



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Dwight French, Water Right Services Division Administrator
Doug Woodcock, Field Services Administrator

SUBJECT: Agenda Item B, May 9, 2013
Water Resources Commission Meeting

Information Update: Klamath Basin Adjudication

I. Introduction

The Klamath Basin Adjudication is the most complex adjudication in Oregon's history and is the first to include determinations on federal reserved water right claims. On March 7, 2013, the Department filed the adjudicator's Findings of Facts & Order of Determination with the Klamath County Circuit Court. In addition, original claim files, contested case records, claim maps, and various other components of the adjudication record were delivered to the circuit court.

This historical event represents the culmination of 38 years of work to determine the validity of more than 730 claims to the use of surface water in the Klamath River Basin. Since 1975, the Department has systematically reviewed and determined these claims. The Department also received and resolved 5,660 contests to these claims.

The Findings of Fact & Order of Determination was entered into the record of the Water Resources Department.

This is an informational report, no Commission action is required.

II. Background

Oregon Revised Statutes Chapter 539 outlines the procedures for carrying out a general stream adjudication in Oregon. These statutes apply to water use initiated prior to the adoption of Oregon's water code on February 24, 1909. The statute also allows for the adjudication of federal reserved rights. In 1975, the Department invoked Oregon's statutory procedure for the adjudication of pre-1909 and federal reserved water rights within the Klamath River Basin. The adjudication was delayed several times due to lawsuits.

In court cases *United States v. Adair*, Adair I (1975-1979) and Adair II (1981-1983), federal courts ultimately ruled that the Klamath Tribes have federal reserved rights to water to support hunting and fishing on former reservation land, and such rights have a priority of “time immemorial.” The federal courts left the quantification of the rights for the state to determine. (*U.S. v. Adair*, 723 F2d 1394 (9th Cir. 1983).)

In *United States v. Oregon* (1990-1994), 44 F.3e 758 (9th Cir. 1994) the courts concluded that the Klamath River Basin Adjudication fell within the provisions of the 1952 McCarran Amendment, giving the state jurisdiction to adjudicate federal water rights.

Following statutorily required field and streamflow inspections, notice was given to file claims by February 1, 1991. Due to the *United States v. Oregon* (1990-1994), federal agencies, the Klamath Tribes and certain other water users in the Klamath Reclamation Project were given until April 30, 1999 to file claims. A total of 730 claims were filed.

Open inspection of claims commenced on October 4, 1999. May 8, 2000 was the deadline for filing contests. A total of 5,664 contests were filed. Only 24 claims were not contested. As required by Oregon Laws 1999, Ch. 849, sec 9, contested claims were referred to the Office of Administrative Hearings¹ for contested case proceedings. A contested case hearing is convened by an Administrative Law Judge (ALJ) who holds the hearing and then issues a proposed order. Hearings concluded in 2011, and the ALJ’s remaining proposed orders were received by the Department in 2012. Contests to claims were resolved by an ALJ’s proposed order, withdrawal of all contests, or a settlement agreement. The adjudicator’s review and determination of each claim is documented in a Partial Order of Determination for each claim. In claims where an ALJ issued a proposed order, the Adjudicator subsequently adopted the Proposed Order in its entirety or with modifications.

III. Discussion

Key Findings

- “Time Immemorial” claims are recognized for the Klamath Tribes² for certain reaches of the major tributaries to Upper Klamath Lake, and for Upper Klamath Lake itself. Other tribal claims were denied for streams outside the boundaries of the former Klamath Indian Reservation. For example, the Klamath Tribes’ claim for portions of the Klamath River was denied.
- Claims based on the 1864 Klamath Treaty were recognized for land within the boundaries of the former Klamath Indian Reservation and carry an 1864 priority date. Allottee claimants are members of the Klamath Tribes who received allotments of land

¹ The Office of Administrative Hearings was initially called the Hearing Officer Panel.

² The claims are held by the Klamath Tribes and the US Department of the Interior Bureau of Indian Affairs as trustee on behalf of the Klamath Tribes.

within the boundaries of the former Klamath Indian Reservation. Walton claimants are non-Indian purchasers of Indian allotments.

- Claims within the Klamath Reclamation Project were granted a priority date of 1905 (there are some limited exceptions). The adjudicator concluded that the United States is the owner of the water rights for the Klamath Reclamation Project and that the beneficial users of project water hold the water rights for the purpose of beneficial use.
- Claims for use of water on natural wildlife refuges were approved for wildlife and for irrigation on farmed agricultural lands. Claims for use of water on irrigated non-farmed lands were not recognized.

Public Outreach

On March 7, 2013, the Department posted several informational documents on its website including a Press Release and FAQs, which are included in this report as Attachments 1 and 2. In addition, the Department made the Findings of Facts & Order of Determination along with the state's motion to set an initial hearing date under ORS 539.130 electronically available to the public at <http://www.oregon.gov/owrd/Pages/adj/index.aspx>.

Media Coverage

KOTI-TV NBC2 news station aired a short story on the filing of the Findings of Fact and Order of Determination. It can be viewed using the following link: <http://www.kobi5.com/news/local-news/item/klamath-river-basin-adjudication-now-underway.html>

See Attachment 3 for a sampling of related media coverage.

Implementation of the Adjudication

In Oregon, the watermaster distributes water by priority date, with senior water rights receiving water before junior rights during times of water shortage. With the delivery of the Final Order of Determination, the recently determined claims are now enforceable as authorized uses of water within the prior appropriation system in Oregon. The watermaster may now regulate for and against these claims, as the protection of senior water rights dictates.

The Department and the Governor's Office are working closely with the U.S. Department of the Interior, Klamath Tribes, and water users in the basin to address regulatory questions and concerns, and, as a group, are developing coordination protocols prior to a significant call on water. The watermaster and other Department staff made a number of presentations starting in 2012 to prepare the public for implementation of the Adjudication.

Klamath County provides the watermaster an office assistant, an office and budget. The watermaster currently has a temporary state-funded field assistant through the end of the

biennium. The Governor's 2013-15 budget requests one full-time assistant watermaster for the Klamath Basin. This staff would be available next biennium if approved in the Legislatively adopted budget. The Klamath Water and Power Agency has committed financial support for an additional assistant watermaster on an annual confirmation basis. Additionally, the Department has watermasters in adjacent counties that can provide regulatory assistance on a short-term basis to the Klamath County watermaster this upcoming irrigation season.

Summary

Most of the active Klamath River Basin Adjudication claims—those not voluntarily withdrawn—were recognized, at least in part. Forty of the original 730 claims were completely denied. One hundred sixty-eight of the original 730 claims were voluntarily withdrawn.

IV. Conclusion

The filing of the Findings of Fact & Order of Determination brings an end to the Department's long and involved administrative process. The circuit court phase in the Klamath River Basin Adjudication has begun. Adjudication claimants or contestants who dispute the Department's determinations will have an opportunity to file exceptions with the Klamath County Circuit Court. The Court will then review those exceptions, and will ultimately issue a water rights decree, either affirming or modifying the Department's Final Order of Determination. The Department can issue water right certificates in accordance with the decree once it is issued by the court.

Copies of the Findings of Fact & Order of Determination and related materials are available from OWRD at: <http://www.oregon.gov/owrd/pages/adj/index.aspx>.

Dwight French and Doug Woodcock
503-986-0819 503-986-0878

Attachment 1: Press Release – Klamath Basin Adjudication (1975-2013)
Attachment 2: Supplemental Media Materials and Frequently Asked Questions
Attachment 3: Related Media Coverage



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Water Resources Department

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Jesse Ratcliffe, Oregon Dept. of Justice
Telephone: 503-947-4549

FOR IMMEDIATE RELEASE
March 7, 2013

The Oregon Water Resources Department Completes Klamath River Basin Adjudication (1975-2013)

Today, the Oregon Water Resources Department (“the Department”) delivered an historic document to the Klamath County Circuit Court. With this delivery, the Department has completed Phase One of the Klamath River Basin Adjudication.

Phase One

The Final Order of Determination in the Klamath River Basin Adjudication, delivered to the Klamath County Circuit Court on March 7, 2013, represents the culmination of 38 years of work to determine the validity of 730 claims to the use of surface water in the Klamath River Basin. Since 1975, the Department has systematically reviewed and determined these claims. The Department also received and resolved 5,660 contests to these claims.

During this phase, administrative law judges from Oregon’s Office of Administrative Hearings issued proposed orders for certain contested claims, making recommendations about the validity of these claims. With the Department’s issuance of the Final Order of Determination, the administrative phase of the Klamath River Basin Adjudication is now complete.

Phase Two

Today marks the beginning of the second phase in the Klamath River Basin Adjudication. Adjudication claimants or contestants who dispute the Department’s determinations will have an opportunity to file exceptions with the Klamath County Circuit Court. The Court will review those exceptions, and issue a water rights decree, either affirming or modifying the Final Order of Determination.

Key Findings

Most of the active Klamath River Basin Adjudication claims—those not voluntarily withdrawn—were recognized, at least in part. Forty of the original 730 claims were completely denied. One hundred sixty-eight of the original 730 claims were voluntarily withdrawn.

The most senior determined claims in the Klamath River Basin Adjudication are claims held by the United States in trust for the Klamath Tribes. These claims carry a priority date of “time immemorial.” The tribal claims were recognized for certain reaches of the major tributaries to Upper Klamath Lake, and for Upper Klamath Lake itself. Other tribal claims were denied for streams outside the boundaries of the former Klamath Indian Reservation. For example, the Klamath Tribes’ claim for portions of the Klamath River was denied.

In general, the recognized claims with the next most senior priority dates are “allottee” claims and “Walton” claims. Both types of claims are for land within the boundaries of the former Klamath Indian Reservation. They are based on the 1864 Klamath Treaty and carry an 1864 priority date. Allottee claimants are members of the Klamath Tribes who received allotments of land within the boundaries of the former Klamath Indian Reservation. Walton claimants are non-Indian purchasers of Indian allotments.

The Final Order of Determination includes a review of both proposed settlements and proposed orders, and either affirms or modifies them. The Final Order of Determination contains numerous modifications to the previously-issued proposed orders; three of the most significant modifications are as follows:

- (1) While the proposed orders for the Klamath Tribes’ instream claims allowed water rights for off-reservation stream reaches, the Final Order of Determination denies these claims.
- (2) Although the proposed order for the Klamath Reclamation Project¹ claims determined that the United States was the owner of the water rights for the Project, the Final Order of Determination concludes that the beneficial users of the Project water hold the Project water rights for the purpose of beneficial use.
- (3) The proposed orders for the Walton claims limited the scope of those claims. The Final Order of Determination modifies the proposed orders, resulting in an increase in the number of acres for which Walton rights are recognized.

Next Steps: A New Management System

Oregon follows the “prior appropriation” doctrine of water use, like most western states. When there is not enough water to satisfy all the water rights, water users with senior priority dates will receive water, while water users with relatively junior rights will not. Simply stated, water users who are “first in time” are “first in right.”

The completion of the Final Order of Determination means that the recognized claims are now a part of Oregon’s “first in time, first in right” prior appropriation system. Water users with recognized claims may now make calls for regulation of junior water users if doing so will result in additional water being available to the senior user.

One practical effect of the Adjudication is that some water users who have regularly been able to make use of the full amount of water under their claims, water right certificates, or water use permits may no

¹ The Klamath Reclamation Project provides water for roughly 200,000 acres of agricultural land south of Klamath Falls on both sides of the Oregon – California border. The Project was jointly developed by the United State Bureau of Reclamation, irrigation districts, and water users.

longer be able to in certain years, while some water users who have not always been able to make use of the full amount water under their claims may now be able to. Regulation of water rights is normal practice in most other basins in Oregon. Water management in the Klamath River Basin will now operate in the same manner as most other parts of the state.

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If you would like more information about this topic, or to schedule an interview, please call Brenda Bateman at 503-986-0879 or e-mail Brenda.O.Bateman@state.or.us.



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Klamath River Basin Adjudication: Supplemental Media Materials and Frequently Asked Questions

March 7, 2013

Prior Appropriation System. Passage of the Water Code in 1909 established, for the first time in Oregon, a centralized administrative system for acquiring, certifying and documenting rights to the use of water. These water rights are then managed within a prior appropriation system of water allocation.

Definition of Adjudication. Holders of vested water rights established prior to 1909 include those claimed by Indian Tribes by virtue of treaties with the U.S. Government. These claims are required to go through a formal administrative, judicial process known as adjudication to have their water right claims quantified, documented, and eventually incorporated into the prior appropriation system.

Definition of a Claim. A claim is an assertion with supporting documentation of the use or development of surface water initiated prior to Oregon's 1909 Water Code, or an assertion of a right to use water based on a federal reservation of land consistent with the primary purpose of the land reservation. The Oregon Water Resources Department assigned a claim number to each claim.

Definition of a Contest. After a claim was filed, contestants had an opportunity to file objections to a claim. This is called a contest. During the adjudication process, claims with unresolved contests were referred to the state's Office of Administrative Hearings for contested case proceedings. The proceedings began in 2001 and were completed in 2011. The Office of Administrative Hearings assigned a case number to each claim and its contests. Upon completion of the hearings, an Administrative Law Judge from the Office of Administrative Hearings issued a Proposed Order as a recommendation to the Adjudicator.

Definition of Findings of Facts and Final Order of Determination. This is the Adjudicator's determination of all claims in the Klamath River Basin Adjudication. It has two main parts:

Part 1: The general Findings of Facts outline the Department's fulfillment of statutory requirements during the adjudication (notices, stream and field investigations, etc.). The general conclusions of law state the Adjudicator's legal basis for determinations.

Part 2: Partial Orders of Determination. These are the Adjudicator's determinations for each individual claim. The determinations were made after consideration of the record for each claim. Each partial order of determination contains findings of fact and conclusions of law specific to the claim. Partial orders of determination may also incorporate certain of the Adjudicator's general findings of fact and conclusions of law.

Two Phases of the Klamath River Basin Adjudication. The Adjudication is the process of determining claims to the use of surface water in the Klamath River Basin. The first phase is the review and determination of these claims by the Oregon Water Resources Department, including the hearing of contests to claims and the issuance of proposed orders by administrative law judges from the State's Office of Administrative Hearings. With Department's issuance of the Adjudicator's Findings of Fact and Final Order of Determination on March 7, 2013, this phase of the process is now complete.

The second phase is the review of the Final Order of Determination by the courts. The second phase of the process is now beginning. Adjudication claimants or contestants who dispute the Department's determination of their claims or contests will have an opportunity to file exceptions with the Klamath County Circuit Court. The Court will then review these exceptions, and will issue a water rights decree affirming or modifying the Final Order of Determination.

The Benefits of Adjudication. The ability to manage water resources has been greatly facilitated in those areas of the state where adjudications have been concluded. By creating a record of enforceable water rights through the adjudication process, water users have greater security, predictability, and flexibility in meeting their water needs.

Status of Adjudication in Oregon. Several areas of the state, primarily river basins located west of the Cascades, remain unadjudicated (white areas on the map below).



Klamath River Basin Adjudication Frequently Asked Questions

Q1. How do I contact the local watermaster?

A1. Please be patient as we expect that our office in Klamath Falls may have many inquiries:

Scott White, Watermaster, District 17
5170 Summers Ln
Klamath Falls, Oregon 97603
Telephone: 541-883-4182

Q2. How do I contact the Klamath County Circuit Court?

A2. <http://courts.oregon.gov/klamath/Pages/index.aspx>

Monday - Thursday

8:00am - Noon; 1:00pm - 5:00pm

Friday

9:00am - Noon; 1:00pm - 5:00pm

Klamath County Circuit Court
316 Main St.
Klamath Falls, OR 97601

Main Telephone: 541-883-5503
Trial Court Administrator: Ext. 242

Q3. How do I access the Final Order of Determination?

A3. It is available on OWRD's website at <http://www.oregon.gov/owrd/Pages/index.aspx>. Click on the "Adjudications" link on the left-hand sidebar, which will take you to the Klamath River Basin Adjudication page, where you can access a complete copy of the Adjudicator's determination, including the partial order of determination for your claim.

Libraries and watermaster offices in Bend, Klamath Falls, Lakeview and Medford have computer access to the Adjudicator's determination. The Klamath County Circuit Court also has a paper copy.

In addition, the Department is mailing DVDs containing the Final Order of Determination to the Adjudication parties.

Q4. How else can I access the partial order of determination for my claim?

A4. Individual partial orders can also be queried in the Department's Water Rights information System at: <http://apps.wrd.state.or.us/apps/wr/wrinfo/>.

Choose KA from the "Claim" drop-down box, and enter your claim number. Then click "Search."

Q5. When did the Klamath River Basin Adjudication begin?

A5. December 23, 1975. The Findings of Fact and Final Order of Determination were delivered to the Klamath County Circuit Court on March 7, 2013.

- Q6.** What does the Klamath River Basin Adjudication include?
- A6.** The Adjudication covers all claims to the use of surface water that predate Oregon's 1909 Water Code. Water users with claims in the Adjudication have been using water pending issuance of the Adjudicator's Findings of Fact and Final Order of Determination, but these claims have not been quantified until now. The Adjudication does not cover claims to the use of groundwater or claims to water use from the Lost River sub-basin.
- Q7.** What are the two types of Claims addressed in this Adjudication?
- A7.** The first are referred to as "pre-1909" claims. These are claims for water rights, based on actions taken by appropriators of water prior to the enactment of Oregon's Water Code in 1909. The second are referred to as "federal reserved water right" claims. These are claims based on reservations of land by the federal government, and include claims made by the Klamath Tribes as a result of the Klamath Treaty of 1864 and Klamath Indian Reservation, as well as claims made by various federal government agencies, including the United States Forest Service, United States Fish and Wildlife Service, National Park Service, and the Bureau of Land Management.
- Q8.** What do I do if I don't agree with the Final Order of Determination?
- A8.** The Oregon Water Resources Department has requested an order from the Klamath County Circuit Court, requesting that the Court set a deadline for filing "exceptions." The Department's request, or "motion," is included in the DVD mailed to all of the Adjudication parties. Once the Department receives the Court's order, it will serve the order on all parties to the Adjudication. Parties may want to contact an attorney or the Court with questions about how to file exceptions with the Court.
- Q9.** How does the Adjudicator's determination affect my existing water right?
- A9.** It does not change any existing water rights. However, it may affect the regulation of existing water rights. Claimants may now make a call for regulation.
- Q10.** How do I find out more details about potential regulation?
- A10.** The Klamath Falls Watermaster's office is in charge of any regulation that may occur as a result of the Final Order of Determination. Please give that office a call if you have questions.
- Q11.** How does the Klamath Basin Restoration Agreement (KBRA) affect the claim recognized in the Adjudication for the Klamath Tribes in Upper Klamath Lake?
- A11.** As part of the KBRA, the United States and Klamath Tribes have agreed not to make a call based on the Klamath Tribes' Upper Klamath Lake claim to any determined claims or water right certificates with a priority date senior to August 9, 1908. This agreement is in effect now, but requires the KBRA to remain in effect and certain events described in the KBRA to occur in order for the no-call agreement to become permanent.

KLAMATH TRIBES OF OREGON PRESS RELEASE
FOR IMMEDIATE RELEASE- March 7, 2013



More information contact:

Klamath Tribal Councilman, Jeff Mitchell (541) 891-5971 or Email: Mohiswaqs@aol.com

Klamath Tribal Water Attorney, Carl Ullman at (541) 783-3081

Monumental Water Right Decision
Findings and Order of Determination - FOD

Chiloquin, OR— The Oregon Water Resources Department today announced its Findings and Order of Determination regarding the hundreds of water rights claims in the Klamath Basin Adjudication. The FOD includes the Department's rulings on the water rights of the Klamath Tribes, and was filed with the Klamath County Circuit Court for further proceedings.

“The FOD has been a long time coming,” said Jeff Mitchell of the Klamath Tribes' Tribal Council, “and the Klamath Tribes are anxious to learn the results of this lengthy process.” The FOD is thousands of pages in length and Mitchell said the Tribes would need to study the document before offering more specific comments.

State law provides that OWRD can immediately begin enforcing the rulings in the FOD in Klamath Basin water bodies. In the past, OWRD has not enforced tribal water rights because they had not gone through the Adjudication process. “The Tribes are pleased that for the first time their water rights may be recognized and enforced,” Mitchell said. “We will be interested to learn the potential impacts on other water uses in the Basin.”

The Tribes called for renewed attention to the Klamath Basin Restoration Agreement which was drafted by many Basin water interests to address water and other resource dilemmas in the Basin. Don Gentry, Vice-Chairman of the Klamath Tribes said, “Whatever the outcome of the FOD, the KBRA still represents the Basin's best opportunity for resolving water issues. Continuing the fights in the Adjudication, as the County Commissioners apparently want to do, will only lead to greater strife, expense, and community division.”

Gentry pointed out that the KBRA can be used to blunt any debilitating impacts of the FOD, and that the Commissioners offer no comparable or alternative plan. “The Tribes will continue to work with people of good will in the Basin to use the KBRA to resolve these issues in an effective, peaceful manner,” he said.

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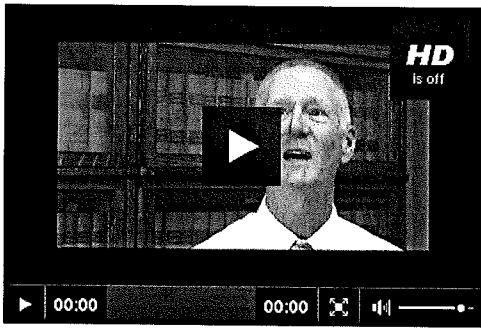
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Klamath River Basin Adjudication Now Underway

Written by Lyle Ahrens, Posted in Local, Posted: Thu, March 7 2013 at 4:47 PM, Updated: Thu, March 7 2013 at 5:10 PM



'Adjudication'. It's a word you'll soon be hearing a lot more...

The 'Klamath River Basin Adjudication' will determine who gets water in the Klamath Basin, and how much.

Just how big is the adjudication process?

"Far bigger than the KBRA." Says Bill Ganong, attorney for the Klamath Irrigation District. "And

immediate. Beginning this year, the Department of Water Resources will begin regulating water."

Klamath County Trial Court Administrator Val Paulson explains...

"The adjudication is a process for determining water rights in a basin."

Oregon water law operates on a 'first in time, first in right' basis...and the Klamath Tribes claim the Treaty of 1864 puts them first in line.

"They will receive what water they are entitled to under the order." Explains Bill Ganong. "And then all the other people in the basin will share what's left, based on the date they first began using it."

The case is assigned to Judge Cameron Wogan, who will determine just how much water the Tribes are entitled to...

"Can't take away the right." Notes Ganong. "They have an absolute right to it. But he can adjust the amount of water they're going to receive."

Ganong add that Tribal 'trump card' could benefit the KBRA...

"In fact, it may be that some of the people who have been against the KBRA will look at it, and say, 'this may help me'."

About 10 thousand pages of evidence were filed in Klamath Circuit Court this morning.

The Oregon Water Resources Department brought down about 264 cases of historical reference material, including two or three filing cabinets, and map cases.

"There were more than 730 claims." Adds Val Paulson. "There were more than 5600 contests to those claims."

The adjudication process has been underway for years...and it could take a while before a judgement is made as to who gets water.

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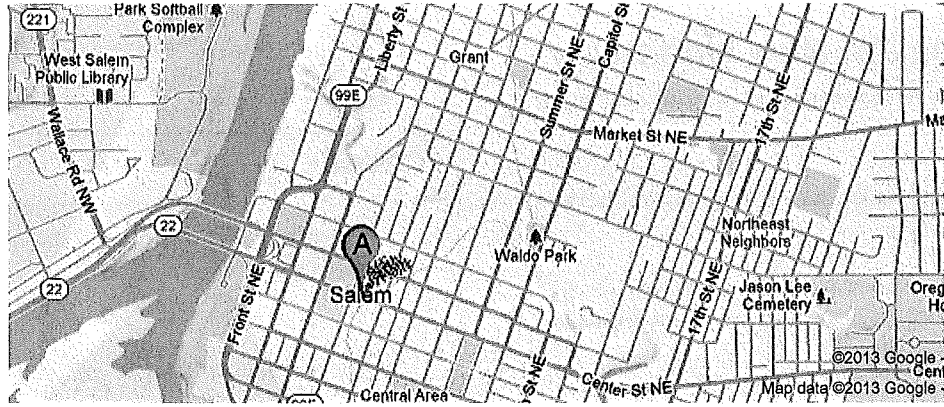
"It began in 1975." Stated Bill Ganong. "I've been working on it for 34 years. It will not be done in my lifetime."

But, the results could have a major impact on future generations.

Here's a link to a digital copy of the 'Findings of Fact and Order of Determination' filed in Klamath County Court:

www.oregon.gov/owrd/Pages/adj/index.aspx

Incident Location



About the Author



Lyle Ahrens

KOTI-TV NBC2 reporter Lyle Ahrens moved from Nebraska to Klamath Falls in the late 1970's. He instantly fell in love with the mountains, the trees and the rivers, and never once regretted the move.

Lyle's job history is quite colorful. He's managed a pizza parlor; he's been a bartender, and a "kiwifruit grader" at an organic orchard in New Zealand. A Klamath Falls radio station hired Lyle in the mid 90's as a news writer and commercial producer. In 2004, Lyle joined the KOTI/KOBI news operation.

Lyle notes with pride that he has a big responsibility presenting the Klamath Basin to a wide and varied audience. "The on-going water crisis has underscored the fact that the people and the issues in the Klamath Basin are every bit as diverse as the terrain. Winning and keeping the trust of the viewers, as well as the newsmakers, is something I strive for with each story".

When he's not busy reporting the news, Lyle enjoys astronomy, playing guitar, fixing old radios and listening to anything by Sheryl Crow.

lahrens@kotif2.com »

Comments (0)

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Tribes get first dibs on water

The state's Klamath Basin decision is based on "first-in-time, first-in-right," but the fight won't end

By **SCOTT LEARN**
THE OREGONIAN

After 38 years of work, Oregon regulators decided Thursday that the Klamath Tribes have top claims to water in much of the Klamath Basin, the state's fiercest battleground for water allocations between fish

and farmers.

The decision is still subject to court challenges, likely to extend awarding of water rights certificates for years. But it gives the tribes, strong advocates for salmon and other fish, an immediate upper hand in legal disputes.

"Everybody is going to be behind the tribes because their rights are time immemorial," said Tom Paul, deputy director of Oregon's Water Resources Department.

The Klamath Basin's water wars drew national attention in 2001



Read more about efforts to resolve the Klamath Basin's water disputes at [ORnews/klamath-basin](#)

when fish got water during a dry summer and fall instead of farmers. In 2002, with help from Vice President Dick Cheney, farmers got more water, but fish died en masse in the Klamath River.

The state's "adjudication" decision awards tribes senior rights to lake levels in Upper Klamath Lake and to portions of major tributaries above

the lake under the state's "first-in-time, first-in-right" water laws.

A Bureau of Reclamation irrigation project taps the lake to supply roughly 1,400 family farms. Many nonproject farmers tap the tributaries.

In 2010, project irrigators signed a deal with tribes and others, the Klamath Basin Restoration Agreement, in which the tribes agreed to not enforce their water rights in exchange for reliable water supplies for fish.

The agreement, which doesn't include off-project farmers, has run

Please see **KLAMATH**, Page B3

Klamath

Continued from Page B1

into local opposition. Bills are stalled in Congress that would endorse the pact, make water allocations between tribes and farmers permanent and tear down four fish-blocking Klamath River dams.

But the agreement protects project farmers on 190,000 acres from tribal claims at least until final water rights certificates are issued, said Greg Addington, executive director of the Klamath Water Users Association. Nonproject farmers don't have that protection and could lose water in dry years.

In a statement, Klamath Tribes leaders said the long-awaited decision gives state water masters authority to enforce the tribes' water rights for the first time.

They said they're still studying the decision, which runs thousands of pages. Over the decades, the state received 5,660 challenges to water claims in the basin.

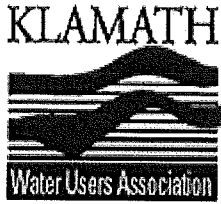
Opposition to the adjudication and the Klamath Basin Restoration Agreement is likely to continue. The Klamath County Board of Commissioners voted 3-0 in the past month to drop out of the restoration agreement.

Commissioner Tom Mal-lams, a nonproject farmer, said granting new water rights in the basin could lead to reopening of water rights decisions in other parts of Oregon. About two-thirds of the state is covered by water rights adjudications, most finalized in the early 1900s.

Don Gentry, vice chairman of the Klamath Tribes, said in the tribal statement that he hopes the decision prompts renewed attention to the restoration agreement and more cooperation in the basin.

"Continuing the fights in the adjudication, as the county commissioners apparently want to do, will only lead to greater strife, expense and community division," Gentry said.

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NEWS RELEASE

For Immediate Release

March 8, 2013

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Klamath River Basin Adjudication Order Released

Outcomes Appear Positive for Klamath Project Family Farmers and Ranchers

Klamath Falls, Oregon - Yesterday, March 7, marked an historic day in the Klamath Basin. After more than 38 years of administrative and legal wrangling, the state of Oregon finished a major phase of the Klamath River Basin Adjudication (KBA) when it issued a Finding of Fact and Order of Determination (FFOD). Gary Wright, President of the Klamath Water Users Association (KWUA) called it a major achievement. "This is an extremely important milestone in a very long process. The Oregon Water Resources Department deserves a lot of credit for staying with it and moving the adjudication through this stage."

Although the KBA has officially been pending since 1975, it began in earnest around 2000 when all the claims and contests had been officially filed. Greg Addington, KWUA's executive director noted that it took a significant commitment from the state to move the Basin onto a level playing field. "To process that very large, very complicated set of issues forward through a litigation-type hearing procedure and all the way to a decision in a dozen years is a worthy accomplishment."

Addington noted that it would take some time to evaluate the full effect of the order. "It's enormous and it will take time to read and understand it all, but based on our preliminary review, the Order appears to be a very positive development for Klamath Project irrigators."

Up until now, there has been no management of water resources in the Basin based on water rights. Regulation of water rights is normal practice in most other basins in the state and in the west. Water management in the Klamath will now operate in the same manner as most other parts of the west.

Luke Robison, manager of two Klamath Project irrigation districts added that "with continually increasing pressure on the Basin's water resources, it is important to know priority dates for water supply and the amount of water that is allowed for use."

The single most important issue for Project irrigators is that water rights for irrigation be recognized on the land that is irrigated, and it appears the Order does that. With the formal recognition of these long-standing water rights, the Project will be able to enforce its water right priority under the prior appropriation doctrine.

The order also confirms the collaborative settlement between the Project districts (those that divert from the Klamath system) and the Klamath Tribes, which was based on the Klamath Basin Settlement Agreement (KBRA). As a result, the Tribes' water rights for Upper Klamath Lake levels will not be used as a basis for water right calls against pre-1908 water rights, which includes all Klamath Project agricultural land that receives water from the Klamath system. This stipulated settlement is very significant in scope even if just one of hundreds of settlements of individual contests that were entered into by adjudication parties over the last decade or more.

According to a release from the Oregon Department of Water Resources, "the completion of the Final Order of Determination means that the recognized claims are now part of Oregon's "first in time, first in right" prior appropriation system.

Now begins the second phase in the KBA. Adjudication claimants and/or contestants who dispute the Department's determinations will have an opportunity to file exceptions with the Klamath County Circuit Court. The Court will conduct trial on those exceptions, and eventually issue a decree, which may either affirm or modify any given part of the FFOD. However, until this second phase is completed, the state is required to regulate based on the FFOD.

For more information:

<http://www.oregon.gov/owrd/Pages/adj/index.aspx>

<http://www.kwua.org>

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English

Initial reactions positive - Enforceable water rights reach Klamath Basin for first time

Herald and News (Klamath Falls, OR) - Saturday, March 9, 2013

Author: DEVAN SCHWARTZ ; H&N Staff Reporter

Klamath River Basin water adjudication was filed Thursday at the Klamath Falls County Courthouse after nearly 40 years of study, sparking a range of reactions and the prospect of future legal actions.

Klamath Tribal Water Attorney Bud Ullman said enforceable water rights have reached the Klamath Basin for the first time.

The Oregon Water Resources Department will

start enforcing local water rights this irrigation season, Ullman said, and will continue doing so unless they are contradicted by future legal appeals. Cameron Wogan, presiding judge of the Klamath County courts, is tasked with handling appeals that may be filed against all or part of the final order.

Ullman has worked on water adjudication in the Klamath Basin since 1988 and has finally started to see his work reach fruition. However, the tribal water attorney expects the final legal process to take at least a couple years.

"In many instances, more water will be retained in the streams," Ullman said, as opposed to that same water being used for irrigation or other purposes. He added that the final order of determination generally confirms tribal claims. Additional water will support tribal fishing and water ecology.

Ullman wasn't the only one with a cautiously optimistic response to adjudication.

"The order appears to be a very positive development for Klamath Project irrigators," said Greg Addington, executive director of the Klamath Water Users Association, in a news release.

The KWUA stated that "the order also confirms the collaborative settlement between the Project districts and the Klamath Tribes, which was based on the Klamath Basin Restoration Agreement."

Addington said that a no-call agreement had been reached with the Klamath Tribes, a binding deal with the state stipulating the tribes will not call for Upper Klamath Lake levels that would trump pre-1908 water rights.

"The problem with adjudication is it creates winner and losers," Addington said. "Some folks wanted to have adjudication rather than the KBRA and western water law is what we got."

The general assessment of Addington was that adjudication so far looks positive for Klamath Project water users. "The lands we're irrigating have a water right," Addington summarized.

Klamath Irrigation District Manager Mark Stuntebeck said signatories to the KBRA made the correct decision and that much is reflected in the adjudication.

But if KID and the Klamath Project water users thus far consider themselves to be the winners, Stuntebeck predicts Upper Basin water users to be the biggest losers. "They're the folks," he said, "who are gonna come up short."

County Commissioner Tom Mallams, who has a ranch north of Beatty, said with

adjudication the state of **Oregon** has "done a disservice to its citizens."

"From all indications it's not good for Upper Basin irrigators," Mallams said.

And the county commissioner considers further control of the federal government over local natural resources to be the true problem.

Mallams said tribal water claims will be made by the Bureau of Indian Affairs, a division of the Department of the Interior.

"Who knows exactly what will happen?" asked Mallams, who, like many, hadn't read through the thousands of pages of adjudication yet.

But Mallams did say he wouldn't rule out another government water shutoff reminiscent of 2001 in the Klamath Basin.

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Section: Front Page

Page: 1, 3

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English

CAN THEY DO THAT? - Questions linger until commissioners sign KBRA withdrawal

Herald and News (Klamath Falls, OR) - Sunday, March 10, 2013

Author: SAMANTHA TIPLER ; H&N Staff Reporter

The Klamath County commissioners said they wanted to opt out of the Klamath Basin Restoration Agreement at their Feb. 26 meeting. They voted to sign an order, which will be drafted and likely signed at their upcoming meeting Tuesday.

With that said, everyone wants to know, can they do that?

Groups like the Klamath Water Users Association and the Klamath Water and Power Agency, as well as the facilitator of the KBRA, say no. The commissioners say yes.

And another question: What kind of an impact can the county's withdrawal have on the future KBRA and the Klamath Hydroelectric Settlement Agreement?

Greg Addington, executive director of the Klamath Water Users Association, said the agreements are contracts signed with the county, not the individual board members. KWAPA Executive Director Hollie Cannon deferred to Addington to voice the group's position on the issue.

"It's the county who is a party, not the individual," Addington said. "And it's a pretty important point to us because this agreement, this contract, is signed by a lot of other parties that have a lot to do with our ability to receive water or not."

Those parties - Addington listed tribes, state agencies and environmental groups to name a few - have agreed to support a stable **water supply** to the Klamath Project.

"So if it's OK for the county to just leave and get out of the agreement, what's to prevent one of those entities from doing the same thing?" Addington asked.

Ed Sheets, facilitator of the KBRA, said if Klamath County pulls out it would not dissolve the agreement.

But the commissioners say they can opt out of the agreements nonetheless.

Commission Chairman Dennis Linthicum said the issue is not a contract, it's a policy.

"They're saying you can't sign a contract and not fulfill your obligations under the contract," Linthicum said. "It's not a contract. We don't have distinct obligations in my view. I could be wrong. What it really is, is a statement about policy, not contractual obligations."

Commissioner Jim Bellet referenced case law during his statements Feb. 26, and again in an interview last week.

"I believe case law confirms that you can't bind this board with last year's board," he said.

In November, previous commissioners Al Switzer and Cheryl Hukill carried the vote to endorse a two-year extension of the KBRA. Dennis Linthicum, current board chair, voted against the extension. The new board's decision contradicts the old board's vote.

"I think that when you study case law it stipulates that what we did will be upheld in court," Bellet said.

Further, Bellet said he didn't know why other parties in the KBRA would want an unwilling partner like the commissioners.

"I don't think it's going to serve any purpose to try and keep us in," he said.

Addington countered, saying if the commissioners stayed at the table, they could introduce amendments to the agreements. He couldn't guarantee those amendments would pass, but it would be an option.

Commissioner Tom Mallams also said in the Feb. 26 meeting and again in an interview last week he was involved in early agreement talks. Then he said other parties were uncooperative with the ideas he raised.

"I sat in and tried to negotiate changes and amendments. It was 100 percent unsuccessful. I got no support whatsoever to make any changes of any substance during those meetings," he said. "To say we should go back to the table and work it out again, it wasn't successful in the past and I see no reason to believe it has changed at this point."

Though Addington said the commissioners can't walk away from the table, he is waiting to see the wording on the paper they will sign Tuesday.

"What it all comes back to is, what are they signing, what are the words to their alleged withdrawal?" Addington said. "To me, it's a political maneuver. It's sending a message to Congress that Klamath County is not supporting this."

That message has been observed in Washington, D.C. by Hayley Hutt, a Hoopa Valley Tribal Council member who travels to the Capitol in a lobbying capacity. The Hoopa Tribe is supportive of dam removal but against the KBRA. Hutt said members of Congress were not surprised to hear this news about the commissioners and aren't sure the agreements have momentum.

"It doesn't affect the agreement," Addington said of the commissioners' actions. "The agreement doesn't die if they pass a resolution. It doesn't go away. No matter what they do next week, they're still a party to the agreement."

Reporter Devan Schwartz (dschwartz@heraldandnews.com) contributed to this story.

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Section: Front Page

Page: 10

Record Number: 144F1D0A24FEC3A0

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What comes next for the KBRA? - Commissioners discuss future plans for Basin water rights

Herald and News (Klamath Falls, OR) - Sunday, March 10, 2013

Author: SAMANTHA TIPLER ; H&N Staff Reporter

With the Klamath County commissioners declaring they will withdraw from the Klamath Basin Restoration Agreement, the question is, what's next?

Commissioners differed on their answers. Tom Mallams said the county opened the door for parties to negotiate a new agreement. Jim Bellet said the county should sit back and wait for the KBRA and the Klamath Hydroelectric Settlement Agreement to expire. Dennis Linthicum said commissioners could lead the way, but the ultimate solution, or a plan B, should be found by private parties.

"We're not just saying 'no' with no other options out there. There are pages and pages of alternatives that need to be put on paper," Mallams said. "A local stakeholders group needs to sit down and start working on that."

The past board of commissioners offered to arrange for mediation between parties, and Mallams said that offer still exists. But he was less clear on if he was going to stand up and lead the way.

"As a county commissioner I can only ask people to come to the table," he said. "The offer is still there."

Linthicum also said the board of commissioners could play a role in finding an alternative to the KBRA, but he didn't want government to play a deciding role.

"Government is not the appropriate solution. The free market is the solution. Commissioners can play a leadership role: get private parties together, work out a solution," Linthicum said. "The best thing the commissioners can do is to be conveners and let the different players decide where they think the best resources belong."

Linthicum advocated starting now, two years before the KBRA expires.

"Rather than stand on the sidelines for two years ... use those two years to craft another solution," he said. "Get a head start on it right now and modify it to meet the needs of the various groups that are a part of the agreement."

Bellet had the opposite idea for the commissioners' role in future water settlements. As long as the KBRA exists, he said no progress can be made on an alternative.

"As long as that is considered a viable alternative out there, it does not behoove us to try to start plan B," he said. "As long as they have the idea of the KBRA going forward, they're not going to talk about plan B."

Paul Lewis, a sheep farmer from Langell Valley who supported the commissioners' decision, said he hopes to see them lead the way to the next step.

"I hope the process starts anew with a more open discussion and more transparency," he said. "It behooves the board of commissioners to take the lead on this and I think there needs to be some public meetings, not to discuss whether there should be a KBRA or not, but to bring out ideas that might be out there in the public forum as to how we can deal with the problem."

Even with an unclear plan to go forward, Mallams said Klamath County has to move beyond the KBRA.

"We can't just sit here and watch it wither away," he said. "It's done. We need to move on to something else. Keep the good parts and pieces of it and the relationships, capitalize on that. Make something work with local stakeholders."

For pro-KBRA farmers like Gary Derry, it's time to wait and see.

"We're going to deal with it as it comes. What we do every day is we work toward **water supply** for agriculture. We deal with energy issues. We deal with regulation. We deal with everything that's going on. We continue to fight those battles one at a time," he said. "We wish there was a better way to do it. We feel the KBRA is a better way to do it."

"It's the best solution right now by far. There is no other solution out there," said Rob Unruh, a Malin-area potato, wheat and alfalfa farmer. "Bellet really doesn't have anything. Linthicum says more storage is a great deal, but it's not realistic in my lifetime. (Mallams') deal is, with an agreement like this, one with dam removal, you don't have an agreement. For now the KBRA is the best thing going."

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Section: Local 2

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[What comes next for the KBRA? - Commissioners discuss future plans for Basin water rights](#)



English

WATERMASTER PREPARES FOR ADJUDICATION - Questions arise over how and when enforcement will take place

Herald and News (Klamath Falls, OR) - Tuesday, March 12, 2013

Author: DEVAN SCHWARTZ ; H&N Staff Reporter

With the arrival of water adjudication in the Klamath Basin come inevitable questions of how and when enforcement will take place.

Will water be shut off to farms and ranches? Will this lead to disputes between neighbors?

The responsibility to measure water and, if necessary, turn it off, falls on Scott White, district 17 watermaster for the **Oregon Water Resource Department**.

"I'm really anxious to see who calls for water and how it will affect everyone," said White, who is holding out hope for wet weather and a good supply of water in the Basin.

"We could still get some great storms," the watermaster said. "I hope we have a good water year for the benefit of the users."

The first enforcement step would come when someone makes a call for water to the local offices of the **Oregon Water Resources Department**, essentially asking for someone else to be shut off.

If a Williamson River irrigator notices the river's flow falls below a certain level guaranteed by their claim, the watermaster would then double check the flows and shut off another irrigator with a junior water right.

Water rights

The Klamath River Basin Adjudication process, which has been ongoing since 1975, now tells water users whose water rights are senior and whose are junior, based on the priority date of their claims.

Problems could then arise if water users don't respect being shut off - for example by opening their irrigation canal headgate.

White said a formal notice of violation would be issued, with a set amount of time to remedy the infraction.

Next, the watermaster could lock the headgates and assess penalties on the water user.

"Some try to play the system as long as they can," White said, though he acknowledged he gets along with most everyone and has yet to deal with such infractions.

Yet, as with any job, there are cautionary tales. White told a story of a watermaster decades ago on Umatilla County's Butter Creek who was shot. "We take threats very seriously," White said.

Observing

Besides checking gauges and fielding calls for water, White said another tool is driving around to see who is irrigating, to be sure they are conforming to adjudication.

It's hard to notice small fluctuations in water flows, given normal fluctuations based on weather and time of day.

Another variable is the irrigation season, which White said varies depending on individual claims.

For example, some claims extend from March 15 to Oct. 31, whereas others run from April 1 to Oct. 31. In contrast, similar adjudications in **Oregon** have standardized irrigation seasons.

The watermaster said the irrigation season still could be defined by Cameron Wogan, presiding judge of the Klamath County courts, who is tasked with handling appeals that may still be filed against the Basin's adjudication.

"Just regulating and seeing how the whole water system responds will be a good way to wrap my brain around adjudication," White said.

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Section: Front Page

Page: 1, 5

Record Number: 144FBE92EBAAAA48

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