

## **For Publication in the May 2013 Issue Klamath News**

### **Klamath Tribes Water Rights Now Quantified and Enforceable**

“Paper water’ rights can now become “wet water” in lakes and streams barring a stay of enforcement

In the world of tribal water rights, there has long been a distinction between “paper water” and “wet water”. For the Klamath Tribes this has been particularly true because the Treaty-protected “paper” right to water, which was recognized and affirmed by the courts in the Adair decision in 1983, can now be enforced in the streams, and lakes as a “wet water right.”

The federal courts in Adair confirmed that the Tribes have a right to maintain sufficient water in lakes, streams, marshes, seeps and springs to protect their fishing, hunting, trapping and gathering activities. The federal courts also determined that the Tribes’ rights hold a priority date of “time and immemorial” making them the most senior, or highest priority, in the Basin. This is in part because of the important reality that the Tribes treaty rights are not grants of rights to the Tribes, but a reservation of rights by the Tribes that they have held forever. The Tribes’ rights were intentionally confirmed and retained in the Klamath Treaty of 1864. But the federal courts left to later State proceedings the question of “how much” water those rights really are ...the “quantification” phase of the water right process. This is what came to be the Klamath Basin Adjudication”.

Because the Tribes rights had not been qualified, they have until now come within the Oregon Water Resources Department’s policy that it will “not enforce for or against junior or senior water rights in an adjudicated basin.” So water in the upper Klamath Basin in Oregon has always been allocated in a “divert whatever water you want whenever you want it” system. There was literally and intentionally no enforcement of anybody’s water rights. Needless to say, in that situation people who diverted water from the streams did not shape their water use to recognize or accommodate the Tribes’ rights. Under that system, since the Tribes’ rights are mostly for leaving water in streams and lakes for fish and other treaty resources, their rights were regularly defeated by withdrawals, for which the Tribes have no legal recourse other than Adjudication.

Now the adjudication has reached the end of its “administrative” phase, and is entering its “judicial reviews’ phase. That is, OWRD has reached its final government-agency decision in the Adjudication, quantifying the rights of the Tribes and the hundreds of other claimants in the Adjudication. The OWRD decision is called the FOD-Final Order of Determination.

The FOD generally confirms the Tribes’ earlier success before the Administrative Law Judges who in December 2011 had issued Proposed Orders informing OWRD what the ALJ’s determined should go into the FOD. The FOD, like the Proposed Orders, generally confirm the Tribes’ water rights in the quantities claimed by the Tribes and the Bureau of Indian Affairs. One significant change to the PO’s made by OWRD in the FOD, however, is the contrary determination that streams outside the boundaries of the former Klamath Reservation cannot support Tribal water rights because of their location. This part of the FOD will likely be

challenged by the Tribes as the cases move forward. In any event, the FOD can properly be viewed as quite positive for the Tribes and will require a serious change in water management in the Basin now that Tribal water rights must be recognized.

OWRD is required to file the FOD with the Klamath Circuit Court for judicial review, which it did on March 7, 2013. Importantly, the law provides that once filed with the Circuit Court, the FOD is enforceable. Provision is made, however, for a party to request a stay of enforcement by posting a bond in an amount sufficient to compensate for any damages due to the stay if the stayed rights are ultimately upheld in court. If a stay of enforcement of the rights would not occur until the Circuit Court issues its final rulings in the case. The amount of a bond for staying enforcement of the Tribes' rights should be substantial. Our opponents filed a request for a stay of enforcement with the Court in early May 2013, requesting an absurdly low amount, which we will adamantly oppose.

So the stage is set for the enforcement, for the first time ever, of the Tribes' long-recognized time immemorial right to keep water in the lakes, streams, marshes, seeps and springs. This will be characterized by some opponents of the Tribes as inappropriately disruptive of the established order, but of course this outcome has been in the works for decades. And moreover, any enforcement of a senior right (Tribal or otherwise) is disruptive of an established order in which as in the Klamath Basin, the lack of enforcement has allowed junior users to have unregulated access and use of somebody else's water.

It is hard to predict the exact impacts that enforcement will have because water uses in the Basin are not well documented. It is safe to say that enforcement of Tribal water rights will mean a substantial change in water management in the Upper Basin. It will also mean that Tribal treaty rights to species for hunting, fishing, gathering, and trapping will be better able to have access to the water they need in order to thrive. It will take time for these resources to recover, but at least they will have the water they need.

It is also hard to predict how the rest of the community will react to enforcement of the Tribal water rights. Everyone remembers 2001 when changes in water management resulted in civil disobedience and violence. Whether the new changes will be met with similar misbehavior remains to be seen. Tribal members are urged to maintain their vigilance and their self-control. Provocations by others is simply an admission that the Tribes' rights are valid.

In any event, the stage is set for the Tribes finally to have "wet water" rights instead of just "paper water" rights.