Fighting for Water in the Klamath Basin

Trygve B. Sletteland

Mark Twain had it figured out a century ago: "Whiskey's for drinkin' and water's for fightin' over." Though the brawling is no longer done in barrooms, fights are still breaking out over western water use.

As these battles have intensified during recent droughts, cooperative efforts to conserve or better manage our primary natural resource have also intensified, leading to legislation and voluntary management plans that benefit in-stream values such as fish conservation. More often, however, relationships have become adversarial, and judges find themselves the final arbiters of water use. In the Klamath River Basin (Figure 1), for example, the intransigence of existing water users and paralysis of government regulators point to the likely need for litigation to break the impasse over reform of an outdated water allocation scheme.

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A mosaic of federal and state laws reflects the public interest and societal values embodied in protecting natural resources. Such laws include the Clean Water Act, the Endangered Species Act, and the public trust doctrine. These laws and doctrines are meant to stand regardless of whether conflicting interests and values can be accommodated through political processes. When laws are sidestepped or ignored–to the detriment of the public interest–litigation to enforce them is the public's last recourse.

The Klamath Project

The Klamath Basin is about one-third arable land and two-thirds forest lands. The Klamath Project was one of the first federal reclamation projects, authorized in 1905 and continuously operated since then by the US Bureau of Reclamation. The project diverts water to some 240,000 acres to grow cattle pasture, alfalfa, sugar beets, potatoes, wheat, and barley; diverted waters are stored primarily in Upper Klamath Lake, the largest lake in Oregon. As the project's environmental impacts began to hit home over the last decade, pressure has mounted for reallocation of limited water resources.

The Klamath is one of the two largest rivers in California, draining about 12,000 square miles of southern Oregon and northern California. Historically, the Klamath and its six major tributaries–the Trinity, Salmon, Scott, Shasta, Sprague, and Williamson Rivers–supported the third-largest Pacific salmon and steelhead runs in the lower 48 states, after the Columbia and Sacramento Rivers. Unfortunately, the Klamath and its tributaries have been dammed, dewatered for commercial agriculture, and polluted, and their associated fish habitat has been degraded by logging and road building in steep, unstable terrain.

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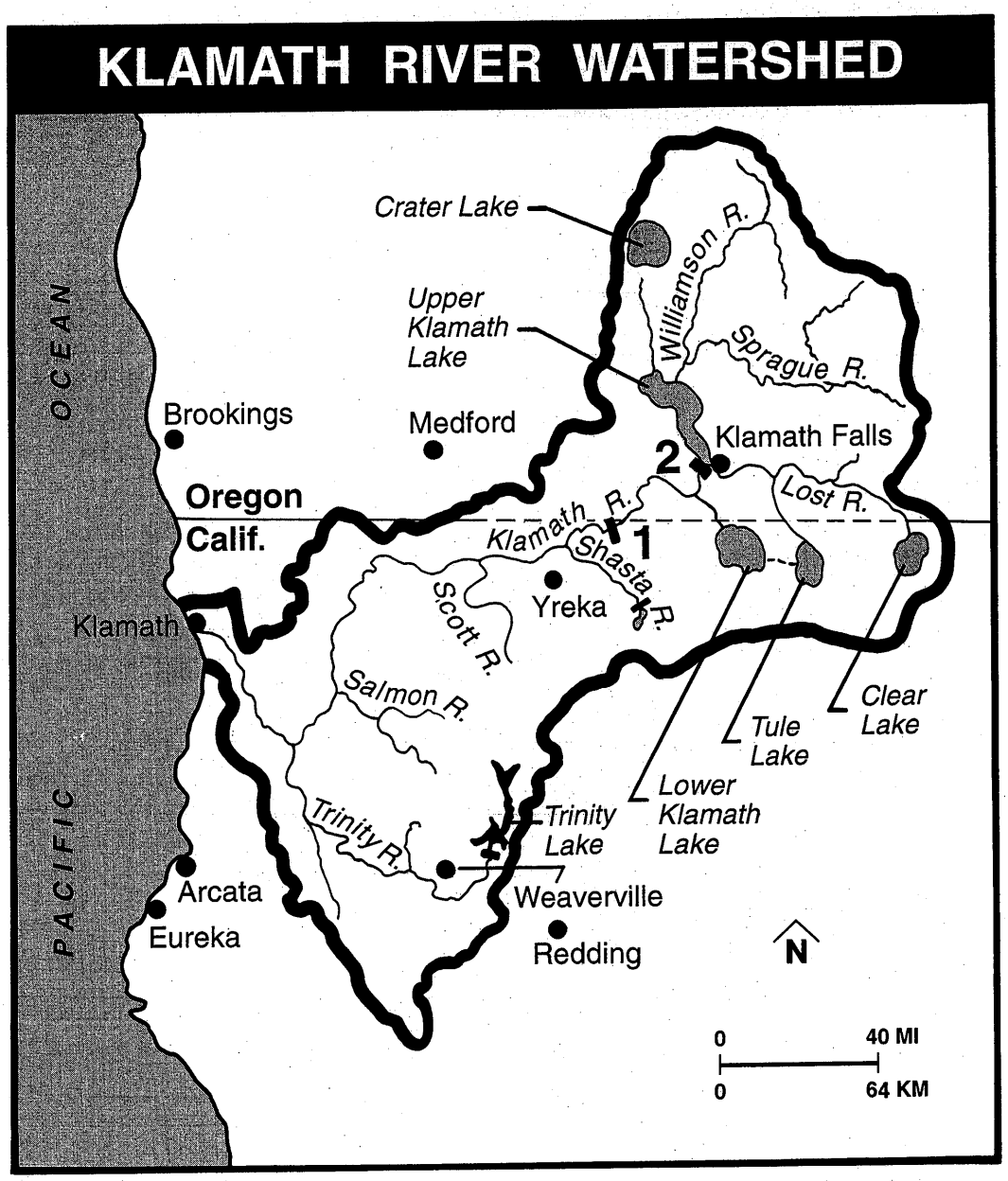

Figure 1

The Klamath River watershed. Iron Gate Dam (1), the lowest mainstem dam on the Klamath River, is impassable to migratory salmonids. Both it and Link River Dam (2) are required by law to allow sufficient water to pass to keep fish "in good condition" below the dams. Map courtesy of the Klamath Fishery Restoration Office of the US Fish and Wildlife Service, Yreka, California.

Consequently, the Klamath's fisheries have declined precipitously in recent times. At least 10 of the basin's 54 salmon and sea-run trout populations are at risk of extinction. Although none has yet been officially listed as threatened or endangered, petitions to list two of the river's four anadromous species–coho salmon and steelhead trout–under the Endangered Species Act are pending before the National Marine Fisheries Service (NMFS). In early 1995, NMFS proposed to list Klamath Mountains Province steelhead as threatened, and in July 1995, in response to a June lawsuit by the Sierra Club Legal Defense Fund, NMFS also proposed listing Klamath River coho as threatened.

The decline of salmon runs has led to a virtual shutdown of commercial salmon fishing off northern California and southern Oregon since 1992. The ceremonial, subsistence, and commercial fisheries of four Indian nations have also been drastically curtailed. The Hupa, Karuk, Klamath and Yurok tribes have fished the Klamath and its

tributaries for more than 10,000 years but now fear that these fish, so central to their lives, will be lost forever.

In addition to fish, the Klamath Basin is visited annually by the largest concentration of migratory waterfowl in North America. The basin is the largest wintering area south of Alaska for American bald eagles, and it supports one of the last two colonies of breeding American white pelicans in California. Peak fall concentrations reach more than a million birds.

Lower Klamath Lake, the most important of the four waterfowl refuges that receive project water, was established by President Theodore Roosevelt as the nation's first waterfowl refuge. Bureau mismanagement during the drought years in the basin from 1987 to 1994 cut off vital water supplies to Lower Klamath Lake and Tule Lake Wildlife Refuges, which provide migratory stopover and wintering habitat for 80% of Pacific Flyway waterfowl. Of the 411 species that use the refuges, some 25 are endangered, threatened, or of special concern.

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Lack of water is also the principal factor responsible for the decline of the Lost River and shortnose suckers found in Upper Klamath Lake. Important to the Klamath Tribe for ceremonial, subsistence, and commercial use, shortnose suckers are federally listed as endangered. Declining water quantity has caused severe water quality problems in the lake, and poor water quality has been identified by scientists as the chief cause of the drop in sucker populations.

The lowest of four mainstem Klamath dams was built at Iron Gate in 1956; it is impassable for migratory salmon and steelhead. In granting a license to Pacific Power and Light Company to operate the dam, the Federal Power Commission (now the Federal Energy Regulatory Commission, or FERC) recognized the fishery's need for assured releases from the dam and made specified minimum releases a condition of the FERC permit. How the Bureau operates the project and allocates the available water determines how much water is available for release from Iron Gate Dam to meet these FERC-mandated minimum flows.

In recent years, the Bureau has refused to provide flows to meet the minimum release schedule, threatening salmon and steelhead with extinction as a result. Yet, as elsewhere around the West, including California's Central Valley, the Bureau has continued to provide full water supplies to irrigators even during extended drought.

The Fight for Klamath Water

Faced with an intransigent Bureau of Reclamation and Klamath Project irrigators who have so far stonewalled all attempts to reallocate scarce water to protect imperiled fish and wildlife populations, the Klamath Forest Alliance, Oregon Natural Resources Council, Northcoast Environmental Center, Salmonid Restoration Federation, Pacific Coast Federation of Fishermen's Associations, and Lane County Audubon Society are prepared to sue. The primary goal of litigation will be to ensure adequate spawning, rearing, and migration habitat for anadromous fish in the Klamath River. Other goals include meeting the minimum needs of birdlife in the Klamath wildlife refuges and of suckers in Upper Klamath Lake.

In December 1994, the Legal Defense Fund called for Secretary of the Interior Bruce Babbitt to order the Bureau to meet FERC minimum flows at Iron Gate Dam in 1995 and future years. It turned out that above-average precipitation in January and March made it relatively easy for the Bureau to meet all competing water demands for 1995. Still, the Bureau's water allocation plan released that April is an important advance for several reasons:

- It commits the Bureau to provide FERC minimum flows, as well as adequate water for wildlife refuges and Upper Klamath Lake fish. The Bureau has acknowledged for the first time that fish and wildlife needs have to be met as well as agriculture's, indeed, that in some instances, agriculture has to line up behind fish and wildlife.
- Now is the first time that the Bureau has had any formal plan at all. Previously, the Bureau managed the Klamath Project ad hoc, essentially providing the irrigators as much water as they wanted, with little, if any, consideration of fish and wildlife needs.

- Again for the first time, the Bureau has taken the views of environmentalists into account.
- The Bureau has committed to formulating, by February 1996, for the first time, a long-term plan that will require disclosure of the priorities in a dry year even if 1996 is a wet one. The Bureau has been issuing long-term plans for its other western water projects for years, but, in the words of one federal hydrologist, the Klamath Project has been a "backwater" of Bureau operations, where the old ways of "seat-of-the-overalls" planning have been slow to die.

If necessary, a lawsuit could invoke principles based on the Klamath River Basin Fishery Resources Restoration Act, the Wild and Scenic Rivers Act, the Reclamation Act, the California Fish and Game Code 5937, and Indian reserved rights and trust obligations.

The Klamath River Basin Fishery Resources Restoration Act (16 USC, sec. 460 et seq.) was enacted in 1986 in response to an 80% decline of Klamath and Trinity River fall-run chinook salmon populations. "Reduced flows" that have "significantly reduced the anadromous fish habitat" were cited as a major cause of this decline. Plaintiffs would argue, among other things, that the law requires the Bureau of Reclamation to maintain minimum FERC flows below Iron Gate Dam.

Similarly, California Fish and Game Code, section 5937–which the federal Reclamation Act obligates the Bureau to obey–requires the owner of any dam to allow sufficient water past that dam to "keep in good condition any fish . . . below the dam." Both Iron Gate Dam and Link River Dam upstream are covered by this law. Again, FERC minimum flows, at least, are necessary to keep salmon nests under water and water temperatures below lethal levels.

The mainstem Klamath below Iron Gate to the Pacific, and many of its tributaries, are officially included in the Wild and Scenic River System as "recreational rivers" (16 USC, sec. 1271 et seq.), in large part because of outstanding anadromous fishery values. The Wild and Scenic Rivers Act requires these values to be preserved "in free-flowing condition"–a condition that would imply the presence of water. Here again, the only credible existing gauge of what constitutes "free-flowing condition" is found in the FERC minimum-flow requirements.

Finally, the secretary of the interior has a legal trust obligation to the Hupa, Karuk, Klamath, and Yurok tribes to protect the fisheries on which the tribes depend. Specifically, this obligation means that the Klamath Project must be operated to leave sufficient water in the mainstem Klamath River to maintain viable and adequate populations of salmon and sea-run trout below Iron Gate Dam. Unless and until studies prove otherwise, the FERC minimum-flow requirements once more furnish the benchmark for the necessary amount of water.

Which Bureau in '96?

A historic moment is approaching in the Klamath Basin. Eventually, a state-of-the-art lower Klamath River in-stream flow study will be completed for the Klamath Basin. This document will provide a more modern biological determination of the water quantity needed by Klamath River salmon and sea-run trout populations. In the meantime, however, the FERC minimum-release schedule incorporates the "best available science," and 1996 will be the first year that the Bureau will disclose which uses will get how much water across the full range of precipitation scenarios.

The Bureau now has a choice: It can continue playing its traditional role as the servant of agriculture, or it can follow the lead of its own Central Valley Project and recognize, finally, the legitimacy of fish and wildlife on an equal footing with all other purposes of the Klamath Project. Which Bureau of Reclamation will show up to manage the Klamath system next year? ■