THE ENDANGERED SPECIES ACT AND IRRIGATED AGRICULTURE IN THE KLAMATH PROJECT: A MATCH MADE IN HELL

Paul S. Simmons
Somach Simmons & Dunn, PC
Executive Director and Counsel
Klamath Water Users Association[1]

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For well over a century, it was well established that the use of water for irrigation in the West, and the relative rights to use of water, were exclusively matters of state water law. Although there were some differences in the laws of the various states, all adhered to the prior appropriation doctrine, under which beneficial use is the "basis, measure and limit" of a water right, and priority to the use of water was determined by the principle of "first in time is first in right." With very limited exception, the federal government and federal law took a back seat. Despite the large federal holdings and large federal water projects: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."[2]

That history has changed. Many irrigation water users have, often the hard way, come to understand that it is possible to have very good water rights but no water. In particular, the federal Endangered Species Act of 1973[3] (ESA) has changed everything. Among the earliest examples is a 1992 case in which the United States sued an irrigation district, seeking an injunction against the district's diversion of water because the diversion entrained an endangered species of fish and the district had not obtained permission to cause "take" via one of the avenues available under the ESA. In response to the irrigation district's contention that state water rights should prevail over the ESA, the district court found: "The [ESA] provides no exemption from compliance to persons possessing state water rights . . . [Moreover, enforcement of the [ESA] does not affect the District's water rights but only the manner in which it exercises those rights].[4]

Increasingly, the ESA has not merely affected the manner of exercise of water rights. It has precluded the exercise of rights and the use of water, to the great detriment of agricultural

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[1] Paul Simmons is employed by the law firm of Somach Simmons & Dunn, PC, and serves as Executive Director and Counsel for Klamath Water Users Association (KWUA) under contracts between those two entities.

[2] *California* v. *United States*, 438 U.S. 645, 653 (1978) (*California*). Federal reserved water rights, typically understood to have begun in 1908 with the Supreme Court's "*Winters*" decision finding water rights for uses on the Fort Belknap Indian Reservation in Montana, are, of course, a creature of federal law. *Winters v. United States*, 207 U.S. 564, 575-77 (1908). Those rights are not based on appropriation and beneficial use. The are, however, reconciled with the western appropriation doctrine in the sense that they have a priority date and are subject to the "first in time" principle of state water law.

[3] 16 U.S.C. §§ 1531-1544 (ESA).

[4] *United States v. Glenn-Colusa Irrigation District*, 788 F.Supp. 1126, 1134 (E.D. Ca. 1992).

communities. The evolution of the ESA has been fueled both by federal agency regulatory action and by the "citizen suit" provisions of the Act, which allow individuals or organizations with standing to sue federal agencies and non-federal parties alike to enforce key substantive and procedural requirement of the ESA.[5]

This paper focuses on the Klamath Basin, which has long been known for knotty legal issues and groundbreaking precedent.[6] To an even greater degree than before, the past few years have opened legal territory that has not been previously explored.

The result is a legal setting where the relationship between the ESA and water law has become even more complicated, and where legal doctrines are being applied in novel ways. In addition, the day before this conference begins, the Ninth Circuit Court of Appeals will hear oral argument in a case that has significant implications for the application of the ESA in the Klamath Project (Project) in the future. Ultimately for irrigation water users, much of the legal debate currently relates to the overlay of the ESA on pre-existing activities, economies, and communities. In other words, it is one thing for the ESA, or ESA-based constraints, to apply to any federal approvals associated with a new highway or shopping center, but it is quite another thing when the ESA is applied to shut off water to users and communities that were established long before the ESA or the listing of species as threatened or endangered. These tensions play out not only in the context of the continuing relevance of state water law, but also in the interpretation of the ESA itself. This is particularly so with issues associated with ESA "discretion" and proximate cause, discussed below.

I. Western Water Law Primer

In the arid West, water for irrigation is necessary for crop production. States own the water in their lakes and rivers and, beginning in the mid-nineteenth century, developed the appropriation doctrine under which rights to use water were created and protected. States also developed systems for the comprehensive adjudication and administration of water based on temporal priorities of rights.

A water right is a right to use water from the source from which it is diverted and applied to a beneficial use. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976) (*Colo. River*). A water right is a valuable property right. *Nevada v. United States*, 463 U.S. 110, 126 (1983) (*Nevada*).

A. The Appropriation Doctrine

In the Western states, water rights are acquired by appropriation. *See* A. Dan Tarlock et al., *Law of Water Rights and Resources* § 5.1 (2019) (Tarlock). Courts recognize rights based on when there has been a manifestation of intent to apply water to beneficial use, a diversion from the natural channel, and use of water within a reasonable time. *Colo. River*, 424 U.S. at 805. The

[5] 16 U.S.C. § 1540(g).

[6] All statements and opinions and errors are the author's alone.

beneficial use of the water defines the scope of the right. *Ibid.* Water rights are appurtenant to the irrigated lands and pass with transfer of title to the land. *Nevada*, 463 U.S. at 126.

A key element of a state water right is its priority date, which is the date of appropriation. *Colo. River*, 424 U.S. at 805. That date is important because, in times of shortage, the holder of a senior right can require curtailment of junior right holders. *Montana v. Wyoming*, 563 U.S. 368, 375-76 (2011).

B. State Adjudication and Administration

Until the early twentieth century, the relative rights of claimants to water from a river system were determined piecemeal in lawsuits in equity. *Colo. River*, 424 U.S. at 804. As demands for water grew, so did conflicts over water rights. Equity litigation joining hundreds of claimants to a river system became unwieldy, while less comprehensive adjudications were of little value. As the Supreme Court observed in *Pac. Live Stock Co. v. Lewis*, 241 U.S. 440, 449 (1916), "the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes." To address this dilemma, Western states developed statutory adjudication systems for the mass determination of the rights of all claimants in a river system. *See* Tarlock § 7.2.

Once water rights are determined, the allocation and use of water based on priority is possible.[7] Western states generally provide for administrative "watermasters" or "commissioners" to administer water rights. Tarlock § 5.34. Watermasters regulate the distribution of water among users, respond to user requests for water (water right "calls"), and divide water among diversions and from storage facilities "according to the users' relative entitlements to water." Or. Rev. Stat. § 540.045(1)(c); *see* Tarlock § 5.34.

Once a call is placed, state officials verify and administer the call and curtail junior water rights as necessary in the stream system. Administration occurs in reverse order of priority, curtailing the most junior water right first and continuing to curtail juniors in order of priority until the senior right receives its water. *See Second Interim Report of the Special Master (Liability Issues)* at 19 (*Second Interim Report*),[8] *Montana v. Wyoming*, 138 S. Ct. 758 (2018) (No. 137, Orig.) (*Montana*). Watermasters thus ensure that water is used in priority, in lawful amounts, and for lawful purposes.[9]

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[7] Beginning in the early twentieth century, Western states developed administrative requirements under which those seeking to appropriate a water right under state law must apply for a permit. Tarlock §§ 5.46-5.47. A permit may issue if there is unappropriated water available. When water is put to beneficial use, the right vests and the owner receives a certificate evidencing the right. However, water rights initiated before enactment of comprehensive water codes remained valid, as "undetermined vested rights" that are subject to determination in comprehensive state adjudications. *See* Tarlock § 7.2.

[8] http://web.stanford.edu/dept/law/mvn/pdf/No_137_Original_Report_Dec_2014.pdf.

[9] Water users in states that lack water administrators obtain compliance with adjudicated priorities, amounts, and purposes through injunctive relief. *E.g.*, Okla. Stat. tit. 82, § 105.5 (2018).

C. The Incorporation of Federal Interests into State Adjudication Systems

The incorporation of federal interests into state-based prior appropriation systems was a challenge, but state systems can accommodate those interests and federal law has deferred to state water law. "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978) (*California*).

1. Federal Reclamation Projects Made Subject to State Water Law

The Reclamation Act of 1902, 43 U.S.C. sections 372, 383 (Reclamation Act), provided for federal financing and construction of dams and canal systems for large-scale irrigation projects. The U.S. Bureau of Reclamation (Reclamation) was to contract with water users and irrigation districts for the payment of construction and operation costs with the goal of eventually turning over title to the contractors. *California*, 438 U.S. at 677.

The Reclamation Act embodies the principle of "cooperative federalism." *California*, 438 U.S. at 650. It requires the Secretary of the Interior to comply with state law regarding the control, appropriation, use, and distribution of water. 43 U.S.C. § 383. And it provides, consistent with state law, that rights to use water acquired under the Act are appurtenant to the irrigated land, and that beneficial use is the basis and measure of water rights. 43 U.S.C. § 372.

2. The McCarran Amendment: Federal Agencies and Reserved Rights Subject to State Adjudication and Administration

"Federal reserved water rights" arise under federal law. McCarran Amendment, 43 U.S.C. U.S.C. § 666. As the Supreme Court has explained, "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose," including for "Indian reservations," "by implication, it reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (*Cappaert*).

These federal reserved water rights are not determined based on state law principles but are instead based on the minimum amount of water needed for the primary purpose of the federal reservation. *Cappaert*, 426 U.S. at 145; *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (*New Mexico*). Like state law-based rights, federal reserved rights have a priority date: for such rights, the priority date is the date of the reservation of the land from the public domain. *Cappaert*, at 138.

Thus, water rights for federal reclamation projects and reservations were consistent with state priority-based systems in that they were based upon priority date, amount of water, and lawful purpose of use. Before 1952, however, there was no legal process to integrate priorities for federal projects and federal reserved rights with priorities for state-based water rights. The United States claimed sovereign immunity from participation in states' comprehensive adjudications, which significantly diminished their value. *See* *United States v. Dist. Court of Cty. of Eagle*, 401 U.S. 520, 522 (1971).

The 1952 McCarran Amendment solved that problem by waiving sovereign immunity of the United States, allowing it to be joined in comprehensive state court proceedings for the adjudication of water rights. *See* 43 U.S.C. § 666(a) (consenting to the United States being joined as a defendant "in any suit" for the "adjudication" or "administration" of "rights to the use of water of a river system or other source * * * 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" and "is a necessary party to such suit"). The McCarran Amendment deemed the United States "to have waived any right to plead that the State laws are inapplicable" in such a suit, and made it "subject to the judgments, orders, and decrees of the court having jurisdiction." *Ibid.* And it provides "consent to determine federal reserved rights held on behalf of Indians in state court." *Colo. River,* 424 U.S. at 809.

While the McCarran Amendment does not preclude water rights litigation in federal court, the *Colorado River* abstention doctrine directs federal courts to abstain from adjudicating water rights in favor of state proceedings when possible. *Colo. River,* 424 U.S. at 819-20. *Colorado River* abstention rests on a clear federal policy to avoid "piecemeal" adjudications in both state and federal courts. *Ibid.*

II. The Klamath Basin and Klamath Project

A. Basic Geography

The Klamath River basin occupies about 10,000,000 acres in southern Oregon and northern California.[10] Various streams, springs, and other tributaries flow into Upper Klamath Lake. Near the city of Klamath Falls, the lake's outlet is Link River, which becomes the Klamath River. Joined by numerous tributaries in California, the Klamath River discharges into the Pacific Ocean at a point about 220 miles from Klamath Falls.

B. Klamath Project and its Water Rights

The Project provides water for approximately 200,000 irrigated acres. Of this, the great majority is served by diversions from Upper Klamath Lake and points just below on the Klamath River. Its irrigated lands straddle the Oregon-California border. The remaining Project land is supplied exclusively by the Lost River system. This paper focuses on the "Klamath" or "west" side of the Project.

Irrigated agriculture in the area that is now the Project began in the nineteenth century. Various private concerns initiated appropriations of water for irrigation under the customs and procedures followed at that time. The 1902 Reclamation Act[11] provided for federal financing of irrigation works, with construction costs to be repaid over time by Project water users. The federal project overlaid and hastened the private development that was in motion by the beginning of the twentieth century.

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[10] *See* attached maps.

[11] 32 Stat. 88 (1902 Act).

Water rights for reclamation projects must be acquired in accordance with state law.[12] The involved states enacted statutes to encourage the development of federal reclamation projects generally and the Klamath Project specifically. In 1905, Oregon enacted 1905 Or. Laws ch. 228, providing that whenever the United States files notice of intent to utilize certain waters in a reclamation project, the water so described is not subject to further appropriation.

With respect to the Klamath Project specifically, both Oregon and California ceded then-submerged land to the federal government for the purpose of having the land drained and reclaimed for irrigation use by homesteaders.[13] The Oregon Legislature also authorized the raising and lowering of Upper Klamath Lake in connection with the Project and allowed the use of the bed of Upper Klamath Lake for storage of water for irrigation.[14]

Beginning in 1904, the Reclamation Service—predecessor of the U.S. Bureau of Reclamation (Reclamation)—gave notices of appropriation of water for the Project in accordance with then-existing practices. In May of 1905, the Secretary of the Interior authorized the development of the Project pursuant to the 1902 Act.[15] Also in May of 1905, Reclamation filed notices of appropriation of waters of the Klamath River and its tributaries for use in the Project under chapter 228.[16] In addition to the filing for Klamath water in 1905 under chapter 228, Reclamation also acquired, by purchase from private parties, water rights with earlier priorities for the benefit of the Project.

The major water storage facility on the Project is Link River Dam on Upper Klamath Lake. The active storage capacity of Upper Klamath Lake is roughly 500,000 acre-feet. Project water users have repaid their share of the costs of construction of the Project. They continue to pay operation and maintenance costs for the works still operated by Reclamation. In the overall development of the Project, Reclamation constructed substantial works, but also numerous contractors of Project water were obliged to construct their own delivery systems and in some cases the diversion works to either take water from Project conveyance facilities or from the Klamath River. In addition, responsibility for operation and maintenance of a number of federally constructed Project works has been transferred to irrigation districts, particularly Klamath Irrigation District (KID) and Tulelake Irrigation District (TID).

Water becomes available to national wildlife refuges through the operation of Project facilities. Substantial national wildlife refuge acreage in Tule Lake and Lower Klamath National Wildlife Refuges is leased for agricultural production, consistent with a unique development and legal history specific to those lands. These "lease lands" are part of the Project. Other national wildlife refuge land receives water through the operation of Project facilities, but has inferior rights to water and there are no specific commitments to deliver water to those lands through

[12] 43 U.S.C. § 383.

[13] Ch. 5, Or. Laws of 1905; 1905 Cal. Stat. at 4.

[14] Ch. 5, Or. Laws of 1905, § 1.

[15] *See* Reclamation Act of February 9, 1905, 58 P.L. 66, 33 Stat. 714, 58 Cong. ch. 567 (1905 Act).

[16] *See* 1905 Or. Laws, ch. 228; *In re Waters of the Umatilla River*, 88 Or. 376, 172 P. 97 (1918).

Project facilities. In recent drought years, water has only been delivered to the refuges through acts of innovative engineering by irrigation district managers.

In the Klamath Basin Adjudication (KBA), water rights claims associated with Project lands were filed by Reclamation, the U.S. Fish and Wildlife Service (USFWS), and Project contractors (including irrigation districts and similar entities, on behalf of their patrons). In general, the KBA findings of fact and order of determination, replaced in 2014 by the amended and corrected findings of fact and order of determination (ACFFOD), recognizes water rights with priority of 1905 (and in some cases earlier priorities) for land in the Project. The rights include rights to live flow and stored water. The ACFFOD finds that Reclamation owns the storage right, but districts and water users have legal and equitable interests in the use rights.[17]

C. Tribal Fishing and Water Rights and Claims

There is overlap between ESA-listed species and rights and claims of tribes in the basin. In turn, the tribes' interests in these resources results in increased intensity and complexity of the ESA issues. The interests or claims of two tribes in particular are a basis for their attempts to have irrigation water users' new litigation dismissed.

The area upstream of Upper Klamath Lake is associated with the Klamath Tribes. In 1864, the Klamath Tribes (Modoc, Klamath, and Yahooskin Band of Snake Indians, now as a recognized tribe called the "Klamath Tribes") entered a treaty with the United States which established a reservation and, among other things, preserved to the Tribes' rights to hunt and fish on that reservation. While the reservation itself no longer exists (the former reservation land is owned by private individuals and in national forests), the Tribes still have federally-protected rights to hunt and fish on the former reservation. Also, in the notable *Adair* case, the Ninth Circuit Court of Appeals held that the Tribes hold water rights, with priority of time immemorial, to support fisheries.[18] In the ongoing KBA, the Oregon Water Resources Department (OWRD) has determined that the United States, as trustee for the Klamath Tribes, holds substantial rights to instream flows in tributaries of Upper Klamath Lake for the benefit of tribal fisheries. The ACFFOD also recognizes a right to elevations in Upper Klamath Lake, based on that water body bordering the former reservation. However, until exceptions to the ACFFOD have been adjudicated and the Klamath County Circuit Court issues a final judgment, the approved claim for Upper Klamath Lake water levels cannot be a basis for regulation of water rights, such as the Klamath Project, having a priority before August 9, 1908.[19]

On the lower river, the Yurok Tribe and the Hoopa Valley Tribe have reservations, established by executive order in the nineteenth century and formally divided into distinct reservations for the two tribes by Congress in 1988.[20] The Hoopa Valley Tribe's reservation straddles the Trinity

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[17] *See* https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx (last visited May 29, 2024).

[18] *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

[19] *See* https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04938.PDF (last visited May 29, 2024).

[20] 25 U.S.C. § 1300i.

River, the Klamath River's largest tributary, and borders the Klamath River. The Yurok Tribe's reservation runs from the Trinity River, on both sides of the Klamath River, to the river's mouth. The two Tribes have federally-protected fishing rights[21] and considerable interests in the waters and habitats upon which the fisheries depend. Both Tribes assert federal reserved water rights to support the fisheries. There have been no adjudicatory proceedings to determine the nature, location(s), source(s), priority, or quantity of any such rights.

III. The ESA and Application in the Klamath Project Generally

A. Basic ESA Mechanics

While familiar to many, the substantive and procedural requirements of relevant portions of the ESA are restated here, for context for the remainder of this paper.

Section 9[22] generally prohibits unpermitted take of animals listed as endangered and certain animals listed as threatened.[23] Section 7(a)(2)[24] applicable only to federal agencies, provides that agencies must ensure that their actions not jeopardize the continued existence of listed species in all or part of their range, or adversely modify designated critical habitat. Procedurally, the "action agency" must consult with either the USFWS or the National Marine Fisheries Service (NMFS) (collectively, "the Services"). Depending on the species in issue, one or both Services renders a biological opinion (BiOp), opining as to whether the proposed action would cause jeopardy. If so, it must also articulate any reasonable and prudent alternatives (RPAs) which would meet the underlying purpose of the action.[25] A non-jeopardy BiOp or jeopardy opinion with RPAs, must also include an "incidental take statement" (ITS) which has the effect of authorizing take that may occur, subject to certain conditions.[26] Upon receipt of the BiOp, the action agency decides whether and how to proceed in light of its substantive obligation (avoid jeopardy) under Section 7(a)(2).[27]

B. Application in the Klamath Project

1. Species

For over two decades, three species of fish listed as endangered or threatened have affected or had the potential to affect water availability for the Project. The shortnose sucker and Lost River sucker, both listed as endangered in 1988, inhabit Upper Klamath Lake and other local water bodies. Significant issues include the depth of water that must be maintained in the reservoirs/lakes to benefit suckers. The Southern Oregon Northern California coho salmon (coho), listed as threatened in 1997, resides in the Klamath River, downstream in California,

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[21] *Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995).

[22] 16 U.S.C. § 1538(a)(1).

[23] *See* 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

[24] 16 U.S.C. § 1536(a)(2).

[25] 16 U.S.C. § 1536(a)(2), (b)(3).

[26] 16 U.S.C. § 1536(b)(4).

[27] 50 C.F.R. § 402.15(a).

below Iron Gate Dam (a barrier to fish passage) and in tributaries of the Klamath River in California. The significant water quantity issue related to coho and the Project concerns volumes of water that must flow in the mainstem Klamath River below Iron Gate Dam.

Beginning in 2020, a mammal has also been the subject of Section 7 consultation: the endangered Southern Resident Killer Whale Distinct Population Segment (Southern Residents). Part of the diet of the Southern Residents is Chinook salmon, including Klamath River Chinook salmon. Reclamation has taken the position that Project operations are not likely to adversely affect the ocean-dwelling Southern Residents, but NMFS disagrees, and the 2019 ESA consultation evaluated effects of Project operations on Southern Residents.

2. Recent Approaches to Section 7 Consultation

Between approximately 1991 and 2012, the regulatory approach to Section 7 consultation at the Project was fairly simple and sequential. Reclamation would propose an action that ordinarily described operation of Project facilities to provide water to meet irrigation demand. The Services would provide BiOps, typically "jeopardy" opinions with RPAs. USFWS's RPAs would identify minimum Upper Klamath Lake elevations to avoid jeopardy to listed suckers. NMFS's RPAs would identify minimum flows at Iron Gate Dam to avoid jeopardy to listed coho. Reclamation would then adopt the RPAs.

This approach proved unsatisfactory, and not simply because of the effects to the Project. The practical problem was that there were two distinct regulatory agencies effectively prescribing water allocation (through RPAs) that were often conflicting and resulted in inconsistencies and confusion. A familiar example is the year 2001. That spring, Reclamation issued a biological assessment (BA). The BA described Reclamation's proposed action as the delivery of water to Project irrigation and wildlife refuges, and it identified the instream water levels that would result in various year types. On April 6, 2001, USFWS and NMFS respectively opined that resultant Upper Klamath Lake levels and Klamath River flows would threaten jeopardy to the listed species and identified new inflexible lake elevations and river flows as RPAs. Reclamation adopted an operations plan for 2001 implementing the Services' Upper Klamath Lake levels and Klamath River flows as operating criteria. If implemented in the future, the RPAs in these opinions would result in significant water shortage to the Project in many years. In the drought of 2001, there was not even enough water to meet the RPAs in both opinions. It was a given that the Project would receive zero water, but the lack of coordination between agencies meant that RPAs were issued that were impossible to achieve.

For a variety of reasons,[28] federal agencies' approach to ESA consultation and compliance has evolved into a negotiated operation of the Project that is not obviously rooted in the logic of the ESA. These consultations are premised on the assumption that Reclamation will define a proposed action that will yield non-jeopardy BiOps. In this process, Reclamation and USFWS and NMFS iteratively review hydrological model results produced under various sets of

[28] The history and evolution of the approach to ESA consultation is discussed in both a (now-withdrawn) ESA Re-Assessment completed in 2021 (https://www.law.berkeley.edu/wp-content/uploads/2021/03/20210115_Klamath_Reassessment_signed-FINAL.pdf (last visited May 29, 2024)) and a chronology produced by KWUA (https://acrobat.adobe.com/id/urn:aaid:sc:US:ae8fb705-bdb3-427d-b410-3b9ab0deeb81 (last visited May 29, 2024)).

operating rules, with USFWS and NMFS allowed to declare whether a given operation provides sufficient water for ESA-listed species for those agencies to accept the operating rules. Reclamation then proposes the negotiated rules as its "proposed action" and the Services issue no jeopardy opinions.

This current approach is unsatisfactory to Project water users. First, with the negotiation premised on the assumption that the resulting proposed action must be acceptable to both Services, Reclamation has little or no bargaining power and no means to require transparency or accountability. Second, since the process is divorced from the typical ESA consultation logic, it can (and does) lead to operations that are not focused on determining the effects of operating the Project for irrigation and avoiding any resultant jeopardy. Rather, the negotiation takes on the appearance of a used car sale, with agencies simply negotiating for blocks of water.

Third, although the Services have issued no jeopardy BiOps on the negotiated proposed actions, they have nonetheless, in those BiOps, also altered the proposed action. Specifically, the "terms and conditions" of the BiOps' ITS typically specify additional operations rules that are derived from modeling outputs. For example, if the modeling of a proposed action showed that, if the proposed action had been followed over the past 30 years of hydrologic conditions, Upper Klamath Lake elevations would not have gone below elevation "x" on July 15 in more than two consecutive years, the terms and conditions of the ITS might require that future operations perform so as not to result in Upper Klamath Lake elevations going below elevation "x" on July 15 in more than two consecutive years. This requirement based on model outputs may not have any connection to biological needs, but it is in effect a change in the negotiated proposed action that can, in turn, result in the proposed action not working as intended in other respects. The use of model results as "rules" rather than "tools" for analysis is a major concern.

IV. Project Irrigators' Push-Back

ESA-driven Project operations have caused severe shortage for irrigation and national wildlife refuges that depend on the Project for water. The years 2021 and 2022 were the worst, and third-worst years ever for water delivery in the Project's 115-year history. The damage has been extensive and is not limited to the agricultural communities. For example, both Tule Lake and Lower Klamath National Wildlife Refuges were dried up, with large areas of land being exposed to air for the first time in thousands of years at least. Although this period was characterized by serious drought, the drought was not more severe than has occurred in other recent historical years such as 1992 and 1994. In those other drought years, there were minimal, if any, ESA restrictions, and no major water shortages in the Project.

Before and during these difficult years, water users in the Project have pushed various legal theories as part of overall efforts to restore water stability. They are summarized immediately below.

A. "Discretion" and the 2020-2021 ESA Re-Assessment

Several years ago, KWUA began requesting that the Department of the Interior conduct an updated analysis of Reclamation's obligations under Section 7 at the Project. The basis for the request was, fundamentally, that prior analyses and Klamath precedents have not involved a

rigorous analysis of the proper application of the specific substantive requirements of Section 7(a)(2) in the unique facts and circumstances of the Project, resulting in confusion over Reclamation's legal obligations and authority relative to conflicting demands on the water supply.

The core of KWUA's request has been the principle that Section 7(a)(2) does not apply to an activity unless the federal action agency has, under its own authorities, discretion "to implement measures that inure to the benefit of" ESA-listed species.[29]

Prior to the Supreme Court's decision in *Nat'l Ass'n of Home Builders v. Def. of Wildlife*,[30] there was uneven, and ultimately inconsistent, authority in the Ninth Circuit on the issue of whether the ESA itself is a source of authority or discretion to act to protect species. Post-*Home Builders*, there is no doubt that the ESA is not an independent grant of authority to protect listed species.

KWUA has urged that, unlike other reclamation projects, the Project is authorized only for the purpose of irrigation, and thus there is no statutorily-based discretion to operate the Project to benefit listed species.[31] In addition, all of the storage, diversion, and delivery of water associated with the Project is either a nondiscretionary federal action or performed by non-federal parties to whom Section 7 does not apply.[32]

KWUA and various individual districts sought to raise these issues affirmatively in the so-called "Medford Litigation" discussed in section V.A below. That litigation was dismissed without reaching the merits.

However, during 2020 and early 2021, the water users' formal requests for a re-assessment of Project legal obligations began to get traction, and the Department of the Interior's Office of the Solicitor began to conduct a legal analysis. This activity gained considerable momentum after a visit to the Klamath Basin by Secretary David Bernhardt in July of 2020.

The re-assessment and supporting memoranda examined the potential sources of Reclamation's discretion that would trigger the application of Section 7(a)(2) to Project operations. This evaluation included consideration of the authorized purposes of the Project, the nature of water rights for use of water stored in Upper Klamath Lake, the terms of contracts between

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[29] *Envtl. Prot. Info Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001) (*EPIC*) (quoting *Sierra Club v. Babbitt*, 63 F.3d 1502, 1509 (9th Cir. 1995) (*Babbitt*); accord, *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1019-20 (9th Cir. 2012).

[30] 551 U.S. 644 (2007) (*Home Builders*).

[31] *See, e.g., WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 640-41 (10th Cir. 2020) (statutory authorization for certain Corps of Engineers dams did not provide discretion to operate for the benefit of species, therefore Section 7(a)(2) does not apply).

[32] *See, e.g., NRDC v. Norton*, 236 F. Supp. 3d 1198, 1216-17 (E.D. Cal. 2017) ("[I]n order to trigger the requirement for re-consultation under *EPIC* and 50 C.F.R. § 402.16 in the context of an executed and otherwise valid contract, the action agency must have retained sufficient discretion in that contract to permit material revisions to it that might benefit the listed species in question").

Reclamation and the Project contractors, and Reclamation's obligations relevant to unadjudicated claims to tribal water rights for flows in California.

In sum, the key conclusions from the re-assessment were:

(1) based on contemporary law, Section 7 of the ESA does not require or authorize the curtailment of the irrigation water deliveries for the Project; for these elements of Project operation, Reclamation lacks the discretion necessary to trigger ESA consultation;

(2) consistent with the ACFFOD, the only legally authorized use of water stored in Upper Klamath Lake is irrigation;

(3) downstream tribes holding federally-protected fishing rights also have water rights to flows in the Klamath River that are senior to the water rights for the Project; and

(4) those downstream rights, which are unadjudicated and thus unquantified, do not include the right to have lawfully stored water released to augment Klamath River flows.

The re-assessment also concluded that some aspects of Project operations *are* subject to ESA consultation, thus its implementation would still have required identification of a proposed action (discretionary activities) which would become the subject of BiOps.

The re-assessment was completed at the end of the Trump Administration. On April 8, 2021, Secretary of the Interior Deb Haaland withdrew it and its supporting legal memoranda. The Secretary's withdrawal order stated that the re-assessment process had not included adequate and necessary consultation with tribes, and that it was not consistent with long-standing Department policy. The withdrawal was not "on the merits."

B. Section 8 and Stored Water

Over the past six years, KID has pushed for enforcement of section 8 of the 1902 Act, specifically in regard to water stored in Upper Klamath Lake. These arguments are not distinct from the broader issues of what does or does not trigger Section 7(a)(2) discretion and are anchored in a nondiscretionary statutory mandate.

Specifically, section 8 of the 1902 Act provides that Reclamation operate projects in conformity with state water law.[33] In the ACFFOD entered in the KBA, water storage in Upper Klamath Lake is authorized only for domestic and irrigation purposes, and irrigation is the only authorized use of the stored water.[34]

In the meantime, Reclamation routinely releases stored water from Upper Klamath Lake to provide flows in the Klamath River for the benefit of listed species. KID's straightforward position, stated in four litigation matters discussed below, is that under section 8 Reclamation lacks the authority or discretion to do so.

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[33] 43 U.S.C. § 383.

[34] KBA_ACFFOD_07155.

C. Klamath Drainage District's Non-Federal Infrastructure and Water Rights

Serving 22,000 acres, Klamath Drainage District (KDD) is the third-largest district in the Project service area. In 1917, KDD first entered a contract with Reclamation for water from Upper Klamath Lake; that contract has been amended or superseded, and the operative contract was entered in 1943. As with other districts, the contract is perpetual in term. Reclamation considers KDD to be a lower priority contractor than certain other districts: specifically, Van Brimmer Ditch Company, KID, and TID are considered to have rights to full delivery before KDD and certain other districts are entitled to water. KDD disputes this interpretation of the contracts.

In recent years, however, other differences between KDD and other districts have risen to the forefront. Specifically, KDD operates two diversion structures on the Klamath River and attendant canal systems and, save for the federally owned headworks on one of the two diversions, KDD constructed, owns, operates, and maintains its entire system. Of particular importance, KDD owns and operates the entirety of the North Canal, including its diversion works. In addition, KDD holds a state water right permit that authorizes diversion and use of water throughout the district. This right is not based on an appropriation of water for the Project as a whole and has no historical connection to Reclamation.

In recent years, based on ESA Section 7(a)(2)-driven operations, Reclamation has ordered KDD to curtail diversion, either because the entire Project is being curtailed or to make the limited Project supply available only to contractors considered to have higher priority. In certain of these years, including 2021 and 2022, KDD declined to discontinue its North Canal diversions in response to the federal directive, citing both the lack of federal ownership or control of the North Canal and the existence of water supply (under KDD's independent state water right) that is not dependent on KDD's contract with Reclamation.

In 2022, Reclamation sued KDD for declaratory and injunctive relief, as described below.

V. Hecka Lawsuits

The discussion above provides context for the numerous recent litigation developments that have implications for Project operations. Some of these court decisions relate to familiar territory[35] but others open new ground.

These developments concern Project water users because they seem to embrace or assume that Reclamation has specific, enforceable obligations to guarantee volumes of water in Upper Klamath Lake and the Klamath River. That concept is not recent, but it is inconsistent with the fact that Reclamation's actual Section 7(a)(2) obligation, which is to ensure that its discretionary actions not jeopardize the continued existence of listed species. The decisions also refer to

[35] In 2024, final judgments have been entered in two lawsuits brought by the Klamath Tribes, one challenging Reclamation's 2021 operations plan, and one challenging its 2022 operations plan. The first was unsuccessful, and the second was successful. *Klamath Tribes v. United States Bureau of Reclamation*, 537 F. Supp. 3d 1183 (D. Or. 2021); *Klamath Tribes v. United States Bureau of Reclamation*, No. 1:22-cv-00680-CL, 2023 U.S. Dist. LEXIS 198398 (D. Or. Sept. 11, 2023). It seems unlikely these specific cases will have major significance for future ESA jurisprudence, speculated by the author with no intent here to minimize their importance for the Klamath Tribes.

obligations to senior tribal rights in contexts that do not involve priority-based enforcement of judicially determined water rights.

In some of the decisions, the concept of a federal duty to provide instream water levels has effectively been treated as if it were a federal statute, such that non-federal infrastructure and private actors are themselves bound by its mandate. For decades, water lawyers have debated about the tension between the ESA and water law, and whether the ESA creates a water right. In the Klamath Basin, the answer grows frighteningly close to "yes."

A. "Medford" Lawsuits (KID)

In 2019, Project irrigation parties filed two lawsuits against Reclamation, each in the U.S. District Court for the District of Oregon. Assigned to Magistrate Judge Mark Clarke in Medford, Oregon, these cases have become known as the "Medford Cases."

Both cases were filed soon after Reclamation adopted its 2019-2024 plan for operations of the Project, which in turn was based on a 2018 proposed action by Reclamation that was evaluated by NMFS and USFWS in 2019. The first of the cases, brought by KID, sought relief related to Reclamation's release of stored water from Upper Klamath Lake for the benefit of ESA-listed species. Such action, KID alleged, is not an authorized use of the stored water: the ACFFOD confirms a right to store water for irrigation and rights of use of the stored water for irrigation on specific land. Thus, the use of the stored water for another purpose and in another place is inconsistent with state water law and with Reclamation's obligation under section 8 of the 1902 Act to operate consistent with state water law.

The second case, brought by several districts and KWUA, and referred to as the "*Shasta View*" case, also addressed the stored water issue. In addition, it sought relief to the effect that Reclamation lacks discretion to curtail the storage, diversion, delivery, and use of water for irrigation in order to benefit ESA-listed species, based on the limited authorization for the Project and the terms of Project contracts.

These cases were consolidated but did not reach a merits hearing. The Hoopa Valley Tribe and the Klamath Tribes were granted intervention for the limited purpose of filing motions to dismiss. The motions to dismiss argued that the plaintiffs had failed to join required parties (i.e., the tribes) under Rule 19 of the Federal Rules of Civil Procedure, and that the Tribes could not be joined due to their sovereign immunity. The Magistrate Judge recommended, and the District Court Judge agreed, that the cases be dismissed on these grounds.

On September 8, 2022, the Ninth Circuit Court of Appeals affirmed the judgment dismissing the two cases.[36] This leaves the irrigation parties in an unenviable situation; apparently, any party with standing can bring challenges to Reclamation decisions in which they seek relief that would be detrimental to irrigation water availability for the Project, but the irrigators are barred from affirmatively challenging the legality or legitimacy of Reclamation decisions in order to protect irrigation water availability.

[36] *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022).

In these cases, the irrigators faced a challenge in the form of precedent that appears to be unique to the Ninth Circuit, the court's decision in *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*.[37] A citizens group sued, alleging noncompliance with the ESA and National Environmental Policy Act (NEPA). The tribe was allowed to intervene for the limited purpose of filing a motion to dismiss for failure to join required parties, and the court held that dismissal was required.

The plaintiffs in the Medford Cases argued that *Diné Citizens* was distinguishable. KID contended that its case was a "suit . . . for administration of [adjudicated] water rights" for which sovereign immunity is waived in the McCarren Amendment, 43 U.S.C. § 666(a)(2), noting that the McCarran Amendment's waiver of sovereign immunity for joinder of the United States in a general stream adjudication, 43 U.S.C. § 666(a)(1), is sufficient to allow an adjudication to go forward in the absence of an interested tribe.[38]

The *Shasta View* plaintiffs based their claim on the Administrative Procedure Act's[39] (APA) waiver of sovereign immunity for suits challenging federal agency action. They argued generally that in cases under the APA, the government is the only necessary party, subject to a narrow exception represented by the facts of *Diné Citizens*. They contended *Diné Citizens* was distinguishable because in that case, the government action was the approval of authorizations for a tribally owned business enterprise. The *Shasta View* plaintiffs analogized to the Supreme Court authority holding that waiver of federal immunity for water adjudications includes waiver as federal trustee. In that sense, tribes are not necessary parties to a water rights adjudication, even though the cases affect their interest. The *Shasta View* plaintiffs contended that the same logic should apply to the waiver under the APA.

The Ninth Circuit rejected all these arguments. Plaintiffs filed petitions for rehearing, which were denied. On May 11, 2023, KID filed a petition for writ of certiorari with the United States Supreme Court, which was also denied.

B. *KID v. Oregon Water Resources Department*

In April of 2020, KID sued the Oregon Water Resources Department (OWRD) over OWRD's failure to enforce Oregon water law. KID alleged that OWRD had, despite KID's urging, failed to prevent Reclamation from releasing stored water from Upper Klamath Lake for uses lacking a water right (specifically, fish in the mainstem Klamath River in California).

The Marion County Circuit Court (court where this case was filed) ruled for KID. It ordered OWRD to stop the use or release of water that is not for a permitted purpose under state law. Ultimately, OWRD issued orders to Reclamation based on the court's requirement. OWRD's order of April 23, 2020, also included an off-ramp of sorts stating that "[n]othing in this order relieves any person, state, or federal agency from any and all obligations to comply with federal

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[37] *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 161 (2000) (*Diné Citizens*).

[38] *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819-20 (1976).

[39] *See* 5 U.S.C. §§ 702, 706.

law[.]" Based at least in part on that language, Reclamation did not alter its behavior, claiming that its storage releases for fish are required by federal law.

Realistically, OWRD's interpretation of its own order to Reclamation was not consistent. On the one hand, it issued notices of violation and threats based on Reclamation's alleged violation of an order prohibiting storage releases.[40] On the other hand, in subsequent federal court proceedings, it argued that its orders were inconsequential for Reclamation because of the off-ramp language. Meanwhile, Reclamation did not at any point alter its behavior based on the existence of the OWRD orders and notices of violation and continued to operate Link River Dam according to its operations plans subject to consultations under the ESA.

Regardless, ultimately, OWRD appealed the Marion County Circuit Court's decision to the Oregon Court of Appeals. On September 8, 2022, the Oregon Court of Appeals ruled that the Marion County Circuit Court erred by not dismissing the case.[41] The appellate court found that Reclamation is a necessary party to the case and, because Reclamation could not be joined in (added to) the case due to Reclamation's sovereign immunity, the case had to be dismissed.

The Oregon Supreme Court denied a petition for review of the court of appeals' decision, and OWRD's orders to Reclamation regarding stored water have been vacated.

C. *KID v. Reclamation*: State Water Rights Administration Case

As discussed above (section V.A), in the "Medford Cases," KID argued that its challenge to Reclamation's actions should go forward based on the waiver of sovereign immunity of the United States as tribal trustee in the McCarran Amendment. In April of 2021, KID pursued that legal theory in an alternative way. Specifically, KID filed a motion for preliminary injunction in Klamath County Circuit Court—the court overseeing the KBA—seeking a preliminary injunction enjoining Reclamation from releasing stored water for purposes for which there is no recognized water right. KID sought to make this action very clearly a "suit . . . for the administration of [adjudicated water] rights."[42] The Klamath County forum is based on state law generally and the Klamath County Circuit Court's role in the KBA.

Reclamation immediately removed the case to the U.S. District Court for the District of Oregon, an automatic right of federal agencies sued in state courts.[43] KID then exercised its right to move for remand to the state court.[44] The district court denied the motion. KID then filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals, asking the appellate court to correct the ruling and order the district court to remand the matter. The Ninth Circuit required responses to the petition and conducted oral argument on November 10, 2022. By a

[40] The above procedural history of the state court litigation and OWRD orders is compressed significantly but reflects the relevant situation overall.

[41] *Klamath Irrigation Dist. v. Or. Water Res. Dep't*, 321 Or. App. 581 (2022).

[42] 43 U.S.C. § 666(a)(2).

[43] 28 U.S.C. § 1442.

[44] 28 U.S.C. § 1447.

2-1 majority, the Ninth Circuit denied the petition for rehearing.[45] KID's petition for writ of certiorari in the Supreme Court was also denied.

D. Currently Active Cases

1. Yurok Litigation

The so-called "*Yurok*" litigation now pending before the Ninth Circuit Court of Appeals has little to do with the complaint filed by the Yurok Tribe in 2019. That case was a fairly typical Project-related challenge; it alleged Reclamation was not providing sufficient flows in the Klamath River and thus was in violation of the ESA. It has evolved, however, both to embrace more fundamental issues of federalism and to involve fundamental issues regarding the very nature of Reclamation's obligations under ESA Section 7(a)(2). Moreover, the issues involving Section 7(a)(2) discretion will be decided in a context that now includes an important decision on those same issues that the Ninth Circuit rendered on May 23, 2024.

The Original Case. In 2019, the Yurok Tribe and others filed a lawsuit against Reclamation and NMFS, asserting noncompliance with the ESA in connection with Reclamation's 2019-2024 Operations Plan (the same plan challenged in the "Medford Cases," section V.A above).[46] KWUA, and subsequently the Klamath Tribes, intervened in the litigation. The original case is now effectively moot, and completely different pleadings and issues are driving the case.

The Federal Crossclaim and KWUA's Counterclaim. As noted above (section V.B), OWRD issued various orders to Reclamation directing that it discontinue release of stored water for uses lacking a water right. Although the state orders did not alter Reclamation's behavior, the United States elected to file a crossclaim against OWRD and KWUA, alleging that the OWRD orders are preempted by federal law. The court bifurcated the preemption litigation into two phases. The first concerns the argument that the ESA preempts the state water right orders, and the second concerns the contention that Reclamation's obligations vis-a-vis unadjudicated tribal water rights preempt the orders. KID then intervened, and subsequently, by stipulation of the parties, the Hoopa Valley Tribe was joined in the first phase. The State of California also filed a brief as amicus curiae.

In December of 2021, KWUA filed a counterclaim against the United States. In its counterclaim, KWUA sought rulings that can be summarized as:

- Section 7(a)(2) of the ESA does not authorize or require Reclamation to curtail, or direct the curtailment of, the storage, diversion, or delivery of irrigation water for or by Project contractors in order to benefit fish species listed as threatened or endangered under the ESA.

- Reclamation does not have the discretion to operate, or direct the operation of, Project facilities to release water from Upper Klamath Lake having the legal character of

[45] *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 2023 U.S. App. LEXIS 702 (9th Cir. 2023).

[46] *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 3:19-cv-04405-WHO (N.D. Cal.).

"stored water" to benefit fish species listed as threatened or endangered under the ESA.

In the meantime, of course, on September 8, 2022, the Oregon Court of Appeals reversed the state court trial decision which caused the OWRD orders to be issued in the first place. The litigation went forward on the United States' crossclaim and KWUA's counterclaim. The court heard arguments on December 7, 2022, and issued its ruling on cross-motions for summary judgment on February 6, 2023.[47]

The motions for summary judgment are in favor of the United States and the Tribes. The court found that the ESA preempted state water law. Responding to KWUA's arguments that Reclamation lacks discretion to curtail diversion and delivery for Project uses, based on the limited statutory authorization and terms of permanent contracts between districts and Reclamation, the court turned to the 1902 Act. It found that the Act is a general mandate directed to particular goals, and that it does not create nondiscretionary duties for storage, diversion, and delivery of water. In light of its reading of the 1902 Act, the court found it unnecessary to address KWUA's arguments that the pre-ESA contracts between Reclamation and districts create nondiscretionary federal obligations and contemplate actions by non-federal parties who are not subject to Section 7.

The Appeals and Recent, Relevant Authority. Both KWUA and KID appealed the ruling. The case has been briefed and is scheduled for oral argument on June 10, 2024, in San Francisco.

In the meantime, developments that have occurred subsequent to the district court's decision have affected the arguments on appeal.

First, as discussed above, the United States' crossclaim in this case focused on administrative, water rights enforcement order issued by OWRD. Those orders, which were required by a state circuit court judge, related to disallowing Reclamation from releasing stored water for the benefit of downstream, ESA-listed species. However, as discussed above, the Oregon Court of Appeals reversed the state circuit court decision that required OWRD to issue its orders, having determined that Reclamation was a necessary party that could not be joined in the state court proceeding, and thus the action should not have been allowed to go forward.[48] At the time of the hearing of the summary judgment motions in *Yurok*, KID had petitioned the Oregon Supreme Court for review of the Oregon Court of Appeals' decision, but the Supreme Court had not taken action.

On April 20, 2023, the Oregon Supreme Court denied KID's petition for review. Now, in response to KID's arguments that state water law prohibits release of stored water for the purpose of ESA-listed fish downstream (and that state water law is not "preempted"), both the State of Oregon and the United States have taken the position that Oregon water law does not prohibit Reclamation from releasing stored water for non-irrigation purposes. Oregon argues that state law allows, but does not require, Reclamation to store water, or to use stored water for irrigation. It additionally contends that, as a matter of state law, Reclamation may abandon the

[47] *Id.* (ECF Doc. No. 1102).

[48] See *Klamath Irrigation Dist. v. Or. Water Res. Dep't*, 321 Or. App. 581 (2022).

stored water—by releasing it downstream. Ultimately, Oregon contends that contracts between Reclamation and water users may specify how and whether rights are to be exercised, but that this contract relationship is not a matter of state water law *per se*. Thus, the Court of Appeals is presented not only with the "preemption" question addressed in the district court, but it is also presented with competing arguments about what state law requires.

Second, and much more promisingly for irrigation water users, a very recent Ninth Circuit decision is highly relevant to the issues in *Yurok* concerning ESA Section 7(a)(2)-triggering discretion and, in turn, what the ESA does and does not require in regard to operation of the Klamath Project.

On May 23, 2024, the Ninth Circuit Court of Appeals issued a 68-page decision in *NRDC, et al. v. Haaland, et al.* (Case No. 21-15163). The court of appeals affirmed the district court's rulings rejecting several claims brought by the Natural Resources Defense Council and other environmental interest groups (collectively, "NRDC"). Several of those claims are not relevant to the *Yurok* appeal or the Klamath Project. But in considering claims that Reclamation was required to re-initiate consultation regarding the effects of existing contracts with irrigation water users, the Ninth Circuit Court issued rulings that are important to the appeal in the *Yurok* litigation.

The court confirmed its standard on discretion under ESA Section 7(a)(2) as it applies to executed contracts: "An agency has discretion to benefit listed species where it retains authority to negotiate contract terms . . . Reclamation retained discretion under the Settlement Contracts only to the extent the contracts themselves give it the power to 'implement measures that inure to the benefit of the protected species.' "

Reviewing the six different contract provisions that NRDC alleged provided such discretion, the court found that Reclamation did not retain discretion under the executed SRS Contracts to take measures that would benefit Chinook salmon like reducing water deliveries. In particular, the court found that Article 3(i) of the SRS Contracts—the liability provision, a version of which appears in reclamation contracts across the west—does not allow Reclamation to alter the SRS Contracts to benefit listed species. The court confirmed that this contract provision "is a force majeure clause that limits Reclamation's liability for damages in the event legal obligations are imposed on Reclamation that require it to breach the Settlement Contracts by reducing the diversion of water." Citing Supreme Court precedent, the court reiterated that complying with legal obligations is not a source of discretion under ESA Section 7(a)(2) and that Article 3(i) and the other cited contract provisions "[do] not allow Reclamation to alter the amount of water diverted at its discretion."

In the author's opinion, the Ninth Circuit's May 23 decision forecloses virtually all arguments that have been made in opposition to KWUA's issue on appeal in *Yurok* that concerns whether Reclamation has the discretion to curtail Project deliveries in order to benefit listed species. It is the author's additional opinion that the only "live" issue on that topic pertains to an old Ninth Circuit decision referred to as the *Patterson* case.[49] In that case, the question on appeal was

[49] *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000).

whether irrigation water users were intended third-party beneficiaries of a now-expired contract between Reclamation and a power company concerning the operation of Link River Dam. The court held that irrigators were not third-party beneficiaries. Without doubt, the court's opinion includes broad and (in the author's opinion) vague statements regarding Reclamation's obligation to comply with the ESA: (i) the third party beneficiary question was the only issue requiring adjudication, and the ESA is not relevant to the parties' intent when entering a contract in 1956 before the ESA existed; (ii) the ESA statements in the decision do not reflect current ESA jurisprudence; and, (iii) the issue in *Yurok* is whether certain specific contracts afford Reclamation discretion to curtail diversion in order to benefit ESA-listed species, and that question is not addressed in *Patterson*.

2. *United States v. KDD*

In *United States v. Klamath Drainage District*,[50] the United States sought injunctive relief against KDD's diversions at A Canal that the United States regards as being out of (contract) priority. KDD contended, among other things, that KDD's North Canal is owned and operated exclusively by KDD, and diversion of water under KDD's own state water right is not subject to federal involvement or control.

The parties consented to this case being heard by Magistrate Judge Marke Clark, and on September 11, 2023, the court ruled on cross motions for summary judgment.[51] The court's ruling supports a reach of federal power that had not been articulated in prior litigation.

In granting the United States' motion for summary judgment, the court rejected KDD's arguments that KDD, when it diverts from its own facility, under a water right in which the federal government has no involvement, is no different than any of the hundreds of private diversions in the basin for use outside of the Project service area. The court found that KDD's 1943 contract with Reclamation was a bargained-for exchange that defined the universe of circumstances under which KDD is able to divert water for use in the district, and thus that its diversion under a state right, even from a non-federal diversion is impermissible. It also found that KDD is bound by Reclamation's annual, ESA- and contract priority-driven operations plans, including because the 1943 contract authorizes Reclamation to promulgate "rules and regulations" for its implementation.

The court permanently enjoined KDD from diverting water from the Klamath River that is not authorized by Reclamation. The case is currently being briefed on appeal in the Ninth Circuit.

3. *Buchanan v. Water Resources Department*

The August 9, 2023 Opinion and Order in *Buchanan* and substantially identical cases,[52] exports the Project's challenges to irrigation parties who are wholly outside the Project. That is, in

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[50] *United States of America v. Klamath Drainage District*, No. 1:22-cv-00962 (D. Or.).

[51] *Id.* (ECF Doc. No. 95).

[52] *Buchanan v. Water Res. Dep't,* No. 1:23-cv-00923-CL, 2023 U.S. Dist. LEXIS 138672 (D. Or. Aug. 9, 2023), voluntarily dismissed.

recent history, federal law duties that courts have determined to exist for Reclamation have affected the water supply available for Reclamation contractors, only. In this opinion and order, however, the Magistrate Judge upholds curtailment of non-Project diverters. The rationale amounts to a blending of water rights and ESA administration that has not previously occurred in the Klamath Basin.

As stated earlier in this paper, the ACFFOD finds that there is a tribal water right to elevations in Upper Klamath Lake, and tributaries to Upper Klamath Lake on the former reservation, for the benefit of the Klamath Tribes' fishery. The ACFFOD is enforceable and, since 2013, the Klamath Tribes have made priority calls that have resulted in OWRD's Watermaster curtailing diversions from the tributaries of Upper Klamath Lake.

The priority of tribal water rights is time immemorial. Since the entry of the ACFFOD, Upper Klamath Lake elevations have almost always been below the determined claim's elevations. However, based on prior agreements, up until the entry of court judgment in the KBA, the water right in Upper Klamath Lake cannot be exercised so as to curtail diversionary rights having a priority before August 9, 1908. As a result, the right cannot call on Project diversions or use under the Project rights of May 19, 1905.

In 2023, the Klamath Tribes made a call for regulation based on Upper Klamath Lake being below the elevations of the determined claim. OWRD enforced the call against diversions having priority after August 9, 1908. The affected parties included irrigators on land adjacent to Upper Klamath Lake that had not previously been curtailed. Several of these parties have challenged the OWRD curtailment orders, by various means.

The plaintiffs in *Buchanan* group of cases filed a petition for judicial review of OWRD's regulation orders in Klamath County Circuit Court. The filing of the petitions resulted in an automatic stay of the regulation orders, but in July of 2023, OWRD exercised its authority to issue orders denying the stay.[53] In the meantime, on June 26, 2023, OWRD removed the cases to federal district court. The parties consented to jurisdiction by a Magistrate Judge.

Petitioners requested a hearing on OWRD's order denying the stay of the regulation orders. Among other things, the petitioners argued that the regulation orders were improper because Reclamation releases water for ESA flows in the Klamath River of California. To require petitioners to make up the difference would bypass the water rights system by making the non-Project diverters liable for an exclusively federal obligation. That is, as an ESA matter, Reclamation lowers Upper Klamath Lake elevations (a non-water right use) causing Upper Klamath Lake to be below the ACFFOD determined claim. As a water rights matter, petitioners argued that the water released to the river is waste.

The Magistrate Judge rejected this and other of petitioners' arguments. As discussed previously, a paradigm has developed under which Reclamation is considered to be obliged to guarantee certain water flows. This obligation, the court finds, can be adversely affected by non-federal

[53] *See* Or. Rev. Stat. § 536.075.

diversions. Thus, the ruling finds the petitioners were properly subject to regulation in favor of Upper Klamath Lake elevations.

The practical effect of the order seems no different than a finding that the federal ESA obligation gives rise to a water right. This and other issues will no doubt receive further attention.

E. Existing Versus New Actions

The ESA Section 7(a)(2) "discretion" issue relates to a longstanding concern among irrigation water users. Specifically, the application of the ESA to an established activity can produce extremely harsh results. It seems that there should be "a different rule" for situations where the ESA applies to a proposed activity in which there has been minimal investment and which is not already relied upon by, and essential to, entire communities, as compared to the layering of the ESA on top of a long-established economy, community, and environmental condition supported by irrigated agriculture.

To some degree, and specifically at the Klamath Project, the Section 7(a)(2) discretion issue can help deal with this inequity. Parties have relied upon contracts that were entered into long before ESA was enacted. In *Home Builders*, the Supreme Court noted that, while Section 7(a)(2) of the ESA itself states an imperative that federal agency actions must not cause jeopardy or other prohibited impacts, the implementing regulations state that, "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. According to the Court:

> Pursuant to this regulation, § 7(a)(2) would not be read as impliedly repealing nondiscretionary statutory mandates, even when they might result in some agency action. Rather, the ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is prohibited from considering such [extra statutory] factors.[54]

It is equally reasonable that the Section 7(a)(2) imperative not apply to nondiscretionary obligations under contracts authorized by federal law.

A similar policy logic supports the outcomes of two district court decisions that concern the ESA Section 9 prohibition against take. Both decisions concluded that a nondiscretionary federal agency action cannot violate Section 9 because such actions are not the proximate cause of take.[55] It is likely that there will be appellate developments on this issue, whether in these cases

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[54] *Home Builders*, 551 U.S. at 665.

[55] *San Luis Coastkeeper I*, 2021 U.S. Dist. LEXIS 82490, at *15 (Section 9 "claim cannot succeed unless the defendant's act is the proximate cause of the alleged take"), *overruled on other grounds by San Luis Obispo Coastkeeper II*, 2022 U.S. App. LEXIS 26738; *NRDC v. Norton*, 236 F. Supp. 3d at 1239 (nondiscretionary actions under a contract are not the proximate cause of Section 9 take).

or others. But the principle is fair and can ensure that a regulated party is not subject to openly conflicting legal mandates.

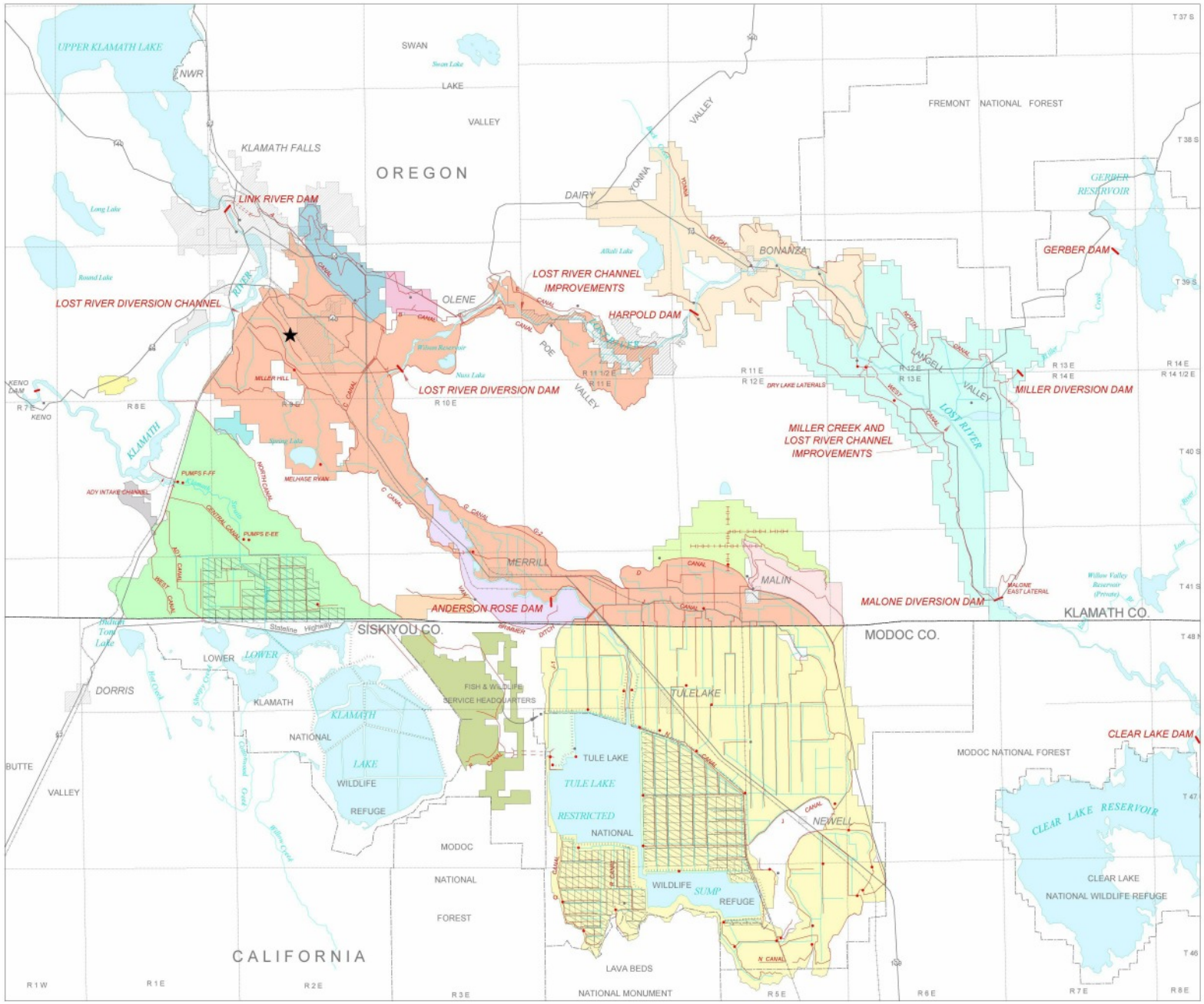
F. Tribal Water Rights Considerations

In practice, the ESA has driven Project operations and, consequently, been the underlying cause of the litigation discussed above. At the same time, court decisions have also commonly referred to an obligation for Reclamation to operate the Project "consistent with the federal reserved water rights and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes," or language to similar effect.

These statements are correct insofar as they confirm the applicability of the prior appropriation doctrine. At the same time, up until the future entry of a judgment in the KBA, the Klamath Tribes' water right in Upper Klamath Lake effectively has a priority of August 9, 1908, and it is unknown what the court's final quantification of that water right will be.[56] Downstream tribal water rights for flows in the Klamath River and/or its California tributaries have not been adjudicated, nor is it clear how, after any adjudication, they would be enforced, particularly across the state border in Oregon.

Regardless, as a practical matter, the tribal fishing rights interest substantially overlaps with the ESA, a fact that has been frequently recognized. There is the potential that existing litigation (e.g., Phase II of the *Yurok* litigation) will involve more specific consideration of the current operative significance for the Project of downstream tribal water rights claims.

[56] Section II.C, *supra.*



LOCATION MAP

FEATURES:

- Hydrography
- Canal
- Drain
- Dike
- Tunnel
- Flume
- Siphon
- Pipeline
- Drop
- Pumping Plant
- Irrigation District Pumping Plant
- Private Utility Powerplant
- Project Headquarters
- Project Land Lease Area

MAJOR WATER DISTRICTS:

- Ady Dist. Improv. Co.
- Enterprise I.D.
- Horsefly I.D.
- Klamath Drain. Dist.
- Klamath I.D.
- Langell Valley I.D.
- Malin I.D.
- Midland Dist. Improv. Co.
- P Canal Mutual Water Co.
- Pine Grove I.D.
- Pioneer Dist. Improv. Co.
- Plevna Dist. Improv. Co.
- Poe Valley Improv. Dist.
- Shasta View I.D.
- Sunnyside I.D.
- Tulelake I.D.
- Van Brimmer Ditch Co.
- Westside Improv. Dist.

KLAMATH PROJECT

Oregon - California

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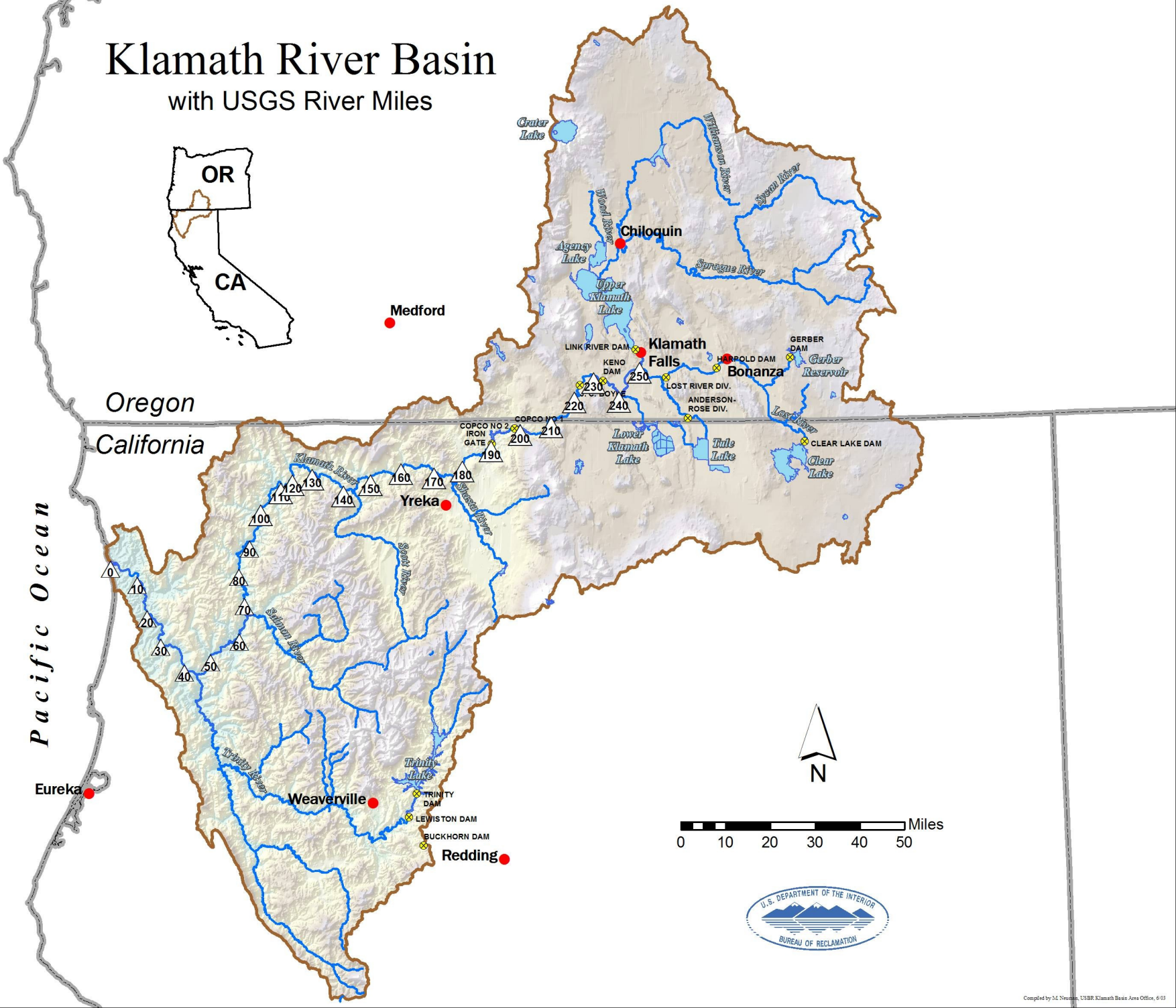
Klamath River Basin
with USGS River Miles
OR
CA
Medford
Oregon
California
Pacific Ocean
Crater Lake
Williamson River
Sycan River
Wood River
Chiloquin
Agency Lake
Sprague River
Upper Klamath Lake
LINK RIVER DAM
Klamath Falls
KENO DAM
HAROLD DAM
Bonanza
GERBER DAM
Gerber Reservoir
LOST RIVER DIV.
ANDERSON-ROSE DIV.
Lost River
COPCO NO 2
COPCO NO 1
IRON GATE
Lower Klamath Lake
Tule Lake
CLEAR LAKE DAM
Clear Lake
Klamath River
Yreka
Shasta River
Scott River
Salmon River
Trinity River
Trinity Lake
TRINITY DAM
LEWISTON DAM
BUCKHORN DAM
Weaverville
Redding
Eureka
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Miles
0 10 20 30 40 50
U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Compiled by M. Neuman, USBR Klamath Basin Area Office, 6/03