

Irrigation, the ESA, and the Klamath Project

Paul Simmons

Somach Simmons & Dunn

**2nd Western Agricultural
Law Conference**





TOPICS

- *ESA Overview*
- *ESA / Water Rights Interface (or Disconnect)*
- *Klamath Basin / Klamath Project ESA Experience*
- *The State of Play in Klamath / Lessons*

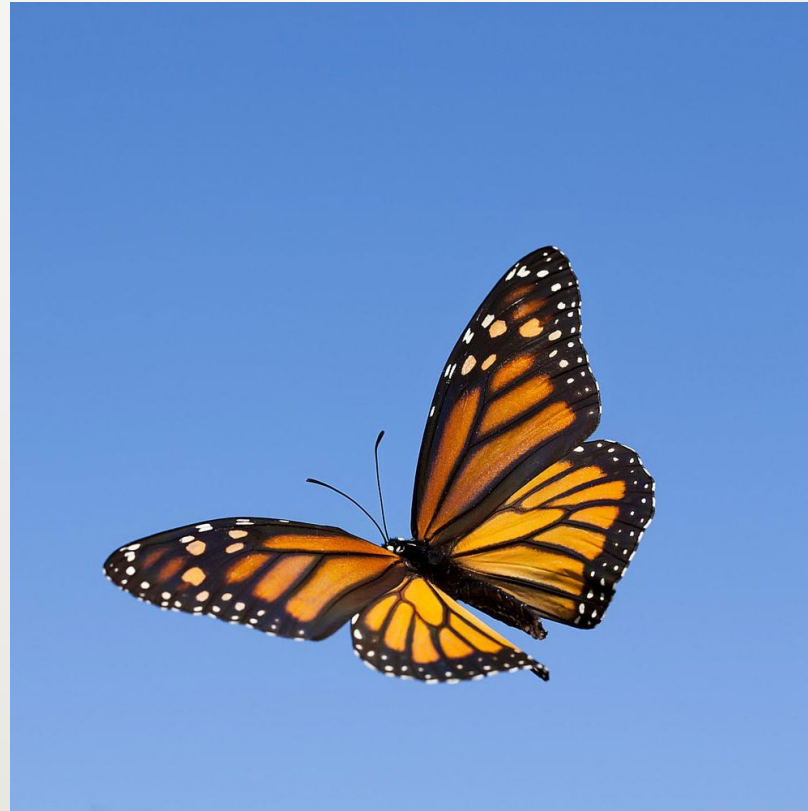


ESA OVERVIEW

- Split Jurisdiction
 - *United States Fish and Wildlife Service (Department of the Interior); Inland and Avian*
 - *NOAA Fisheries / National Marine Fisheries Service (Department of Commerce); Aquatic Marine and Anadromous Species*

ESA OVERVIEW: SECTION 4 (16 U.S.C. 1533)

- Formal Rulemaking Procedures for Listing a Species as Threatened or Endangered and Designating “Critical Habitat”



ESA OVERVIEW: SECTION 9 (16 U.S.C. 1538)

- Section 9 Prohibits (Unauthorized) “Take” of Listed Animals
 - *Prohibition applies to everyone (private citizens, local and state agencies, federal agencies)*
 - *Taking includes kill, harm, harass... Habitat modification can result in take if an individual is harmed*
 - *Intent is not relevant*
- Enforcement
 - *By the Services*
 - Injunctive relief
 - Civil and criminal penalties
 - *By Citizens*
 - Injunctive relief
 - Attorneys’ fees recoverable

SECTION 9 IN ACTION: EXAMPLES

- *United States v. Glenn-Colusa Irrigation District*, 788 F. Supp 1126 (E.D. Ca 1992)
 - Diversion from the Sacramento River serving approximately 200,000 acres
 - District Court
 - found that the diversion caused take of endangered winter-run salmon; and
 - enjoined all diversions between July 15 and November 30 of each year



SECTION 9 IN ACTION: EXAMPLES

An aerial photograph of a river valley. The river winds through a landscape of rolling green hills and some agricultural fields. The sky is blue with scattered white clouds. The overall scene is a natural, scenic view of a river basin.

- *Wishtoyo Foundation v. United Water Conservation District* (C.D. Cal. 2018)
 - Citizen suit alleging unlawful take of southern California steelhead
 - District Court found take. An injunction:
 - limits diversions
 - requires new fish passage
 - Attorneys' fees to plaintiffs

SECTION 9 IN ACTION: EXAMPLES

Wishtoyo Foundation et al v. United Water Conservation District

California Central District Court

Judge: David O Carter
Referred: Paul L Abrams
Case #: 2:16-cv-03869
Nature of Suit: 893 Other Statutes - Environmental Matters
Cause: 33:1365 Environmental Matters

Case Filed:
Terminated:

Jun 02, 2016
Sep 27, 2018

Docket Parties (4) Related Cases (1)

Tuesday, May 28, 2024

615 order Minutes of In Chambers Order/Directive - no proceeding held
MINUTE (IN CHAMBERS) ORDER IN CHAMBERS
Agencies, to submit prop...

MINUTE (IN CHAMBERS) ORDER IN CHAMBERS by Judge David O. Carter. Although the anticipated modified Hardened Ramp design is acceptable to the parties and the non-party Agencies, the operation of the Hardened Ramp once it is constructed continues to be the subject of significant disagreement. To better identify these disputes the Court orders the parties, and invites the non-party Agencies, to submit proposed findings and orders addressing the operation of the Hardened Ramp once construction is completed on or before **July 9, 2024**. The Court will hold a hearing on this matter on **July 16, 2024** at 9:00 AM (SEE DOCUMENT FOR FURTHER DETAILS.) (rolm)

tes the Court orders the parties, and invites the non-party

ESA OVERVIEW: AUTHORIZATION OF TAKE

- Otherwise-Prohibited Take Can Be Authorized in Two Major Ways
 - *For nonfederal parties: permits issued under Section 10 (16 U.S.C. 1539)*
 - *For both federal and nonfederal parties: in incidental take statements issued in a biological opinion by the Services [next topic]*



ESA OVERVIEW: SECTION 7 (16 U.S.C. 1536)



- Section 7 Applies Only to Federal Agencies
- Substantively
 - Section 7(a)(2) requires that federal agencies insure [sic] that their actions not jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat
 - This mandate applies “whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)
- Procedurally (ESA Consultation)
 - The action agency describes its proposed action, in a “biological assessment”
 - The Service issues its biological opinion, opining as to whether the proposed action would violate the substantive requirement of Section 7(a)(2)
 - If so, the biological opinion also identifies any “reasonable and prudent alternatives” that would not result in jeopardy
 - Then the action agency decides whether and how to proceed in light of its Section 7(a)(2) duty

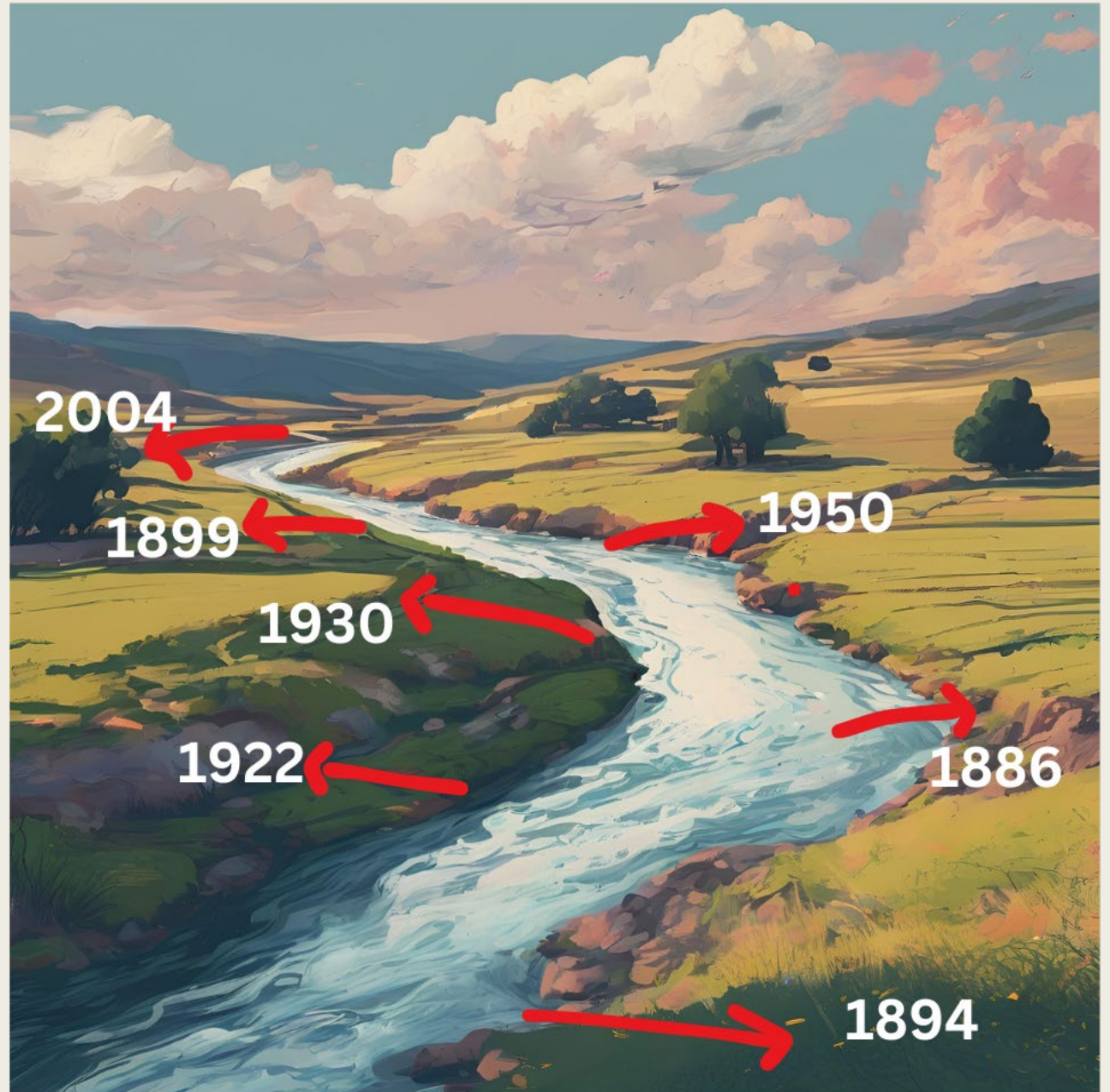
Western Water Law Conference
CLE International
Las Vegas
September 26, 2006

**DOES THE ENDANGERED SPECIES ACT
CREATE A WATER RIGHT? WHY IT MATTERS
AND DOESN'T**

**Paul S. Simmons
Somach, Simmons & Dunn
Sacramento, CA**

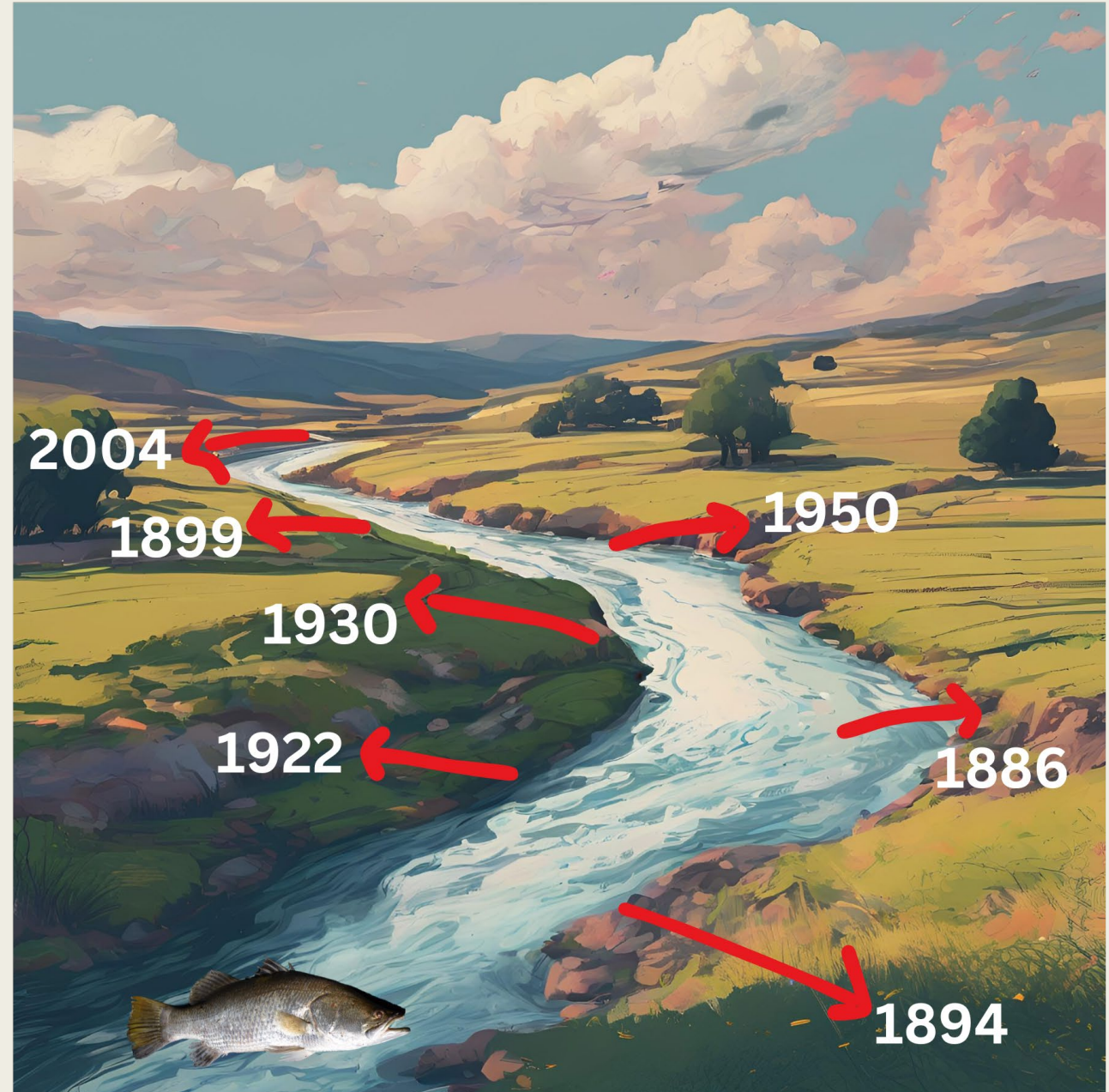
ESA AND WATER RIGHTS

*Western States
Follow Prior
Appropriation
Doctrine*



ESA AND WATER RIGHTS

Is the Fish an Appropriator?





A Year (+) in the Life: DISPOSITIVE RULINGS OF NOTE

Ninth Circuit Court of Appeals

Klamath Irrigation Dist. v. United States Bureau of Reclamation, 48 F.3d 934 (Sept. 8, 2022)

Klamath Irrigation Dist. v. United States Bureau of Reclamation, 69 F.3d 204 (June 5, 2023)

Oregon Court of Appeals

Klamath Irrigation Dist. v. Or. Water Res. Dep't, 321 Or. App. 581 (Sept. 8, 2022)

U.S. District Court (D. Or.)

Buchanan v. Or. Water Res. Dep't (D. Or. Aug. 29, 2023)

Klamath Tribes v. United States Bureau of Reclamation (D. Or. Feb. 7, 2024)

Klamath Tribes v. United States Bureau of Reclamation (D. Or. Feb. 7, 2024)

United States of America v. Klamath Drainage Dist. (D. Or. Sept. 11, 2023)

U.S. District Court (N.D. Cal.)

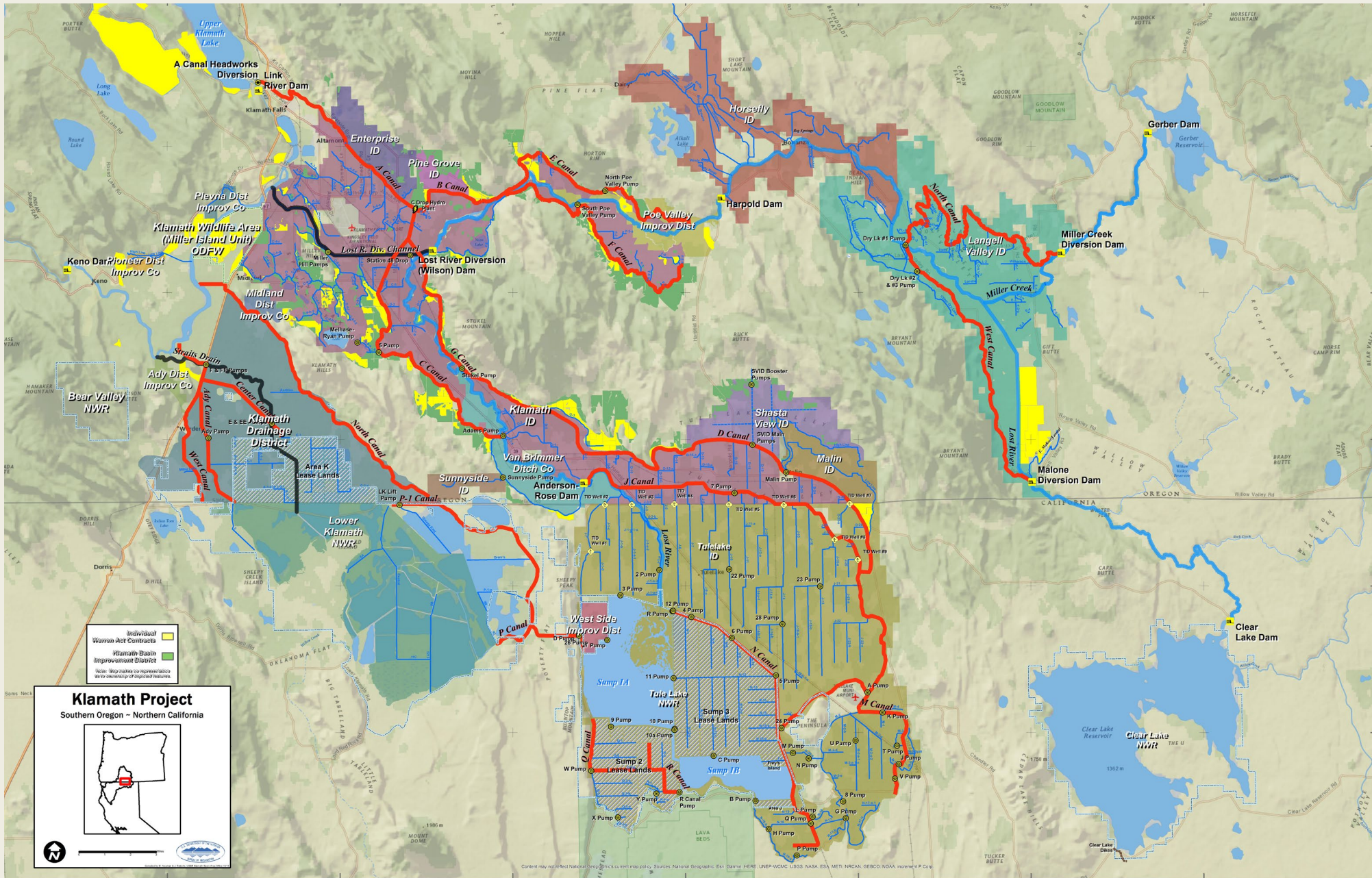
Yurok Tribe v. United States Bureau of Reclamation (N.D. Cal. Feb. 6, 2023)

STC





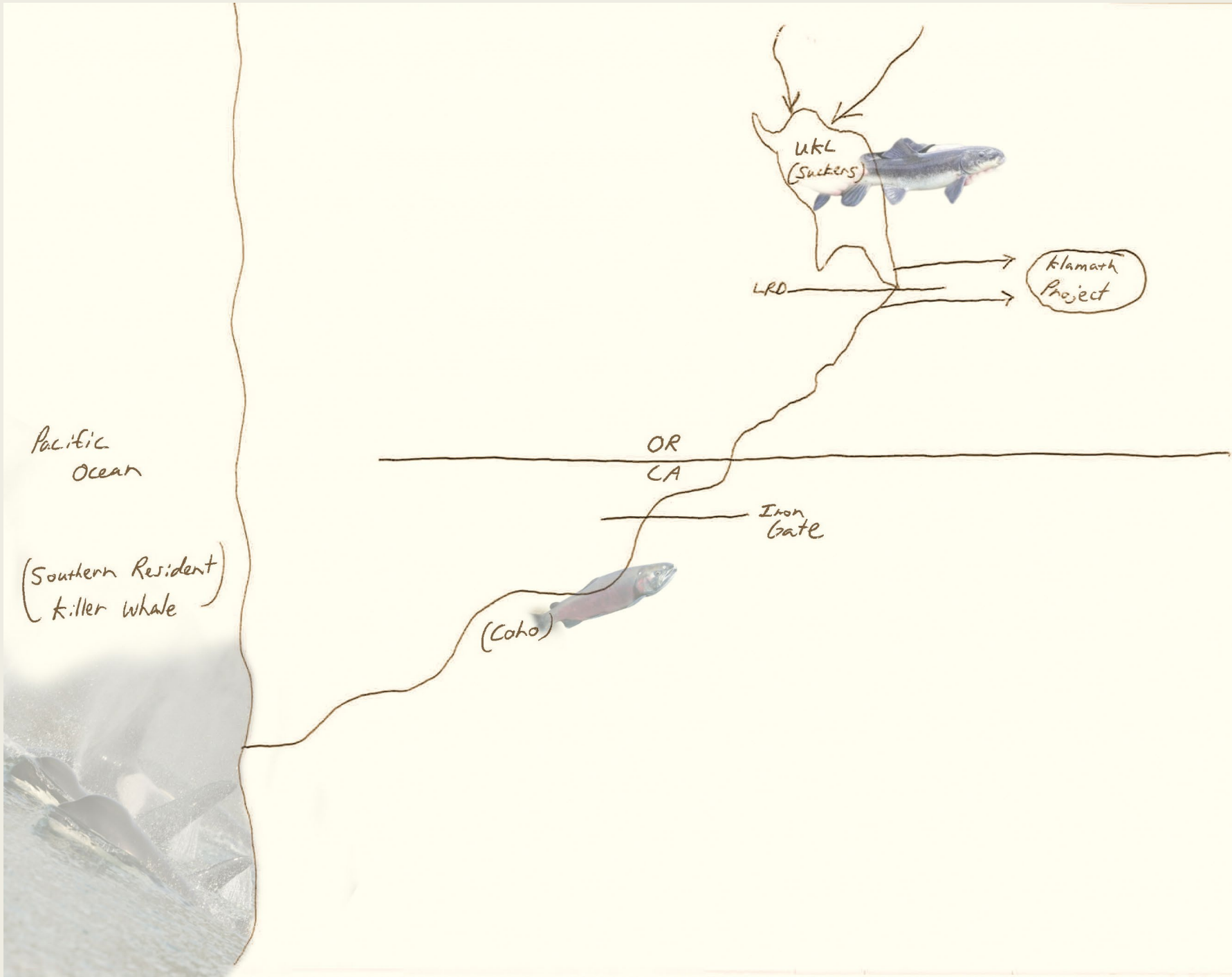
About 150 miles (241 km) across



Klamath Project
Southern Oregon - Northern California

1:000 m

Content may reflect National Geographic's current map policy. Sources: National Geographic, Esri, Garmin, HERE, UNEP-WCMC, USGS, NASA, ESA, METI, NRCAN, GEBCO, NOAA, increment P Corp.



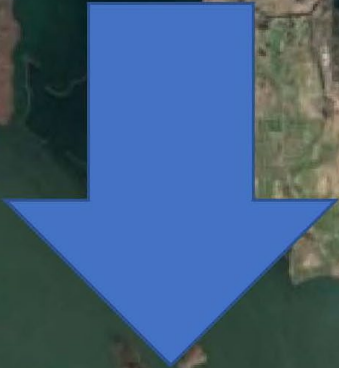
The Klamath Project ~ ESA Section 7 Logic

Section 7(a)(2): Federal Agencies Must Ensure that Their Actions Not Cause Jeopardy to ESA-listed Species

...is interpreted to mean...

The Project must “**provide adequate water**” for ESA-listed species in Upper Klamath Lake (suckers) and Klamath River (coho, killer whales), as determined by USFWS and NMFS

**UKL Net
Inflow**
260,000 AF



**2021
UKL Net Inflow-Allocation
Comparison**

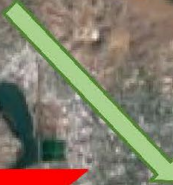
Spring-Summer Period
March-September

Arrow line widths are to
approximate relative scale.

River Releases
361,686 AF



**Project
Supply**
33,000 AF



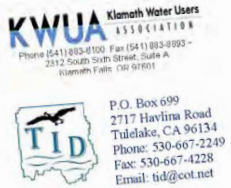
A HOT TOPIC: DISCRETION

- Federal Agency's Section 7(a)(2) obligation to ensure that their actions do not cause jeopardy, etc., applies only to **discretionary actions**; that is, actions where the agency has discretion to modify the action to benefit ESA-listed species. For nonfederal actions occurring under a federal authorization (permit, contract, etc.), the federal agency must have retained discretion to impose measures that inure to the benefit of the listed species.

See 50 C.F.R. 402.14(a); *National Ass'n of Home Builders v. Wilderness Society*, 551 U.S. 644 (2007); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003).

DISCRETION AND THE KLAMATH PROJECT

- For the last seven years, KWUA has sought a changed paradigm
 - *The argument is that matters associated with diversion and delivery of water for irrigation in the Klamath Project is not subject to the Section 7(a)(2) prohibitions*
 - *The argument is that such actions are either: nondiscretionary federal actions, or nonfederal actions as to which Reclamation has not retained discretion to direct conduct of irrigation districts so as to benefit listed species*
 - *The issue was joined in litigation filed in 2019 but that litigation was dismissed due to the inability to join necessary parties (tribes)*



July 16, 2020

Via Electronic Mail Only

Honorable Daniel Jorjani
Solicitor, U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
daniel.jorjani@sol.doi.gov

RE: Klamath Project: Request for Solicitor's Opinion

Dear Mr. Jorjani:

As public agency districts who operate Klamath Project (Project) works and deliver Upper Klamath Lake and Klamath River water to the vast majority of all Project land reliant on that water, and the trade organization for such parties, we respectfully request that your office complete an opinion providing advice on the obligations and authorities of the United States Bureau of Reclamation (Reclamation) at the Klamath Project, specifically in regard to section 7(a)(2) of the Endangered Species Act (ESA), section 8 of the Reclamation Act, applicable contracts, and Reclamation's trust responsibilities. Such an opinion will require revisiting and updating a 1995 Regional Solicitor's Memorandum, which was supplemented by a 1997 Regional Solicitors' Memorandum that responded to an analysis by the Oregon Department of Justice.

Relevant developments since the time of the two Regional Solicitors' memoranda include:

- The decision of the United States Supreme Court in *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (*Home Builders*), and conforming and consistent decisions of lower courts.
- The state of Oregon's adoption of its Findings of Fact and Order of Determination in the Klamath River Basin Adjudication, as modified in the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).
- The decision of the United States Supreme Court in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (*Jicarilla Apache Nation*), and consistent or conforming decisions of lower courts, including a federal district court decision agreeing with Reclamation's characterization of its trust responsibilities in the Klamath Basin.

Honorable Daniel Jorjani
RE: Klamath Project: Request for Solicitor's Opinion
July 16, 2020
Page 2

We submit that this analysis must include consideration of the authorized purpose or purposes of the Project, the nature of water rights associated with the Project including both storage and use rights, the activities that are and are not discretionary actions, the relative roles of Reclamation and consulting agencies in characterizing and evaluating effects of a proposed action, and any other responsibilities that affect Project operations. It is the water users' position that Reclamation does not have legal authority or discretion in the Klamath Basin to operate the Project, or direct the operation of the Project, for the benefit of fish species over irrigation uses.

The last several years of Klamath Project operations have been extremely challenging and damaging for our communities. We believe that it is critically important to give attention to outdated assumptions or understandings of Reclamation's authority and obligations. We understand that the results of this analysis cannot be predicted, but we believe it is essential. Legal authority supporting this policy change is outlined in Attachment A. We also request that we and counsel be provided with an opportunity to discuss these legal and operational concepts with your team as the work proceeds.

Finally, we recognize that the issues raised here have significant implications for Project operations. To the extent there is flexibility in Project operations consistent with the application of all of the principles discussed in the attached analysis, we will support working with Reclamation and all stakeholders to identify the optimum management for all affected resources.



**Reassessment of U.S. Bureau of Reclamation
Klamath Project Operations
to Facilitate Compliance with
Section 7(a)(2) of the Endangered Species Act**

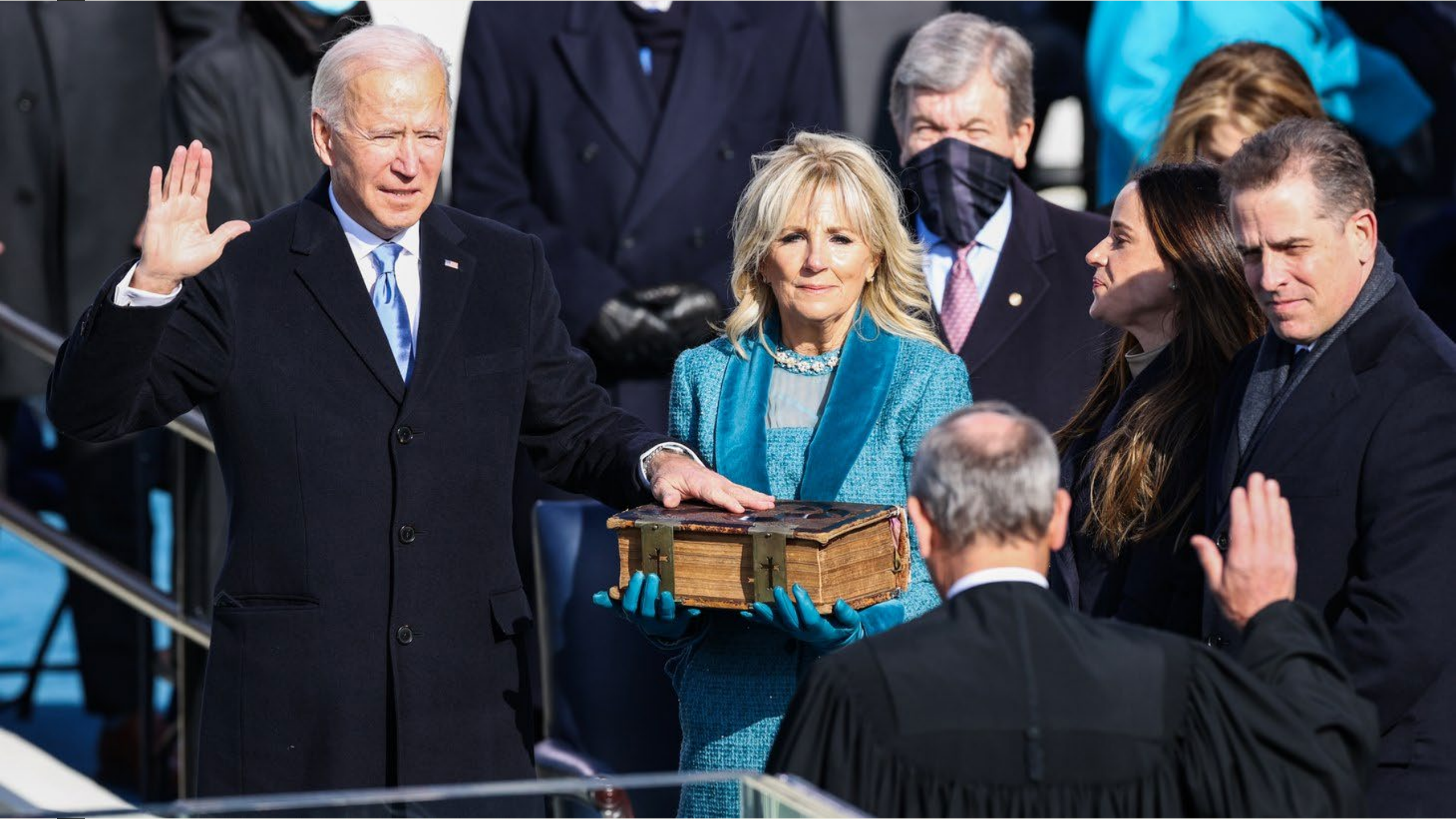
This Document is for Decision Purposes Only

U.S. Bureau of Reclamation
California-Great Basin Region (Region 10)
2800 Cottage Way
Sacramento, CA 95825-1898

January 2021

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THE SECRETARY OF THE INTERIOR
WASHINGTON

APR 08 2021

Memorandum

To: Deputy Solicitor – Indian Affairs¹
Principal Deputy Assistant Secretary – Water and Science
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
Principal Deputy Assistant Secretary – Indian Affairs
Senior Counselor to the Secretary

From: Secretary

Subject: **Withdrawal of Klamath Project-Related Memoranda, Letters, and Analyses**

On January 20, 2021, President Biden signed Executive Order (EO) 13990, entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” 86 Fed. Reg. 7037 (Jan. 25, 2021). EO 13990 affirms the new administration’s commitment to organize and deploy the full capacity of its agencies to combat the climate crisis, increasing resilience to the impacts of climate change; protecting public health; conserving our lands, waters, and biodiversity; and delivering environmental justice. Among other things, the EO directs agencies to “immediately review and, as appropriate and consistent with applicable law, take action to address” certain regulations or other agency actions that conflict with national objectives set forth in the EO. The Biden-Harris administration has also made clear its commitment to respect Tribal sovereignty and self-governance and to fulfill Federal trust and treaty responsibilities to Tribal Nations through regular, meaningful, and robust consultation.

The Klamath Basin in southern Oregon and northern California is facing one of the worst drought years in 4 decades. Water flowing from the Upper Klamath Lake and in the Klamath River is critically important to communities in this region, including farmers and ranchers, sport and commercial fishermen, and multiple Tribes in the Klamath Basin that depend on these waters, fisheries, and other natural resources for their livelihoods. Given the dire and unprecedented drought conditions that we are facing, we know that difficult decisions will need to be made in the coming days and weeks to address water shortages. Through this memorandum, I am directing each of you to work collaboratively, across our agency and across the Federal Government, and with our State, local, Tribal, and community partners to identify steps that can be taken to minimize the impacts of upcoming water allocation decisions and develop a long-term plan to facilitate conservation and economic growth in the Klamath Basin.

¹ The Principal Deputy Solicitor is recused from this matter.



Yurok Case (N.D. Cal.)

Through a procedurally tangled lawsuit that included...

The Yurok Tribe filing a lawsuit against Reclamation and NMFS; and the United States filing a crossclaim against Klamath Water Users Association and the State of Oregon; and

KWUA filing a counterclaim against the United States...

The “discretion” issue was teed up in federal court in litigation in which basin tribes are parties

Yurok Case (N.D. Cal.)

Does Reclamation have the discretion to curtail storage, diversion, and delivery of water to Project irrigators in order to benefit ESA-listed species?

Irrigators' Answer: No.

Read Home Builders. The ESA itself does not create any authority to protect listed species. Section 7(a)(2) only requires exercise of otherwise-existing discretion that can be exercised to benefit species. The Project is authorized for irrigation only. Under contracts, diversion and delivery are either: non-discretionary federal obligations; or actions performed by non-federal parties to whom Section 7(a)(2) does not apply.

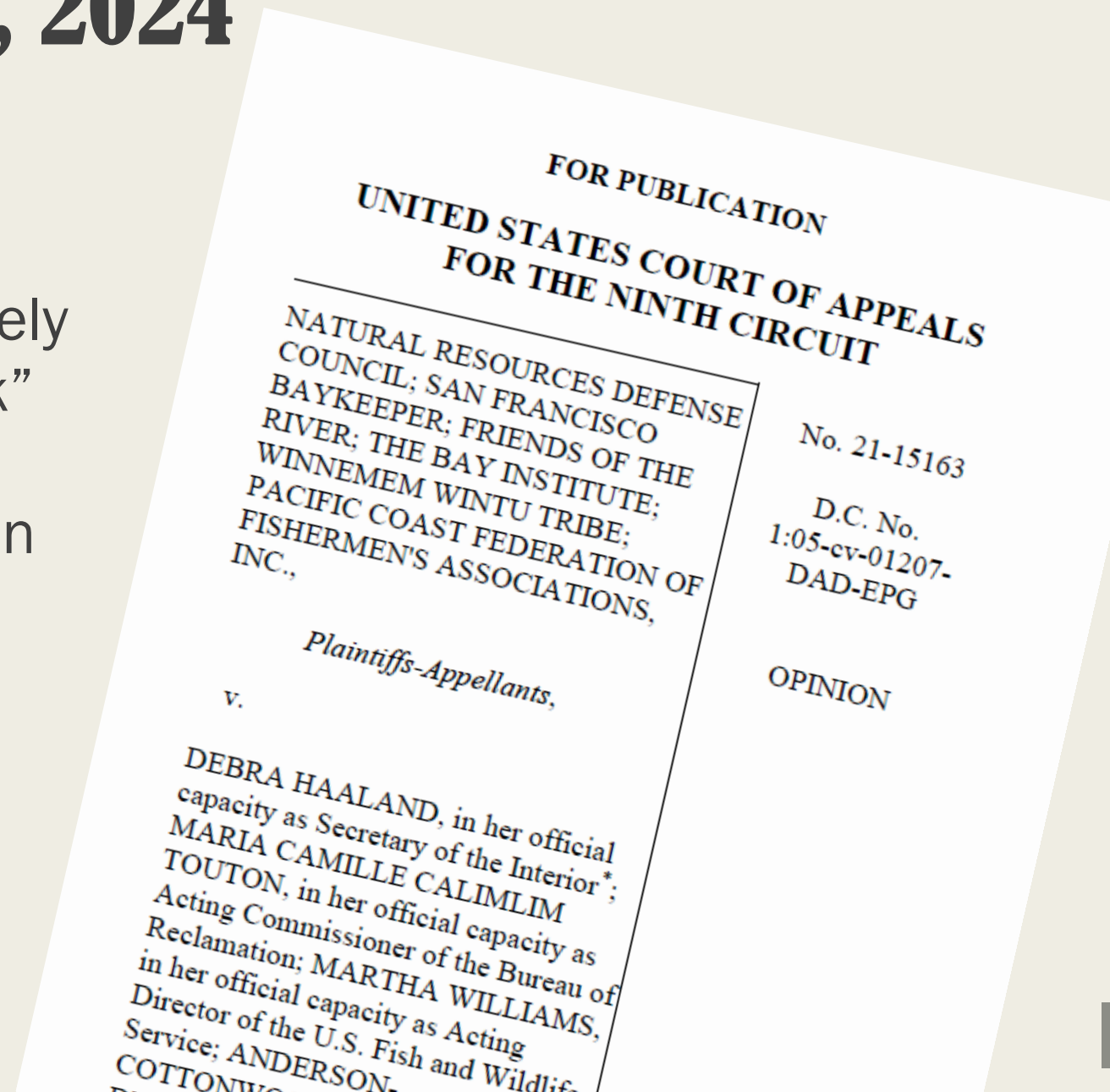
District Court's Answer (Feb. 6, 2023): Yes.

Section 10 of the Reclamation Act (43 U.S.C. 373) confers broad authority to “perform any and all acts and make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.” That is sufficient to create discretion to protect species, even to the detriment of Project water users.

The Case is Now Pending Before the Ninth Circuit Court of Appeals

Meanwhile, on May 23, 2024

- The NRDC decision is extremely helpful in the Klamath “Yurok” case on the issue of the absence of retained discretion in existing contracts





23-15499 Yurok Tribe v. Klamath Water Users Association

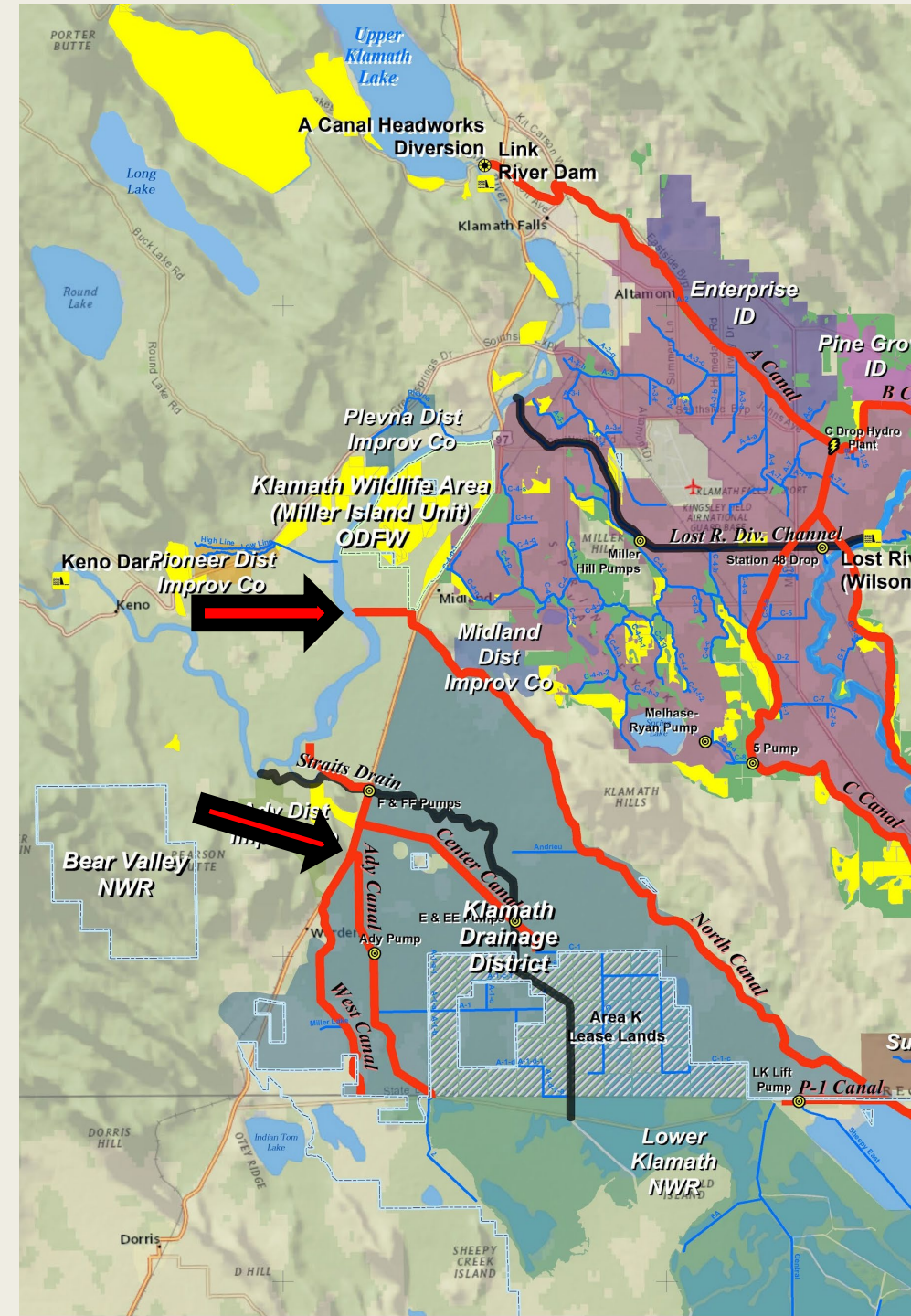


June 12, 2024
Courtroom 1, 3rd Floor
San Francisco, California
Before: SCHROEDER, GOULD, R. NELSON



U.S. v. Klamath Drainage District (D. Or. Sept. 11, 2023)

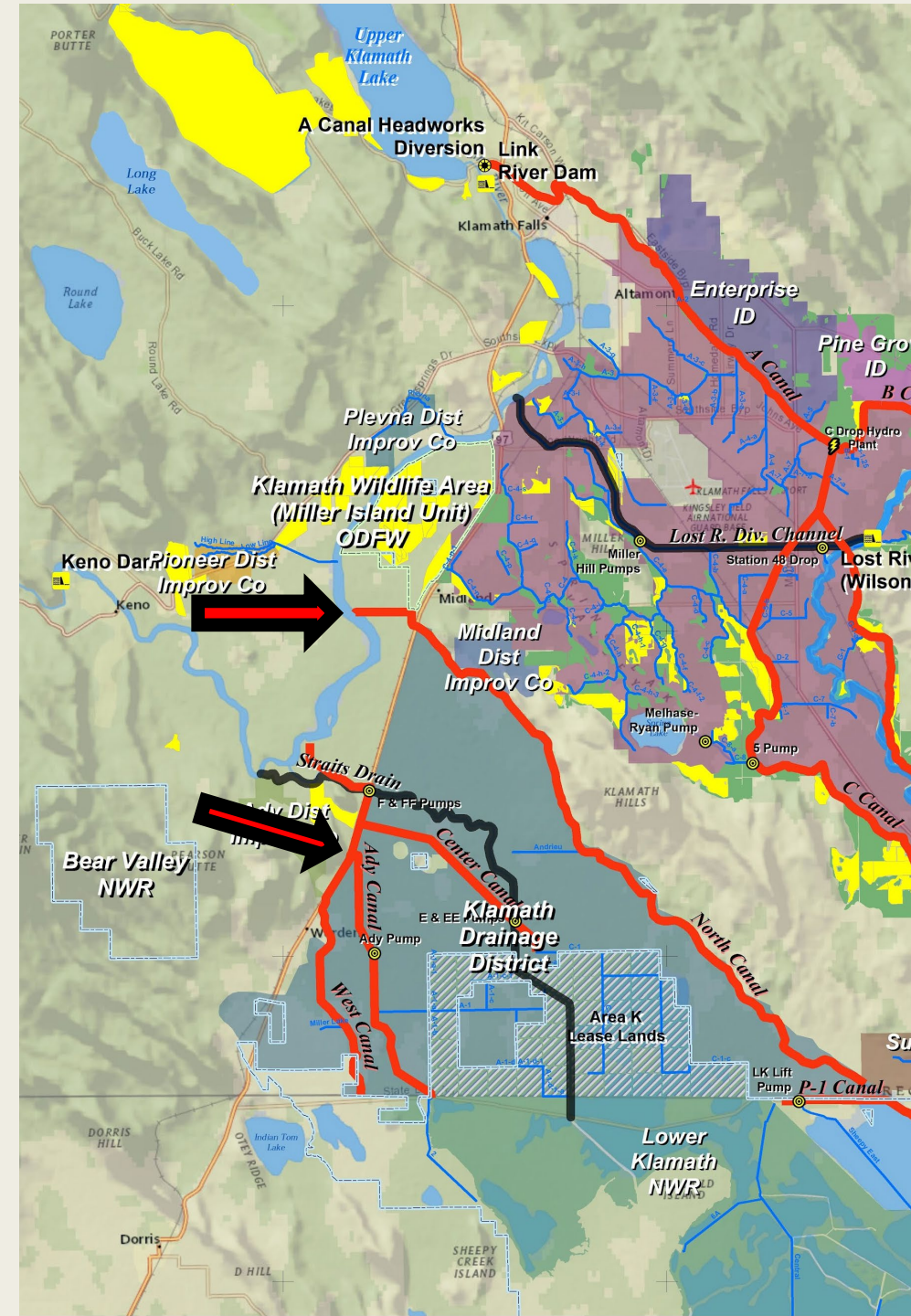
- In a 1943 contract, KDD and Reclamation agreed that Reclamation would release water from Upper Klamath Lake for diversion by KDD from the Klamath River, in exchange for payment and other consideration
- Reclamation owns/operates the headworks of one of KDD's diversions (Ady Canal) but KDD owns North Canal in its entirety
- KDD also has a supplemental state permit that is not based on appropriation of the water for the Project as a whole



U.S. v. Klamath Drainage District (D. Or. Sept. 11, 2023)

- **Question Presented:** Must KDD comply with a Reclamation directive to cease or limit diversion from North Canal based on ESA Section 7 and the 1943 contract?
- **KDD's Answer:** No, of course not. It's our canal and our water right. KDD is not subject to Section 7. Plenty of diverters take water from their own facilities and water rights without Reclamation's permission.
- **District Court's Answer:** Yes, of course it must. The 1943 contract is a bargained-for exchange that provides the full universe of circumstances under which KDD may divert Klamath water. The contract also makes KDD subject to "rules and regulations" such as Reclamation's ESA-based operations plans.

The Court permanently enjoined KDD from diverting any water, from any diversion, without Reclamation's authorization.



WHAT CAN WE CONCLUDE FOR SURE?

- It is possible to have very good water rights...
 - And no water

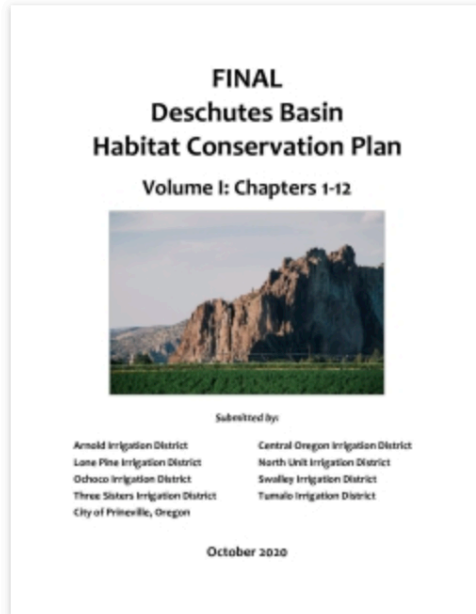
- If you can litigate your way to irrigation stability in the face of the ESA...
 - You will be in a minority of one



DBHCP Volume 1 December 2020.pdf



Document - application/pdf



Eight irrigation districts (Districts) in the Deschutes Basin of Oregon and the City of Prineville, Oregon (City) have prepared the Deschutes Basin Habitat Conservation Plan (DBHCP) to support the issuance of incidental take permits by the US Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), collectively called the Services, under Section 10(a)(1)(B) of the federal Endangered Species act of 1973, as amended (ESA). The Districts and the City (collectively called the Permittees) utilize waters of the Deschutes River and its tributaries (Figure 1-1) where their activities have the potential to incidentally harm (take) one wildlife species (Oregon spotted frog) and two fish species (steelhead trout and bull trout) that are currently listed as threatened under the ESA. The taking of a listed species is prohibited under Section 9 of the ESA, but avoidance of take for these three species would require the Permittees to cease or significantly curtail a number of essential activities involving the use of water. The incidental take permits will allow the Permittees to continue their otherwise lawful uses of water without the threat of prosecution for the incidental taking. The DBHCP will be implemented to minimize and mitigate the impacts of the authorized taking. The incidental take permits and the DBHCP will have concurrent terms of 30 years.

The DBHCP also provides mitigation for the effects of the activities on one species that currently has no status under the ESA in the Deschutes Basin (sockeye salmon). In the event this unlisted species becomes listed under the ESA during the term of the DBHCP, the Permittees will receive incidental take coverage for it as well. All eight Districts covered by the DBHCP are quasi-municipal corporations formed and operated according to Oregon law to distribute water to irrigators (patrons) within designated geographic boundaries. Collectively the Districts serve over 7,653 patrons and provide water to nearly 151,000 irrigated acres. Prineville is an incorporated city and the county seat for Crook County, Oregon. It operates City-owned infrastructure and provides essential services, including public safety, municipal water supply, and sewage treatment to more than 9,000 residents.



BUILDING A FUTURE FOR WATER, WILDLIFE AND WORKING LANDS

YAKIMA RIVER BASIN INTEGRATED WATER RESOURCE MANAGEMENT PLAN

Reservoir Fish Passage

Provide fish passage at:

1. Clear Lake
2. Cle Elum
3. Bumping
4. Tieton (Rimrock)
5. Keechelus
6. Kachess

Enhanced Water Conservation

1. Implement an agricultural water conservation program designed to conserve up to 170,000 acre-feet of water in good water years.
2. Create a fund to promote water use efficiency basin-wide using voluntary, incentive-based programs. Focus on outdoor uses as top priority.

Habitat/Watershed Protection & Enhancement

1. Protect ~70,000 acres of land by acquiring high elevation portions of the watershed and forest and shrub steppe habitat.
2. Evaluate potential wilderness area and wild and scenic river designations to protect streams and habitat.
3. Create a habitat enhancement program to address reach-level floodplain restoration priorities and restore access to key tributaries.

Market Reallocation

Employ a water market and/or a water bank to improve water supply in the Yakima River basin. Market reallocation would be conducted in two phases:

The near-term phase would continue existing water marketing and banking programs in the basin, but take additional steps to reduce barriers to water transfers.

The long-term program would focus on facilitating water transfers between irrigation districts. This would allow an irrigation district to fallow land within the district and lease water rights for that land outside the district.

Structural & Operational Changes

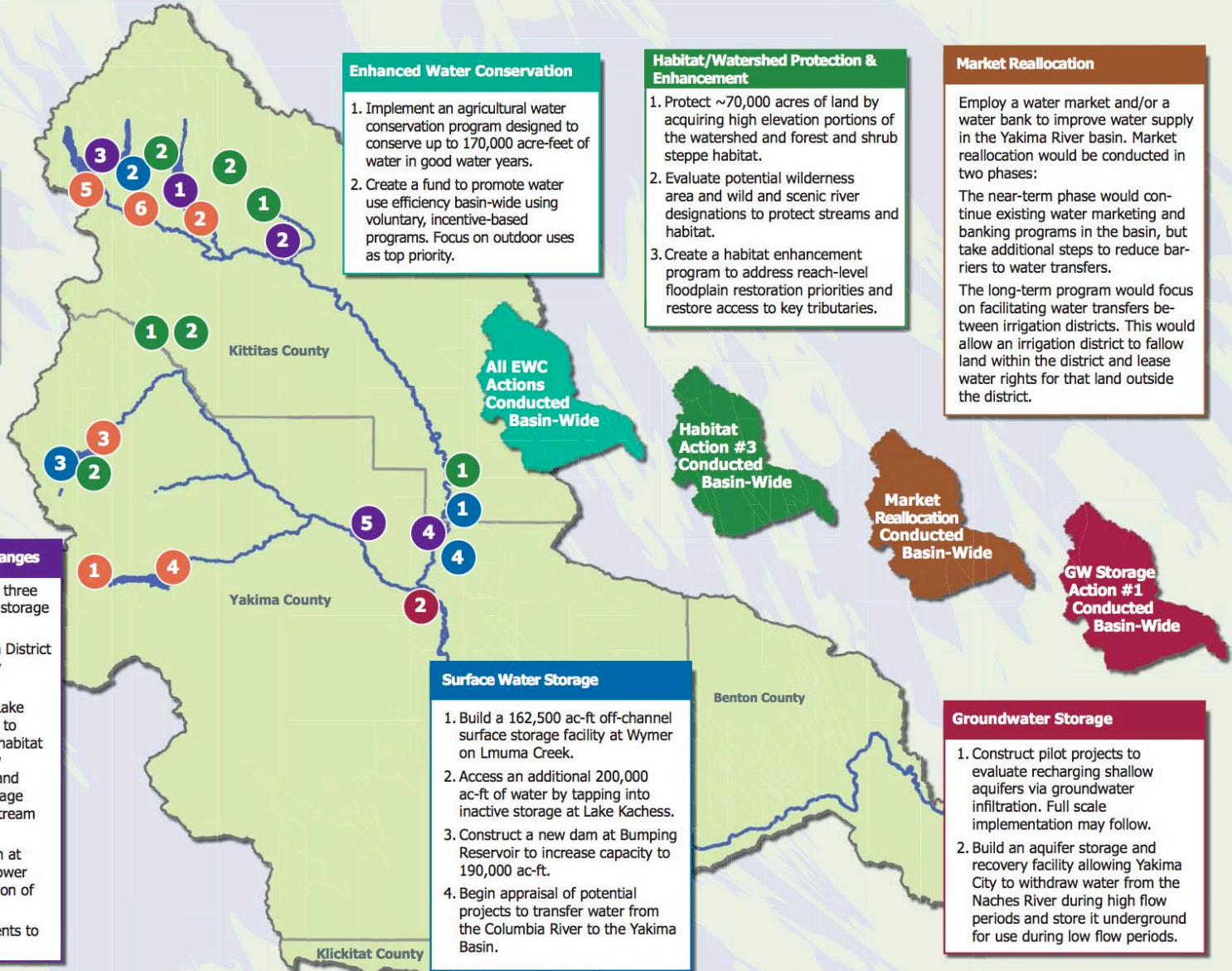
1. Raise the Cle Elum Pool by three feet to add 14,600 ac-ft in storage capacity.
2. Modify Kittitas Reclamation District canals to provide efficiency savings.
3. Construct a pipeline from Lake Keechelus to Lake Kachess to reduce flows and improve habitat conditions during high flow releases below Keechelus and to provide more water storage in Lake Kachess for downstream needs.
4. Decrease power generation at Roza Dam and Chandler power plant to support outmigration of juvenile fish.
5. Make efficiency improvements to the Wapatox Canal.

Surface Water Storage

1. Build a 162,500 ac-ft off-channel surface storage facility at Wymer on Lmuma Creek.
2. Access an additional 200,000 ac-ft of water by tapping into inactive storage at Lake Kachess.
3. Construct a new dam at Bumping Reservoir to increase capacity to 190,000 ac-ft.
4. Begin appraisal of potential projects to transfer water from the Columbia River to the Yakima Basin.

Groundwater Storage

1. Construct pilot projects to evaluate recharging shallow aquifers via groundwater infiltration. Full scale implementation may follow.
2. Build an aquifer storage and recovery facility allowing Yakima City to withdraw water from the Naches River during high flow periods and store it underground for use during low flow periods.



Yakima River Basin Integrated Water Resource Management Plan

KBRA Signing Ceremony from Salem



Answers?

