

# Klamath Adjudication - Lessons Learned

Holly R. McLean

*Office of General Counsel, United States Department of Agriculture, Portland, Oregon*

Beginning in 1990, the Forest Service and the U.S. Department of Agriculture, Office of General Counsel (OGC) became intensely engaged in developing federally reserved claims to be filed in the Klamath River basin water rights adjudication. With no data and no inventory of water uses on the three forests in two regions covered by the adjudication, the Forest Service and OGC began what looked at first to be a monumental task. Not only were claims developed, but also the underlying hydrologic information and analysis tools to support such claims. In addition, a unique instream flow protection claim pursuant to the Organic Act was developed. After claims were filed, the Forest Service, OGC, and U.S. Department of Justice (USDOJ) presented preliminary evidence to the Oregon Water Resources Department (OWRD) to assist in its preliminary determinations of the validity of the Forest Service water right claims. After the preliminary evaluations were issued by OWRD, various claimants and water rights holders in the Klamath River basin filed over 1000 objections to Forest Service claims. The Forest Service and OGC met with the various objectors and were able to resolve all objections without contested hearings. This paper discusses the steps taken to assure success in this most contentious of situations, and lessons learned in conducting such complex litigation.

Keywords: *water rights, adjudication, instream flow*

## HISTORY

The Klamath Basin Adjudication was initiated in 1975 to quantify all federally reserved water rights and state law based rights prior to the date of the Oregon Water Code, 24 February 1909, on the waters of the Klamath River and its tributaries, located in the state of Oregon. Shortly thereafter, litigation between the State of Oregon and the Klamath Tribe (Tribe) was started over whether the Tribe retained a water right after sale of former reservations lands, and if so how much.

The Federal Courts, through the Adair decisions issued by the United States District Court for the District of Oregon and the 9th Circuit Court of Appeals, held that the Klamath Tribe retained a water right initially reserved under its treaty of 1868, but left to the State of Oregon adjudication proceedings the determination of the quantity of that right. (United States v. Adair, 478 FS 336 (Dist. OR 1979) aff'd 723 F.2d 1394 (9th Cir. 1983)).

The State of Oregon issued a notice to the federal government, requiring that federally reserved claims be filed by 1 February 1991. The United States then filed its own action against the State of Oregon, challenging the adequacy of the procedures in the Adjudication,

arguing the procedures did not meet the requirements of the McCarran Amendment. The United States lost its challenge of procedural issues. However, the Court held that the United States could not be required to pay filing fees to the State of Oregon.

## CHALLENGES OF THE ADJUDICATION

Pursuant to federal case law, when Congress reserves land from the public domain, such as for a national forest, a reservation of water to fulfill the purposes of the reservation is implied.

Obtaining federally reserved water rights for the Forest Service in the Klamath Basin Adjudication was a challenge. The State of Oregon had never before granted federally reserved water rights in any of its adjudications. The listing of fish species as threatened and endangered was just beginning in 1990. The public in the Klamath River basin was generally suspicious of the federal government, with some ranchers warning that the granting of instream reserved rights was just a veiled attempt to stop all irrigation in the basin.

Early on, the Forest Service arranged a meeting with the Director of the Oregon Water Resources Department (OWRD). In this meeting the Forest Service explained the benefits of instream rights that might be granted, including the benefit to maintaining and enhancing habitat of recently listed fish species. This meeting helped to

---

M Furniss, C Clifton, and K Ronnenberg, eds., 2007. *Advancing the Fundamental Sciences: Proceedings of the Forest Service National Earth Sciences Conference, San Diego, CA, 18-22 October 2004*, PNW-GTR-689, Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station.

convince OWRD that Forest Service instream rights might help soften the impact of the listing of fish species under the Endangered Species Act, and gained the Forest Service considerable credibility.

Through the process, the Forest Service had to deal with this laundry list of challenges:

1. Determining what rights the Forest Service should file, and on what theories.
2. Hydrology – How much water is there in the Klamath River basin, how to calculate those flows, and what to do about the lack of flow data in the basin.
3. Klamath Tribal Claims – as outlined in the Adair decisions, discussed earlier.
4. Endangered Species Act and listed species in the Klamath River basin – How would the listing of fish species effect operation of Federal irrigation projects in the Klamath River basin?
5. Bureau of Reclamation/Klamath Irrigation Project – who owns the water right for lands in the project area: Bureau of Reclamation, the irrigation districts, or the private land owners.
6. Operation of the Klamath Irrigation Project and priorities among the irrigators.
7. Downstream fisheries.
8. Walton irrigation rights – claimed by individuals owing lands formerly owned and farmed by Tribal members.
9. The Klamath Compact, between the states of Oregon and California, governing management of this two-state basin.
10. Claim of the Klamath Tribe for return of former reservation lands.
11. Downstream Tribes – Hoopa and Yurok – They claim their treaty right to salmon harvest is not being met.
12. Dealing with the many differences of opinion and direction among the group members – Bureau of Reclamation, Fish and Wildlife Service, Bureau of Land Management, National Parks Service, Bureau of Indian Affairs, Klamath Tribe and the Forest Service, plus the U.S. Department of Justice.
13. Filing Claims – Based on these Acts of Congress; Organic (instream favorable conditions, instream fire, consumptive), Wild and Scenic Rivers, Wilderness, and Multiple Use Sustained Yield (MUSY).
14. Coordinating science and its application to the claims.
15. Working with the State on the actual mechanics of filing claims – compiling maps, land status documents, consumptive claims by sub-basin.
16. Alternative Dispute Resolution process – what could be gained in that forum.

## 17. Litigate or Settle

The above issues all had to be analyzed and addressed while developing the claims. Many times the team had to change or modify direction as analysis was evolving.

No other Forest Service region had yet been successful in an adjudication that could provide any guidance, though there were other adjudications at similar stages. Region 6 of the Forest Service (the Pacific Northwest Region) chose to use and develop its own expertise and responses to the challenges listed above.

## RESULTS

1. The Forest Service collected all data to support its claims. Now that data is relied upon by almost all other claimants and OWRD. This includes sediment data, flow and stage readings, and habitat rating curves.
2. The Forest Service developed a favorable conditions of flow claim theory and hydrograph that meshed with the hydrology and needs of the Forest Service in the Klamath River basin.
3. Over 1000 instream nonconsumptive and consumptive claims were filed by the Forest Service in a timely manner.
4. The Forest Service quantified fisheries flows. The results are used by the forests for planning purposes; however, MUSY Act-based claims were withdrawn because of prior unfavorable case law.
5. The Forest Service created fire suppression instream claims pursuant to the Organic Act, which were granted by OWRD, resulting in the awarding of almost the same flow amounts as the MUSY fisheries claims that were later withdrawn. This type of claim was first filed in Oregon, and exhibits the creativity of the team in claiming water for National Forest purposes.
6. Over 1000 objections to FS claims were filed by private parties. All objections were settled by the Forest Service without compromising legal and management objectives.

## LESSONS LEARNED

In going through this more than ten-year process, the Forest Service and OGC personnel working on the case came up with the following lessons and pearls of wisdom to share with anyone starting work a water rights adjudication:

1. Know your objectives – it keeps the team from being sidetracked, and wasting time and resources.

2. Listen for understanding – you may learn from so-called opponents and see you have more in common than you suspected.
3. Be truthful – it helps gain credibility when trying to resolve differences.
4. Share information – again, it illustrates that there are no ulterior motives.
4. Work towards common goals – understand other claimants' motivations.
6. Cooperate – again, helps gain credibility.
7. Be helpful – it helps to shorten the process.
8. Know your partners' objectives, policies, rules and regulations.
9. Know your opponents' objectives, policies, rules and regulations.
10. Don't lose sight of your agency's objectives.
11. Don't depend on others, i.e., tribal rights on FS lands.
12. Make sure your attorneys understand your science.
13. Don't be afraid to get the lawyers out of the room and talk about what is on the ground.
14. Expertise can and should be local – parties don't like persons outside the area telling them about their areas of expertise.
15. Don't be afraid to come up with your own science.
16. Again, know and keep sight of your objectives – this cannot be repeated enough.
17. Be realistic with your claims – claim just what is needed for forest purposes.
18. Don't be afraid to branch out and be creative when drafting water right claims.
19. Respect the opinions of others.
20. Don't panic; if you are moving forward you will compete the tasks – break down the tasks into smaller, achievable items.
21. Large negotiations don't necessarily solve all issues, but they can solve small issues.
22. The lawyers' objectives may not be the same as yours – keep them focused on the agency's goals.
- 23 Don't make assumptions.
24. Use time in meetings with the public to educate them on Forest Service goals, benefits to the public and the limits of Forest Service authorities.

Service. When the final order of the Director of OWRD is issued, it will grant to the Forest Service water rights reserved under the Organic Act for favorable conditions of flow, fire suppression flows and administrative consumptive uses; instream flows for Wilderness Act purposes; and instream flows for Wild and Scenic River Act purposes.

The effort in the Klamath Adjudication was successful because Region 6 Forest Service personnel did not try to solve all issues in the Klamath River basin. General stream adjudications can be successful in meeting Forest Service water needs if the agency concentrates on its specific objectives and direction, as well as mapping out a reasonable strategy. The key to resolving objections and issues with other claimants is being open to scrutiny and the sharing of information.

## CONCLUSION

Though the Klamath Adjudication is a few years from receiving a final order from the Director of OWRD because of the time needed to address the reserved claims of other federal agencies, the reserved claims filed by the Forest Service have been resolved, and the Director will be issuing virtually all reserved claims filed by the Forest