Klamath Adjudication

OREGON'S KLAMATH BASIN ADJUDICATION

THE FIRST FIVE YEARS OF THE CIRCUIT COURT PHASE

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INTRODUCTION

Judicial Phase

Although there were no champagne toasts or gifts exchanged (as far as we know), March 7, 2018 marked the five-year anniversary of the initiation of the judicial phase of the Klamath Basin Adjudication (KBA). The KBA involves the State of Oregon's determination of pre-code surface water rights in the Klamath Basin pursuant to Oregon Revised Statues (ORS) chapter 539. The KBA is the most complex general stream adjudication in Oregon's history, and the first in Oregon to involve the determination of federal reserved water rights claims. When the United States reserves public domain land for particular purposes, it implicitly reserves sufficient water to accomplish those purposes. *See Winters v. United States*, 207 U.S. 564 (1908). The water rights associated with such reservations are referred to as federal reserved water rights. The Oregon Water Resources Department (OWRD) processed over 700 water right claims and over 5,000 contests to those claims during the 38-year administrative phase of the KBA.

Issues

The judicial phase has included proceedings to determine how to file exceptions to the order and then the filing of exceptions; briefing and hearings regarding how the court is to review the exceptions to the administrative order; regulation of water rights for the first time in the history of the Klamath Basin; and litigation in multiple courts challenging water rights regulation. The first five years of water regulation in the Klamath Basin has coincided with considerable drought, engendering substantial challenges for water users of all types. This article summarizes the judicial process to date, including the consequences of the court's procedural decisions and water regulation on water users, and provides an outlook for the next five (or more?) years. The beginning of the article provides background regarding the KBA, including the steps leading to the judicial phase. The second part summarizes the judicial proceedings to date, with an emphasis on the court's procedural rulings that will impact forthcoming litigation on parties' specific exceptions to the administrative order. Finally, there is an overview of litigation, including within the KBA itself, resulting from water regulation.

BACKGROUND

KLAMATH BASIN ADJUDICATION

Oregon's General Stream Adjudication Procedures

Permits (Post-1909)

Since 1909, Oregon law has required that all rights to water by appropriation be acquired through an application for a permit from the Oregon Water Resources Department (OWRD) or its predecessor agency. The permits (and certificates issued upon proof of beneficial use under the permits) specify all elements of the rights, including priority date, point of diversion, place of use, and other elements. Thus, all post-1909 water rights under state law are "determined." Rights initiated by pre-1909 appropriation (pre-code), and federal reserved water rights, are undetermined unless adjudicated through the state's statutory adjudication procedures. ORS Chapter 539 outlines the process for determining otherwise "undetermined" claims to surface water. Like other state adjudications, the process involves the filing of claims, contests, and litigation of the validity of the claims; in Oregon the process includes both an administrative and a judicial phase. At the completion of the administrative process, OWRD submits its order of determination and record to the Circuit Court (i.e., a State of Oregon trial court) of the county where the stream or some part of it is located. In the Circuit Court, claimants may file written exceptions to OWRD's findings and order of determination (FOD). The Circuit Court processes any exceptions.

"Undetermined" Claims

Interim Regulation

Between the issuance of the order of determination by OWRD and the final decree by the Circuit Court — which may be a gap of many years — OWRD is required to regulate water use according to the FOD. A party may seek a stay to prevent the OWRD from regulating according to part or all of the order of determination, but to do so it must post bond in an amount set by the Circuit Court, and conditioned on the party paying all damages that may result from the order of determination *not* being enforced.

Final Decree

The ultimate outcome of the Circuit Court's process is a final decree that specifies all water rights. The decree becomes the basis for regulation of water in the basin, unless it is modified on appeal or on rehearing in the Circuit Court. Further appeals, including proceedings in federal courts, are possible. The courts may also send all or portions of the FOD back to OWRD for further investigation.

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The ORS Chapter 539 process is a "speak now or forever hold your peace" scheme; it ultimately culminates in a single, basin-wide water rights decree that is "conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination." ORS 539.200. The effect of a decree is *res judicata* as to all parties who were in the adjudication and all water users claiming water rights through those original parties. *Id. Res judicata*, also known as "claim preclusion" is the principle that a cause of action may not be relitigated once it has been judged on the merits. In other words, a matter raised once cannot be raised again, either in the same court or in a different court.

Administrative Phase of the KBA

The KBA was initiated in 1975. OWRD specified in the 1975 notice that it would commence the investigation necessary to adjudicate the surface waters of the Klamath River Basin in Oregon, and requested that all persons claiming a right of use file a notice of intention to file claim. Following a period of investigation, OWRD issued a notice to file claims to all persons in the Klamath Basin in 1990. Subsequent to the notice to file claims, the United States filed a federal lawsuit alleging that Oregon's adjudication process did not meet the requirements of the McCarran Amendment (43 U.S.C. § 666) in order to waive the United States' sovereign immunity. *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), upheld the validity of Oregon's surface water adjudication statute and thereafter OWRD issued a second notice to those persons claiming a federal reserved right and to water users associated with the federal Klamath Reclamation Project. In total, over 730 claims were filed during the KBA's administrative phase.

McCarran Amendment

The McCarran Amendment, passed by Congress in 1952, waived federal sovereign immunity for the joinder of the United States as a defendant in general stream adjudications. Prior to passage of the McCarran Amendment, federal water right could not be determined in state courts without the waiver of sovereign immunity.

In 1999 and 2000, there was an opportunity for "open inspection" of claims, a time during which parties could evaluate the claims of others and determine whether or not to file a contest. Thereafter, the parties filed contests to claims. Over 5,600 contests to claims were filed in the KBA. OWRD used Oregon's Office of Administrative Hearings (OAH) to conduct contested case proceedings in cases organized by individual water right claim or groups of associated claims. The OAH process included approximately twelve years of active contested case litigation. Following issuance of proposed orders by OAH, and the opportunity to file exceptions to the proposed orders, OWRD ultimately issued the Findings of Fact and Order of Determination (FFOD) for the Klamath Basin Adjudication on March 7, 2013.

Circuit Court Phase of the KBA

Case Management

On March 7, 2013, OWRD deposited the FFOD with the Klamath County Circuit Court (Court). In addition, OWRD provided the administrative record associated with the process, which included over two million pages of documents and required a truck to transport it from the capital in Salem, Oregon to the Klamath County Circuit Court in Klamath Falls, Oregon. The case was initially assigned to Judge Cameron Wogan and remains with Judge Wogan today. Judge Wogan manages the case via Case Management Orders. For example, Case Management Order 1 provided background on the service list and petitions for stay of the administrative order, among other housekeeping items. Case Management Order 3, issued in September 2013, established a Case Management Committee, consisting of attorneys for various parties, who were directed to provide proposed case management orders for consideration of the Court and the parties as to subsequent proceedings. The Case Management Committee has provided proposals since its creation and continues to exist today. The Klamath County Circuit Court's webpage includes a repository of KBA documents at: www.courts.oregon.gov/courts/klamath/resources/Pages/KlamathBasinAdjudication.aspx.

Following an opportunity for submission of non-disputed technical corrections, OWRD submitted the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) to the Circuit Court in February 2014. The ACFFOD is the operative order presently before the Circuit Court (Court) for review.

CIRCUIT COURT PROCEEDINGS: EXCEPTIONS AND PHASES

Exceptions and Orientation

Exemptions Filing

The first several years of the judicial phase might be considered an orientation period. The court and the parties had the enormous ACFFOD and a 1909 statute (ORS chapter 539) as the guideline for judicial review. The case initially included the requirement to serve documents on nearly 1,000 individuals. ORS chapter 539 requires the Court to set an "initial hearing," which serves as the deadline for filing exceptions to the administrative order. Due to the breadth of the ACFFOD, the record, and the vast number of parties involved, the time to prepare exceptions was necessarily lengthy. In addition, the general format, substantive requirements, and service requirements of exceptions are not clearly provided by statute. For example, ORS chapter 539 includes only the following regarding the content of exceptions: "any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to." ORS 539.150(1).

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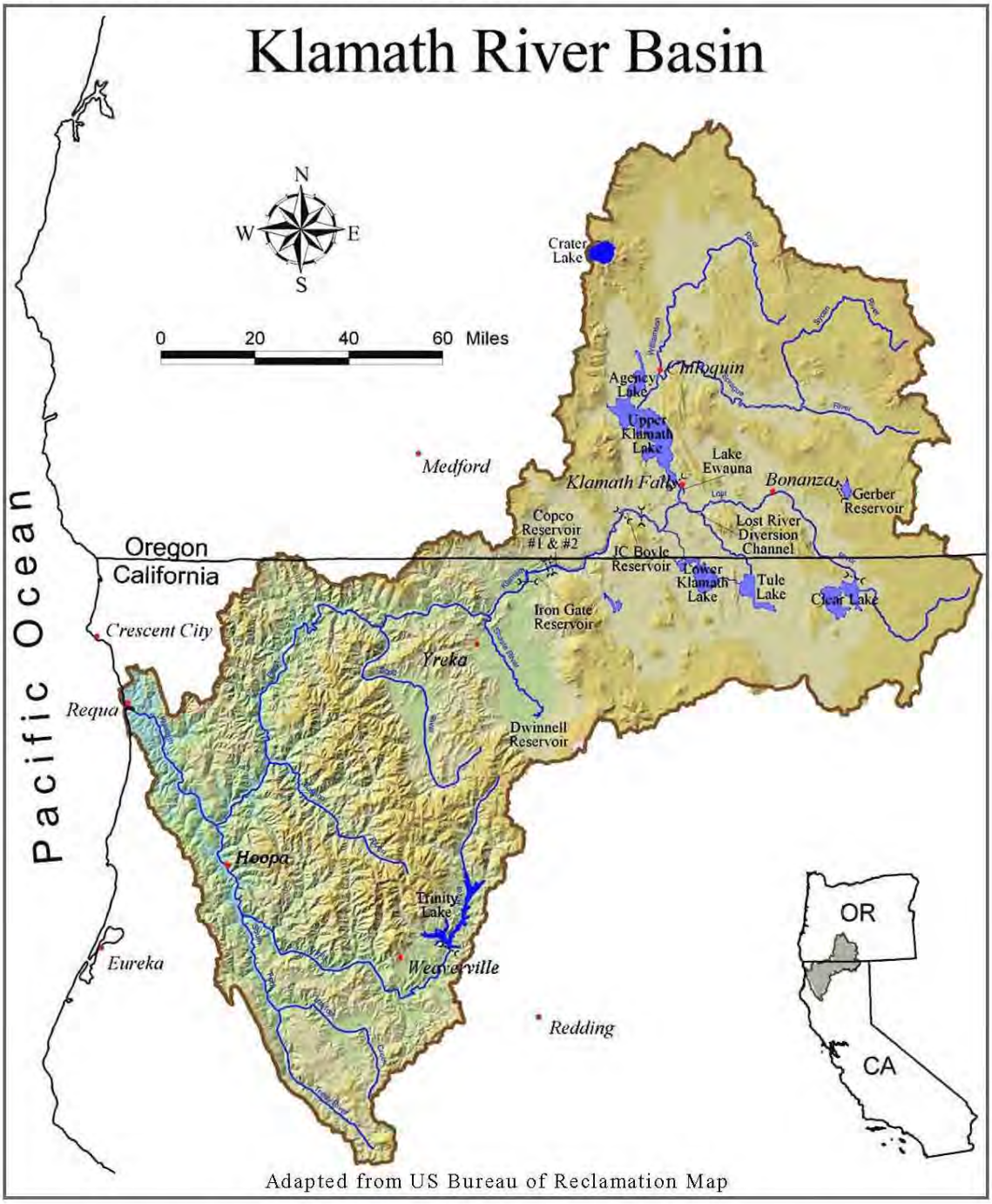
"Request to Be Heard"

The Case Management Committee prepared a proposal for exceptions, including an exceptions template with specified service instructions. The proposal was circulated for comment and, in Case Management Orders 7 and 8, Judge Wogan provided the standards for the exceptions and set the initial hearing and exceptions deadline for October 17, 2014. Over 200 individual statements of exception were filed, including thousands of individual exceptions to the ACFFOD.

The Case Management Committee also proposed, and the Court approved, a procedure called a "Request to Be Heard" (RTBH). The RTBH involved a court filing indicating that a party or group of parties collectively sought to be heard regarding another party's exception. In particular, the RTBH would allow a party to address an "alternative grounds" argument. For example, assume the ACFFOD denied a claim that Party A had contested in the administrative phase. Assume Party B, the claimant for the denied claim, filed an exception to the ACFFOD as to the denial of its claim. Party A would not have filed an exception to the denied claim, but would want the opportunity to be heard on Party B's exceptions, particularly in the event that the Circuit Court changed the administrative denial of claim. Thus, the RTBH process provides an important mechanism to ensure all parties have the opportunity to address exceptions of others. The deadline for RTBH was January 16, 2015.



Adapted from US Bureau of Reclamation Map

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Threshold Issues

The Court held a Case Management Conference to address proceedings on the exceptions and RTBH on March 18, 2015. Over a period of several months, the parties and Case Management Committee submitted comments, prepared proposals, and the Court circulated for comment a final proposal to structure proceedings on exceptions. On December 10, 2015 the Court issued Case Management Order 14, which declared that proceedings on exceptions would occur in phases. The goal of the phased process is to address threshold issues first, and gradually move from the more general to the more specific. As explained by Judge Wogan in Case Management Order #14, "[t]hreshold issues are issues raised by exceptions, or reasonably necessary to resolution of exceptions, and not inherently limited to a single claim or category of claims." Within each phase, exceptions are resolved via motion practice, subject to timelines set by the Court in accordance with the complexity and number of motions filed in each individual phase. In other words, issues are raised by the parties via requests for orders from the Court. The Court considers written and oral argument in response to the parties' motions.

Phase 1

Cross-Cutting Issues

Phase 1, now complete, proceeded in three distinct sub-phases: Phase 1A (jurisdiction and similar issues), Phase 1B (procedural issues), and Phase 1C (other threshold or cross-cutting issues). Broadly, the Circuit Court proceeding involves the review of exceptions to OWRD's determination of over 700 claims. Cross-cutting issues are those issues that potentially impact the determination of multiple individual claims. Phase 2 occurred simultaneously with Phase 1, and involved the Court's resolution of undisputed exceptions, limited to exceptions in the nature of typographical or minor corrections. To date, several unopposed Phase 2 motions have been approved by the Court, but otherwise Phase 2 was relatively unremarkable. Phase 1, and Phase 1B in particular, included several milestone rulings that have and will continue to control subsequent proceedings.

Phase 1A

Jurisdiction & Authority

Phase 1A addressed five jurisdictional and similar issues including:

(i) the Court's jurisdiction;
(ii) the validity, lawfulness, or effectiveness of the Amended and Corrected Findings of Fact and Order of Determination as a whole;
(iii) issues concerning the rights of the parties to pursue exceptions or requests to be heard;
(iv) the Court's authority to alter a partial order of determination to which no exceptions have been filed; and
(v) the Court's authority to issue a partial judgment (i.e., a judgment on one or some, but not all, water rights claims).

The parties filed seven motions directed at the Phase 1A issues or issue categories and various parties filed responses and replies. The Court held oral argument in October 2016 and issued rulings thereafter.

No Partial Judgements

Several parties filed motions that addressed whether the court has the authority to issue a partial judgment on some, but not all, water right claims. The ultimate outcome of the KBA process is a decree that determines all the relative rights to the use of the surface water of the Klamath River and its tributaries. During the administrative phase, numerous water right claims and contests were resolved via stipulation of the claimant(s) and contestant(s). As a result, assuming the stipulation was approved by OWRD in the ACFFOD, no one filed an exception to the administratively-stipulated claims. Certain parties in that position sought, via Phase 1A, to request the opportunity to end their participation in the judicial phase via a partial judgment as to their water right claim. Several parties opposed that position, chiefly on the ground that the judicial phase might result in different conclusions than the ACFFOD about an adjudication-wide issue, or a claim-type issue, that might have the effect of altering the water rights determination even as to the stipulated claims. On review of the motions, Judge Wogan held that ORS chapter 539 provides for a single judgment, and the court does not have authority to issue partial judgments.

Examination

One Phase 1A motion addressed various parties' exceptions to the ACFFOD on the grounds that OWRD failed to properly conduct its pre-claim filing deadline examination, including measurements, of the Klamath River and tributaries. The Court denied those exceptions and ruled that if OWRD improperly performed the pre-claim filing examination, that is only relevant as it may be reflected in the ACFFOD. In so ruling, the Court emphasized that its role is to review the ACFFOD. On another motion, the Court also denied exceptions relating to the organization of the ACFFOD and access to the record prior to the exceptions filing deadline. In both cases the Court found no deficiency with the ACFFOD or record.

Phase 1B

Procedural Issues

Phase 1B addressed threshold procedural issues and included several noteworthy rulings that will impact all remaining KBA proceedings. Many parties filed motions, responses, and replies relating to the Phase 1B issues or issue categories. Below is a summary and explanation of the implications of the court's rulings by issue.

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De novo Review

Evidence Standard

Deference

Walton Rights

Factual Deference

Good Cause Standard

New Evidence Requirement

STANDARD OF REVIEW FOR THE ADJUDICATION PROCEEDING

The Court ruled that it will conduct *de novo* review (i.e., without the need for reference to any conclusion made by OWRD) regarding both questions of law and questions of fact contained in the ACFFOD. *De novo* review means that a court can take a fresh look at a lower court (or administrative) decision; the court need not defer to the lower court's decision. The parties generally agreed that the Court reviews questions of law *de novo*, thus the briefing focused on the standard of review that the Court should apply to questions of fact contained in the ACFFOD. A question of fact might include, for example, the date on which a party's predecessor in interest provided notice of their intent to develop a water right. Several parties proposed a substantial evidence standard of review for questions of fact, in line with the standard of review applied in Oregon Administrative Procedures Act (APA) cases. Other parties, largely relying on cases decided in the early 1900's prior to the addition of APA procedures to the adjudication process, argued for the *de novo* standard. In ruling that the *de novo* standard applies, the Court indicated that it has discretion to give greater weight to certain evidence, although it need not do so. For example, the Oregon Supreme Court has noted that "[i]t is seldom, if ever, that a court will interfere with discretionary action of the state engineer upon matters involving the administration of the water laws of the state and substitute its judgment for his. Judges are not super engineers." *Smyth v. Jenkins*, 208 Or. 92, 100 (1956). The Court's ruling indicates that it may afford some level of deference and/or weight to certain findings, but that such deference is discretionary.

The *de novo* ruling is important for all KBA parties. As to questions of law, the court may take a fresh look at OWRD's conclusions when it reviews exceptions to the ACFFOD. For example, the ACFFOD reached multiple legal conclusions regarding the elements of pre-1909 water rights, federal reserved water rights, and "*Walton*" right claims. The court may review those legal conclusions without deference to OWRD's conclusions. Certain exceptions go as far as to say that certain rights (such as *Walton* rights) should not even exist, thus the Phase 1B ruling keeps the door open for the Court to significantly alter the ACFFOD's legal conclusions and corresponding water right determinations, including as to the elements of a type of water right claim. *Walton* claims are federal reserved water right claims based on the primary purposes of the Klamath Treaty of 1864. A number of KBA claimants claimed water rights as non-Indian successors to Klamath Indian allottees. KBA_ACFFOD_00024. Provided a claimant was able to prove the elements of a *Walton* right, the ACFFOD assigned a priority date of 1864.

As it relates to questions of fact, the court's Phase 1B ruling indicates that it may do the same, but the court also retains discretion to defer or give weight to certain of OWRD's findings. For example, it appears likely that the court will defer, at least on some level, to findings of fact within the area of OWRD's expertise. Given OWRD's authority over water rights determination and administration, a level of deference to the ACFFOD's findings of fact can be expected.

INTRODUCTION OF NON-RECORD EVIDENCE IN THE ADJUDICATION PROCEEDING

A key point of contention among several of the parties concerned whether a party may present non-record evidence in the Circuit Court or whether the Circuit Court is limited to the evidentiary record created in the administrative phase of the adjudication. In other words, several parties considered the Circuit Court proceeding to be in the nature of a new trial, with the opportunity to present evidence and the application of the Oregon Rules of Civil Procedure. Other parties considered the Circuit Court proceedings to be a record review, with the introduction of new evidence *limited* to certain circumstances, and only allowed on remand to OWRD. The Court ruled that non-record evidence may only be taken for good cause shown, pursuant to the requirements of the Oregon APA. *See* ORS 183.482(5). The good cause standard requires that the evidence is material and that there were good and substantial reasons for the failure to seek to introduce the evidence during the administrative phase of the adjudication. The Court further ruled that if the good cause standard is met, new evidence will be taken on either remand to OWRD or by appointment of a referee pursuant to the procedural and evidentiary rules used during the administrative phase.

The Court's ruling on introduction of non-record evidence has enormous implications for the KBA and potentially for future Oregon adjudications. The ruling ensures that all evidence considered in the ACFFOD (and ultimately in the Court's decree) is addressed pursuant to the same evidentiary standards, whether the party offered the evidence during the administrative phase or if the party seeks to offer new evidence during the judicial phase. The ruling further heightens the importance of the 38-year long administrative phase of the adjudication, including the administrative contested cases. To present new evidence during the judicial phase, a party will have to overcome the good cause requirement, which requires more than just a demonstration that a party or its predecessor failed to present some piece of evidence.

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Administrative Phase Importance

The ruling also acknowledges the record review nature of the judicial phase of the adjudication. The onus is on adjudication parties to appear and present their claims and contests during the administrative phase. The Circuit Court's review is limited to exceptions to the ACFFOD, and is not a brand new trial or do-over of the proceedings below. The ruling thus rewards those parties that put forth their best effort during the administrative process.

Provided the ruling holds up in the event of a future appeal, the non-record evidence ruling will be important to consider in any future Oregon adjudications; adjudication parties must gather and put forward all available evidence during the administrative phase in order to ensure its full consideration in the overall process. In the KBA, there are likely to be several motions filed seeking introduction of non-record evidence and the court is likely to further address the bounds of the good cause standard in subsequent phases.

Impact of Burdens

Burden of Production and Burden of Proof in the Adjudication Proceeding

Burden of production generally describes the obligation of a party to come forward with sufficient evidence to support a particular proposition of fact. Burden of proof generally describes the obligation of a party to prove an assertion. In Phase 1B, the court ruled that the burden of production is on the exceptor in the judicial phase and that the burden of proof is the preponderance of the evidence. Several parties argued that the burden is on the water right claimant to prove their claim during the judicial phase. The Court disagreed. Although the burden was on the claimant to appear and submit proof of their claim during the administrative phase, the burden is on the exceptor during the Circuit Court phase, when the Court's jurisdiction is to review exceptions to the ACFFOD. In general, this means that exceptors must affirmatively raise an exception with identification of proof to support the exception in order to result in any modification of the ACFFOD. Like other Phase 1B rulings, the setting of the burden with the exceptors heightens the benefit of a favorable ruling in the ACFFOD.

Evidentiary Rules

Availability and Timing of Discovery

Discovery generally describes the pre-trial procedures in which the parties may seek evidence from the other parties to the lawsuit, pursuant to a set of rules. Closely related to the non-record evidence issue, the Court ruled that discovery is only available if the Court determines that non-record evidence may be taken. In such a case, the discovery rules of the forum that will hear the evidence apply. For example, on remand to OWRD, the Oregon APA discovery rules would apply. This ruling ensures consistency in evidentiary rules between evidence submitted during the administrative phase and new evidence allowed to be submitted in subsequent proceedings.

Applicability of the Oregon Rules of Civil Procedure (ORCP) Generally or as to Specific Rules

During the 2013 stay proceedings (discussed below), the Court held that the ORCP apply except where a different procedure is specified by statute or rule. *See* ORCP 1A. In the Phase 1B ruling, the Court indicated that the ORCP discovery rules do not apply in the event that a matter is remanded to OWRD.

Record Review Approach

The net effect of the Phase 1B ruling is that the Circuit Court proceedings are not a trial *de novo*, as in normal bilateral civil lawsuits. The Court will review OWRD's ACFFOD *de novo*, but parties are limited by application of the good cause standard to the presentation of non-record evidence. Furthermore, the ORCP discovery rules do not apply and if the good cause standard is met, the Court will remand or appoint a referee to consider the new evidence. The ruling generally adopts a record review approach. The upshot is that parties will not be able to have the opportunity for a do-over of the administrative phase. Rather, the Circuit Court's purpose is to consider exceptions to the ACFFOD based on review of the existing record, except in limited circumstances where non-record evidence may be submitted upon good cause shown. Generally, the Phase 1B ruling should avoid lengthy and protracted trial court litigation, however, the number of exceptions and record associated with the ACFFOD is highly voluminous, so even a record review proceeding will be lengthy.

Phase 1C

After the completion of Phase 1B, Phase 1C addressed other threshold or cross-cutting issues. The purpose of Phase 1C was to provide the parties with the opportunity to file a motion on any exceptions addressing threshold issues not addressed in Phase 1A or Phase 1B. Below is a summary of the Phase 1C rulings by issue or issue category.

Agency Findings

OWRD's General Findings in the Corrected Findings of Fact and Order of Determination

The Court reviewed several motions directed at the general findings. The general findings include an overview of the physical characteristic of the Klamath Basin, the procedures followed in the administrative process, and general descriptions of the record associated with the ACFFOD, among other terms. The Court ruled that the final decree will affirm the general findings section of the ACFFOD.

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Amendment "Up"

Conclusion of Law Concerning Amendment of Claims

The Court affirmed the general conclusions of law concerning amendment of claims. The ACFFOD includes a section describing the standards that apply relating to a claimant's attempt to amend aspects of a water right claim. The ACFFOD provides that a party may *not* amend their claim "up" after the applicable claim filing deadline. For example, a party may not seek to claim a superior water right after the deadline. Therefore, a party could not seek a more senior priority date, a greater volume of water, or other improved water right through a post-deadline amendment. The ACFFOD allows parties to amend their claims "down," meaning for a less superior water right. The rationale behind the rule is that the claim filing deadline set the stage for open inspection of other claims, followed by the contest deadline. The parties needed to be aware of all water right claims, and the aspects of those claims, prior to filing contests. A rule allowing parties to amend claims after the deadline would upend the process. The Court found that the "statutory scheme sets forth a sequential process where each step relies on the previous steps. If the parties were allowed to increase their claim by amendment after the deadline, many of the steps would need to be repeated." Court's Amended Order on Phase 1C, Category 2 Motions, Ex. A at p. 2.

Initial Claim Importance

The Court's ruling on amendment of claims resulted in the denial of the exceptions of several parties who sought to "amend up" after the claim filing deadline. This underscores the importance of the claim filing deadline and held that the outer scope of the final water right determination is dictated by the initial claim.

Exceptions Concerning the Denial of Late-Filed Claims

Late Claims

The Court denied late-filed claims, meaning claims filed or attempted to be filed after the applicable claim filing deadline. The rationale for the ruling is identical to the amendment of claims ruling. The denial of all late-filed claims was an important Phase 1C issue; it clarifies that no one can show up after-the-fact seeking to assert a claim. The ruling corresponds with the plain language of the Oregon adjudication statute: "...it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law." *See* ORS 539.210.

Phase 3

Substantive Exceptions

Phase 3 will address substantive exceptions to the ACFFOD, not previously addressed in Phase 1. Phase 3 is the third, and final phase of the Circuit Court phase. Conceptually, the objective of Phase 1 was to address threshold exceptions that potentially implicate the FFOD as a whole. Phase 3 is more narrowly focused, and includes resolution of all remaining exceptions. In order to accomplish the task of resolving all remaining exceptions, the Case Management Committee proposed and the Court adopted a multi-part procedure for Phase 3. Phase 3, part 1 will address exceptions that raise legal issues that may be capable of resolution with regard to disputed facts, and that have a broad application to exceptions within a specific group of claim determinations in the FFOD. Phase 3, part 1 includes three groups of "categories of claims": (1) state law pre-1909 water right claims and federal reserved water right claims, excluding tribal claims; (2) *Walton* right claims; and (3) tribal claims.

Categories of Claims

The Court will consider briefing on legal issues or issues that can be resolved without consideration of disputed facts for each category. Motions relating to the pre-1909 claims and federal reserved water right claims, excluding tribal claims, are due in August 2018. The motion practice on the Phase 3, part 1 issues should take 18 to 24 months. Following completion of Phase 3, part 1, the Court will consider specific exceptions to the ACFFOD's water right claim determinations.

WATER REGULATION and LITIGATION

"Calls" for Water

As noted above, 2013 was the first time water rights were subject to Basin-wide regulation in the Klamath Basin. Once the FFOD was deposited in the circuit court, OWRD's administrative determination of the water rights of the Klamath Basin was "of record" for regulation pursuant to Oregon's water rights administration statute. *See* ORS Chapter 540. Accordingly, 2013 was the first summer in which senior water right holders in the Klamath Basin had the opportunity to make a "call" to satisfy their rights. In Oregon, the senior user "calls" on the river system by notice to a watermaster, and the watermaster curtails the use of juniors, in reverse order of their priority, until the senior's entitlement is met. This had and continues to have enormous implications for all water right holders in the Klamath Basin. For the first time, regulation under Oregon's prior appropriation system is at work. This means that in times of shortage, junior right holders will be regulated to satisfy senior right calls. Accordingly, upstream juniors who never before have been subject to regulation, have since 2013 experienced the consequences of priority calls.

Stay Petitions

In 2013 and subsequent years, several parties filed petitions seeking to stay enforcement of the ACFFOD or to challenge specific regulation orders in both the Klamath County and Marion County Circuit Courts. Although several of the petitions are still pending in the Oregon courts, the Oregon courts have thus far upheld Klamath Basin water regulation.

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Regulation Prevented

Stay Issues

Stay Holdings

2013 Stay Proceedings

In late spring and early summer 2013, four separate petitions were filed before Judge Wogan in the Klamath County Circuit Court by various irrigators or groups of off-Project irrigators (i.e., irrigators upstream of Upper Klamath Lake and not associated with the Klamath Reclamation Project). The petitions sought to stay regulation of water rights based on both the tribal instream water rights recognized in the ACFFOD and the rights of irrigation water users in the Klamath Reclamation Project. A stay, in this case, a stay of enforcement of the water right claims determined in OWRD's order, is an order of the court that would stop enforcement pending completion of the judicial proceeding. The off-Project irrigators' petitions were opposed by the United States, Klamath Tribes, and Klamath Project Water Users (various entities who receive water through the Klamath Reclamation Project via contract with the US Bureau of Reclamation), among others. Briefing on the stay petitions raised several issues of first impression in Oregon, particularly as the first modern adjudication to include both administrative contested case litigation pursuant to the Administrative Procedures Act (APA) and the determination of federal reserved water right claims. Specifically, the Court addressed the parties' arguments relating to four important questions:

(i) Does the Court have discretion to issue a stay or is a stay automatic upon the posting of a bond?;

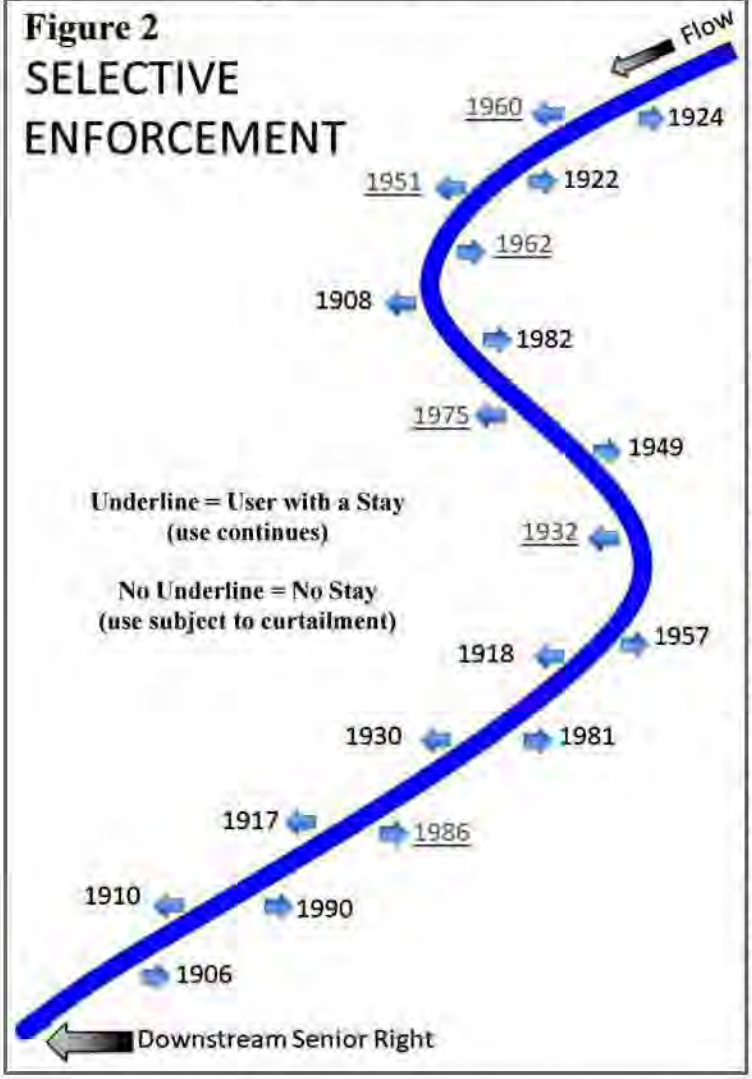
(ii) If the Court has discretion to issue a stay, what factors does the Court consider in making that determination?;

(iii) Is the potential liability of a party who obtains a stay capped by the bond or letter of credit they post in support of the stay?; and

(iv) Can the Court issue a stay as to regulation of certain individuals only (i.e., a selective call)?

Due to the enormous implications — regulation versus non-regulation of water use — briefing on the stay petitions was lengthy and complex. It culminated in a hearing before Judge Wogan attended by more than twenty lawyers in July 2013. In multiple orders issued on the various stay petitions between September and November 2013, Judge Wogan ruled that a stay of enforcement of the administrative order does not issue automatically. Rather, the Court has discretion on whether to issue a stay and will apply Oregon's provisional process rules in making a stay determination. In addition, and perhaps most detrimental to the 2013 stay petitions, Judge Wogan ruled that the potential liability to a party who obtains a stay is not capped by the bond or letter of credit set by the Court at the time the stay issues. Pursuant to ORS 539.180, Judge Wogan ruled that a party seeking a stay must agree to "pay all damages that may accrue by reason of the determination not being enforced" in addition to the bond.

Figure 2
SELECTIVE ENFORCEMENT



The Court further indicated that a stay could not be obtained as to an individual water user. In other words, several of the petitioners sought a stay as to enforcement against their own individual water right. As shown in Figure 2 on selective enforcement, if such a stay were granted, it would upend the priority system. The result would be that certain junior water right holders (underlined in Figure 2) could continue to use water while other more senior users who did not file a petition would be regulated off (i.e., have their use curtailed by enforcement). In effect, the stay as to certain individuals would create a "super priority" for certain water users who file a petition, which is not a concept that exists under Oregon water law.

Following this ruling, none of the parties associated with the 2013 petitions elected to pursue their petitions further and the Court did not need to exercise its discretion to determine whether a stay should issue in any of the cases. The petitioners likely did not wish to assume the liability for "all damages" that may accrue by reason of the FFOD not being enforced. For example, several entities associated with the Klamath Reclamation Project submitted expert declarations regarding the impact of non-enforcement of the Project's determined claims; the Project water users' experts valued water received via a Project call in the tens of millions of dollars.

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Klamath Adjudication

Damages Deterrent

Time Immemorial Calls

Conjunctive Regulation

Judicial Review of Regulation

Stay Pending Resolution (Auto Stay)

Groundwater Regulation Standards

"Reasonable Person" Finding

It is safe to say that the Court's ruling, and the plain language of ORS 539.180 which requires that a petitioner "pay all damages" that may accrue, is a deterrent to seeking a stay of the ACFFOD. This underscores the importance of the ACFFOD; for the period between entry of the ACFFOD and completion of the Circuit Court proceeding, unless a petitioner is willing to assume all potential monetary liability, the FFOD provides the enforceable water rights for regulation in the basin.

No party has sought a stay since the four petitions filed in 2013. As a result, except as to certain circumstances associated with petitions for judicial review filed in the Marion County Circuit Court (*see below*), the ACFFOD has been in full force and effect in all five years since 2013. OWRD's Klamath County Watermaster regulates junior water uses in response to valid senior calls. The reality of prior appropriation, which can result in harsh consequences for junior users, is now active in the Klamath Basin pursuant to enforcement of the determined claims recognized in the ACFFOD.

Marion County Circuit Court Petitions: Jurisdiction for Regulation

As previously noted, due to both drought conditions and water right realities, OWRD has regulated off water users in each of the years since 2013, including in the present 2018 season. As a result of the priority system and enforcement of the ACFFOD, tribal time immemorial water right calls have resulted in complete shutoff of off-Project irrigation upstream of Upper Klamath Lake. In other years, calls have resulted in more limited shutoffs. The priority date associated with tribal water rights is generally "time immemorial." This is the most senior priority in the prior appropriation system. Furthermore, in 2015, OWRD began to regulate hydraulically connected groundwater use in response to downstream senior surface water right calls. Oregon is a conjunctive management state and the water regulation statute specifically contemplates regulation of groundwater in certain instances in response to senior surface water calls.

As discussed above, four petitioners or groups of petitioners unsuccessfully sought to stay portions of the FFOD in summer 2013. Oregon law also provides that a water right holder in receipt of a regulation order may challenge the regulation order either in the county where the water body sits (i.e., Klamath County for the Klamath River) or in Marion County, the location of OWRD's main office. In particular, a regulation order is considered an "order in an other than contested case," subject to judicial review pursuant to the Oregon APA.

Since 2015, several individuals have sought judicial review of regulation orders issued following senior surface water right calls in the Klamath Basin, pursuant to the calling parties' determined claim(s) under the adjudication. The cases include circumstances such as groundwater regulation and the unique circumstance of regulation arising despite a "no call agreement" among several parties. Oregon law specifically provides that application of an OWRD regulation order is stayed pending resolution of the petition for judicial review challenging the order. OWRD may lift the stay if it makes a determination that it is in the public interest to remove the stay. To date, OWRD has not lifted a stay pertaining to petitions challenging water rights regulation in the Klamath Basin. Thus, to date, by filing a petition for judicial review, the regulated parties continued to use water pursuant to their junior water rights until resolution of litigation on the particular petition.

Groundwater Cases: Conjunctive Regulation

Oregon law requires that OWRD regulate groundwater hydraulically connected to surface water *if* the groundwater use causes substantial interference with the surface water and that regulation of the groundwater use will provide timely and effective relief to the surface water user. In other words, the groundwater use must be shown to impact the surface use and regulation of the groundwater use must provide near-term relief to the surface water user. To date, several petitions or series of petitions have been filed by groundwater users in the Sprague River Valley pertaining to regulation of wells in response to downstream tribal and Klamath Project calls for water. Approximately five such petitions were filed between 2015 and 2017. As of July 2018, ten petitions relating to groundwater regulation in response to senior surface water right calls have been filed in the 2018 irrigation season in both Klamath County and Marion County.

Several of the 2015-2016 petitions were consolidated and have been tried in Marion County. The consolidated *Sees et al. v. Water Resources Department* case included a six-day trial in March 2017 in the Marion County Circuit Court. Trial in these matters, pursuant to the Oregon APA, weighs in favor of OWRD: the Court need only find that a "reasonable person could agree" that OWRD properly regulated a particular water use. *See* ORS Chapter 183. Following presentation of expert witnesses on behalf of the petitioners, OWRD, and intervening senior water districts, the Marion County Circuit Court found that OWRD acted reasonably in regulating petitioners' wells in response to the senior surface water right calls. The *Sees* petitioners have filed a notice of appeal, and briefing before the Oregon Court of Appeals is slated to be completed by fall 2018.

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Klamath Adjudication

No other party has tried a groundwater regulation appeal, but several of the petitioners have benefitted from the stay of regulation pending resolution of the petition. Moreover, with the number of petitions filed in 2018, it remains to be seen whether public interest considerations will come into play with respect to automatic stays related to 2018 petitions (see above regarding automatic stays).

No-Call Agreement Case

"No-Call" Agreement

Another petition involved a challenge to water right regulation predicated on the existence of a "no-call" agreement entered into among several parties relating to water use on the Sycan River, a tributary to the Klamath River. In that case, an irrigator, The Klamath Tribes, the United States, and the State of Oregon entered into an agreement that included, among other provisions, an agreement that The Klamath Tribes would not call on the irrigators' right. Pursuant to a validated call by another water user who was not a party to the agreement, OWRD regulated all diversions on the Sycan River in 2015, including the diversion subject to the no-call agreement. In 2015, there were calls both by the Klamath Tribes and irrigators in the Klamath Project. The Klamath Tribes were a party to the agreement.

Selective Call

The irrigator filed a petition challenging the enforcement based on the existence of the no-call agreement. In late 2017, the Marion County Circuit Court ruled in favor of the irrigator and upheld the validity of the no-call agreement. The State of Oregon has appealed that ruling, and that appeal is pending. If the no-call agreement is upheld on appeal, it would validate what is, essentially, a selective call, by removing the no-call agreement party from the priority system. The case underscores tensions that may arise in the regulation of junior users in the Klamath Basin: with litigation in multiple forums there is the possibility of inconsistent rulings and tracking the status of Basin-wide regulation can be difficult. On the other hand, it is possible that the Oregon appellate courts will issue rulings to resolve any inconsistency. In any case, it is an early example of the challenges that arise in a newly-regulated basin.

NEXT STEPS

Ten Years?

The first five years of the judicial phase of the KBA has included: Klamath County Circuit Court (Court) resolution of novel questions of Oregon law; the first regulation of water rights in the history of the Klamath Basin; and separate litigation resulting from regulation in a previously unregulated basin. In the adjudication proceeding, among many other activities, the Court resolved: four petitions for stay of the application of the ACFFOD; created a procedure to review the enormous OWRD record; explained how to file an exception to the order and how to be heard on others exceptions; and resolved all threshold issues pertaining to the ACFFOD as a whole.

Summer 2018 will commence litigation of substantive water law issues pertaining to the various types of water right claims at issue in the adjudication. Based on the crucial Phase 1B ruling, which largely establishes that the judicial phase of the adjudication is a record review proceeding of exceptions to the ACFFOD, it appears possible that the Circuit Court phase will ultimately be ten years or less.

CONCLUSION

Water rights regulation in the Klamath Basin has included growing pains, introducing the harsh reality of prior appropriation which extends to groundwater use in Oregon. Petitions of regulation orders have resulted in litigation pertaining to Klamath regulation in both Marion and Klamath Counties. To date, several petitions have been filed in the 2018 seasons and petitioners enjoy the benefit of an automatic stay of regulation as a result of the petitions.

Ongoing Issues

The KBA, and related water regulation litigation, is but one factor impacting water use in the Basin in 2018 and beyond. In the meantime, in the background lie several complex proceedings: the re-initiation of consultation relating to operation of the Klamath Project, litigation by several parties arising under the Endangered Species Act, proceedings regarding the removal of four hydroelectric dams along the Klamath River, and informal conversations relating to re-initiating complex, basin-wide settlement discussions. Thus, in addition to the adjudication and related sideboard litigation, a lot is at play and substantial challenges lie ahead for the Klamath Basin.

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