

**No. 2018-1323**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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LONNY E. BALEY, et al and JOHN ANDERSON FARMS, INC., et al  
Plaintiffs-Appellants,

v.

UNITED STATES and PACIFIC COAST FEDERATION OF FISHERMAN'S  
ASSOCIATION,

Defendants-Appellees.

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On Appeal from the United States Court of Federal Claims  
Hon. Marian Blank Horn

Case Nos. 1:01-cv-00591 MBH; 1:07-cv-00194-MBH; 1:07-cv-19401-MBH;  
1:07-cv-19405-MBH; 1:07-cv-19410-MBH; 1:07-cv-19402-MBH;  
1:07-cv-19403-MBH; 1:07-cv-19404-MBH; 1:07-cv-19406-MBH;  
1:07-cv-19407-MBH; 1:07-cv-19408-MBH; 1:07-cv-19409-MBH;  
1:07-cv-19411-MBH; 1:07-cv-19412-MBH; 1:07-cv-19413-MBH;  
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1:07-cv-19420-MBH;

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**Amicus Curiae Brief of the State of Oregon  
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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

**Lonny E. Baley, et al v. United States, et al**

Case No. 2018--1323

**CERTIFICATE OF INTEREST**

Counsel for the:

(petitioner)  (appellant)  (respondent)  (appellee)  (amicus)  (name of party)

**State of Oregon**

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
State of Oregon	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

FORM 9. Certificate of Interest

Form 9  
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

6/29/2018

Date

/s/ Denise G. Fjordbeck

Signature of counsel

Denise G. Fjordbeck

Printed name of counsel

Please Note: All questions must be answered

cc: \_\_\_\_\_

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**INTEREST OF AMICUS CURIAE  
STATE OF OREGON**

The State of Oregon, by and through the Oregon Water Resources Department (OWRD), appears as amicus to explain the principles of state law that underlie this case. Oregon does so as a matter of right under Fed. R. App. Pro. 29(b)(2). While Oregon takes no position on the merits of the takings claim by the plaintiff-irrigators against the United States Bureau of Reclamation, it has a strong interest in providing this court with an accurate factual and legal context insofar as Oregon water law may bear on the ultimate resolution. OWRD is charged with the administration and enforcement of state laws concerned with the water resources of Oregon.

All water within Oregon from all sources of supply belongs to the public. Or. Rev. Stat. §537.110. Subject to existing rights and rights already vested, all waters within the state may be appropriated for beneficial use. Or. Rev. Stat. §537.120. Since the adoption of the comprehensive state water code in 1909, the Water Resources Department and its predecessor agency have been responsible for processing applications for the appropriation of water. Of more relevance here, the Water Resources Department is also responsible for adjudicating vested rights that pre-existed the 1909 code and federal reserved rights, including adjudicating rights to the waters of the Klamath Basin within the boundaries of the State of Oregon. These vested rights include federal

reserved rights of the Klamath Tribes, because the former Klamath reservation is in Oregon, as well as the vested rights held by the United States Bureau of Reclamation and by the Bureau for the benefit of the plaintiffs and others.

Oregon is concerned that the Court of Claims may be misinterpreted in a way that implicates Oregon water law. It is important that this court fully and correctly understand the interplay between Oregon water law and the property rights asserted by plaintiffs in this case. In addition, Oregon has a strong interest in ensuring that the Klamath Basin Adjudication comprehensively, finally, and completely resolves the relative rights of tribes, federal entities, and private property owners with respect to water and points of diversion within the boundaries of the State of Oregon. Oregon therefore submits this brief to protect that interest and to provide assistance to this court.

### **INTRODUCTION TO ARGUMENT**

While Oregon takes no position on the merits of plaintiffs-appellants' claims that their property rights were taken by the actions of the Bureau of Reclamation in 2001, the opinion of the Court of Claims contains a number of factual and legal errors in the interpretation of Oregon law. As is further explained in the briefing below, those errors include the following:

- The Court of Claims assumed that the Klamath Tribes had a legally established federal reserved right in Upper Klamath Lake. As of 2001,

the vested and undetermined hunting and fishing rights of the Klamath Tribes included the waters of the Williamson and Sprague Rivers in the Upper Klamath Basin, but had not yet been legally recognized as to Upper Klamath Lake. The lake formed a part of the western boundary of the original reservation.

- The court assumed that the Yurok and Hoopa tribes have a federal reserved right in the waters of Upper Klamath Lake. Although the Bureau of Indian Affairs (BIA) and the Klamath Tribes asserted claims of the Klamath Tribes in the Klamath adjudication, the BIA did not assert any claims on behalf of the Hoopa and Yurok tribes, nor did those tribes assert their own claims. The time to make such claims has long since passed.
- The court assumed that the federal reserved rights of federal agencies and of the tribes could be enforced against junior appropriators. In 2001, at the time that the claims in this case arose, the rights of the Bureau of Reclamation were vested rights, but were not “rights of record” because they had not yet been quantified. As a result, the Bureau could not make a “call” for water to the Oregon Water Resources Department and its watermasters to satisfy its rights and thereby prevent the use of more junior water rights. The same is true of the Bureau of Indian Affairs and

the Klamath Tribes; those instream rights were also vested yet undetermined, and the Tribes could not “call” for water.

- The court referred to the rights of the plaintiff-irrigators as “water rights.” At the relevant time, the irrigator-plaintiffs had, at a minimum, some equitable or beneficial interest in the rights vested in the Bureau of Reclamation. However, their rights were also vested but undetermined, and it is inaccurate to refer to them as “water rights.”

As a result of these errors, the ultimate conclusion reached by the Court of Claims, that the Klamath, Hoopa, and Yurok Tribes all had federal reserved water rights in the Upper Klamath Lake in 2001 that were legally enforceable under state law, is flawed.

## **ARGUMENT**

### **A. The Geographical Setting**

The water system known as to Klamath Basin straddles the Oregon-California border. At the northern end of the basin in Oregon, the Wood, Williamson, and Sprague Rivers flow into Upper Klamath Lake. Neuman, *Oregon Water Law: A Comprehensive Treatise on the Law of Water and Water Rights in Oregon* at 142 (Portland 2011). The Sprague and Williamson Rivers are largely within the boundaries of the former Klamath Indian Reservation. *Id.*

Upper Klamath Lake is the largest lake by area in Oregon, approximately 25 miles long from north to south. Johnson, *Atlas of Oregon Lakes* (Corvallis, OR 1985). The lake terminates at the Link River in the city of Klamath Falls; the Link River Dam, owned by the Bureau of Reclamation, controls lake levels and downstream flow. *Neuman, supra*. The diversion canals for the Klamath Project take water from above and below the dam. *See* Map of Klamath Project, Appendix 1. Upper Klamath Lake is the principal source of water for the Klamath Project irrigators, the plaintiffs-appellants in this case.<sup>1</sup>

Below the Link River Dam, the water flows south into Lake Ewauna and from there into the Klamath River itself. In Oregon, the flow of the river is further regulated by the Keno Dam, six miles downstream from Lake Ewauna, and the John C. Boyle Dam, before the river flows into northern California. *Neuman, supra*, at 142-143.

## **B. Background Principles of Oregon Water Law**

Like most of the western states, Oregon is a prior appropriation state: “First in time, first in right.” In broad terms, this means that senior appropriators – those with earlier priority dates – are entitled to have their rights

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[https://web.archive.org/web/20110808091759/http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Klamath%20Project](https://web.archive.org/web/20110808091759/http://www.usbr.gov/projects/Project.jsp?proj_Name=Klamath%20Project) (last visited June 20, 2018).

satisfied to the full extent of available water, even if that means that those with later priority dates receive little or no water. A water right does not guarantee that water will be available at the place where that right can be lawfully exercised.

Water in Oregon can be diverted only for beneficial use without waste. Or. Rev. Stat. §540.610(1). The definition of beneficial use is broad, and can include in-stream uses as well as more traditional consumptive uses such as irrigation. Or. Rev. Stat. §537.334(1). As to consumptive uses, a water right is appurtenant to the land described in the permit, water right certificate, or decree. Or. Rev. Stat. §540.510(1). In other words, a water right is not transferable separate from the land on which it was applied and proved up. A water right may only be exercised at a specific point of diversion from a water body, canal, or other works. And finally, a water right may be forfeited or cancelled if it is not used for a period of years, most often five years. Or. Rev. Stat. §540.610; Or. Rev. Stat. §540.621; Or. Rev. Stat. §540.631

There are two broad categories of water rights under Oregon law: vested rights created by the actual application of water to beneficial use prior to the effective date of the Oregon Water Code on February 24, 1909, *see* Or. Rev. Stat. §539.010; and water rights recognized under the permit system maintained by the Water Resources Department and its predecessor agency under the 1909

code. *See generally* Or. Rev. Stat. Chapter 537. The priority date under the permit system is generally the date of the application. Each permit will specify the point of diversion, the place from which water can be taken, and a place of use, the specific property to which the water right will be appurtenant. As is further explained below, the vested rights at issue in this case are pre-1909 rights held in the name of the United States Bureau of Reclamation.

Although no comprehensive water code existed before 1909, the courts could and did decide disputes among water users and enter decrees establishing relative priority dates. Or. Rev. Stat. §539.010(3) preserves the finality of such decrees. As to works that were under construction in 1909, the right to take and use water for a beneficial use is preserved provided that the works were completed and the water applied to beneficial use within a reasonable time, as established by the director of the Water Resources Department. And as to construction that was begun and completed prior to 1909, and the water put to beneficial use, the rights are subject to adjudication to establish relative rights and priorities. Or. Rev. Stat. §539.010(4).

The last subcategory of water rights, those subject to adjudication, are composed of federal reserved water rights, including the rights of Indian tribes; rights held by the Bureau of Reclamation in the 1905 Klamath irrigation

project; and the rights of private parties or companies that completed their works and put water to beneficial use before 1909.

**C. Adjudication of Pre-1909 Rights**

The adjudication process is spelled out in Or. Rev. Stat. Chapter 539. The process, at least in its initial stages, is controlled by the Water Resources Department; the administrative process culminates in the presentation of findings of fact and an order of determination (FFOD) to the circuit court (the trial level court) in the county where the stream or river is located.

An adjudication may start with a petition from one or more surface water appropriators on a stream or upon motion of the director of the Water Resources Department. Or. Rev. Stat. §539.021(1). The director gives notice by publication of the intent to begin an investigation of the relative rights of various claimants to the waters of the stream within the boundaries of the State of Oregon. Or. Rev. Stat. §539.030. The director then gives notice of the necessity of any person, corporation, or government agency claiming an undetermined vested right, federal reserved right, or right derived from such right to file a registration statement. Or. Rev. Stat. §539.230. The Water Resources Department has specific authority to adjudicate federal reserved rights for water necessary to fulfill the federal purpose of the reservation. Or.



Rev. Stat. §539.010(7).<sup>2</sup> Registration statements for all undetermined rights to surface water were due not later than December 31, 1992. Or. Rev. Stat. §539.240(1). Failure to file a registration statement creates a rebuttable presumption that the water right has been abandoned. Or. Rev. Stat. §539.240(3).

After an examination of the discharge and capacity of the stream and of the works and diversions in operation, Or. Rev. Stat. §539.120, the director gives notice to all registrants and by publication of the time and place where testimony will begin to be taken as to the rights of the various claimant. Or. Rev. Stat. §539.040. After testimony is completed, notice is again given to the claimants and to anyone who has indicated a wish to contest the claims of others that evidence is available for inspection, Or. Rev. Stat. §539.090. Statements of contest are then filed, Or. Rev. Stat. §539.100, and hearings scheduled on the various contests. Or. Rev. Stat. §539.110.

The culmination of this process is the entry of an FFOD by the director, which is then filed with the court along with all of the evidence gathered in the adjudication process. Or. Rev. Stat. §539.130. The court proceedings will

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<sup>2</sup> The McCarran Amendment, 43 U.S.C. §666, waives the sovereign immunity of the United States to the extent necessary to perform a comprehensive stream adjudication.

eventually result in a water rights decree that is conclusive as to all prior rights and the rights of all existing claimants. Or. Rev. Stat. §539.200.

While the circuit court proceedings are pending, the division of water from the stream is made in accordance with the FFOD. Or. Rev. Stat. §539.170. It is only at that point that the vested undetermined rights, including federal reserved water rights, become subject to regulation. As will be further explained below, at the time of the events that precipitated this litigation, the undetermined vested rights of the Klamath Tribes and of the Bureau of Reclamation — and for that matter, of the plaintiffs — were not rights subject to enforcement and regulation by the Water Resources Department. As a result, despite their priority dates of time immemorial and 1905, respectively, they could not call upon the watermaster to regulate the use of water in their favor, nor could they demand that the points of diversion of junior users be shut off by WRD.

#### **D. The Bureau of Reclamation and the Klamath Project**

In 1902, Congress adopted the Reclamation Act, the purpose of which was to facilitate the development of irrigation projects in arid regions, thereby promoting settlement. The Reclamation Act affirmed many of the basic tenets of Oregon water law: “The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial

use shall be the basis, the measure, and the limit of the right.” 43 U.S.C. §372.

Water rights acquired by the Bureau of Reclamation were subject to state law.

43 U.S.C. §383.<sup>3</sup> Thus, although the Bureau built and controlled the works, and the land to be irrigated was generally acquired under the provisions of the federal Homestead Act, any rights acquired as the result of the application of water to beneficial use were acquired under, and adjudicated by, state law.

After an investigation into the feasibility of a Bureau project for the Klamath Basin, in 1904 the Bureau stated its intention to assert water rights on the Link River and Upper Klamath Lake. The lake was to be used as a reservoir for storage of water for the project. Skene, *Klamath Project* at page 6 (Bureau of Reclamation 1994), found at <https://www.usbr.gov/projects/pdf.php?id=129> (last visited June 28, 2018).

In 1905, the Secretary of the Interior authorized the Klamath Project as one of the nation’s first large reclamation projects. *Id.* The Oregon legislature also authorized the project in 1905. 1905 Oregon Laws, Ch 228, §2.

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<sup>3</sup> “Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.”

### **E. The Klamath Adjudication Begins**

The process of adjudicating the relative rights to the waters of the Klamath Basin began in 1975. Prior to that time, there was little conflict among surface water users. On December 23, 1975, the department gave notice that persons desiring to make claims in the adjudication were required to file claims. On March 1, 1977, a further notice was given to those who claimed rights to the beneficial use of waters within the boundary of the former Klamath Indian Reservation, requiring that they also file notice of intent to make a claim.

The adjudication was unfortunately delayed by successive lawsuits. The first of these, *United States v. Adair*, commenced in 1975. Federal agencies brought that action to determine “the rights of parties with interests in former Reservation lands to use the waters of the Williamson river system.”<sup>4</sup> The Tribes intervened as a plaintiff. The federal district court held that the Klamath

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<sup>4</sup> In 1864, the Klamath Tribes entered into a treaty which reserved to them “the exclusive right of taking fish in the streams and lakes [of the reservation]. Quoted in *Adair*, 479 F. Supp, 336, 339 (D. Or. 1977). In 1954, Congress terminated the reservation. 25 U.S.C. §564-564w. Termination of the reservation did not terminate hunting and fishing rights. *Kimball v. Callahan (Kimball I)*, 493 F.2d 564, 566 (9th Cir 1974), *cert denied*, 419 US 1019 (1974). The original reservation lands included the Williamson River and abutted, but did not include, Upper Klamath Lake. The treaty is reproduced at [https://www.fws.gov/pacific/ea/tribal/treaties/Klamath\\_1864.pdf](https://www.fws.gov/pacific/ea/tribal/treaties/Klamath_1864.pdf) (last visited June 15, 2018). The Klamath Tribes were restored in 1984. 25 U.S.C. §566-566h.

Tribes retained rights to the waters of the Williamson River on the former reservation:

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, s 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 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.

*United States v. Adair*, 479 F. Supp. 336, 335-346 (D. Or. 1977). The priority date for the tribes' hunting and fishing rights was declared to be time immemorial; the priority date for agricultural uses was 1864, the date of the treaty creating the reservation. 479 F. Supp. at 350.

The Ninth Circuit modified the holding of the district court, but affirmed the central premise. The tribe held a reserved right for water for hunting and fishing purposes, consisting of "the right to prevent other appropriators from depleting the stream's waters below a protected level *in any area where the non-consumptive right applies.*" (Emphasis added.) *U.S. v. Adair*, 723 F.2d 1394, 1411 (9<sup>th</sup> Cir. 1983), *cert. den.* 467 U.S. 1252 (1984). The reserved water rights thus encompassed the waters of the Williamson River, and other areas

upstream from Upper Klamath Lake, but did not encompass the lake itself.<sup>5</sup>

The court did not quantify the amount of water necessary to satisfy the water right, except to note that it “secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.” *Id.* at 1415, quoting *Washington v. Fishing Vessel Ass’n*, 443 U.S. 658, 686 (1979). Instead, the court left the task of quantification for the Oregon adjudication.

The *Adair* court assumed, but did not decide, that the Klamath basin adjudication of waters within the State of Oregon qualified as a comprehensive stream adjudication within the meaning of the McCarran Act. 723 F.2d at 1405, fn 9.

In 1990, Oregon reissued notices of its intention to adjudicate water rights in the basin, and the United States, in its capacity as an owner of property in the basin and as trustee for the Klamath Tribes, filed suit, asserting that it had not waived its sovereign immunity, notwithstanding the text of the McCarran amendment, and that the tribe and federal agencies were not required to

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<sup>5</sup> That conclusion is consistent with the holding of the United States Supreme Court in *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). “More importantly, the language of the 1864 Treaty plainly describes rights intended to be exercised within the limits of the reservation. This point can be best understood by consideration of the entire portion of the Treaty in which the right of taking fish is described.”

participate in the Klamath adjudication.<sup>6</sup> Once again, the Klamath Tribes intervened as plaintiffs.

Among other claims, the government asserted that the Klamath adjudication was not a comprehensive general adjudication of the type included within the waiver of immunity under the McCarran amendment. The State of Oregon asserted that the Tribes were required to file claims to the rights that had been reserved to it by treaty, and that the federal agencies were likewise required to file claims for federal reserved rights held by various agencies.

The district court agreed with Oregon that the McCarran amendment applied and that the Klamath Tribes and federal agencies were required to participate in the Oregon's Klamath Basin Adjudication or waive their federal

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<sup>6</sup> The McCarran Act provides:

Consent is 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, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. 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. 43 U.S.C. §66.

reserved water rights. *United States v. Oregon Water Resources Dept.*, 774 F. Supp. 1568 (D. Or. 1991). The Ninth Circuit affirmed that holding. *U.S. v. Oregon*, 44 F.3d 758 (9<sup>th</sup> Cir. 1994), *cert den* 516 U.S. 943 (1995). “[W]e 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.”<sup>7</sup> 44 F.3d at 770.

As a result of the McCarran Act litigation, federal agencies were required to file claims no later than April 30, 1997. Many did, including the Bureau of Indian Affairs, the U.S. Forest Service, Bureau of Land Management, National Park Service, and the Bureau of Reclamation.<sup>8</sup>

The claim filed by the Bureau of Indian Affairs was made on behalf of the Klamath Tribes.

[https://www.oregon.gov/owrd/PUBS/docs/reports/kba\\_v.pdf](https://www.oregon.gov/owrd/PUBS/docs/reports/kba_v.pdf) The Klamath Tribes filed their own claim, incorporating by reference the claim filed by the BIA. [https://www.oregon.gov/owrd/PUBS/docs/reports/kba\\_vi.pdf](https://www.oregon.gov/owrd/PUBS/docs/reports/kba_vi.pdf). No claims

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<sup>7</sup> For the same reason, the Bureau of Indian Affairs was required to assert any claims that the Hoopa or Yurok Tribes have to Klamath Basin waters within Oregon.

<sup>8</sup> Summary and Preliminary Evaluation of Claims, October 4, 1999, at [https://www.oregon.gov/owrd/pages/adj/klamath\\_claim\\_summary.aspx](https://www.oregon.gov/owrd/pages/adj/klamath_claim_summary.aspx). (last visited June 15, 2018).



were made by the BIA on behalf of the Hoopa or Yurok tribes, nor did either tribe file their own claim in the adjudication. Any such tribal claims of federal reserved rights to water in Oregon was required to be raised in the adjudication, as required by *U.S. v. Oregon, supra*.

Among the Klamath Tribes' claims was a claim to a lake level in Upper Klamath Lake sufficient to support fish and wildlife habitat. That claim was approved by the adjudicator on October 4, 1999, for somewhat lower monthly lake levels consistent with those that existed in the 1978-1979 water year, the year of the *Adair* decision. Summary – Preliminary Evaluation of Claims, Claim No. 662.<sup>9</sup> In general, tribal claims were deemed proper as to water within the boundaries or boundary waters of the former reservation within Oregon.

In all, 734 claims were made in the adjudication to the waters of the Klamath Basin in Oregon. Exceptions were filed to many of these claims, and hundreds of contested case hearings were held to resolve those exceptions. The process culminated in the filing of Findings of Fact and Order of Determination

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<sup>9</sup> The Summary may be viewed at [https://www.oregon.gov/owrd/PUBS/docs/reports/kba\\_v.pdf](https://www.oregon.gov/owrd/PUBS/docs/reports/kba_v.pdf) (last visited June 28, 2018).

filed in the Klamath County Circuit in 2013, many years after the events that are critical to the present proceeding.

The Klamath Basin Adjudication is still pending. The circuit court judicial review proceedings will result in a water rights decree. Or. Rev. Stat. §539.160. The decree is appealable to the Oregon Court of Appeals and review may be sought in the Oregon Supreme Court. Or. Rev. Stat. §539.150(4).

**F. Plaintiffs' Property Rights**

At the time that the facts underlying plaintiffs' cause of action arose, both the water rights of the Klamath Tribes and of the Bureau of Reclamation were vested, undetermined claims. As such, they were not "existing rights of record" in favor of which the watermaster could regulate off junior users, in spite of their priority dates, nor were they included in an order of determination in a adjudication. There was no statutory authority allowing the Water Resources Department to regulate in their favor. *See* Or. Rev. Stat. §539.170 and Or. Rev. Stat. §540.045.

The irrigation claims made by the Bureau of Reclamation were by far the largest claims made in the adjudication. Consistent with the 1905 Notice of Intention to Utilize all Waters of the Klamath Basin, the claims encompassed the waters of all of the lakes and streams in the basin within Oregon's boundaries. In order to prove a pre-1909 claim, the bureau was required to

prove use of water or construction of works for the application of water began prior to February 24, 1909; and completion of the works within a reasonable time after commencement of use or construction. The claims of the plaintiff-irrigators were derivative of those of the bureau; it therefore became essential to the outcome of the taking claim to determine the nature of the water or property rights granted to them under state law. To make that determination, this court turned to the Oregon Supreme Court, certifying three questions:

“1. Assuming that Klamath Basin water for the Klamath Reclamation Project ‘may be deemed to have been appropriated by the United States’ pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?”

“2. In light of the statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable interest in the water right acquired by the United States?”

“3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of the Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?”

*Klamath Irrigation Dist. v. United States (Klamath III)*, 532 F.3d 1376, 1377-1378 (Fed. Cir. 2008). The Oregon Supreme Court agreed to accept the

certified questions. *Klamath Irr. Dist. v. U.S.*, 345 Or. 638, 650, 207 P.3d 159, 165 (2009) (order accepting certified questions).

After full briefing, the Oregon Supreme Court answered the certified questions. *Klamath Irr. Dist. v. U.S.*, 348 Or. 15, 227 P.3d 1145 (2010). Noting that the adjudication would determine the legal title to the vested and undetermined rights that they exercised, plaintiffs asserted that they held equitable or beneficial property interests in those rights.<sup>10</sup> The Supreme Court concluded that the 1905 Oregon statute, which authorized the Bureau to appropriate all waters not yet appropriated in the Klamath Basin, did not preclude the plaintiffs from acquiring a beneficial or equitable interest in the waters. 227 P.3d at 1160. The court then held that putting water to beneficial use, in and of itself, does not establish an equitable property interest in a water right. Rather, a court must look to the nature of the relationship between the legal title holder and the purported beneficiary, including any contractual agreements between them. The Bureau holds the water rights for the use and benefit of the people who put the water to beneficial use, in part because the use

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<sup>10</sup> Although the Oregon Supreme Court, and the parties to the litigation, assumed that legal title was held by the Bureau of Reclamation, the adjudicator in the Klamath Basin Adjudication found that some Klamath Project irrigators also hold legal title to water rights. That determination was not effective until the FFOD was issued in 2013.

of the water was appurtenant to the land on which it was used. However, the Bureau and the irrigators could enter into contracts that, within statutory and constitutional limits, defined their relationship. Because there were several forms of contract between the Bureau and the plaintiffs, some of which were not before the court, the Oregon Supreme Court declined to definitively opine as to the nature of the property interests held by plaintiffs. 227 P.3d at 1165-1166.

The state court did answer the final question posed by this court: those people who hold beneficial or equitable rights to water in the Klamath Basin would not have their rights determined in the Klamath adjudication. Rather, the Bureau of Reclamation, as the legal title holder, was the proper claimant and would be the decreed holder of a perfected water right when the adjudication is completed.<sup>11</sup> 348 Or at 1168-1169.

Consistently with the decision of the Oregon Supreme Court, this court then remanded the proceeding back to the Court of Claims to apply the test articulated by the state court and determine, on a case-by-case basis, whether the relationship between the parties was such that a plaintiff had an equitable

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<sup>11</sup> As previously noted, the Bureau was not the sole holder of legal title.

and thus compensable property interest in the water rights legally held by the Bureau.<sup>12</sup> *Klamath Irr. Dist. v. U.S.*, 635 F.3d505 (2011).

### **G. The Court of Claims Ruling**

Following several more years of litigation, the parties filed cross-motions for summary judgment on the taking claim. As directed by this court, the Court of Claims first examined the various types of contracts held by the irrigators in the Klamath Project to determine the nature and existence of property rights. The court concluded that some of the Project irrigators did have cognizable property interests for purposes of the takings clause. *Baley v. United States*, 134 Fed. Cl. 619, 659 (2017). The Bureau and the Klamath Tribes argued, however, that the plaintiffs' water rights to the live flow of the river were subordinate to those of the Klamath, Yurok, and Hoopa tribes. The court erred in accepting that premise.

#### **1. The Hoopa and Yurok Claims Have Been Waived**

The Yurok and Hoopa tribes have no rights to the waters of Upper Klamath Lake. They made no claims in the Klamath adjudication, and no claims were made on their behalf by the Bureau of Indian Affairs. To the

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<sup>12</sup> Breach of contract claims not relevant here were also at play. In 2014, plaintiffs dismissed those claims without prejudice. *Klamath Irrigation District v. United States*, 116 Fed. Cl. 117 (2014).

extent that the Court of Claims' opinion implies otherwise, the opinion is in error.

Oregon does not dispute that the federal government may have treaty obligations or obligations arising out of the Endangered Species Act or other federal laws in favor of the tribes on the lower river, but those obligations are not based on water rights under Oregon law. *See San Luis & Delta-Mendota Water Authority v. Haugrad*, 848 F.3d 1216 (9<sup>th</sup> Cir. 1981). If any federal reserved rights existed, the failure to file any claims in the adjudication extinguished them. The law of prior appropriation has no application to the Hoopa or Yurok tribes, and the statement that those tribes have federal reserved rights in the Upper Klamath Basin is simply wrong. The Klamath adjudication is a comprehensive general stream adjudication in which the federal government, including the Bureau of Indian Affairs, was obliged to assert its claims, including its claims it holds as trustee for tribes, or see those claims lost.<sup>13</sup>

The Court of Claims appeared to acknowledge that any vested undetermined federal reserved claims that the Hoopa or Yurok tribes may have

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<sup>13</sup> Oregon does not dispute that the tribes on the lower Klamath River have treaty rights to take fish. The origin of those rights, however, has no basis in any water rights established under Oregon law.

had under Oregon water law have been lost. However, the court then asserted that those claims nonetheless survive as federal reserved rights. That holding is contrary to the holding of the Ninth Circuit in *United States v. Oregon*, 44 F.3d 758 (9<sup>th</sup> Cir. 1994), *cert. den.*, 516 U.S. 943 (1995), requiring the United States to participate in the Klamath adjudication to the extent that federal agencies and tribes asserted water rights in Oregon. The McCarran amendment was designed to allow the determination of the scope and extent of federal reserved rights in a comprehensive general stream adjudication. The entire point of a comprehensive adjudication is to confirm and quantify the rights of *all* parties having a claim to the waters of the stream being adjudicated, in this case, the waters of the Klamath Basin located in Oregon. In the western states, where the federal government is often by far the largest landowner, it would serve no purpose to attempt an adjudication if the result was not a final and comprehensive determination of federal reserved rights as well as the rights of individual irrigators and of irrigation districts.<sup>14</sup>

Contrary to the Court of Claims' opinion, the Supreme Court has recognized that federal reserved rights are among the kinds of federal water

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<sup>14</sup> According to the New York Times, the federal government owns 47% of all land in the West, including the majority of land in Oregon, Utah, and Nevada. Bui and Sanger-Katz, *Why the Government Owns So Much Land in the West*, January 5, 2016.



rights that may be adjudicated in a comprehensive state proceeding. *United States v. District Court In and For Eagle County, Colo.*, 401 U.S. 520 (1971). There, the court held that there are no exceptions to the types of federal rights that may be adjudicated, including riparian rights, rights acquired by appropriation, and reserved rights. *Id.* at 524.

*Cappaert v. United States*, 426 U.S. 128 (1976), cited by the Court of Claims, is not to the contrary. There, the National Park Service sought an injunction against a private appropriator who had received state permits to pump groundwater. The federal rights were unquantified and undetermined under state law. The Supreme Court held that the government was not bound by state water law when it reserves water for federal purposes; it need not file an application or take action required of other appropriators when it reserves unappropriated water against rights that might be acquired by future appropriators. Further, the government may file suit in federal court to protect its reserved water rights; in other words, the government is not *limited to* a state comprehensive stream adjudication as a way to protect and quantify its rights. *Cappaert* says nothing, however, about cases such as the present case, where a comprehensive stream adjudication, in which federal courts have held that the United States must participate, is actually taking place.

In rare circumstances, the United States or a tribe can request that the federal courts exercise their concurrent jurisdiction to ensure that a state adjudication process preserves and protects federal reserved rights. *See United States v. Braren*, 338 F.3d 971 (9<sup>th</sup> Cir. 2003) (holding that federal court intervention in the Klamath adjudication was premature where the state had made only a preliminary evaluation of federal reserved rights). When the adjudication is complete, the circuit court result may be appealed to the Oregon Court of Appeals, then to the Oregon Supreme Court and finally, as to federal reserved rights, to the United States Supreme Court. *District Court In and For Eagle County, Colo.*, 401 U.S. at 526.

In sum, neither the Hoopa nor the Yurok tribe have vested but undetermined federal reserved water rights in Upper Klamath Lake that are senior to the water rights in which plaintiffs have an interest.

## **2. The Klamath Tribes Claims Were Not Fully Established in 2001**

The Court of Claims also held that the Klamath Tribes had a vested right to Upper Klamath Lake waters, citing the *Adair* cases. *Adair I* and *II* established that the Klamath Tribes had a vested, undetermined right to waters of the Williamson River, upstream from Upper Klamath Lake. Those cases did not establish any federal reserved right of the tribe to Upper Klamath Lake. The government and the tribe made claims in the adjudication on locations

other than the Williamson; however, as of 2001, no such claims had been determined.<sup>15</sup> Claim 622 asserted a federal reserved right to maintain the level of the water in Upper Klamath Lake; the preliminary evaluation of that claim approved it, albeit for a lower lake level than claimed, but that claim was contested and required a full contested case hearing before an administrative law judge.

Thus, the statement of the Court of Claims that “The Klamath Tribes hold a “non-consumptive” right in the waters of Upper Klamath Lake and its tributaries *arising under state law* entitling them to call on the state Water Resources Department to prevent other appropriators from depleting these waters below levels that would prevent them from “support[ing] game and fish adequate to the needs of Indian hunters and fishers” is not correct as of 2001 (emphasis added). The filing of the Order of Determination with the Klamath

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<sup>15</sup> In a sequel to *Adair, United States v. Braren*, 338 F.3d 971 (9<sup>th</sup> Cir. 2003), the Ninth Circuit Court of Appeals described the state of the Klamath adjudication as of May 2001. The United States filed 395 claims, including claims by the Bureau of Indian Affairs for the Klamath Tribes. The tribe also submitted five claims. In October 1999, OWRD issued a Summary and Preliminary Evaluation. The United States filed 480 contests; the tribe filed 242. Contests were also filed against the government’s claims; 134 contests were filed to the BIA claims and 36 to the tribe’s claims. In all, 5,634 contests were filed, and many proceedings on contests had been commenced. The contests filed by the BIA and the tribe had not yet commenced. Thus, although the adjudication had made “much progress,” it was far from complete. 338 F.3d at 973-974.

County Circuit Court in 2013 altered that status. The Tribes now have rights of record to Upper Klamath Lake that can be enforced by OWRD. “While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal shall be made in accordance with the order of the director.” Or. Rev. Stat. §539.170.

The ultimate conclusion of the Court of Claims, that the irrigators who had beneficial or equitable interests in the water delivered by the Bureau of Reclamation had no right to receive water in 2001 “based on the superior water rights held by the Klamath, Yurok, and Hoopa Valley Tribes,” was in error.

### **CONCLUSION**

Oregon again emphasizes that it takes no position on the merits of this long-running dispute. The United States has treaty and trust obligations to the tribes that have nothing to do with whether the tribes have water rights under Oregon law. Those obligations should form the basis for deciding whether a taking occurred in 2001. But the statements made by the Court of Claims as to water rights purportedly held by the tribes are inconsistent with the Order of Determination issued by the Oregon Water Resources Department in the Klamath Basin Adjudication. The portion of the claims court decision relating

to water rights that are the subject of the adjudication should be vacated, and this matter remanded to that court to determine appropriate issues of federal law.

Respectfully submitted,

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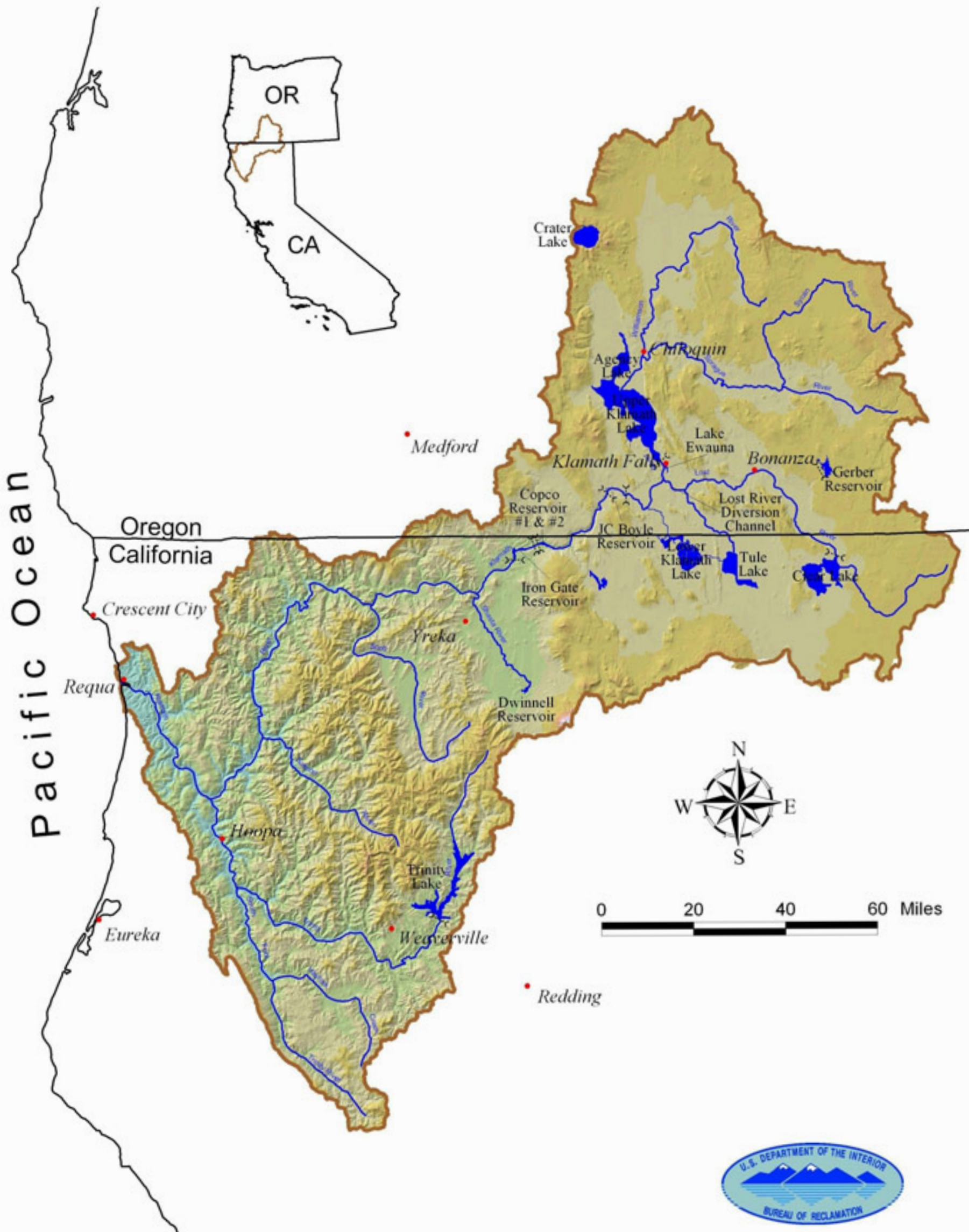
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# APPENDIX

# Klamath River Basin



## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations set forth in Federal Circuit Rule 28(d) and the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in Times New Roman 14 point, a proportionally spaced font using Microsoft Word. I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,742 words, excluding the parts of the brief exempted by Federal Rule Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b).

DATED: June 29, 2018

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 29, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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