



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 30, 1999

TO: Richard Bailey, Adjudicator
Water Resources Department

FROM: Meg Reeves, Assistant Attorney General
Natural Resources Section

Walter Perry, Assistant Attorney General
Natural Resources Section

SUBJECT: Klamath Adjudication
BIA/Klamath Tribes claims in support of hunting, fishing and gathering rights
DOJ File No. 690-600-GN0269-97

The United States Bureau of Indian Affairs as Trustee on behalf of the Klamath Tribes (BIA) and the Klamath Tribes (Tribes) (collectively claimants) have made identical claims in the Klamath Basin Adjudication for water rights reserved to the Tribes by the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, October 14, 1864, 16 Stat. 707. The claims are for instream flows and for marsh, lake, seeps and springs levels to support the Tribes' treaty hunting, fishing and gathering rights. You have asked for our assistance in evaluating the claims in light of the Ninth Circuit Court of Appeals' interpretation of the Tribes' treaty water rights in *United States v. Adair*, 723 F2d 1394 (9th Cir 1983), *cert den Oregon v. United States*, 467 US 1252 (1984). Although the BIA advances a plausible alternative interpretation of the *Adair* decision, we think the better argument is that claimants are entitled to the minimum amount of water necessary to support the Tribes fishing and hunting rights as they were exercised contemporaneously with the *Adair* decision.

We emphasize that our advice is preliminary, and may change based on arguments made, or evidence presented, by the claimants and others over the course of the adjudication.

I. The Claims

In response to a request from the Department the BIA has identified the resources the claims seek to protect. Letter dated March 1, 1999 to Dick Bailey, Administrator, Oregon Water Resources Department from David W. Harder, United States Department of Justice (March 1 BIA letter). Those resources include all fish species of the Upper Klamath River Basin and the habitat upon which they depend; all wildlife species that use various habitats within the basin,

including streams, marshes, lakes, riparian zones, seeps and springs; and vegetation of all types associated with the claimed water bodies in the Upper Klamath River Basin. March 1 BIA Letter at 1, 12, 18. Included with the March 1 BIA letter were data on which the claims are based and a narrative explanation of the relationship between the amounts claimed and the fishery, wildlife and vegetation the claims are designed to support.

As described by the BIA, the claims are designed to provide “the necessary habitat at all locations utilized by the treaty resources to ensure harvestable supplies of these resources for the Tribes.” Letter dated March 26, 1999 to Dick Bailey, Administrator, Oregon Water Resources Department from David W. Harder, United States Department of Justice (“March 26 BIA letter”) at 26. Briefly summarized, the claims are for seeps and springs within the national forests, water levels on Klamath Marsh, water levels on Upper Klamath Lake, and instream flows on rivers and streams within, bordering on, and originating off, but traversing, the former reservation. The seeps and springs claims are designed to provide habitat for birds and animals within the national forests. The marsh claim is designed to provide better habitat for waterfowl and to provide greater access to water for other animal species. The instream flow claims have three components, physical habitat maintenance, structural habitat maintenance and riparian habitat maintenance. Physical habitat maintenance claims are designed to protect the physical habitat used by fish within a stream. Structural habitat maintenance flow claims are designed to maintain the integrity and dynamic geomorphic stability of the channel. Riparian habitat maintenance flow claims are designed to maintain the riparian plant communities along the banks and floodplain of the stream. The Upper Klamath Lake claim is designed to enhance water quality for the target fish species, and to provide necessary habitat for fish populations. March 26 BIA Letter at 26-29.

II. Attributes of the Water Rights

a. The Adair Decision

In *Adair*, the court confirmed to the Tribes “a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe’s treaty right to hunt and fish on reservation lands.” 723 F2d at 1410. The claimants also assert protection of a treaty gathering right. We do not think the *Adair* court confirmed such a right. The District Court decision clearly did not award claimants a water right to support their treaty gathering rights. *United States v. Adair*, 478 F Supp 336 (1979). In that proceeding the Tribes contended that they were entitled to enough water to “preserve the Marsh as a suitable wetlands habitat for fish and wildlife” and that the treaty reserved to the Tribes enough water flowing through reservation lands to preserve the lands “as suitable habitat for fish and wildlife.” *Id.* at 342-343. Although the District Court described the Tribes’ treaty rights as including gathering rights, it consistently referred to the water right as one to support the hunting and fishing right. *See id.* at 345 (“the Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights”); *Id.* at 346 (“[w]ithout sufficient water to preserve fish and wildlife on the Reservation lands, Indian hunting and fishing rights would be worthless”). Neither the Tribes nor the United States appealed from this aspect of the District Court decision.

The Ninth Circuit opinion is similarly imprecise as to the scope of the treaty rights to be protected. The court variously stated (1) that Article I of the 1864 treaty reserved to the Tribe “the exclusive right to *hunt, fish, and gather* on its reservation,” *Adair*, 723 F2d at 1408; (2) that the issue for decision was “whether, as the district court held, these *hunting and fishing rights* carry with them an implied reservation of rights,” *Id.*; (3) that resolution of that question turned on “whether securing to the Indians the right to *hunt, fish, and gather* was a primary purpose of the Klamath Reservation,” *Id.* at 1409; and (4) that Article I of the Treaty “expressly provides that the Tribe will have *exclusive on-reservation fishing and gathering rights*,” noting that the language has been interpreted to include “*exclusive hunting and trapping rights*.” *Id.* (Emphasis added). As was true for the District Court opinion, in every case the Ninth Circuit refers to the *water right* as one to support treaty hunting and fishing rights. Given that, and given that neither the United States nor the Tribes took issue with the District Court’s characterization of the time immemorial water right, we think the better argument is that claimants may only claim hunting and fishing water rights, not gathering water rights.

Article I of the treaty reserved to the Tribes the right to hunt and fish on the reservation. *Kimball v. Callahan*, 493 F2d 564, 566 (9th Cir 1974), *cert den* 419 US 1019 (1974); *Kimball v. Callahan*, 590 F2d 768, 775-776 (9th Cir 1979), *cert den* 444 US 826 (1979). The *Adair* court clearly intended to give meaning to that treaty right by holding that the treaty reserved to the Tribes a corollary hunting and fishing water right. The court held that the priority date for the Tribes’ hunting and fishing water right is time immemorial. *Adair*, 723 F2d at 1415. The priority date for irrigation and domestic purposes on the former reservation is 1864. *Id.* Quantification of the reserved rights was left to the state under the provisions of the McCarran Amendment. 723 F2d at 1399-1407; *United States v. Oregon*, 44 F3d 758 (1994), *cert den* 516 US 943 (1995). The Tribes may claim “only that amount of water necessary to fulfill the purpose of the reservation, no more.” 723 F2d at 1409, quoting *Cappaert v. United States*, 426 US 128, 141 (1976).

The formidable task of quantifying a water right to support a hunting and fishing right is further complicated by language in the *Adair* opinion that appears to qualify that right. In response to the appellants’ argument that a Tribal instream water right with a priority date of time immemorial would subject the former Klamath Reservation to a “wilderness servitude” that would make water completely unavailable for out of stream uses, the court stated:

* * * Apparently, appellants read the water rights decreed to the Tribe to require restoration of an 1864 level of water flow on former reservation lands now used by the Tribe to maintain traditional hunting and fishing lifestyles. We do not interpret the district court’s decision so expansively.

In its opinion discussing the Tribe’s hunting and fishing water rights, the district court stated ‘[t]he Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights.’ 478 F.Supp. at 345. We interpret this statement to confirm to the Tribe the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864. We find authority for such a construction of the Indians’

rights in the Supreme Court's decision in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979). There, citing *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), a reserved water rights case, the court stated "that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living." 443 U.S. at 686, 99 S.Ct. at 3075. Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 686, 99 S.Ct. at 3074-75. 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.

723 F2d at 1414-1415.

By relying on both *Arizona v. California* and *Washington v. Fishing Vessel Ass'n*, the *Adair* court blended two distinct theories for allocation of treaty rights in a natural resource. In *Arizona v. California*, the United States Supreme Court announced the "practicably irrigable acreage" standard for quantification of out of stream reserved rights, holding that the Indians had reserved enough water to irrigate all the practicably irrigable acreage on the reservation. *Arizona v. California*, 373 US at 600-601. The court expressly rejected Arizona's argument that the quantity reserved should be measured by the Indians' reasonably foreseeable needs:

How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

373 US at 601. Thus, the Indians' share of the water was determined by the productive capacity of the treaty acres, not by the number of Indians that might rely on the water.

In contrast, the *Fishing Vessel* court expressly tied the maximum allocation of a treaty harvest right to the standard of living of the tribal members. *Fishing Vessel*, 443 US at 685-687. The case involved construction of a treaty that awarded the tribes at issue a "right of taking fish * * * in common with all citizens of the Territory." *Id.* at 662. The court held that the treaty secured to the tribes a right to harvest a share of each run of anadromous fish that passes through tribal fishing areas. The guiding principle was that "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living." *Fishing Vessel*, 443 US at 686. The court held that the harvestable portion of each run that passes through a usual and accustomed fishing place should initially be divided into approximately equal treaty and nontreaty shares. The initial 50% share was a maximum

allocation that should be reduced “if tribal needs may be satisfied by a lesser amount.” *Fishing Vessel*, 443 US at 685. The minimum allocation could be reduced upon “proper submissions to the court” demonstrating changing circumstances:

If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

443 U.S. at 667.

The court did not address whether or to what extent the treaty right to a harvest included a right to habitat protection.

The *Adair* court clearly intended to place limits on a right that might otherwise actually create a “wilderness servitude” on the former reservation. The limiting language of the court’s decision is susceptible to at least two different plausible interpretations. One would limit the Tribes’ water right to a level that would support a hunting and fishing right as it is exercised in modern times, or more specifically at the time of the *Adair* decision. Such approach would focus on the treaty resources as they existed at that time. We believe that interpretation has considerable textual support in the opinion. First, the court began with the observation that the Tribes had been confirmed enough water to “protect” their hunting and fishing rights – not to restore or enhance them. 723 F2d at 1414. Use of the verb “protect” suggests a focus on the level of resources that existed at the time of the *Adair* decision. Second, the court flatly rejected the notion that the Tribes’ had been decreed an “1864 level of flow” on the former reservation. *Id.* Third, the court held that the Tribes were entitled to the amount of water necessary to supports their hunting and fishing rights *as currently exercised* to maintain the livelihood of tribe members, not as these rights once were exercised by the Tribes in 1864. *Id.* at 1414-1415. The court appeared to explicitly fix the water right to support the Tribes’ hunting and fishing as of a contemporaneous date. Finally, the court observed that “tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living.” *Id.* at 1415.

The BIA emphasizes the part of this passage that refers to the fact that the Tribes’ hunting and fishing rights are no longer exclusive, arguing that the “currently exercised” language is simply a recognition of the non-exclusivity. But the court also stated that the Tribes are not entitled to the same level of “exploitation of a natural resource” that they enjoyed at the time of the treaty. *Id.* This seems to us an explicit recognition that the Tribes hunting and fishing resources must now share the former reservation with other interests – including the agricultural interests of its own members and their successors. The BIA argues that the state may not engage in an accommodation of competing interests in the basin when it quantifies rights, and we agree with that position. But if this interpretation of *Adair* is correct, that court has already made such

an accommodation, by confirming a water right to support the Tribes' hunting and fishing as it exists in modern times, not at the time of the treaty.¹

A second plausible interpretation of *Adair*, advanced by the BIA, is that the Tribes are entitled to the amount of water necessary to support harvestable levels of treaty resources, without regard to the level of exercise of the hunting and fishing right in the modern era, and without regard to the other uses that have developed over time in the area. March 26 BIA Letter at 30. The BIA emphasizes the *Adair* court's reliance on *Arizona v. California*, which focused on the productive capacity of the treaty acreage. By analogy, quantification of the Tribes' instream rights would focus on the capacity of the water body to produce harvestable resources. The BIA argues that the moderate living standard operates as a limitation on the Tribes' hunting and fishing water right *only* if the record shows either that the Tribes have abandoned or significantly reduced their reliance on a treaty resource, or have otherwise achieved a moderate standard of living. Under this theory claimants need not demonstrate that the Tribal members continue to rely on treaty resources, or that they have *not* achieved a moderate living, in order to make a prima facie showing in support of the claims. The burden is on opponents of the claims to justify a cap on the hunting and fishing water right based on the moderate living standard. The BIA argues that the moderate living standard does not limit the Tribes' water rights because their claimed amounts "will not cause the Tribes' living standard to exceed a moderate living." March 26 BIA Letter at 30.

The *Adair* decision is not a model of clarity, and we acknowledge the force of the BIA's argument. Although both positions are defensible we believe, on balance, the more persuasive interpretation is that *Adair* confirmed to the Tribes an amount of water sufficient to protect the Tribes hunting and fishing rights as they were exercised at the time of the decision.

b. The Amounts Claimed

Under any interpretation of *Adair*, the Tribes have the burden of demonstrating that the amounts claimed are the minimum necessary to protect the Tribes' hunting and fishing water right, no more. *Adair*, 723 F2d at 1409. Analysis of that amount will depend, in the first instance, on the interpretation of *Adair* that is adopted by the adjudicator. The BIA has disavowed an approach that would tie the water right to treaty fish and wildlife resources as they existed contemporaneously with the *Adair* decision. March 26 BIA Letter at 7, 14, 32. The adjudicator may reasonably conclude that claimants have not provided information to allow quantification on that basis. If the adjudicator adopts that interpretation of *Adair*, the adjudicator could reasonably either propose to reject the claims on the basis that they do not make a prima facie case for the minimum amount of water necessary to support the hunting and fishing

¹ In this passage the *Adair* court disavowed a tribal right to the same level of exclusive use and exploitation of a natural resource enjoyed at the time of the treaty unless "no lesser level will supply [members of the Tribes] with a moderate living." 723 F2d at 1415. We are uncertain what the court meant by this observation. The court may have left open the possibility that the Tribes may be entitled to more water than would support their hunting and fishing rights as they were "currently" exercised, if no lesser level would supply members of the Tribes with a moderate living. But even if that interpretation is correct, to our knowledge, claimants have not attempted to show in this proceeding that more water to support hunting and fishing will increase the standard of living of Tribal members.

resources that existed contemporaneously with *Adair*, or rely on other available information to make the preliminary determination.

If the adjudicator adopts the interpretation of *Adair* advanced by the BIA, the adjudicator could reasonably use the information provided by the BIA and the Tribes as a starting point, bearing in mind that the claimants are entitled to the minimum amount necessary to support hunting and fishing rights. We understand that in most instances the flow levels sought for fish protection identify the amount of water that would be necessary to provide 100% of weighted usable area for the target species.² That suggests that the amounts sought are not the minimum necessary to achieve a harvestable resource. In addition, the Oregon Department of Fish and Wildlife (“ODFW”) has obtained instream water rights on many of the same reaches for which the BIA and the Tribes have claimed. In most instances those amounts are substantially below the amounts claimed by the BIA and the Tribes. ODFW has characterized these flows as the minimum amount necessary for fish life. The disparity between the claims and the ODFW flows also suggests that the claims are not for the minimum amount necessary to produce a harvestable fishery. The adjudicator may also reasonably rely on other available information to quantify the right under this interpretation of *Adair*.

III. Off-reservation Claims

The claims include lake levels in Upper Klamath Lake, which borders the reservation, stream flows in the Klamath River, and stream flows that originate off the former reservation and traverse the former reservation. Claimants assert that all the waters claimed are biologically necessary for various fish species that tribal members harvest or have harvested within the former reservation.

a. Water Bodies Beyond Reservation Boundaries

We do not believe claimants are entitled to water rights beyond the boundaries of the former reservation. First, the *Adair* court held that the Tribes are entitled to hunting and fishing water rights *on the former reservation*. 723 F2d at 1410, 1414. In addition, the United States Supreme Court has held that tribal members are not entitled to hunt and fish free of state regulation on lands that the Tribes ceded to the United States in 1901. *Oregon Fish & Wildlife Dept. v. Klamath Tribe*, 473 US 753 (1985). In the court’s words, “the 1901 Agreement contained a broad and unequivocal conveyance of the Tribe’s title to the land and a surrender of ‘all their claim, right, title, and interest in and to’ that portion of the reservation.” 473 US at 768 (emphasis in original). Any water rights claimed within the area ceded in the 1901 Agreement are likely foreclosed by *Oregon Fish & Wildlife Dept.* Finally, to our knowledge, no appellate court has recognized an off-reservation water right to support an on-reservation hunting and fishing water right. Given that fact, the holding in *Adair*, and the holding in *Oregon Fish & Wildlife Dept.*, we believe the better argument is that claimants are not entitled to claim on water bodies that are not within, and do not border, the former reservation.

b. Boundary Water Bodies

² Weighted usable area is a measure of habitat available to support given species.

Several cases have confirmed reserved water rights for consumptive uses from a boundary stream. 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). While these cases did not involve instream rights, they do suggest that a hunting and fishing water right may legitimately be claimed for a boundary water body. In addition, we believe the *Adair* court's holding that the Tribes are entitled to hunting and fishing water rights *on the former reservation* could reasonably be construed to include boundary water bodies for the purpose of the Tribes' hunting and fishing water rights.

c. The Klamath River Claims

Three claims are for instream flows in the Klamath River above the Oregon border. These claims are for future use "to support an anadromous fishery when salmon are reintroduced to the Upper Klamath Basin" on relicensing of the Klamath River dams. March 26 BIA Letter at 24-25. Anadromous fish have not inhabited the Klamath River in Oregon in many years. They had been completely eliminated from the basin by the mid-20th century. If the Tribes' fishing and hunting right protects the treaty resources as they existed at the time of the *Adair* decision, the Tribes are clearly not entitled to an instream flow to support anadromous fish.

Even if the adjudicator adopts the interpretation of *Adair* advanced by the BIA, it does not follow that claimants are entitled to a water right for a fishery that has not existed for many years and for which no firm prospects exist for reintroduction. The BIA argues that quantification of a tribal water right generally should take into account current and future needs.³ Nonetheless, we believe the adjudicator could reasonably conclude that the reintroduction of anadromous fish into the Upper Basin is too speculative to warrant inclusion of water for that fishery among the Tribes' future needs.

IV. The Out of Stream Claims

Claimants have made claims for six out of stream uses. All of the claims are for lands reacquired by the Tribes, presumably after some period in non-Indian ownership. On reacquisition of allotted lands the Tribes, as would any other successor in interest, acquire the water rights, including the priority date, of their predecessor in interest. *United States v. Anderson*, 736 F2d 1358, 1361-1362 (9th Cir 1984). If those water rights have an 1864 priority date then the Tribes succeed to that priority date. *Id.*

The BIA argues that claimants are entitled to the priority date of the treaty, and that "tribal water uses on reacquired lands are governed by the reserved rights purposes of the reservation analysis." March 26 BIA Letter at 38. (citing *In re Rights to Use Water in Big Horn River*, 753 P2d 76, 114 (Wyo 1988)). We do not agree with that statement, nor are we persuaded that *Big Horn* supports it. The *Big Horn* court held first that a non-Indian successor to an Indian owner acquires a water right for any acreage developed by the Indian owner, as well as any for acreage developed by the non-Indian successor within a reasonable time, with the priority date of

³ In our view the cases on which the BIA relies for this position have limited applicability, as the *Adair* decision fully articulated the scope of the Tribes' hunting and fishing water rights.

the reservation. *Big Horn*, 753 P2d at 113-114. The court then held that a similarly situated Indian or tribal purchaser would succeed to the same priority date. *Big Horn*, 753 P2d. 114. To the extent the *Big Horn* court held that in every case treaty reserved water rights are resurrected on reacquisition by an Indian or tribal purchaser, its decision conflicts with the Ninth Circuit's decision in *Anderson*.⁴

V. Conclusion

We believe the most persuasive interpretation of *Adair* is that claimants are entitled to the minimum amount of water necessary to protect the Tribes' hunting and fishing rights as they were exercised contemporaneously with the *Adair* decision. Under the alternative interpretation of *Adair* advanced by the BIA, claimants would be entitled to the minimum amount necessary to support a harvestable level of treaty fish and wildlife resources. In either case, the minimum amount necessary is a factual determination that must be made based on the material provided by claimants, as well as any other reliable information available to the Department as it evaluates the claims. Claimants may appropriately claim hunting and fishing water rights in boundary water bodies, but not in water bodies that are beyond the reservation boundaries.

Claimants may appropriately claim water rights for out of stream uses as successor in interest to other water right holders. The authorized use, as well as the priority date, will require a fact-specific inquiry. Claimants are not entitled to out of stream treaty uses with an 1864 priority date unless the Tribes acquired such a right from an Indian predecessor.

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⁴ The *Adair* court evaluated the purposes of the reservation, and confirmed to the Tribes water rights for agricultural and domestic purposes and to support hunting and fishing. Even if we were to agree with the BIA's view of the law governing reacquisition, we do not agree that the Tribes could hold a treaty water right for cemetery watering, a casino or a fish farm. These are commercial or municipal purposes for which water is not reserved by the treaty. The BIA relies on *Big Horn*, a decision of the Wyoming Supreme Court, for the proposition that municipal and commercial uses were encompassed within the tribes' agricultural reserved right. The Wyoming court drew that conclusion with no explanation and no citation to other authority. The Wyoming court's decisions are not binding on the courts of Oregon. In this matter we do not recommend adoption of the court's analysis.