

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
A Tributary of the Pacific Ocean

In Re:)	
WATERS OF THE KLAMATH RIVER)	Case No. WA1300001
BASIN,)	
)	COURT'S OPINION AND CONCLUSIONS
)	OF LAW ON PHASE 3, PART 1, GROUP
)	C MOTIONS
)	

This opinion contains my decisions on Phase 3, Part 1, Group C motions. No later than March 16, 2021 counsel for the Oregon Water Resources Department must submit a proposed order which incorporates this opinion. No later than March 30, 2021 any party can file an objection to the proposed order. The proposed order and any objections must be served on the current service list. If there are objections, the court in its discretion may simply determine the form of the order, may set the matter for arguments, or may take other action.

INTRODUCTION.

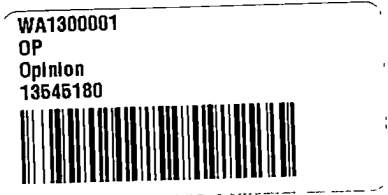
This introduction is the same as it was for the Group A motions.

These motions are described in Case Management Order (CMO) #33, Page 2:

The court is informed that many parties assert that a significant number of exceptions raise legal issues that may be capable of resolution without the court's consideration or resolution of disputed issues of fact, have broad application to most exceptions or PFODS [partial final orders of determination] in a group ..., and are recommended as appropriate for resolution before proceeding to individual ... PFOD[S]

CMO #33 at Page 7 lists 13 legal issues that can be addressed by these Group C motions. No motions were filed for issues 5 (claim or issue preclusion), 9 (quantification itself), 10 (gathering), or 13 ("catch all" regarding legal issues).

These are some things the court is not doing in these motions:



1. The court is not making decisions that involve factual disputes.
2. The court is not making fact specific legal decisions.
3. The court is not considering proposed changes in grammar, writing structure, or organization alone.
4. The court will not approve language that duplicates or is redundant to what is already in the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD).
5. The court will not consider motions that are raised for the first time in responses or replies because the other parties will not have an adequate opportunity to respond to them.
6. The court will not decide issues other than those presented in the parties' motions. The ACFFOD remains the same except as modified by an order.

The Mosby Family Trust adopts all of the motions filed by the Upper Basin Irrigators (UBI).

MOTION GROUP No. 1
Applicability of US v. Adair

Motion Group No. 1 includes argument of Issue No. 1 as follows:

Issue No. 1 (Applicability of *Adair*):

The applicability of judgments entered in the *United States v. Adair* litigation to the Klamath Basin Adjudication.

MOTION No. 1 (KPWU Motion 2.a.), p. 14-16.

KPWU move for an order on Issue No. 1 (Applicability of *Adair*) ruling that:

“Neither the State of Oregon, in its adjudicatory capacity, nor KPWU are bound by the judgment of the *United States v. Adair* litigation.” Motion No. 1, p.1.

OPINION -- DENIED - because it involves a factual determination.

“Although we are not bound by lower federal court decisions, we give due regard to federal Courts of Appeal decisions on matters of federal law.” *McWhorter v. First Interstate Bank of Oregon*, 67 Or. App. 435 1438 (Or. App 1984). “However, in cases in which federal law is applied, Oregon courts are not bound by Ninth Circuit decisions simply because we are within the boundary of that circuit. ... Although decisions of inferior federal courts should be considered and are, of course,

persuasive on issues that are unresolved by the United States Supreme Court, Oregon courts must engage in their own analysis of federal law and reach their own conclusions.” Beason v. Harcleroad, 105 Or. App 376, 382 (Or. App. 1991).

United States District Judge Soloman’s pre-trial order in U.S. v. Adair, 478 F. Supp. 336 (1979) (Adair I) is helpful: “The judgment in this case, if otherwise proper, will be binding upon the State of Oregon as a property owner. However, the judgment will not bind state officials as to decisions to be made in their official capacity affecting the rights or interests of nonparties to this litigation. The judgment will only bind state officials acting in their official capacity as to decisions concerning interests within the litigation area affecting actual parties to this litigation and their successors in interest”.

Thus, those who were parties to Adair I or U.S. v. Adair, 723 F.2d 1394 (1983) (Adair II) are bound by it and their rights and relationships as to each other are bound by its holdings. If a party to this case was not a party to Adair I or II, that party is not bound by it. As to those parties, this court has an independent duty to consider and render a decision on issues decided in Adair I or II. In doing so, “due regard” is given to Adair I or II and it is persuasive. McWhorter, *supra*; Beason, *supra*. The State of Oregon in its adjudicatory capacity is bound by Adair I or II in its relationship with a party to those case(s) but Adair I or II are only persuasive in the State’s relationship with a non-party to those cases.

However, it is a factual determination whether a party to this case was a party to Adair I or II and therefore, this motion is denied. That determination can be resolved by taking judicial notice of Adair I or II to determine if an entity (such as KPWU or the State of Oregon) was a party to those cases.

MOTION GROUP No. 2 ***General Legal Principles, Diminishment and Abandonment***

Motion Group No. 2 includes argument of Issues Nos. 2, 4 and 6 as follows:

Issue No. 2 (General Legal Principles):

General legal principles pertaining to the tribal water rights and/or recognition of tribal water rights based on any claimed limitation of the purpose(s) for the rights.

Issue No. 4 (Diminishment):

Whether the tribal water rights have been abrogated or diminished, in whole or in part.

Issue No. 6 (Abandonment):

Whether Oregon’s law of abandonment applies to tribal water right claims.

MOTION No. 1 (KPWU Motion 1.a.), p. 16-19.

KPWU move for an order on Issue No. 2 (General Legal Principles) ruling that:

“Hunting, fishing, trapping and gathering were not a primary purpose of the reservation under the 1864 Klamath Treaty.” Motion No. 1, p.1.

OPINION - DENIED

Oregon case law does not address this topic but federal court cases are persuasive authority that hunting, fishing, trapping and gathering were primary purposes of the reservation.

“[T]he Klamath Tribes have an implied right to water to the extent necessary for them to accomplish hunting, fishing, and gathering on the former reservation, a primary purpose of the Klamath reservation”. *Baley v. United States*, 942 F.3d 1312, 1337 (Fed Cir., 2019).

The 1864 treaty has been interpreted to include a grant of exclusive trapping rights to the tribe. See *Adair II*, 723 F.2d at 1408-1410. I conclude that trapping is a part of the “Indians’ hunting and gathering lifestyle” and therefore also qualifies as a primary purpose of the 1864 Treaty. *Id.*

MOTION No. 9 (UBI Motion No. 4), Mosby Family Trust.

UBI move for an order on Issue No. 2 (General Principles):

“[M]odifying the priority date of the tribal claims from “time immemorial” to the date of the Klamath Treaty, Oct. 14, 1864, including, specifically, Claim Nos. 622 (Upper Klamath Lake), 624 (Seeps and Springs), 625-630, 634, 640, 641-649, and 652-653 (Sprague River), 658-663 and 665-667 (Sycan River), 668-670 (Wood River), for instream water rights ... because, in [*Adair II*], the Ninth Circuit misinterpreted the Klamath Treaty and, in doing so, it recognized a “time immemorial” water right that mostly, if not entirely, defeats the agricultural purpose of the Treaty.” Motion, pg 1-2.

OPINION -- DENIED.

The UBI acknowledge that the motion seeks a ruling that is contrary to *Adair II* and *United States v. Winans*, 198 U.S. 371 (1905), upon which *Adair II* is based. They suggest that the *Adair II* court misinterpreted the Klamath Treaty, misapplied *Winans*, and/or “... this case presents good cause for the U.S. Supreme Court to eventually reconsider *Winans* ...”. UBI Motion #9 at Page 4.

The United States Supreme Court decision in *Winans* is binding precedent and *Adair II* is persuasive authority to deny this motion.

MOTION No. 11 (UBI Motion No. 6), Mosby Family Trust.

UBI move for an order on Issue No. 2 (General Principles):

“[M]odifying the tribal claims by declaring that, when they are re-quantified, they will be limited to, or “capped” at, 50% of available streamflow, including, specifically, with respect to Claim Nos. 622 (Upper Klamath Lake), 624 (Seeps and Springs), 625-630, 634, and 640, 641-649, and 652-653 (Sprague River), 658-663 and 665-667 (Sycan River), 668-670 (Wood River), for instream water rights” because: (1) “capping the allocation of water to tribal fishing and hunting purposes at 50% of available streamflow is rooted in the moderate living standard and related U.S. Supreme Court precedents, which the Ninth Circuit incorporated into [*Adair III*]” and (2) “capping the water allocation to fishing and hunting purposes at 50% is necessary in order to give effect to the coprimary purpose of the Klamath Treaty: agriculture.” Motion No. 11, p. 1-2.

OPINION – DENIED.

The motion relies upon *Washington v. Washington State Commercial Passenger Fishing Vessel Assn*, 443 U.S. 658 (1979) (“Fishing Vessel”) where the court placed a 50% cap on the tribe’s fish harvest. The motion suggests that the tribal water claims in this case should likewise be limited to 50% of the available streamflow.

Although water in the Klamath Basin, like salmon in *Fishing Vessel*, is a scarce natural resource, that is where the similarity ends. The law that allocates these scarce natural resources is significantly different. Setting a cap for water allocation at 50% is arbitrary and not consistent with the fundamental principles of the prior appropriation doctrine where a water right is fully met before the next junior right gets any water. *Benz v. Water Resources Commission*, 94 Or. App. 73 (1988).

MOTION No. 6 (UBI Motion No. 1), Mosby Family Trust

UBI move for an order on Issue No. 4 (Diminishment):

“[D]ismissing all tribal claims asserted by the United States and the Klamath Tribes in this matter, including, specifically, Claim Nos. 622 (Upper Klamath Lake); 624 (Seeps and Springs); 625-630, 634, and 640 (Williamson River); 641-649 and 652-653 (Sprague River); 658-663 and 665-667 (Sycan River), and 668-670 (Wood River), for instream water rights” because “even if the Treaty originally reserved water rights for fishing, hunting, and gathering purposes, Congress unilaterally changed the Treaty by converting all available water on the Klamath Reservation exclusively, or predominately, to agricultural purposes with the passage of the General Allotment Act and as expressed by acts of the President and the Department of Interior in carrying out the General Allotment Act.” Motion No. 6, p. 1-2.

OPINION – DENIED.

Persuasive federal court case law establishes that instream water rights existed and continue to exist long after the passage of the General Allotment Act. The language of the treaty did not change that conclusion. Adair II.

MOTION No. 1 (KPWU Motion 2.f.), p. 32-33.

KPWU move for an order on Issue No. 8 (Quantification Standard) ruling that: [W]ater rights ... exist, at most, only with respect to fishing on the so-called “diminished” reservation; i.e., lands exclusive of any areas ceded by the Tribes in 1901. Motion No. 1, p 32.

OPINION – GRANTED.

I believe that none of the responses dispute this motion. In contrast, the United States seems to agree with it, acknowledging that the 1901 agreement altered reservation boundaries, but the General Allotment Act did not. USA’S RESPONSE IN OPPOSITION TO MOTIONS FOR RULING ON LEGAL ISSUE CATEGORY NOS. 2, 4, AND PART OF 8 ... at pp. 29-30, 32. The motion relies upon ODFW v. Klamath Indian Tribe, 473 U.S.753 (1985) which held that the Tribe’s exclusive right to hunt and fish on the reservation did not survive in lands ceded to the government in 1901 where the agreement was ratified by Congress in 1906.

MOTION No. 1 (KPWU Motion 2.i.), p. 25-37.

KPWU move for an order on Issue No. 8 (Diminishment) ruling that:

“If a fishing right is, based on the evidence, found to be diminished, the water right is limited to the absolute minimum amount of water necessary to sustain fish life, if such fishery is utilized for subsistence purposes.” Motion No. 1, p 2.

OPINION – DENIED.

It is not clear what this motion requests. It apparently mandates a new result (limiting water rights to the absolute minimum amount necessary to sustain fish life) provided:

1. The fishery is utilized for subsistence purposes; and
2. Based upon the evidence a fishing right is found to be diminished.

This could create an unfair outcome because it is not clear how, why or to what degree the fishing right must be diminished nor is there any indication what type or amount of evidence may suffice to do so. The moving party cites Washington v. Acquavella (*Washington Superior Court for Yakima County, Case No. 77-2-01484-5*) but it is not binding on this court and the holding that may apply to this motion appears to be fact specific.

Furthermore, this language apparently reduces the Tribes’ treaty rights but only Congress can do so through a clear expression of its intent. Minnesota v. Mille Lacs Band of Chippewa Indians, 391 U.S. 172, 202-203 (1999).

MOTION No. 1 (KPWU Motion 2.b.), p. 21-23.

KPWU move for an order on Issue No. 6 (Abandonment) ruling that:

“The Tribal claims are subject to the Oregon law of abandonment of water rights as of August 10, 1976.” Motion No. 1, p. 1.

OPINION -- DENIED.

Although KPWU acknowledges that “... as a general proposition, federal reserved rights are not subject to these ‘use it or lose it’ doctrines”, Motion Page 22, it relies upon language in the Klamath Termination Act (KTA). That language provides that Oregon’s law of abandonment will not apply to tribal members until 15 years after the date of termination, i.e. August 10, 1976. However, the KTA further provides that it will not “abrogate any fishing rights or privileges ...”.

I agree with the USA’s argument that the only reasonable explanation of these provisions is that the language about abandonment applies only to consumptive water uses, not to the non-consumptive in-stream flow rights that are not abrogated. That makes sense because Oregon law did not recognize non-consumptive, in-stream flow rights when the KTA was enacted.

This interpretation is supported by persuasive federal court case law. See e.g. *Adair II*, 723 F.2d at 1412. (“Because Congress in Section 564m of the Termination Act explicitly protected tribal water rights and nowhere in the Act explicitly denied them, we can only conclude that such rights survived termination”); *Baley v. United States*, 942 F.3d 1312, 1322-1323 (Fed Cir 2019). (“Courts have subsequently held that the Klamath Tribes’ hunting, fishing and implied reserved water rights survived passage of the Termination Act”). These cases do not say that these rights are subject to loss by abandonment after 15 years pursuant to the KTA.

In any event, even if the above analysis is wrong, the 1986 Klamath Indian Tribe Restoration Act restored any tribal rights or privileges that may have been lost under the KTA.

MOTION GROUP No. 3
Equitable Defenses and Preclusion

Motion Group No. 3 includes argument of Issue No. 12 as follows:

Issue No. 12 (Equitable Defenses):

Whether equitable doctrines are applicable (as a matter of law, not fact) against the United States and/or Klamath Tribes with respect to the tribal claims.

MOTION No. 12 (UBI Motion No. 7), Mosby Family Trust

UBI move for an order on Issue No. 2 (Equitable Defenses):

“[R]eversing the Adjudicator’s determination, memorialized in the Proposed Orders applicable to Claim Nos. 622, 624, 625-640, 641-657, 658-667, and 668-670, that equitable doctrines are inapplicable to the tribal claims.” Motion No. 12, p. 1.

OPINION -- DENIED.

The motion “... seek[s] a ruling that whatever tribal claims this court may recognize, and quantify, as part of this adjudication, those quantifications may still be limited on the basis of equitable doctrines”. Motion #12 at Page 4. UBI seeks an order that “would not diminish the tribal claims” but “would only limit vindication of those rights to alternate remedies, such as financial compensation ...”. Motion #12 at Page 5.

The motion relies upon *City of Sherrill v. Oneida Nation*, 544 U.S. 197 (2005) (*Sherrill*) which held that where there were dramatic changes in land reacquired by the Oneida Tribe and two centuries during which the tribe did not assert sovereignty to that land, the tribe was prevented from once again asserting sovereignty because of laches, acquiescence and impossibility. UBI suggests that here, similar to *Sherrill*, innocent parties should be protected by equitable remedies from the tribe asserting potentially disruptive rights that have not been asserted for many years.

The motion is denied because the purpose of this adjudication is to determine the parties’ relative water rights, but not their remedies. ORS 539.030; 539.200. It is not now the court’s job to determine equitable or other remedies. “... [W]hether the plaintiff has any right ...” is a “very different question ... from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is”. *Sherrill*, 544 U.S. at 213.

Sherrill, a case involving property taxes, does not lead to the conclusion that a party has equitable defenses against Federal reserved water rights in an ORS Chapter 539 general stream adjudication.

MOTION GROUP No. 4
How Tribal Water Rights are Held

Motion Group No. 4 includes argument of Issue No. 11 as follows:

Issue No. 11 (Separate Claims):

General legal principles pertaining to how the tribal water rights are held and whether denial of the Tribes’ separate water right claims was appropriate.

MOTION No. 2 (Klamath Tribes Separate Claims Motion)

Klamath Tribes moves for an order on Issue No. 11 (Separate Claims) ruling that:

The ACFFOD should be modified to “explicitly state that the Tribes also hold ownership interest in these same water rights based on the Treaty of 1864 and federal law applicable to reserved Indian water rights” and “acknowledge that the Tribes and United States are entitled to maintain their separate party status in these proceedings”. Motion No. 2, p. 2.

OPINION – DENIED. See separate claims opinion and discussion below.

MOTION No. 4 (U.S. Separate Claims Motion)

U.S. moves for an order on Issue No. 11 (Separate Claims) ruling to:

“[R]everse OWRD’s erroneous conclusions of law to deny the Klamath Tribes’ separate water right claims and to modify the ACFFOD to explicitly state that the Klamath Tribes hold a separate and distinct ownership interest in the Tribal water rights” as detailed in Exhibit 2 to the Klamath Tribes’ Motion. Motion No. 4, p. 3-4.

OPINION – DENIED. See separate claims opinion and discussion below.

Separate Claims Opinion and Discussion

The Tribes acknowledge that the majority of their claims are granted in the ACFFOD and that it correctly indicates “that the tribal water rights are held by the United States in trust for the Tribes”. Motion #2 at Page 2. The Tribes move the court for an order that the ACFFOD: (1) “explicitly states that the Tribes also hold an ownership interest in these same water rights”; (2) should grant the Tribes “separate claims for tribal water rights ...” and (3) “acknowledge that the Tribes and the United States are entitled to maintain their separate party status ...”. Id. at Page 2.

Although the Tribes and the United States may prefer language other than that now in the ACFFOD, the existing language is correct and there are no laws or reasons that require it to be changed.

MOTION GROUP No. 5
On/Off-Reservation Rights

Motion Group No. 5 includes argument of Issue No. 3 as follows:

Issue No. 3 (Off Reservation Rights):

Whether the Klamath Treaty reserved water rights in streams and water bodies lying outside, or bordering, the former Klamath Reservation.

MOTION No. 1 (KPWU Motion 1.b.), p. 19-21.

KPWU move for an order on Issue No. 3 (Off Reservation Rights) ruling that:

“The Klamath Treaty did not reserve out-of-reservation water rights in Upper Klamath Lake, which is outside of the former Klamath Reservation.” Motion No. 1, p 1.

OPINION – DENIED. See bordering and off reservation waters opinion and discussion below.

MOTION No. 7 (UBI Motion No. 2), Mosby Family Trust

UBI move for an order on Issue No. 3 (Off Reservation Rights):

“[D]ismissing claims 622 and 668, for instream water rights on Upper Klamath Lake and Wood River, respectively. The claims should be dismissed because they are claims for waters that fall outside of the former Klamath Indian Reservation (“former Reservation”) boundary.” Motion No. 7, p 1.

OPINION – DENIED.. See bordering and off reservation waters opinion and discussion below.

MOTION No. 8 (UBI Motion No. 3), Mosby Family Trust

UBI move for an order on Issue No. 3 (Off Reservation Rights):

“[M]odifying the tribal claims by declaring that no water right exists for lands and waters ceded, sold, or otherwise divested from the former Klamath Reservation except where tribal fishing, hunting, or gathering rights were expressly reserved in the conveyance or other instrument divesting the Klamath Tribes of title of former Reservation lands” and “mandating that part of the United States’ burden of proof for each tribal claim is to demonstrate that tribal fishing hunting, or gathering rights still exist for each tribal claim reach at issue.”

OPINION – DENIED.

This motion asserts that there are no instream water rights when reservation lands were “divested” without reserving those rights and that the United States must prove they still exist.

This motion is contrary to *Adair II* which is persuasive. *Adair II* concluded that in-stream water rights survived the complete termination of the reservation. Termination and the General Allotment Act involved lands and waters ceded, sold, or otherwise divested and yet *Adair II* established that in-stream water rights remained.

The issue is whether these water rights, once reserved, are terminated by a transfer of the appurtenant land. We have already held in *Kimball I* that the tribes’ hunting

and fishing rights guaranteed by the treaty survived despite the land transfer. 493 F.2d at 569-70. Adair II, 723 F.2d at 1415 footnote 24.

MOTION No. 14 (MID/RRVID Motion 1.), p. 5-7, 14.

MID/RRVID move for an order on Issue No. 3 (Off Reservation Rights) ruling that:

The Treaty with the Klamath, Etc. of 1864, 16 Stat 707 (1864) (“Klamath Treaty”) does not support a federal reserved water right for instream flows or minimum lake level maintenance in off-Reservation water bodies. Motion No. 14, p 1.

OPINION – GRANTED in part and DENIED in part. See bordering and off reservation waters opinion and discussion below.

MOTION No. 14 (MID/RRVID Motion 2.), p. 2-14.

MID/RRVID move for an order on Issue No. 3 (Off Reservation Rights) ruling that:

Fishing outside the former Klamath Reservation (“Reservation”) boundaries is not a primary purpose of the Reservation; therefore, claimants are not entitled to an implied reserved water right for that purpose. Motion No. 14, p 1.

OPINION – GRANTED with further explanation.

It is true that claimants are not entitled to an implied reserved water right for fishing outside the former reservation, so I grant this motion. However, that ruling comes with an important caveat. “Even if the Klamath Tribes’ fishing rights extend only to lakes and streams within their former reservation, this does not mean their reserved *water* right is so limited”. Baley v. United States, 942 F.3d 1312, 1338 (Fed Cir. 2019).

It doesn’t matter if the tribe has an exclusive or non-exclusive right to fish in Upper Klamath Lake or no right to fish in it at all. If other requirements are met, it may still have reserved water rights in it for primary purposes on the reservation as discussed in Bordering and Off Reservation Waters Opinion and Discussion below.

MOTION No. 3 (Klamath Tribes Off Reservation Rulings Motion)

Klamath Tribes moves for an order on Issue No. 3 (Off Reservation Rights) ruling:

[T]o reverse OWRD’s conclusion of law that a water right arising under the federal reserved water rights doctrine cannot be recognized beyond the territorial limits of the former Klamath Reservation, and modify the ACFFOD to reinstate the ruling of Administrative Law Judge (ALJ)

Joe L. Allen below that the Tribal water rights may extend to water sources outside the boundaries of the former Klamath Reservation that are necessary to fulfill the hunting, fishing, trapping, and gathering purpose of the Reservation. Motion No. 3, p 2.

OPINION – DENIED. See bordering and off reservation waters opinion and discussion below.

MOTION No. 5 (U.S. Off Reservation Rulings Motion)

U.S. moves for an order on Issue No. 3 (Off Reservation) ruling to:

[R]everse OWRD’s erroneous conclusion of law that a water right arising under the Federal Reserved Water Rights Doctrine (or *Winters* Doctrine) cannot be recognized beyond the map-drawn boundaries of the former Reservation (also referred to herein as ‘off-Reservation’ lands)” and to “modify the ACFFOD to reinstate Administrative Law Judge (ALJ) Joe L. Allen’s ruling below. Motion No. 5, p 2.

OPINION – DENIED. See bordering and off reservation waters opinion and discussion below.

Bordering and Off Reservation Waters Opinion and Discussion

I conclude that the ACFFOD is correct.

KLAMATH RIVER

The Tribes do not have reserved in-stream rights for completely off reservation waters such as those they seek on the Klamath River for a number of reasons. Unlike some treaties, the language of this one does not support those claims. To the contrary, the Tribes “ceded ‘all [its] right, title and claim’” to the areas outside the reservation. *Adair II*, 723 F.2d at 1413-14. Furthermore, I do not consider these waters to be appurtenant to the reservation. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017). I have conservatively construed these claims after “careful examination”. *United States v. New Mexico*, 438 US 696 (1978).

Recent cases do not change this result. *Katie John v. United States*, 720 F.3d 1214 (2013) is about whether an administrative decision was reasonable, not whether reserved rights existed. *US v. Washington*, 853 F.3d 954 (2017) is about fishing rights, not water rights.

KLAMATH LAKE

If they otherwise prove their claim, the Tribes do have federal reserved in-stream rights in bordering appurtenant waters in Klamath Lake. *Baley v. United States*, 942 F.3d 1312 (2019) (the Court of Federal Claims did not err in finding that the Klamath Tribes’ implied water rights include Upper Klamath Lake).

I agree with the ACFFOD:

There is support in the case law for treating waters bordering Indian reservations as eligible for federal reserved water rights, assuming the other elements for such a right exist. See *United States v. Rio Grande Dam & Irrig. Co.*, 174 Us 690, 703 (1899); *Winters v. United States*, 207 Us 564, 565-567 (1908); *United States v. Ahtanum Irrig. Dist.*, 236 F2d 321, 325 (9th Cir 1956), cert den 352 US 988 (1957).
KBA_ACFFOD_04940.

Furthermore, “as soon as a reservation for Indians has been established, there is an implied reservation of rights to the use of the waters which arise, traverse, or border upon the Indians’ reservation, which rights may be exercised in connection with the Indian lands. This rule applies although the waters are not mentioned in the treaties, executive orders or other means used to establish the reservations”. *U.S. v. Preston*, 352 F.2d 352, 357 (9th Cir 1965). (emphasis added)

WOOD RIVER

Likewise, if the Tribe otherwise proves their claim, they have federal reserved in-stream rights in the Wood River, the relevant length of which is within the reservation. I reach that conclusion from the plain language of the treaty describing the reservation. After describing a part of the boundary as the “eastern shore ... of Klamath Lake”, the following description “thence up Wood River” in contrast indicates that the boundary includes the entire river, not just the eastern shore:

... Beginning upon the eastern shore of the middle Klamath Lake, at the Point of Rocks, about twelve miles below the mouth of the Williamson’s River; thence following up said eastern shore to the mouth of the Wood River; thence up Wood River to a point one mile north of the bridge at Forth Klamath; thence due east to the summit ... 1864 Treaty, Art I (16 Stat 707).

MOTION GROUP No. 6 ***Burden of Proof and Quantification***

Motion Group No. 6 includes argument of Issues No. 7 and 8 as follows:

Issue No. 7 (Burden of Proof):

General legal principles pertaining to the burden of proof for tribal claims that were imposed during the claims/contests process before the Adjudicator.

Issue No. 8 (Quantification Standard):

Whether the Adjudicator applied the correct quantification standard to the tribal claims.

MOTION No. 1 (KPWU Motion 2.c.), p. 23-25.

KPWU move for an order on Issue No. 7 (Burden of Proof) ruling that:

“The claimants carry the burden of proof for tribal water right claims and there is no burden of proof on contestants.” Motion No. 1, p 1.

OPINION – DENIED. See burden of proof discussion below.

MOTION No. 14 (MID/RRVID Motion 3.), p. 2-15.

MID/RRVID move, in the alternative, for an order on Issue No. 7 (Burden of Proof) ruling that:

“The claimants have the burden of proof to show that the fishing rights reserved to the Klamath Tribes (“Tribes”) under the Klamath Treaty would be entirely defeated without the implied reservation of instream flow rights in off-Reservation water bodies.” Motion No. 14, p 1.

OPINION – DENIED. See burden of proof discussion below.

Burden of Proof Discussion

Both motions suggest that only the claimants should have a burden of proof. I disagree and conclude that the ACFOD is correct. It says that “[c]laimants have the burden to establish their claims by a preponderance of the evidence”. KBA_ACFOD_04962. This is their opportunity to prove all elements of their claims. Contestants then have burdens to “present evidence to support each fact or position” raised in the contest. Id.

More specifically, claimants initially have the burden of persuasion, ORS 40.105, and the burden of producing evidence, ORS 40.115. Contestants then have the same burdens for the assertions they make in their contest.

MOTION No. 1 (KPWU Motion 2.e.), p. 25-37.

KPWU move for an order on Issue No. 8 (Quantification Standard) ruling that:

“The ‘healthy and productive habitat’ standard is not applicable in this proceeding. Any water rights recognized are limited to the minimum amount of water needed to sustain a fishery as exercised on no more than the ‘diminished’ reservation on April 30, 1997, to maintain a moderate standard of living for tribal members, and any water rights shall not create a wilderness servitude.” Motion No. 1, p 1-2.

OPINION – GRANTED in part and DENIED in part. I will address separate segments of the motion as follows.

Motion 1st segment: The “healthy and productive habitat” standard is not applicable in this proceeding.

DENIED – I agree with the ACFFOD that this does apply.

Motion 2nd segment: Any water rights recognized are limited to the minimum amount of water needed to sustain a fishery ...

DENIED – “The quantity of water is the minimum amount necessary for the primary purpose(s) of the reservation”. Court’s Opinion and Conclusions of Law on Phase 3, Part 1, Group A Motions signed 5/24/19. Hunting, fishing, trapping, and gathering were primary purposes of the reservation. Court’s Opinion and Conclusion of Law on Phase 3, Part 1, Group C Motions, pp 3-4, Motion No 1 (KPWU Motion 1.a)

Motion 3rd segment: ...as exercised on no more than the “diminished” reservation ...

GRANTED – Court’s Opinion and Conclusions of Law on Phase 3, Part 1, Group C Motions, p 6, Motion No 1 (KPWU Motion 2.f)

Motion 4th segment: ... on April 30, 1997.

DENIED – Quantification measures are not based upon a single date in time.¹

Motion 5th segment: ... to maintain a moderate standard of living for tribal members ...

GRANTED – *Adair II*, 723 F.2d at 1415.

Motion 6th segment: ... and any water rights shall not create a wilderness servitude.

GRANTED – *Adair II* 723 F.2d at 1414.

MOTION No. 1 (KPWU Motion 2.g.), p. 25-37.

KPWU move for an order on Issue No. 8 (Quantification Standard) ruling that:

“‘Currently exercised’ shall be construed to mean the date of filing of the claims or, alternatively, the date the Oregon Water Resources Department gave notice of this adjudication.” Motion No. 1, p 2.

¹ *United States v. Adair*, 187 F. Supp 2d 1273 (D. Or. 2002) (*Adair III*) vacated on other grounds, *United States v. Braren*, 338 F. 3d 971 (9th Cir. 2003) Vacation of an opinion for other procedural purposes does not imply a rejection of the vacated analysis. *Erickson v. American Golf Corp.*, 194 Or. App. 72 (2004). Regardless of whether *Adair III* can be considered persuasive as a result of *Erickson*, I conclude that its reasoning makes sense and consider it to reach my own conclusions

OPINION – DENIED. Quantification measures are not based upon a single date in time.²

MOTION No. 1 (KPWU Motion 2.h.), p. 25-37.

KPWU move for an order on Issue No. 8 (Quantification Standard) ruling that:

“Assuming the existence of a water right and the applicability of the ‘moderate living’ standard of *United States v. Adair*, 723 F.2d 1394 (9th Cir 1983) the Tribes are not entitled to a water right in each individual water course that is sufficient to support a moderate living – rather, hunting and fishing and gathering rights as currently exercised on the entire former Reservation must be considered.” Motion No. 1, p 2.

OPINION – GRANTED.

MOTION No. 10 (UBI Motion No. 5), Mosby Family Trust

UBI move for an order on Issue No. 8 (Quantification Standard):

“[V]acating the Adjudicator’s quantification of all tribal claims asserted by the United States and Klamath Tribes in this matter, including, specifically, Claim Nos. 622 (Upper Klamath Lake), 624 (Seeps and Springs), 625-630, 634, and 640 (Williamson River), 641-649, and 652-653 (Sprague River), 658-663 and 665-667 (Sycan River), 668-670 (Wood River), for instream water rights, and remanding all those claims for re-quantification under the correct quantification standard. The Court should grant this motion because the Adjudicator refused to apply the moderate living standard in his quantification of the claims, in contravention of *Adair II*.” Motion No. 10, p1-2.

OPINION – GRANTED. *Adair II* provides guidance for this process at pages 1414-1415. It provides in part:

As limited by the “moderate living” standard enunciated in *Fishing Vessel*, we affirm the district court’s decision that the Klamath Tribe is entitled to a reservation of water, with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights.

The “reservation of water ... sufficient to support exercise of treaty hunting and fishing rights” is determined by the healthy and productive habitat standard.³ That “reservation” is “... limited by the ‘moderate living’ standard ...” as *Adair II* instructs. In sum, the two-step process in the ACFFOD is correct with the addition of the moderate living standard in the second step. See KBA_ACFFOD_04950, footnote 10, item 3.

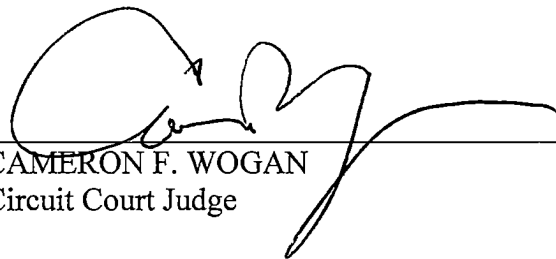
² See footnote 1 on Page 15.

³ See footnote 1 on Page 15.

In practice the moderate living standard may not have much effect upon the level of water necessary to have a healthy and productive habitat. That is because the water level cannot be reduced below what the evidence establishes is the minimum required for a healthy and productive habitat. To do so would violate the Tribe's treaty rights.⁴

A level of water that is more than the minimum required for a healthy and productive habitat could be reduced by the moderate living standard; a level of water that is already the minimum cannot.

Dated this 24th day of February, 2021.



CAMERON F. WOGAN
Circuit Court Judge

⁴ See footnote 1 on Page 15.