management (BLM) filing a water right claim in the Klamath Basin Adjudication in Oregon. This corridor of the Klamath River is listed by the U.S. Environmental Protection Agency as having poor water quality; also, this corridor experiences extensive daily peaks in flow during the summer months. Although water quality and daily power peaking affect fish biology, they are beyond the scope of the water rights adjudication and this study and should be addressed in the appropriate forum.

INTRODUCTION

There are several models available to determine aquatic habitat available within a riverine environment. Physical Habitat Simulation (PHABSIM) is a generally accepted model with widespread use and was chosen to model habitat in the Upper Klamath River. It is a model that integrates open channel hydraulics with physical habitat (depth, velocity, substrate type) requirements for selected aquatic species. It is designed to quantify how incremental changes in flow affect a rivers capacity to provide useable physical habitat to aquatic species.

PART 1

THE PHABSIM PROCESS

There are three fundamental components to the PHABSIM process:

1. *Data collection:* This component includes field measurement and data collection of stream channel morphology and hydraulic characteristics. These are accomplished through detailed cross sectional surveys (transects) of the channel and evaluation of existing hydraulic conditions (e.g. water depth, velocity, substrate size and type).

2. *Hydraulic Simulation:* The field-collected data are reviewed and inputted into the hydraulic portion of the PHABSIM model. Using these data to describe existing channel and hydraulic conditions, the model predicts the variations in water depths and velocities associated with changes in flow levels.
3. *Habitat Modeling:* The results of the hydraulic modeling, predicted depths and velocities, are passed to the habitat model along with substrate characterizations, cross sectional profiles, and modeled flows. This information is coupled with Suitability Index (SI) curves, which dictate the physical habitat (depth, velocity, substrate) that each aquatic species prefers. The SI curves allow the model to generate a weighted index of useable surface area of physical habitat for each modeled flow. Results are plotted as weighted useable area vs flow to determine what flow maximizes physical habitat.

DATA COLLECTION

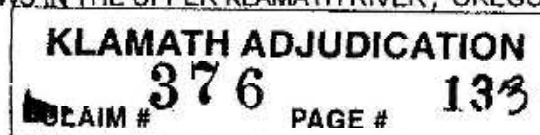
For this analysis, raw data were used that were collected from 1983-1986 by the City of Klamath Falls, Oregon, in cooperation with Beak Consultants, Inc. and VTN Consulting for an instream flow evaluation of the upper Klamath River in conjunction with a proposed hydroelectric project. The raw data that were collected for that study were used for the analysis to establish the flow recommendations for the BLM's Wild and Scenic River claim for the Klamath Basin Adjudication. During the BLM modeling process, all appropriate changes were made to ensure that current scientific methods were applied without compromising the integrity of the original data. The upper Klamath River is a system that has not undergone long-term changes in channel morphology since the data were collected. Therefore, the data were still considered an accurate representation of current conditions.

The first step in data collection is a general field overview of river morphology and hydraulics. The Wild and Scenic corridor of the upper Klamath River exhibits two distinctive characteristic reaches, the Upper reach and the Lower reach.

The Upper reach of the corridor extends from the John Boyle Powerhouse to approximately River Mile (RM) 214.3. This section is characterized by a steep walled canyon with an average channel width of approximately 190 ft. The floor of the canyon becomes progressively wider at the downstream end reaching approximately 1/4 mile in width. The average channel gradient is 27 ft/mile. Channel substrate is heavily armored with boulders and large cobble with few pockets of loose gravel. Fish cover is primarily instream cover with large boulders and good water depth. Bank cover in the form of vegetation is relatively sparse. There is a wide range of aquatic habitat types present in this reach.

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The Lower reach (RM 214.8 - RM 209.8) significantly changes character. The river falls into a much more constricted corridor with the average channel width now approximately 90 ft. Average channel gradient increases from 27 ft/mile to 77 ft/mile. The river consists primarily a long series of cascades, rapids, and runs with a few deep pools. The channel substrate is heavily armored with boulders and large cobble with no appreciable loose gravels. Good instream cover is available due to large boulders and appreciably better bank vegetation. The range of aquatic habitat types is much more limited compared to the upper reach.

Because of these two distinct reaches, two different methods were employed in the process of field data collection. Due to large variation of habitat types present in the upper reach, 10 types were identified in the field and mapped over the entire reach. From this data, the percentage of each type of habitat exhibited over the reach was determined. Ten (10) cross sections were randomly chosen that represented each of the 10 habitat types and field data collected at those sites. This type of approach is termed "representative habitat".

The limited habitat types in the lower reach allows for a simpler but no less effective method. A single longitudinal section of the river is identified to represent the entire reach. Individual cross sections are located within this section that represent habitat types and hydraulic controls. Six (6) cross sections were located and placed to represent the lower reach. This approach is termed "representative reach".

The actual field data collection at each cross section followed the same methods and procedures in both the upper and lower river reaches. Fixed points were placed at the ends of each cross section on opposite sides of the channel. A series of points (verticals) were then surveyed along a line between end points. A distance and elevation was recorded for each vertical to the edge of water. At the edge of water, the water depth was then measured at each vertical across the channel and this was subtracted from the surveyed water surface elevation to determine a channel profile. At each vertical in the channel, the substrate type was recorded and a mid-column water velocity was measured and recorded. This process was completed at a single flow level for each cross section in the upper reach and at three different flow levels for each section in the lower reach. The surveying was completed using a Nikon ZA-1 Autolevel and standard accepted survey techniques. Water velocities were measured using a Model 622 Price AA current meter or a Marsh McBirney 201 Electromagnetic current meter using standard measurement techniques.

HYDRAULIC SIMULATION

PHABSIM provides several options for hydraulic modeling. All of the choices require input of the field-determined cross sectional profile, water velocities, water surface elevations, substrate description, longitudinal distance between sections and a transect weighting factor. Following a review of the input data, the IFG4 option was chosen for the modeling. IFG4 calculates a log-log water stage vs flow regression for

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each transect using the cross sectional profile and the surveyed water surface elevations. This regression is then used to predict stage which is converted to a predicted water surface elevation for each of the requested modeled flows. Predicted water depths are then calculated by subtracting the field measured channel bed elevations from the predicted water surface elevations.

Manning's Equation is used to calibrate and predict mean water column velocities.

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Manning's Eqn: velocity(v) = $(1.49/n) * R^{2/3} * S^{1/2}$

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R: Hydraulic Radius = Cross Sectional Area/Wetted Perimeter

S: Energy Gradient; Approximated by the water surface slope

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This is an empirical equation that calculates water velocities using cross sectional profile characteristics, energy gradient, and a roughness coefficient known as Manning's "n". At the field measured flows, v, R, and S are either known or calculated by the model using input data and the "n" value is solved for at each vertical in the cross section. For all of the modeled flows, "n" is assumed constant, and R and S are determined using predicted water surface elevations and associated cross sectional profile and the equation is solved for a predicted velocity. The incremental flow at each vertical is calculated using predicted velocity and depth and all verticals are summed across the channel. This total flow is then compared, in the form of a ratio, to the requested modeled flow. This ratio is termed the Velocity Adjustment Factor (VAF). The VAF is used to determine the accuracy of the modeled water velocities. VAF's for all the Klamath River modeled flows generally fell between 0.9 - 1.10. This is well within acceptable limits for the model indicating the predicted depths and velocities are appropriate estimates. At this point, the modeled flows, velocities, and depths are passed on to the biological portion of the model to determine the associated physical habitat.

PART 2

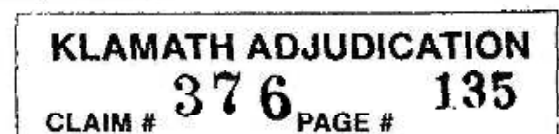
HABITAT SIMULATION

Species included in this analysis are rainbow trout (*Oncorhynchus mykiss*), Lost River sucker (*Deltistes luxatus*), and shortnose sucker (*Chamistes brevirostris*).

Rainbow trout are an important sportfish in the Upper Klamath River. Rainbow trout native to the east slope of the Cascades and the Upper Klamath River are referred to as redband trout as well.

There is little information about the population dynamics of rainbow trout in this corridor of the Klamath River. There have been no studies documenting population structure or population size. Furthermore, there is little site-specific knowledge of where or when these fish spawn. However, recreational catches in the corridor are

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high and the corridor is considered a high quality wild trout stream (ODFW 1997). Catch data indicate a healthy population size but the size of adults is generally small (trout smaller than 16 inches). The Klamath River in this corridor is not thought to contain spawning habitat for rainbow trout because of inadequate spawning gravels and extreme daily fluctuations in flow to increase power production (ODFW 1997). Upstream of the corridor natural bedload has been blocked by J.C. Boyle dam, which has caused the substrate to become armored and contain few spawning gravels. During summer, flows can fluctuate from 350 cfs at night to up to 3200 cfs in the day which also limits spawning success because redds would be de-watered during low flows. Recruitment into the population appears to be good despite the lack of spawning area and spawning is known to occur in tributaries such as Shovel Creek. However, since significant spawning does not occur in the corridor, this analysis does not include spawning as a life stage for rainbow trout.

Lost River and shortnose suckers are federally listed endangered species and both inhabit Copco Reservoir, downstream of the Oregon Wild and Scenic corridor of the Klamath River. The suckers enter this corridor for spawning. Both sucker species spawn between April 1 and June 15. The end of June the larval fish then move to Copco Reservoir. Because spawning is the only life stage that occurs in the corridor, we did not analyze life stages other than spawning for either species of suckers, winter and spring.

The following life stages were analyzed: juvenile and adult rainbow trout, and spawning for Lost River and shortnose suckers. WUA for these life stages were analyzed for the upper and lower reach separately and then compared. Because of their endangered status, the habitat needs of the suckers were emphasized during the spawning period from April 1 through June 15.

The suitability index (SI) curves is a set of equations that predict how "fish use" depends on velocity, depth, and substrate. The SI curves for rainbow or redband trout in this analysis are the same as those used by the U.S. Forest Service (USFS) and the Bureau of Indian Affairs (BIA) for the adjudication in the Klamath Basin (fig. 1; fig. 2). The indexes were created by an interagency group of specialists who were familiar with Klamath Basin rainbow trout. The specialists were:

Craig Beinz, Fisheries Biologist, Klamath Tribes
 Mark Buettner, Fisheries Biologist, U.S. Bureau of Reclamation
 Larry Dunsmore, Fisheries Biologist, Klamath Tribes
 Jeff Kershner, Fisheries Program Manager, USFS
 Hiram Li, Professor, Oregon State University
 Del Simmons, Fisheries Biologist, USFWS
 Dudley Reiser, R2 Resources (BIA consultant)

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The SI curves for both species of suckers were also the same as those used by the USFS and the BIA in the Klamath Basin (fig. 3; fig. 4). These curves were

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developed by the same team of specialists as rainbow trout curves using work done by Buettner and Scoppetone (1990). However, the substrate codes we used were modified slightly to account for differences in the way the substrate data was collected by BEAK consultants in 1982. The SI curves as used by the USFS and the BIA used a Wentworth scale which rates substrate from one to nine with one having the smallest particle size. BEAK collected their data using a scale from one to eight with one having the smallest particle size. The changes we made to the SI curves were made by consulting Buettner and Scoppetone (1990) and by consulting Mark Buettner an expert in Lost River and shortnose suckers (personal comm.).

Parameters for the SI curves are predicted velocity, predicted depth, and measured substrate. Velocity in a given cell tends to decrease with depth. This is because the substrate creates friction, which slows water movement. Velocity can be related to the SI curves using mean column or nose velocities. The way that predicted velocity is related to the SI curves should match the methods used to set up the SI curves. This analysis uses mean column velocity because the SI curves were intended to use mean column velocity.

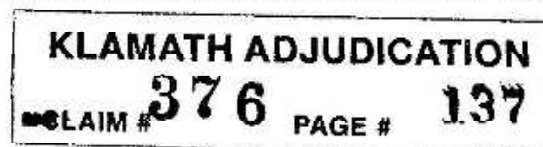
Using the SI curves, PHABSIM calculates a suitability factor for velocity, depth, and substrate for each cell in a cross section. Suitability factors are ranked from zero to one with one being perfectly suitable for a given life stage for each parameter. The WUA for the cell was usually calculated by multiplying the suitability factors for all three parameters. Thus, if velocity= 0.5, depth= 1.0, and substrate= 0.5, the WUA for the cell will be 0.25. The WUA for a cross section is the sum of WUA for all cells in the cross section. In the above example each parameter carries equal "weight" which is called a standard composite index. Another common method of calculating WUA for a cell is to use the geometric mean of the suitability factors, which gives greater "weight" to low values. Our conclusions were based on a standard composite index but we also calculated WUA using geometric mean calculations and achieved similar results. WUA was normalized on a scale from zero to one to allow comparison of WUA from the different species and life stages in the upper reach and the gorge. Next, we plotted WUA from the gorge and the upper reaches versus flow for all species and life stages (fig. 5; fig. 6). The flows we are recommending balance the habitat needs of each species and life stage.

Fisheries habitat in streams and rivers is enhanced by higher flows that occur in winter and spring. These higher flows are necessary to scour and deepen pools, maintain riparian vegetation, and stop riparian vegetation from encroaching on the channel. The upper Klamath River is largely unregulated during the winter and spring and thus receives these flows. For this reason, we did not analyze channel maintenance flows for the winter.

CONCLUSIONS

Based on the spawning habitat needs for both species of endangered suckers

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for the months of April 1 through June 15, the recommended minimum instream flow is 625 cfs for the corridor at that time. Although optimal flows for both species are higher in the lower reach than in the upper reach, the recommended flows balance the habitat needs of fish in the two reaches (fig. 5). Furthermore, this flow will not significantly reduce habitat available to rainbow trout since WUA for all life stages of trout in both reaches is greater than 90% of maximum at 625 cfs (fig. 6). Since suckers do not use the corridor during the other times of the year, we recommend a minimum flow of 525 cfs for the corridor from June 15 through March 31 based on a balance of the needs of adult and juvenile rainbow trout in both the upper and lower reaches (fig. 6).

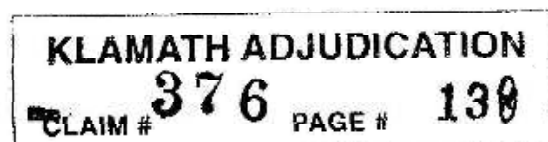
Literature Cited

- Buettner, M. and G. Scopettone. 1990. Life history and status of catostomids in Upper Klamath Lake, Oregon. USFWS Completion Report. 108 pp.
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- Rosgen, D. 1996. "Applied River Morphology" copyright Wildland Hydrology, Pagosa Springs, CO. 201 pp.

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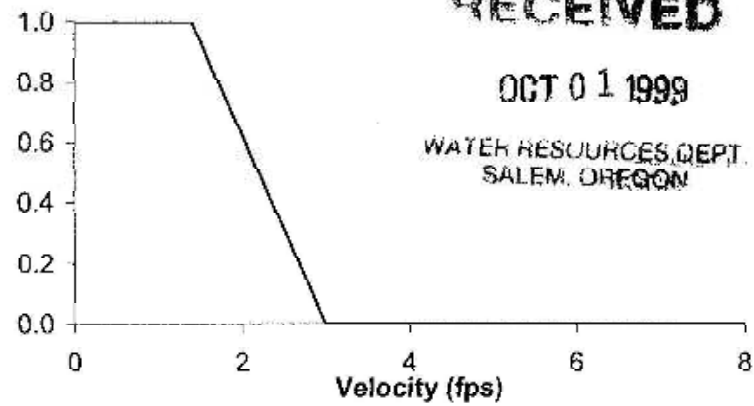
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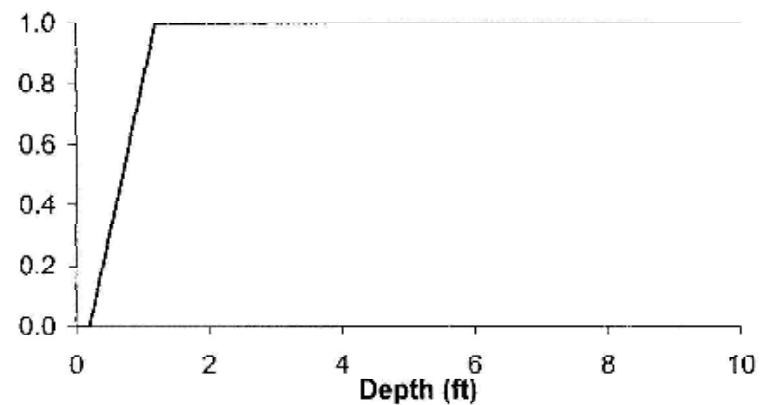
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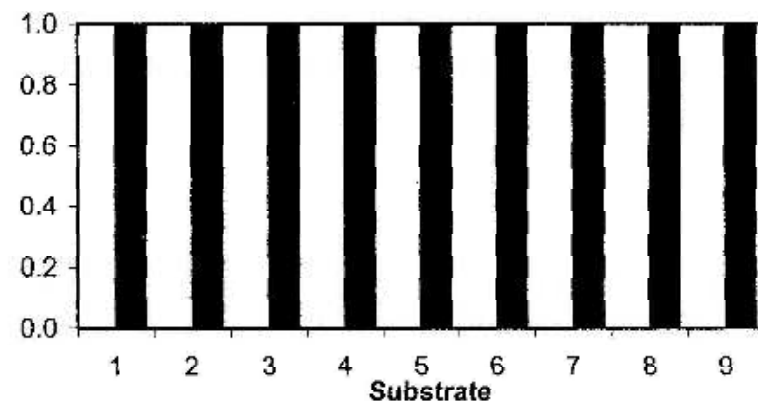


Fig. 1: Species: Rainbow Trout, (Redband)

Lifestage: juvenile

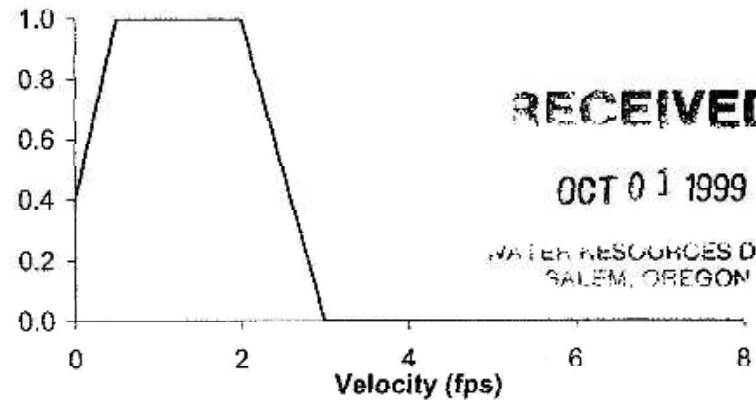
Location: Klamath Basin

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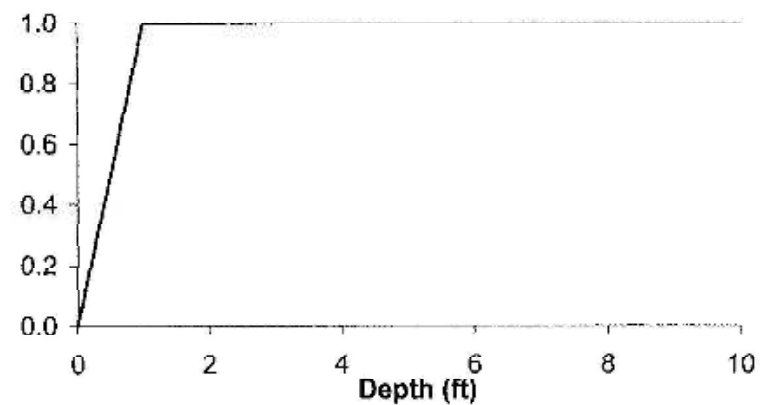
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ORIGINAL
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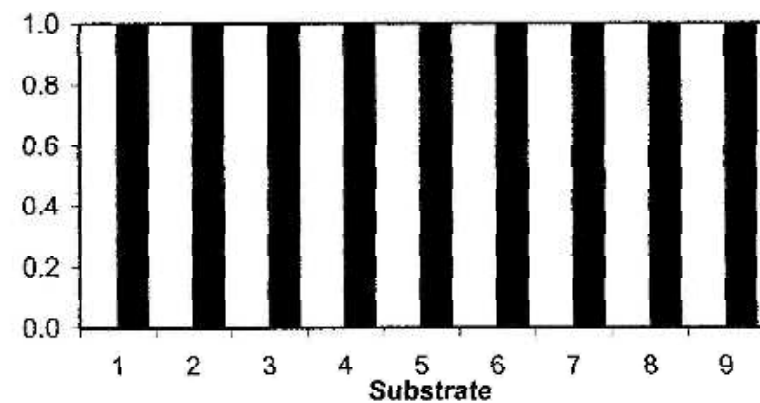


Fig. 2: Species: Rainbow Trout, (Redband)

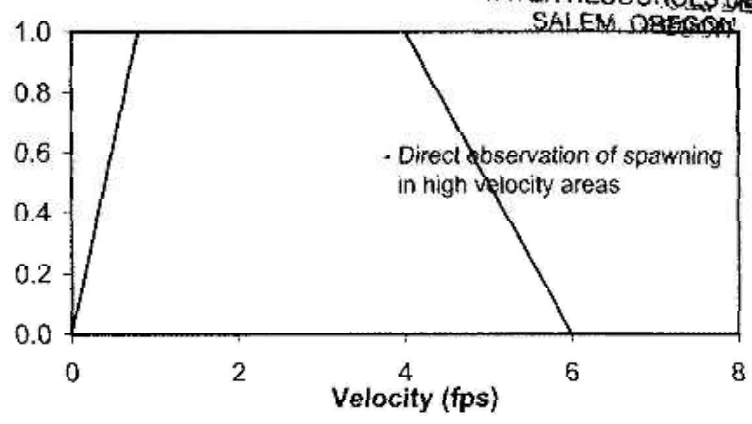
Lifestage: adult

Location: Klamath Basin

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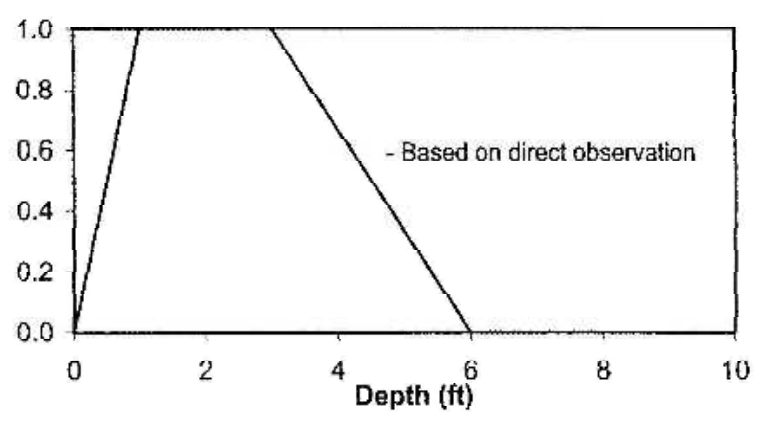
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ORIGINAL
x y

FINAL	
x	y
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3.00	1.00
6.00	0.00
10.00	0.00



ORIGINAL
x y

FINAL	
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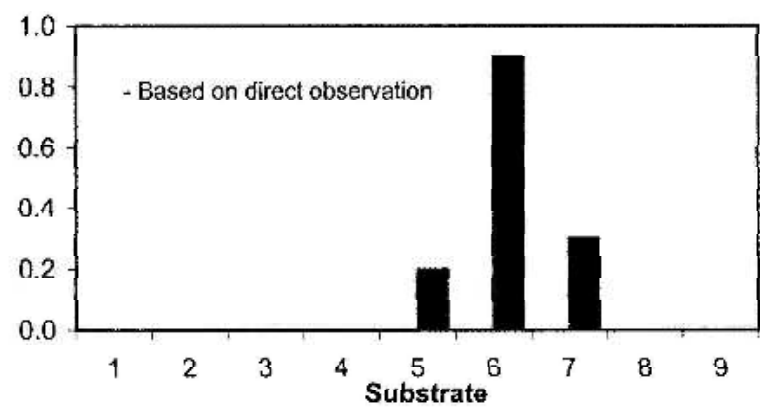
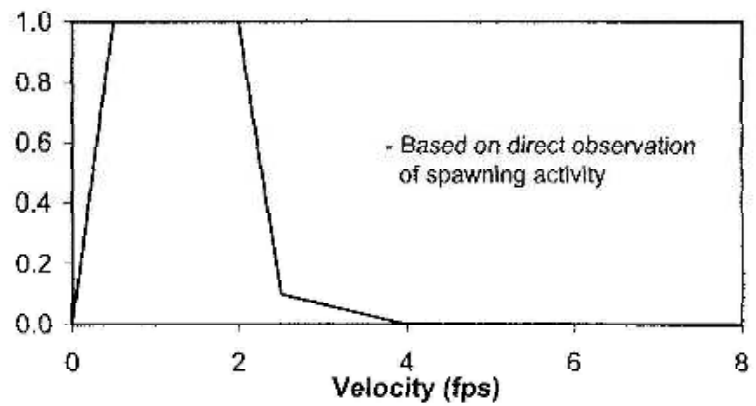


Figure 3: Species: Lost River Sucker Lifestage: Spawning
Source: Buettner & Scopetone (1990)
Curves: Utilization; Cat. II, modified. Location: Klamath Basin

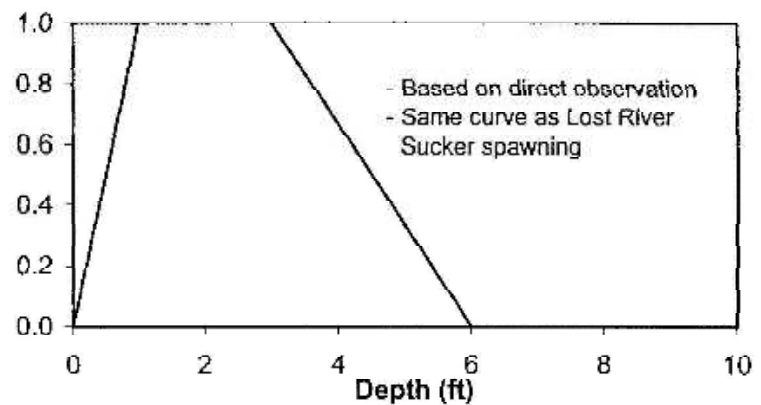
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4.00 0.00
8.00 0.00



ORIGINAL
x y

FINAL
x y
0.00 0.00
1.00 1.00
3.00 1.00
6.00 0.00
10.00 0.00



ORIGINAL
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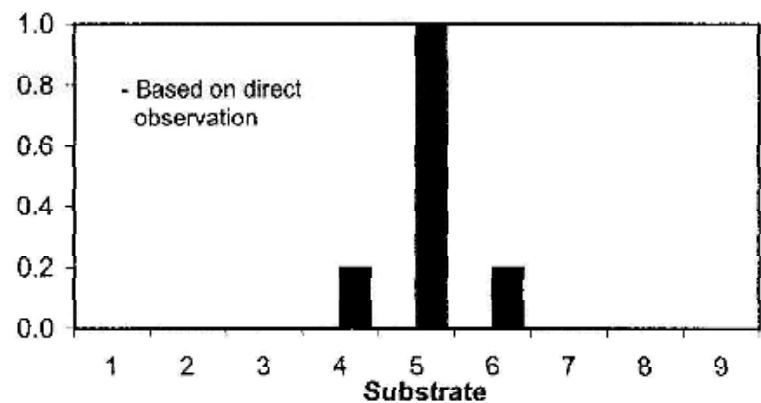


Figure 4:

Species: Shortnose Sucker
Source: Buettner & Scopetone (1990)
Curves: Utilization; Cat. II, modified.

Lifestage: Spawning

Location: Klamath Basin

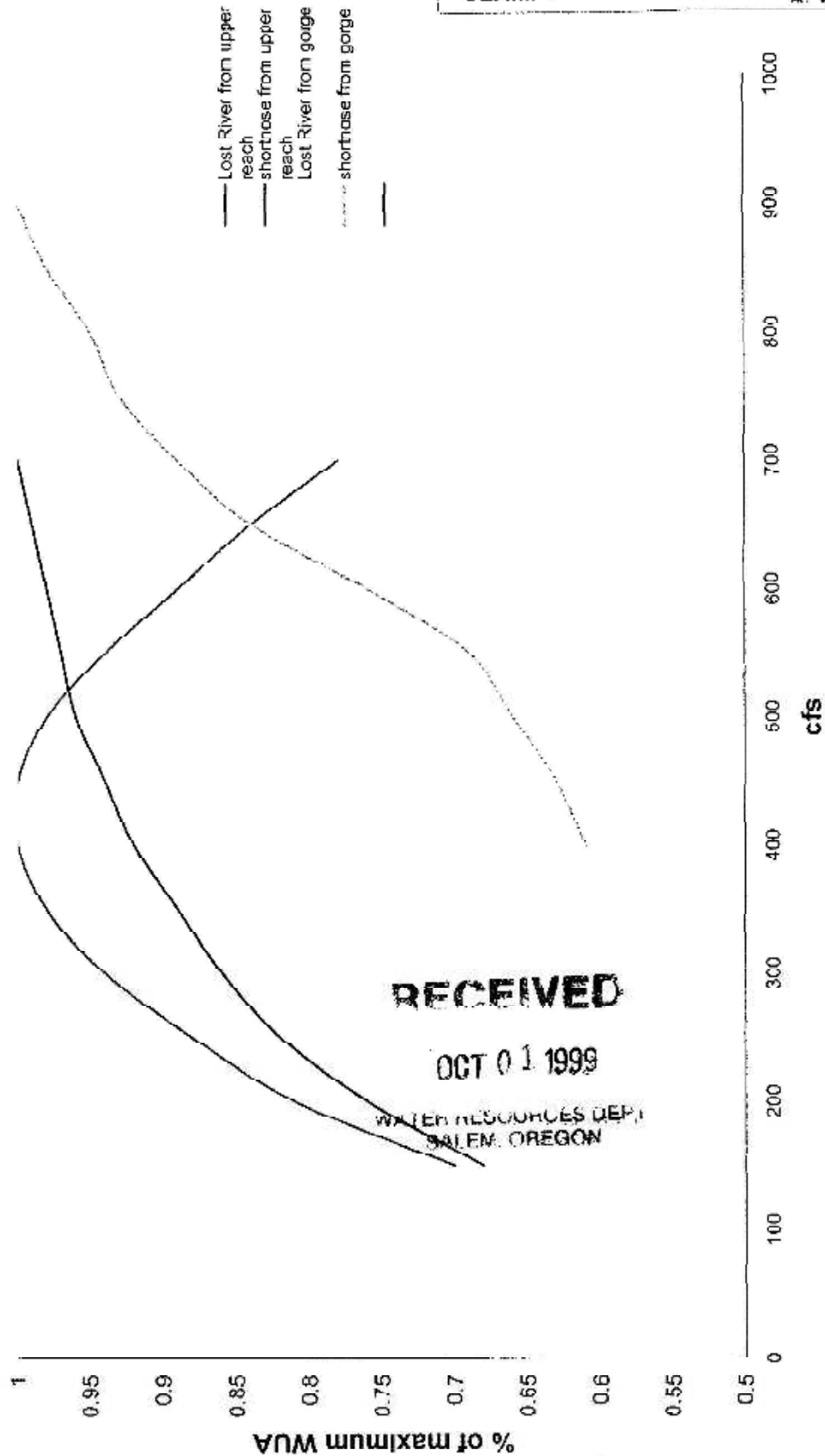
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Fig. 5: Wetted Usable Area for Spawning. Lost River and Shortnose Suckers from Upper Klamath River, OR. Recommended Flow= 625 cfs.



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Fig. 6: Wetted Usable Area for Rainbow Trout from Upper Klamath River, OR. Recommended Flow= 525cfs

