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**Adjudicating Water Rights While Addressing Broad Resource Policy Issues:
Fitting a Round Peg Into A Square Hole**

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ABSTRACT

The Klamath Basin has achieved the dubious distinction as one of the best known river basins in the West because of its apparently intractable, interwoven resource problems. In recent years a series of costly and divisive “rotating catastrophes,” including fish kills and suspensions of irrigation water deliveries, have been visited on agricultural, fishing, and other Basin communities. In this setting, Oregon is conducting its Klamath Basin Water Rights Adjudication that although a useful tool, is too narrow in scope to fix the underlying causes of the catastrophes. With remarkably bold leadership, a group of Basin interests has taken a wider view and is working to address broad policy issues that can tackle the Basin’s underlying problems. This paper will examine the background of the Klamath Tribes’ water rights involved in these matters, the various political interests joined in the struggle with policy changes, the policy initiatives aimed at resolving some of the Basin’s resource problems, and the challenge of fitting the litigation demands of the Adjudication into the broader negotiation of policy issues.

The Klamath Basin gained national notoriety in 2001 as the result of the cessation of agricultural water deliveries from Upper Klamath Lake to the Klamath Irrigation Project, and again in 2002 when unprecedented numbers of salmon died in the mainstem Klamath River. While less attention was paid to fish kills in Upper Klamath Lake in 1995, 1996, and 1997 because they did not involve salmon, these events, destroying fish of great importance to the Klamath Tribes, were nonetheless part of the “rotating catastrophes” that have been visited on the Basin’s various water-dependent communities.

Despite cries of astonishment from some quarters, these events came as no surprise to many Basin-watchers. Since 1975 the Oregon Water Resources Department (OWRD) has been conducting the Klamath Basin Adjudication, a proceeding necessitated by the

inadequacy of the Basin water supply to meet modern demand. The Adjudication offers a partial resolution of legal issues in the Basin by offering to delineate winners and losers in water rights contests. But the Adjudication cannot address underlying policy issues that truly drive the Basin conundrum—how to preserve all the Basin’s water-dependent communities and restore a stable future for them all, rather than just declaring some to be winners, leaving the losers to fend for themselves.

In the early 2000s a new forum came on the scene, the relicensing process for PacifiCorp’s Klamath Hydroelectric Project. It soon became apparent that this was a forum that could invoke broader state, tribal and federal attention to the policy issues that the Adjudication could not address. Hydroelectric relicensing affected virtually every water interest in the Basin—tribes, states, federal agencies, non-Indian fishing groups, recreationists, and environmentalists.

The hydro-centered talks have proven very promising at a broad policy level, but they have not eclipsed the Adjudication’s authority in matters of water rights. This paper examines one aspect of the interaction between the Adjudication and the Hydro relicensing process, the need to fit the square peg of the Adjudication water rights determinations into the round hole of Basin-wide policy changes resulting from the many-party talks rooted in the Hydro relicensing.

1. Setting the Stage: Tribal water rights to instream flows and state jurisdiction to quantify them.

Understanding the water issues in the Klamath Basin requires a working knowledge of the water rights of the Klamath Tribes for several reasons, not the least of which is their relevance to our topic today—why reaching water rights settlements takes such a long time.

The Klamath Tribes’ water rights trace their legal origins to the Treaty of 1864 in which the Tribes reserved their existing rights to hunt, fish, trap and gather, albeit on a reduced homeland.¹ For its part, the United States guaranteed these rights, the federal negotiators being aware of the Tribes’ dependence on these resources and the United States, at the time of the Civil War, wanting to bring Oregon into the Union without having to find other ways of supporting the Indians.

In the late 1950s the United States unilaterally disavowed the Klamath Treaty and liquidated the Klamath Indian Reservation in the Klamath Termination Act, 25 USC ____, as part of a nationwide policy. One impact of the policy was the calling into question of the continuing vitality of the Tribes’ hunting, fishing, trapping and gathering rights. In two cases captioned *Kimball v. Callahan* Oregon contended that the Termination Act extinguished tribal Treaty harvest rights.² The courts, however, ruled for the Tribes, holding that tribal Treaty hunting, fishing, trapping and gathering rights survived Termination

¹ 16 Stat. 707.

² *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979).

This soon led to the question whether there remained any water rights associated with the harvest rights that survived Termination, spawning the the Adjudication and *United States v. Adair*,³ both of which began in 1975. Accounts differ as to whether Oregon initiated the Adjudication in order to wrest the quantification of tribal water rights out of the federal courts in *Adair*, or whether the United States and the Tribes initiated *Adair* to wrest the quantification out of the Adjudication.

In either event, in the *Adair* litigation the serendipitously named judge Solomon bifurcated the issues. He held that the federal courts would rule, as a matter of federal law, on the question of the existence and scope of tribal water rights, and that the quantification of those rights would be left to Oregon's Adjudication.⁴ On the federal side, he held that the Tribes retained the right, with a time immemorial priority date, to sufficient water to support Treaty-protected fishing, hunting and gathering. Within these parameters, he left the quantification of "how much water a fish needs" to the state's processes. The ruling was upheld on appeal.⁵

In the early 1990s, Oregon's publication of notice that water rights claims must be filed or forever forfeit was met with further challenge by the United States and the Klamath Tribes. These plaintiffs claimed Oregon's process was not "McCarranworthy," that is, Oregon's Adjudication, conducted as it was by OWRD and not the courts, was not a "suit" in "court" as is required by the McCarran Amendment.⁶ If it could not take advantage of the McCarran Amendment's waiver of federal sovereign immunity, Oregon's Adjudication would not have jurisdiction to adjudicate federal and tribal water rights.⁷ The challenge failed and the state's jurisdiction was upheld.⁸ This cleared the way for the Adjudication to proceed. OWRD established deadlines for the filing of claims, by type of claim, over a period of years, ending with the filing of amended claims in 1999. Contests to claims were filed in the ensuing year.⁹

In sum, Oregon's jurisdiction to quantify tribal and federal water rights has been upheld by the federal courts. But those courts have provided particular guidance, as to the nature and scope of those rights, for Oregon's use in the Adjudication. As the Adjudication

³ 478 F. Supp. 336 (D. Or. 1979), 723 F.2d 1394 (9th Cir. 1984) *cert. denied* (1984).

⁴ *Adair*, 478 F. Supp. at 345.

⁵ *Adair*, 723 F.2d 1394 (9th Cir. 1984).

⁶ 42 USC 666.

⁷ *United States v. State of Oregon, Water Resources Department*, 774 F. Supp. 1568 (D. Or. 1991); 44 F.3d 758 (9th Cir. 1994).

⁸ *United States v. State of Oregon, Water Resources Department*, 44 F.3d 758 (9th Cir. 1994).

⁹ At the same time OWRD published a Preliminary Evaluation of Claims based on admittedly incomplete information and legal analysis regarding the claims. Some of the conclusions in the Preliminary Evaluation appeared inconsistent with the holdings of *Adair* regarding the nature and scope of tribal water rights. So again the United States and the Klamath Tribes challenged the legitimacy of the Adjudication proceedings. Again, the state's process and authority were upheld. *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003).

enters the quantification phases, the tribal rights are beyond doubt the most senior in the Basin, holding a priority date of “time immemorial.”¹⁰ The tribal rights are for instream flows and other non-consumptive uses required to protect the tribal members’ ability to hunt, fish, trap, and gather as reserved by them, and as guaranteed by the United States, in the Treaty of 1864.¹¹

2. The Klamath Basin Adjudication: An Important Player, But Without a Magic Wand.

For all the attention lavished on the Adjudication by the parties and the courts, there remained a nagging awareness that the problems of the Klamath Basin run deeper than the question of water right priority and quantity which is all the Adjudication can address¹². No community can be saved by simply “winning” the Adjudication. For the agricultural community, the specters of the Endangered Species Act (ESA), the Clean Water Act (CWA) and other environmental laws would remain, threatening their access to reliable water supplies. Similarly, for the Indian tribes of the Basin and for environmental interests, an Adjudication victory securing increased and reliable streamflows would be a major advance toward fishery protection, but recovery of invaluable salmon fisheries would require removal of, or fish passage around, hydropower dams in the River.

A real settlement effort would need to go beyond the legal structures of the Adjudication to address broad policy issues about how best to bring peace and security to the Basin. Three early settlement efforts foundered on this challenge.

One initial effort in the mid-1990’s began with the Klamath Tribes and the Klamath Project Water Users (farmers and ranchers who get their water from the Bureau of Reclamation’s Klamath Irrigation Project). The talks brought together individuals who formerly had little to say to one another, a significant contribution to all later settlement efforts. But the “rotating catastrophe” had not yet afflicted enough of the community, and the talks, while cordial and constructive, lacked sufficient motive.

A second effort in the late 1990s arose under the auspices of OWRD, under the leadership of Martha Pagel. OWRD committed extraordinary resources to host a series of Alternative Dispute Resolution meetings at which all concerned parties would meet in good faith to seek a negotiated settlement, the relevant parts of which could be woven into the Adjudication processes. In this writer’s opinion, the effort was ultimately stymied by two factors. First, there were participants who currently enjoyed unfettered access to water;¹³ their goal was not to settle the relevant issues, but to prolong and ultimately scuttle the Adjudication itself. Second the Clinton Administration was greeted

¹⁰ *Adair*, 723 F.2d at 1414.

¹¹ *Ibid.* See also, 16 Stat. 707.

¹² See, ORS 539.021(1) (limiting the scope of adjudications to the OWRD Director “mak[ing] a determination of the relative rights of the various claimants to the waters of that watercourse.”)

¹³ Oregon has a policy of not enforcing water rights in unadjudicated basins like the Klamath. This gives rise to a class of water users who have the freedom to take as much water as they want whenever they want it.

with deep suspicion in the Klamath Basin which is overwhelmingly Republican, so the United States had difficulty presenting a unified, committed position from among the several agencies involved in Basin water issues.

A third effort arose under private auspices with close ties to the Bush Administration. It took the uncommon approach of excluding lawyers from the talks. (In this writer's opinion, this is not the reason, nor is it related to the reason, that the talks did not reach fruition.) On more than one occasion it appeared that a real breakthrough might be near. But each time success proved elusive because of a lack of clarity about the implications beyond the Adjudication. This effort centered on Oregon's Adjudication did not address issues in the California half of the Basin, though the River's problems pay no attention to the state line. Also, the private negotiations could not adequately work with regulatory agencies, so the result could not offer agricultural interests security against future disruptions of water supply caused by the ESA or CWA.

In sum, the breadth and depth of the issues needing to be addressed in order to stabilize the Basin were such that efforts centered on the Adjudication, or efforts limited to the Oregon portion of the Basin, were simply insufficient.

3. Enter the Dragon: Relicensing of PacifiCorp's Klamath Hydroelectric Project

PacifiCorp owns and operates five dams on the Klamath River, four of which generate electricity, with a total nameplate capacity of about 160 megawatts.¹⁴ The dams are licensed pursuant to the Federal Power Act by the Federal Energy Regulatory Commission (FERC). PacifiCorp's Klamath Project is FERC project number 2082, with all five dams included in the single license. The 50 years license expired on February 28, 2006.

PacifiCorp filed an application with FERC for a new license on February 25, 2004. PacifiCorp's license application consisted of approximately 7,000 pages of documentation. FERC issued notice of PacifiCorp's application on March 3, 2004¹⁵.

Prior to formally requesting relicensing, PacifiCorp and others initiated a voluntary process of settlement discussions aimed at resolving the myriad issues surrounding relicensing of the Klamath Hydroelectric Project. Interested parties were invited to attend a series of meetings and mediated negotiation sessions toward this end.

It soon became clear that relicensing the dams affected nearly all the water interests in the Klamath Basin. These interests found the negotiation opportunities in the relicensing process especially intriguing because no interest had been able to achieve its water needs or other goals through litigation. In addition to the obvious interests of PacifiCorp:

- Agricultural interests had been pumping water with extremely inexpensive power rates as a result of an early 20th Century arrangement with the Bureau of Reclamation

¹⁴ The other dam is Keno Dam, which is a re-regulating flow facility. A fifth generating facility is on Fall Creek, a tributary to the Klamath.

¹⁵ 69 Fed.Reg. 10025 (March 3, 2004).

and the power company. The expiration of the license for the dams portended enormous increases in critical power costs to farmers and ranchers.

- Four of the federally recognized Indian tribes in the Klamath Basin—the Hoopa Valley Tribe, Karuk Tribe, Yurok Tribe, and Klamath Tribes—had for decades decried the damage done to their fisheries by PacifiCorp’s dams. The expiration of the dams’ license offered an opportunity to advocate for dam removal.
- While Endangered Species Act and Clean Water Act litigation had offered some success, Environmental groups (referred to here for convenience as NGOs) still lacked an encouraging path to attainment of their goals of protecting wildlife refuges and fisheries
- Two major National Wildlife Refuges—Tule Lake NWR and Lower Klamath NWR—depend for their water deliveries on the Klamath Irrigation Project. The Refuges have long suffered from their relatively low priority to water in dry years.
- Non-Indian fishing groups suffered resource declines like those of the Indians, and their litigation programs were, like those of the NGOs and tribes, not sufficiently successful or encompassing of Basin problems.
- A tasty alphabet soup of federal and state resource agencies had struggled for years with their balkanized spheres of authority which hamstrung efforts to craft what they all knew was needed—a Basin-wide approach to habitat, water quality, and ecosystem problems. USFWS, NMFS, BIA, BLM, OWRD, ODF&W, ODEQ, CDFG, SWRCB, CRWQCB and others all knew that getting beyond balkanization and band-aid approaches to larger problems would require political and policy initiatives of the kind that were beginning to appear in the relicensing arena.

Thus the relicensing arena attracted a wide spectrum of Basin resource players, so that resolving their conflicting and overlapping needs presented a huge challenge. But at the same time, the situation also presented an opportunity of a scope equivalent to the challenge. That is, there were finally gathered on one stage almost all of the performers, with their problems, that would be necessary to craft an enduring solution to Basin resource conflicts.

The gathering allowed each, and all, of the participants to raise otherwise taboo policy issues for consideration—an often scary process. For example, the future of the Klamath Irrigation Project, the National Wildlife Refuges, tribal and non-Indian fisheries, and, indeed, the future of Klamath River fisheries and of the River itself became topics for discussion and resolution. Not surprisingly, addressing these policy questions and reaching some sort of consensus on how to manage them, has taken a long time.

The product of the negotiations is a pair of settlement documents intended to be adopted, enacted, and implemented in tandem. The Klamath Basin Restoration Agreement (KBRA) includes all parties but PacifiCorp. It addresses issues of watershed restoration and reintroduction of anadromous fish to their historic ranges above the Hydroelectric Project. The Klamath Hydroelectric Settlement Agreement (KHSA) provides for a

process leading up to removal of PacifiCorp's four mainstem Klamath River hydroelectric.¹⁶

A too-brief description of the salient elements of the KBRA and the KHSA gives a sense of the breadth of issues addressed and the details necessary to conclude agreements among so many and disparate parties.¹⁷ Each of the following items is, in context, an excruciatingly complex topic for negotiation, resulting in a negotiating process with many fits and starts and requiring strong commitment by each party to work through many apparent deadlocks.

In the KHSA:

- The Interior Secretary is to study whether dam removal will advance restoration of salmon fisheries and is in the public interest; he will make a formal determination by March 31, 2012. If he decides to proceed, he will appoint a Dam Removal Entity (DRE) which may or may not be a federal agency. The target for removal of the dams is 2020.
- A staged process of planning for and executing dam decommissioning and removal by the Dam Removal Entity, and coordinated relinquishment of possession and transfer of the dams to the DRE by PacifiCorp is required.
- Costs of removal will be met by (i) a surcharge on ratepayers authorized by the Oregon legislature, and (ii) a bond issued by the State of California. The removal fund will total \$450 million dollars. (This funding serves as the non-federal cost share to the federal funding of the KBRA, below.)
- Provision is made for PacifiCorp to interact with a newly formed consortium of irrigation interests to deliver (though not to produce) renewable power for use in agricultural activity.
- Because dam removal will not take place until 2020, the KHSA sets out a detailed set of Interim Measures under which PacifiCorp will continue to operate the facilities until that time.

In the KBRA:

- A long-sought "water balance," which would resolve many Adjudication issues, is struck. Agricultural interests agree to reduce and cap their water demand, and tribes and others agree not to interfere with agriculture's access to the reduced, capped amount. However, the tribes are unwilling to provide these "no-calls" until it is certain the dams will be removed, because the water balance only works if there is a

¹⁶ At this writing both the KBRA and the KHSA are released for public review and comment, but have not yet been fully finalized by the negotiating parties. The documents, as well as useful summaries of each, are available at <http://www.edsheets.com/Klamathdocs.html>.

¹⁷ What is "salient" in the KBRA and KHSA depends on whom one asks. It brings to mind the parable of the elephant and the blind men each of whose description of the beast depended on the part of it he touched. Similarly, different participants will emphasize different aspects of the KBRA and KHSA according to where their interests lie.

healthier river brought about by removing the dams. Finding a way to implement a water balance now, when it will not be clear if the dams will be removed until at least 2012, proves very challenging, as discussed in section 5 below.

- Several key components fall under the category of a Water Resources program. This includes the reduction and capping of diversions for use by the Klamath Irrigation Project, delivery water to National Wildlife Refuges, and providing greater reliability of the reduced and capped diversion amount (as against interference from tribal rights or regulatory restrictions).
- Various aspects of fisheries restoration and reintroduction are addressed, in some situations with specific prescriptions and in others with further planning required before any action is taken. This includes a significant fishery monitoring component intended to be used by the governance bodies in a program of adaptive management.
- The KBRA measures will free up, and will lease or purchase, water to be used as “environmental water.” With the Klamath Irrigation Project diversions reduced and capped, this water can be managed exclusively for the benefit of fisheries and related resources throughout the Basin. This is intended to allow more responsive management at times of critical water need for the fisheries. The water will be managed by a newly created Klamath Basin Advisory Council, comprised of representatives of most Basin water interests, which will advise federal water management agencies.
- A voluntary water use retirement program is provided on the tributaries to Upper Klamath Lake, in order to get more water into the Lake which allows for management of more water in the lower River system.
- A system of “regulatory assurances” is constructed to protect both fisheries and agriculture by using appropriate aspects of the Endangered Species Act. No changes to the ESA are proposed, but the focus of its implementation should shift from Section 7 and occasional Biological Opinions, to more predictable Habitat Conservation Plans.
- Provision is made to provide electrical power to agricultural power users at below market rates to replace the extremely cheap power formerly delivered by the dams. This provides agriculture with an incentive, otherwise lacking, to support the fisheries aspects of the KBRA.

4. Fitting the Round Peg of the Adjudication Into the Square Hole of the KBRA/KHSA.

Together the KBRA and KHSA seek to atone for a multitude of sins in the Klamath Basin. They go well beyond the Adjudication’s aspiration of simply(!) resolving priority dates and quantities of water rights. They contemplate timetables for implementation that both ignore and reach beyond those of the Adjudication. Moreover, they contain contingencies as to whether the dams will be removed. (Will the Secretary decide that the dams should be removed? Will the removal funding systems be effective? Will the cost estimates for removal be met? Will the tribes’ non-interference assurances to the Irrigation Project become permanent? Et cetera.) Nonetheless, early on Oregon determined that the Adjudication must remain a separate and independent proceeding

from the KBRA/KHSA. Whether the contingencies are met will not be known until the Adjudication has marched much farther toward its goal.

This has presented great challenges when reconciling the Adjudication and its processes with the KBRA/KHSA and their contingencies and content. A particular problem is that some of the key provisions of the KBRA/KHSA will not be final until, more than ten years from now, it is known whether certain contingencies—most importantly dam removal—have actually taken place. That is, if dam removal fails between now and its intended 2020 completion date, the conditions necessary for the agreed-upon water balance will not be met. In that case central aspects of the KBRA will fall apart; parties who had hoped the KBRA would resolve their Adjudication water issues will need to return to litigation in the Adjudication.

One goal of the Oregon Department of Water Resources in its Adjudication is to complete the proceedings as diligently and as quickly as possible. The Adjudication has been going on for 34 years and there is pressure from some quarters, particularly the Legislature that funds large parts of it, to complete it.

In contrast, the KBRA/KHSA are driven by several other timetables. First, there has been the considerable length of time needed to simply negotiate these complex, multi-party agreements. Second, there is decade or more required prior to removal of the PacifiCorp dams. Third, there is the ten-year fishery and habitat restoration program of the KBRA. Fourth, there is the question of congressional funding for the various programs; Congress' actions cannot be guaranteed and flexibility is required.

The challenges of reconciling the Adjudication with the KBRA/KHSA can be put into two categories.

1. Accommodating the need for time to negotiate the KBRA and KHSA

As to the length of time needed to negotiate the agreements—the Adjudication authorities have been very accommodating. No fewer than ten motions to extend the Adjudication schedule have been made by Adjudication parties and granted by the Adjudication Administrative Law Judge. Most of these motions have been premised on the idea that if the KBRA/KHSA negotiations were successful, then the workload in the Adjudication, while not eliminated, could be much reduced. In total, there have been more than two years of extensions, continuations, and postponements in the Adjudication on this account.

The other timing issues all arise from the contingent nature of the KBRA/KHSA and cannot be accommodated by rearranging the Adjudication's schedule. Instead, these issues depend on the outcomes, years from now, of the KBRA/KHSA, which is the second challenge of reconciliation.

2. Planning in the Adjudication in case the KBRA/KHSA contingencies are not met.

The KBRA and KHSA deliver their benefits over time. And each Agreement contains contingencies and can fail in the future due to factors beyond the control of the parties to the Adjudication.

As a result, the Adjudication parties who are also parties to the KBRA/KHSA need to construct a system that would allow them to put off litigation in the Adjudication so long as the KBRA/KHSA contingencies are being met, and to return to litigation in the Adjudication if one or more of those contingencies fails. This requires creativity on the part of OWRD and close negotiation by the relevant parties to the Adjudication. Those parties—traditional antagonists who have buried the hatchets (though not forgotten where they're buried) for the KBRA/KHSA—are the water rights claimants Klamath Tribes and Bureau of Indian Affairs (BIA), and the contestant to those claims the Klamath Project Water Users (“Water Users”).

A prerequisite to reconciling the Adjudication with the KBRA/KHSA is that the Adjudication continue marching along at its normal pace as regards Adjudication claimants and contestants who are not also parties to the KBRA/KHSA. That is, Adjudication parties who do not participate in the KBRA/KHSA will not be affected by those two Agreements, so those parties' litigation of Adjudication issues must continue unaffected.

The strategy arrived at allows the Water Users to remain “on the sidelines” of the Adjudication as the Adjudication marches through its administrative phase in the OWRD forum and, subsequently, in the Oregon Circuit Court phase, so long as the KBRA/KHSA remain effective; that is, so long as the contingencies in the two Agreements are being met. In effect, the Adjudication decrees will contain “reopener” provisions. Can you contrast these with FERC license reopener provisions? These provisions will not be used if the contingencies of the KBRA/KHSA are satisfied and the dams are actually removed. In that situation the Tribes' non-interference assurances will become permanent and KPWU's obligation to reduce and cap its diversions will also become permanent.

However, if the contingencies in the KBRA/KHSA are not fulfilled and the dams are not removed, the reopener provision will allow the KPWU to rekindle the Adjudication litigation and challenge the Klamath Tribes water rights claims. While this preserves the rights of all parties to return to the status quo ante in the event of failure of the two Agreements, it is a suboptimal outcome. The reopener might not be exercised for a decade or more. In the interim, witnesses may become unavailable, evidence can become stale, and judges with a familiarity with the complexities of the Adjudication can move on.

Nonetheless, at this writing most of the parties appear to be committed to this path. They have determined that these risks are worth accepting in exchange for the potential benefits of the KBRA/KHSA. A confidence that the round peg can be pounded into the square hole is just one of the leaps of faith required by people who want to end decades of litigation and to chart a new course for all the water-dependent communities in the Klamath Basin.