

**LITIGATION*****Klamath Irrigation District v. Reclamation*****January 19, 2024**  
**Special Report #2592**

On January 8, the U.S. Supreme Court denied a second petition for certiorari in *Klamath Irrigation District v. Reclamation* (#23-216) (Klamath II). A related petition was denied last September (#22-1116) (Klamath I). The underlying issue in both cases was whether the Bureau of Reclamation (USBR) held the water rights necessary to implement its 2019-2024 Klamath Project operating procedures, which were based on the biological opinions of the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), to maintain instream flows from the Upper Klamath Lake to the Klamath River downstream to benefit the threatened salmon and to comply with the Endangered Species Act (ESA). USBR noted that the 2019-2024 operations plan has the added effect of partially protecting the tribal fishing-based water rights in California.

The Klamath River Basin Compact between California and Oregon (1957) recognizes vested rights to waters originating in the Upper Klamath River Basin, whether diverted or used in Oregon or California, and does not deprive tribes of their rights to those waters under treaty, agreement, or statute. While the United States filed water rights claims in the Klamath Basin Water Adjudication on behalf of tribes in Oregon, and for diversions that take place in Oregon but are used in California, they did not file claims on behalf of the Hoopa Valley Tribe and Yurok Tribe in California. USBR asserted that they did not need to because those tribes and their water uses are outside of Oregon jurisdiction.

The Klamath I petition was an appeal of a case filed in the U.S. District Court for the District of Oregon (#1:19-cv-00451), with Administrative Procedure Act (APA) claims alleging that USBR's 2019-2024 operating procedures were unlawful. The lower court dismissed the case under Federal Rule of Civil Procedure (FRCP) 19, because the Klamath Tribes and the Hoopa Valley Tribe, which could not be joined as parties to the APA action due to their tribal sovereign immunity, were indispensable parties to a lawsuit that could impact their rights to the water for hunting, fishing, and gathering. The court held that because the case was not about administering rights following a state stream adjudication, the McCarran Amendment did not apply and could not waive the immunity of the tribes. The 9th Circuit affirmed.

The underlying case for Klamath II began as a motion for a preliminary injunction in the Klamath Basin Water Adjudication (In re Waters of the Klamath River Basin, #WA1300001). In Oregon, OWRD handles the first phase of reviewing water rights claims, hearing contested claims, and issuing a determination. OWRD began the Klamath Basin Water Adjudication in 1975 and issued its Findings of Fact and Final Order of Determination in 2013. In the second phase, the Klamath County Circuit Court is responsible for resolution of exceptions and issuance of the water right decree. See <https://www.oregon.gov/owrd/programs/waterrights/adjudications/klamathriverbasinadj/pages/default.aspx> and <https://www.courts.oregon.gov/courts/klamath/resources/pages/klamathbasinadjudication.aspx>

In 2021, the Klamath Irrigation District (KID) filed a motion for a preliminary injunction in the Klamath Basin Water Adjudication to enjoin certain aspects of USBR's operation of the Klamath Project, based on the water rights and storage rights in OWRD's Final Order of Determination. KID argued that USBR had to acquire a water right to implement its operations plan, and that the Hoopa Valley Tribe and Yurok Tribe in California lacked any water rights to the Klamath River flows because they had failed to file water rights claims in Oregon.

USBR removed the motion to the U.S. District Court for the District of Oregon (*KID v. USBR*, #1:21-cv-504) due to ESA compliance implications under federal law, as well as the reserved water rights of tribes in California. OWRD joined as an intervenor. The U.S. District Court denied KID's subsequent motion to remand back to the State Court, holding that the Adjudication did not possess exclusive jurisdiction over the injunctive claim. The court rejected KID's argument that the McCarran Amendment waived the United States' sovereign immunity on the issues of ESA compliance and the fishing-based water rights in California, noting that these issues are not governed by Oregon law. OWRD explained that the jurisdiction of the Klamath Basin Water Adjudication does not extend to these issues. On appeal, when KID sought a writ of mandamus on the motion for remand, the 9th Circuit (#22-70052) affirmed, holding that the McCarran Amendment does not expand a state court's subject matter jurisdiction or empower a state to adjudicate rights beyond its jurisdiction.

In its Klamath I petition for certiorari, KID's question presented was: "Whether [FRCP] 19 requires dismissal of an action challenging a federal agency's use of water subject to state-adjudicated water rights if a Native American tribe asserts an interest in the suit and does not consent to joinder." KID argued that the decision of the lower courts granted Native American tribes a veto power over water rights cases against the federal government, and undermined the Western water rights adjudication regime. KID argued: "The real-world consequences of the Ninth Circuit's holding are severe. Property

rights that cannot be asserted in court are not property rights at all. The Ninth Circuit's ruling deprived thousands of farmers and ranchers in Oregon's Klamath Water Basin of their ability to vindicate water rights in Oregon's Upper Klamath Lake against the federal government after they spent more than 38 years in litigation to obtain a comprehensive adjudication of all state and federal rights in that source." KID noted that it did not seek to prevent USBR from satisfying its obligations to the Tribes or under the ESA, only to require that USBR obtain water using lawful means, including purchase, appropriation, or judicial condemnation.

KID also expressed concerns about the U.S. Supreme Court waiting for a Circuit split. "Nearly all Native American land is located within the Ninth and Tenth Circuits. This means that only those two circuits are likely to address the Rule 19 and McCarran Amendment questions this case raises; indeed, they account for most of the cases that cite the McCarran Amendment and Reclamation Act.... [The Ninth Circuit] has jurisdiction over seven Western States that encompass a population of over 65 million people-approximately a fifth of the country.... Scarcity of water is one of the most important problems facing this vast region, yet the decision below severely undermines the legal framework to determine and administer rights in that scarce and vital resource."

In Klamath II, KID's question presented was: "Whether the federal government can avoid the doctrine of prior exclusive jurisdiction in an ongoing, comprehensive water adjudication under the McCarran Amendment by asserting defenses based on federal law." KID argued that the ruling of the lower courts enables the federal government to remove any water rights case or enforcement proceeding that affects an interstate water system or federal obligations to federal court. KID pointed out that Klamath I enabled the tribes to close the federal courthouse doors to water users, and Klamath II allowed the federal government to close the state courthouse doors. "As a result, the rights of every other water user turn on the tactical litigation decisions of parties who compete with them for access to this limited resource. Collectively, those parties now have the power to insulate agency water rights actions from judicial review."

See also, WSW #2543 Special Report.