

Klamath Basin Water Wars

Stakeholder Groups

1. **Klamath Tribes/Bureau of Indian Affairs** - "Time immemorial" instream rights
 2. **Upper Basin "Off-Project" Irrigators** - Claims considered individually resulting in a variety of priority dates
 3. **Klamath Reclamation Project Irrigators/Bureau of Reclamation** - Priority Date: 1905
 4. **Other Federal Reserved Rights** - Wildlife refuges, Crater Lake National Park, etc.
 5. **Environmental Groups** - Bird watchers, recreationalists, etc.
 6. **Fishermen** - Commercial and sport
 7. **Local Government** - County Commissioners, etc.
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OVERVIEW

The Klamath Basin

The Klamath Basin, an area comprising more than 5,600 square miles within south-central Oregon and north-central California, is drained by the Klamath River, which pierces both the Cascades and Coastal Mountain Ranges before emptying into the Pacific Ocean in California. The water features within the Basin are considerable and varied. The shallow, turbid water of Upper Klamath Lake contrasts dramatically with the clear, turquoise water of Crater Lake, which is located within the northern portion of the basin. Without question, water is the single most valuable—and therefore disputed—resource of the Klamath Basin.

The Basin is the ancestral home of the Klamath Tribes. The Tribes have hunted, fished and gathered the abundant flora and fauna throughout the Basin since time immemorial. Today, the Basin's economy is primarily built upon irrigated agriculture, recreation and tourism. The agricultural producers include many cattle ranches, as well as farmers who grow mint (used in Wrigley's chewing gum and Colgate toothpaste), potatoes (for Lays and Pringles brand potato chips), and other crops. The basin is home to two fish species listed as threatened or endangered under the federal Endangered Species Act, and to bald eagles and other wildlife, whose habitat is protected in several wildlife refuges. The basin also contains Crater Lake National Park and acres and acres of the Fremont and Winema National Forests.

Oregon Water Law

Oregon water law is based on the principle of prior appropriation, which can be summarized as "first in time, first in right." This means that the first person to obtain a water right is the last to be shut off when there is not enough water to go around (usually an annual summer occurrence). During water shortages the water rights holders with the oldest priority date can demand the water specified in their water rights ("calling" their right) regardless of the needs of junior users. If there is a surplus beyond the needs of the

senior right holder, the water right holders with the next oldest priority date can take as much as necessary to satisfy the needs under their rights. This process continues down the line until either there is no surplus or all water rights are satisfied.

The Adjudication

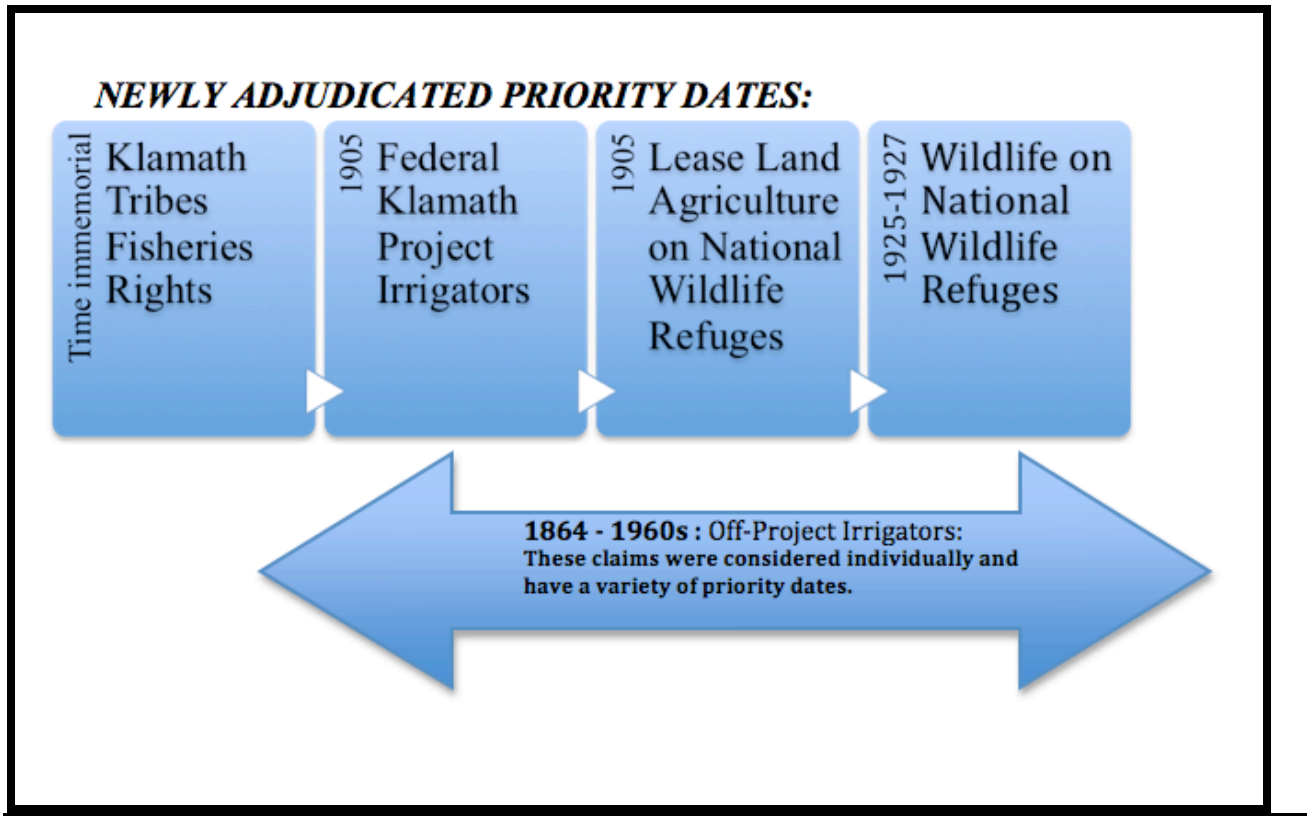
Claims for water rights established by use before the 1909 Oregon Water Code permit requirement went into effect and claims based on the doctrine of federal reserved water rights must go through an *adjudication* in order to be documented and quantified. The adjudicated rights can then be incorporated into Oregon's prior appropriation system and integrated with post-1909 permitted rights. Federal reserved rights include rights of Indian Tribes and rights associated with dedicated federal lands such as national parks, national forests, and wildlife refuges.

The Klamath River Basin Adjudication began in 1975 to determine the validity and priority dates of more than 730 pre-1909 claims to water rights in the Klamath Basin. These included claims by the Klamath Tribes based on water rights reserved by and for the Tribes in the Treaty of 1864, irrigation rights from Klamath Lake for the farmers and ranchers served by the Klamath Reclamation Project, rights for off-Project irrigators, and non-tribal federal reserved rights.

Summer 2013

On March 7, 2013, nearly four decades after the Adjudication began, the Oregon Water Resources Department delivered its Findings of Fact and Final Order of Determination (FFOD) to the Klamath County Circuit Court. The FFOD determines the validity, quantity and priority of all the claims. But this ends only the first phase of the process. The second phase is the review of the FFOD by the Court. Claimants who dispute the determination of their claims will have a chance to file exceptions with the Klamath County Circuit Court. After reviewing exceptions, the Court will issue a final decree either affirming or modifying the Department's decision. Importantly, however, the FFOD now represents the "law of the basin" and its declared priorities are fully enforceable while the matter is pending in court, which is expected to be several years.

Until the preliminary phase of the Adjudication was finished, the Water Resources Department would not enforce the claims of the pre-1909 claimants in the Klamath Basin. Thus, with the filing of the FFOD last spring, comprehensive enforcement of water rights priorities came to the Klamath Basin for the first time in more than a century. A simplified diagram of the priorities reflected in the FFOD follows.



In mid-June, 2013, the Klamath Tribes and the Klamath Irrigation Project exercised the newly-enforceable FFOD by calling their rights. The Tribes called their time immemorial instream rights in the upper basin, and the Project called its 1905 right for irrigating Project lands from the stored water in Klamath Lake. Water Resources Department staff fanned out through the basin to enforce the Tribes' and Project's priorities, visiting ranchers and farms and placing "yellow cards" on all of the diversion structures. The yellow card is a formal notice prohibiting water diversion.

STAKEHOLDER GROUP PROFILES

1. *Klamath Tribes – Priority Date of “Time Immemorial”*

The Klamath Tribes—composed of the Klamath, Modoc, and Yahooskin Indians—have lived in the Klamath Basin and subsisted on its salmon, deer, elk, and edible plants for over 1,000 years. The Klamath Tribes signed a treaty with the U.S. government in 1864, relinquishing their claim to approximately 12 million acres of their former lands but reserving a portion of those lands as the Klamath Reservation along with the Tribes’ rights to hunt, fish and gather on the reservation lands. In 1954, Congress terminated the Klamath Tribes and dissolved the Reservation (upon a finding that the Klamath Tribes had “assimilated” and demonstrated “independence”). Most of the former reservation lands became a wildlife refuge (the Klamath Marsh) or were added to the federally-managed national forests. A portion of the remaining reservation lands were “allotted” to individual tribal members and more than 1,600 of these allotments were sold to non-Indians. The Termination Act and ensuing land transactions left open many questions concerning the Tribes’ continued rights under the 1864 Treaty.

In the late 1970s, as Oregon initiated the Klamath Basin Adjudication, the federal courts began deciding a series of cases that defined the Tribes’ rights and outlined the parameters of federal law that the state would be required to apply in its determination of the Tribes’ claims in the Adjudication. In *US v. Adair I, II, and III*, the federal courts held that the Tribes were entitled to water rights necessary to support their hunting, fishing, and gathering rights reserved by the Treaty, with a priority date of time immemorial, and that these rights survived the Tribes’ termination. The federal courts left the precise quantification of the Tribes’ water right to the state’s adjudication.

The Final Order and Determination (FFOD) issued last spring formally declared and quantified the Tribes’ water rights for the first time. The Tribes were awarded significant instream flows throughout the Klamath Basin with a priority date of time immemorial, the most senior right of all. The FFOD also declared reserved irrigation rights for the reservation lands with a priority date of 1864, the date of the Klamath Treaty. Enforcing these rights during dry years will prevent most diversionary uses throughout the upper basin above Klamath Lake. This past summer (2013) was dry, and when the Tribes called their rights in June, the Water Resources Department took action to cut off the upper basin irrigators’ diversions completely.

Tribal Voices

“My granddad equated it to scratching a penny with a pocketknife ... that scratch you get off the penny, that’s what you were given for your life, your culture.” *Chock-toot, age 36, Klamath Tribe Member*

“The mission of the Klamath Tribes is to protect, preserve and enhance the spiritual, cultural and physical values and resources of the Klamath, Modoc, and Yahooskin Peoples by maintaining the customs and heritage of our ancestors. To establish comprehensive unity by fostering the enhancement of spiritual and cultural values through a government whose function is to protect the human and cultural resources, treaty rights, and to provide

for the development and deliver of social and economic opportunities for our People through effective leadership.” *The Klamath Tribes Mission Statement*

Prior to calling their water rights in June, the Klamath Tribes worked with Gov. John Kitzhaber and other water users to reach an agreement that would help protect instream flows in the basin without enforcement of the FFOD. “We didn’t get there. What we had left to protect our treaty resources was seeking an enforcement of our right. That’s the only tool we have available to us right now.” *Jeff Mitchell, lead negotiator for the Tribes*

2. *Upper Basin “Off-Project” Irrigators – Priority Dates vary by individual claim, ranging from 1864 and forward.*

The Upper Klamath Basin was historically part of the Klamath Reservation but now consists of national forest land and private ranches and farms. These lands are outside the area served by the Klamath Reclamation Project, and their water rights instead come from the Sycan, Sprague, Wood, and Williamson rivers which eventually flow into Upper Klamath Lake (the source of the Project’s water). The off-project water rights have a range of priority dates, from 1864 until well into the 20th century. The oldest rights are referred to as “Walton rights” after the federal court case of *Colville Confederated Tribes v. Walton* (E. D. Wash. 1981). That case held that non-Indians who purchased former reservation land from Indian allottees could acquire a pro rata share of the allottees’ reserved irrigation rights with the priority date of the Reservation, as long as the non-Indians continued irrigating. Thus, many of the upper basin irrigators hold water rights with a priority date of 1864, the date of the Klamath Treaty.

Although the Walton rights have a very favorable priority date, they are still junior to the Klamath Tribes’ time immemorial instream rights. Fearing the impact of the FFOD’s determination of tribal rights, a group of upper basin landowners asked the Klamath County Circuit Court to stay the order’s enforcement, but the Court denied their request. When the Klamath Tribes “called” their rights this summer, the Oregon Water Resources Department ordered shut-offs throughout the Basin that eliminated water for more than 100,000 acres of pasture supporting an estimated 70,000 head of cattle.

Irrigators’ voices

“For me to have to be someplace where I don’t have horses and cattle and my working dogs... you’d just as well shoot me!” *Sam Gould, age 78, a third-generation rancher on the Sprague River*

“This is a core piece of our economy. It’s not like we can lean back on tourism and things can be okay.” *Becky Hyde, cattle rancher and irrigator*

“We need policies that reflect a clear understanding of how our ability to feed the world is limited when we take domestic agricultural lands out of production as water tied to those lands is moved elsewhere.” *Joint Publication by Family Farm Alliance and Irrigation Association*

Irrigated agriculture is a key economic driver for the Western United States, with over \$117 billion being generated across 17 western states. “Without water for agricultural irrigation, our nation would not only suffer significant food shortages, we would also see significant damage to our economy and job losses throughout the Western United States.” *John Farner, former government affairs director for the Irrigation Association*

3. Klamath Reclamation Project Irrigators/Bureau of Reclamation – Priority Date of 1905.

In 1905, the federal government established the Klamath Reclamation Project (KRP) under the Reclamation Act to create roughly 200,000 acres of agricultural lands to be irrigated from water stored by controlling the outlet of Upper Klamath Lake. Of the lands served by the Project, 62% are in south-central Oregon, with the remainder in north-central California. The Project lands contribute significantly to the region's strong agricultural economy—an economy threatened with collapse if crop-sustaining water is shut off. In fact, the Project irrigators have already experienced life without water. In 2001, the Pacific Coast Federation of Fisherman's Association, along with six other environmental groups, successfully sued the federal Bureau of Reclamation and the National Marine Fisheries Service under the Endangered Species Act to protect the listed fish affected by the Project's water diversions. Water deliveries were shut off to tens of thousands of acres of Project lands, with severe economic impacts, even though Vice President Cheney, among others, intervened to restore the irrigators' water. Soon after, more than 30,000 salmon died in the basin.

While the 1905-priority Project irrigators suffered during the summer of 2001, the upper basin irrigators continued to irrigate, regardless of their particular priority dates. As noted earlier, until the Adjudication's first phase was finished, the pre-1909 claims were not enforced by the Water Resources Department. The tables were turned during the summer of 2013, when the Project landowners irrigated while even the most senior upper basin landowners were shut off because of the earlier tribal priority date.

The significant losses of the 2001 shut-off sparked negotiations between the Project and the Tribes, resulting in the Klamath Basin Restoration Agreement (KBRA) a few years later. The KBRA attempted to balance the interests and rights of parties in the Klamath Basin, and was coupled with a plan to remove 4 PacifiCorp dams on the Klamath River by 2020. The proposed dam removal would be the largest of its kind in U.S. history, and could go a long way to protect both irrigators and wildlife in the region. At an estimated cost of at least \$500 million, the large-scale agreement has not yet been approved the Congress. Without the effectuation of the agreement by Congress, any progress of the KBRA has been halted in a stalemate. Furthermore, the KBRA did not include the participation of the upper basin, and thus does not represent a comprehensive settlement for the basin's water disputes. After this summer's developments, another negotiated process was begun, this time including as many of the various constituents as possible; but no agreement has yet been reached.

4. *Environmental Groups (bird watchers, recreationalists, etc.) and Other Federal Reserved Rights (wildlife refuges, Crater Lake National Park, etc.) – Wildlife Priority Date of 1925, though some can date back to 1905 if they are tied to the Lease Land Commercial Farming Program*

The Klamath River Basin Adjudication has received a great deal of attention for the impact it will have on irrigators, ranchers and the Tribes. However, it may be the unique and threatened species of the Klamath Basin that will bear the brunt of the manmade water crisis. Just as with the 2001 shutoffs, the continued policies favoring agriculture and business may win out over the protection of the thousands of eagles, ducks, grebes, and egrets that rely on the refuges. There is simply not enough water to go around.

Under the FFOD, the Tule Lake and Lower Klamath National Wildlife Refuges will continue to receive water at many times due to their ties to the 1905 Klamath Reclamation Project. However, to the extent that the oldest Tribal claims limit the amount of water available for any junior uses, these and other refuges could still be affected along with all other users, even though some of them have priority dates in the early 1900s. Those refuge lands that serve wildlife alone and lack ties to the Project will likely run dry in drought years as, with a 1925 priority date, they are last in line for consideration.

For example, an official from the Fish and Wildlife Service found that this year's drought resulted in the earliest dry date in 70-years for the nation's oldest waterfowl refuge. The Lower Klamath Refuge needs an estimated 95,000 acre-feet of water per year to run at full capacity, yet it received only 3,700 acre-feet in 2010, with a slight rise to 24,000 acre-feet in 2012. While the impact on existing bird migration patterns would be tremendous, there is little intervention by the federal government unless an endangered species is threatened. Wildlife defenders see this as faulty logic—extending efforts to save the species only after they have endured significant harm.

Other effects include disease and die-offs that continue to spread as too many birds crowd into the few remaining wetlands. Refuges with junior priority could simply become "collateral damage" to the agricultural and tribal interests. "Legally and physically, the Lower Klamath Refuge is at the end of the system. The only viable way to insure that birds, like farmers and ranchers, have a reliable water supply is passage of the Klamath Settlement Agreements."

Environmental Voices

"You have absolutely carved the heart out of the Pacific Flyway when you dry up the Klamath refuge." Ron Cole, 10-year manager of the U.S. Fish and Wildlife Service's extensive Klamath refuge system

5. *Fishermen – Priority Date tied to Tribal Interests*

The Klamath River was once the third most productive salmon river system in the United States. Today, thanks to habitat blocking dams, poor water quality and too little water left in the river, the once abundant Klamath salmon runs have now been reduced to less than 10% of their historic size. Some species, such as coho salmon, are now in such low numbers in the Klamath River that they are listed under the Federal Endangered Species Act (ESA). Salmon losses in the Klamath Basin have had devastating impacts on the lower river fishing-dependent economy, putting thousands of people out of work and eliminating tens of millions of dollars annually from the economy of these rural areas and coastal ports, from Fort Bragg, California to Florence, Oregon.

One of the biggest problems for water quality in the Klamath River is the operation of the Klamath Irrigation Project, a huge federal water project which diverts most of the water from the Upper Klamath Basin (in Oregon) for irrigation long before it can reach salmon spawning areas downriver in California. The remaining water left in the river, whatever the Project is willing to release from Iron Gate Dam, is so little in volume, so hot and so laced with pesticides and nitrates from agricultural waste water that it is often fatal for salmon as much as 100 miles downriver. Hundreds of thousands of salmon have been killed in recent years as a result, and Klamath River coho salmon driven nearly to extinction.

The fishing economy is partially—but not completely—aligned with the Tribes' interests in supporting their treaty fishing rights. Supporting fisheries that are healthy enough to withstand not just subsistence fishing, but also sportsfishing and even commercial fishing, may require much more than just enforcing the Tribes' instream flow rights. The Pacific Coast Federation of Fishermen's Associations' lawsuit against the Bureau of Reclamation under the Endangered Species Act in 2001 stopped irrigation that year from the Klamath Reclamation Project. The Federation is also strongly in favor of removing the four PacifiCorp dams on the Klamath River.

Fishermen's Voices

"As family food providers ourselves, we certainly feel for the plight of farming families that will be affected in this drought, but all the lawyers in the world cannot make more rain. The question the court had to address was whether it was legal and appropriate to give nearly all the remaining water, in a serious drought year, to these particular farmers, and in the process dry up the river and most of the lakes, or whether enough water should be kept back to prevent huge economic losses – and even extinction – for downriver fishing communities that are every bit as valuable to society [...] In a drought, farmers can get by in a hard year with drought assistance from the federal government. However, fish have only one river, and if they go extinct they are gone forever, and so are the communities which depend upon them for food and for their livelihoods." Glen Spain of Pacific Coast Federation of Fisherman's Associations, remark made during 2001 shut-off.

6. Local Government (County Commissioners, etc.)

Local government officials, including both Oregon and California county commissioners, are in a difficult position with regard to the basin's water disputes. Their primary interest is in supporting healthy local economies. Thus, they often tend to identify most strongly with the irrigators, who, in turn, support local banks, businesses, and the local tax base for education and governmental services. Indeed, many of the local officials have been very vocal in their support for the irrigators (and conversely, very critical of the Tribes). However, the Klamath Tribes are a critical part of the basin's culture and history, and they attempt to work collaboratively with the other interests in the basin in spite of facing substantial prejudice and criticism. Recreation and tourism are also very important in the basin, and the local governments cannot ignore these interests and the water they depend on. Furthermore, fishing was once an important part of the regional economy, and this constituency deserves recognition and attention as well.

The local leaders get short-term pressure to stand up for whatever interest group is suffering most at the moment, which this summer happened to be the upper basin irrigators. However, forward-thinking leaders need to look beyond the election cycles to seek solutions that can sustain the basin and its many interests over the long term.

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