



# United States Department of the Interior

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TO: Regional Director, Bureau of Reclamation,  
Mid-Pacific Region

FROM: Regional Solicitor, Pacific Southwest Region

SUBJECT: Certain Legal Rights and Obligations Related  
to the U.S. Bureau of Reclamation, Klamath  
Project for Use in Preparation of the Klamath  
Project Operations Plan (KPOP)

This memorandum describes the general rights to the waters in the Klamath and Lost River drainages affected by the operation of the U.S. Bureau of Reclamation's (Reclamation) Klamath Irrigation Project located within the Upper Klamath and Lost River Basins in Oregon and California. In addition, the obligations of Reclamation to the holders of these rights are discussed. The rights that are treated in this memorandum include those of the Klamath Project water users (those who hold contracts with the United States to receive water from the project), the Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake National Wildlife Refuges (NWR) managed by the U.S. Fish and Wildlife Service (these refuges are located within the exterior boundaries of the Klamath Project), and the Klamath, Yurok, and Hoopa Tribes (they have treaty-based or federally reserved fishing and water rights that are or may be affected by project operations). None of the above water rights has been quantified.

## Rights

### Klamath Project Water Users

The Klamath Project water users obtain their supply of water for irrigation purposes from the project facilities pursuant to various contracts with Reclamation entered into pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 371 et seq., as amended and supplemented. The contracts are between Reclamation and a water district or Reclamation and an individual water user. These contracts provide, in general, that the water user is to receive enough water to satisfy the beneficial use for

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<sup>1</sup> The existence and nature of the Klamath Tribes' reserved water rights for hunting, fishing, and gathering were declared in United States v. Adair, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984).

the irrigation of a specified acreage. Certain of the contracts specify the beneficial use amount on a per acre basis.

The underlying water rights for the project, upon which the water supply stated in each of the contracts discussed above depends, were obtained by Reclamation, in accordance with state law, in 1905, when Reclamation filed a notice of intent to appropriate all of the available water in the Klamath River and Lost River and their tributaries in Oregon. Similar filings were made for the waters originating in California, within the Lost River and Clear Lake drainages.<sup>2</sup> Subsequent to these filings, Reclamation constructed project facilities through which water is delivered to the project water users. The project's 1905 water rights are junior to the reserved water rights of the tribes but senior to the reserved water rights of the refuges, as discussed below.

Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. 43 U.S.C. § 383; California v. United States, 438 U.S. 645, 678 (1978); appeal on remand, 694 F.2d 117 (1982). The beneficial ownership of a project water right is in the water users who put the water to beneficial use. Nevada v. United States, 463 U.S. 110 (1983). Under law of most western states a water right is obtained through appropriation followed by application within a reasonable time to beneficial use. Nebraska v. Wyoming, 325 U.S. 589 (1945); Ickes v. Fox, 300 U.S. 82 (1937). Oregon law (as well as California law) is similar to the laws of most other western states in that actual application of the water to the land is required to perfect a water right for agricultural use.<sup>3</sup>

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<sup>2</sup> Oregon statutes concerning the appropriation of water before February 24, 1909, the effective date of the Oregon Water Rights Act of 1909, provided that the extent of the appropriation was determined by the actual capacity of the completed diversion structure, assuming that the requirement to post a notice of intent to appropriate together with application of water to beneficial use within a reasonable time had occurred. See In re Waters of the Tualatin River and its Tributaries, 366 P.2d 174 (Or. 1961). The laws for appropriation of water in California that were in effect in 1905 were similar to those in Oregon. Cal. Civil Code of 1872, §§ 1410-22 (Deering 1977). The effective date of the California Water Commission Act, which established California's current appropriation scheme, is December 19, 1914.

<sup>3</sup> See ORS §§ 539.010 et seq.; State ex rel. v. Hibbard, 570 P.2d 1190, 1194 (Or. Ct. App. 1977); Alexander v. Central Oregon Irrigation District, 528 P.2d 582 (Or. Ct. App. 1974), and Cal.

Oregon also recognizes that water for irrigation purposes is appurtenant to the land for which it is appropriated and applied, but is not inseparable from the land. In re Deschutes River and Tributaries, 286 P. 563 (Or. 1930); see also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir.), cert. denied, 464 U.S. 863 (1983). Federal law concerning Reclamation projects also provides that the use of water acquired under the Act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right." 43 U.S.C. § 372. Beneficial use is determined in accordance with state law to the extent not inconsistent with congressional directives. See Alpine Land & Reservoir Co., 697 F.2d at 853-854; see also California v. United States, 438 U.S. at 678.

### Wildlife Refuges

There are two National Wildlife Refuges that are particularly dependent on project operations: Lower Klamath and Tule Lake NWRs.<sup>4</sup> The Lower Klamath NWR consists of 51,713 acres which straddle the Oregon-California border. This NWR was created by Executive Order No. 924 (Aug. 8, 1908) "as a preserve and breeding ground for native birds." The boundaries of the Lower Klamath NWR were altered by Executive Order No. 2200 (May 14, 1915). The Tule Lake NWR is a 39,990 acre marsh area located in northern California just south of the Oregon border. Tule Lake was created by Executive Order No. 4975 (Oct. 4, 1928) also "as a refuge and breeding ground for birds."<sup>5</sup>

Each refuge has a federal reserved water right to the amount of water, unappropriated at the time of creation of the refuge, necessary to fulfill the primary purposes of the refuge. See United States v. New Mexico, 438 U.S. 696 (1978). The priority date for the reserved water right of each refuge is the date of the executive order creating that refuge. See Cappaert v. United

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Water Code § 1240; Joerger v. Pacific Gas & Elec. Co., 276 P. 1017 (Cal. 1929); Madera Irr. Dist. v. All Persons, 306 P.2d 886 (Cal. 1957).

<sup>4</sup> There are two other National Wildlife Refuges within the exterior boundaries of the project that are also dependent on project operations. The Upper Klamath NWR was created in 1928 and is located at the northern portion of Upper Klamath Lake. It encompasses 14,965 acres of marsh and open water. The Clear Lake NWR was created in 1911 and encompasses 20,000 acres of water surface and upland area within the Clear Lake drainage in the Lost River Basin.

<sup>5</sup> The interrelation of the Klamath Project irrigation uses and the NWR purposes are further delineated in the Kuchel Act, 16 U.S.C. §§ 695k-695r.















