U.S. v. Klamath Irrigation District, 2023 WL 5899910 (D. Or., September 11, 2023).

- **Holding**: In order to protect senior tribal reserved water rights and endangered species needs, U.S, Bureau of Reclamation was entitled to injunction enjoining irrigation district, which held 1943 contract with Bureau for delivery of water from Bureau projects, from diverting water under the district's independently-acquired state water right with 1977 priority date.
- **Summary**: In 1905, Congress authorized the Secretary of the Interior to construct and operate the Klamath River Basin Project ("Klamath Project"), a series of dams and diversion works on Upper Klamath Lake, the Link River, and the Klamath River. On May 17, 1905, pursuant to Oregon law, Reclamation filed a notice of appropriation as to all of the then-unappropriated waters of the Klamath Basin for the Klamath Project. Prior decisions established that the Bureau must operate the project "consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project …." The Bureau must also operate the Project in a manner consistent with its obligations under the Endangered Species Act (ESA).

  Reclamation maintains contracts with individual irrigators and with irrigation districts, under which the United States has agreed to supply water from the Klamath Project to the irrigators, "subject to the availability of water." Contracts are assigned to one of four categories, with a different priority level assigned to each category. Categories with seniority receive water before contracts in lower categories. One such contract holder, the Klamath Drainage District (KDD), held rights under a 1943 contract with the second-lowest priority among the four categories. In addition to its Project contract rights, KDD applied for and was granted a Permit to Appropriate Public Waters of the State of Oregon ("1977 Water Permit") from the Oregon Water Resources Department, with a 1977 priority date, that, when exercised, allowed KDD to divert up to 57,702.9 acre-feet ("AF") of water per year.

  The Bureau initially acknowledged KDD's use of its 1977 Permit outside of Reclamation's Project allocations, although noting that it was junior to Reclamation's 1905 water right. In 2012, the Bureau advised KDD that, "[f]rom this point forward, Reclamation will consider water diverted for use on lands identified in KDD's Permit, as water diverted under the permit," so that "Project water will only be made available to KDD after KDD has fully utilized all water available under the Permit, and if Reclamation determines Project water supplies are available."

  Beginning in 2014, the Bureau objected to KDD's water diversions outside of Reclamation's Project allocation, noting that "a fundamental disagreement exists as to how the 1905 Klamath Project water right and KDD's junior state permit can be exercised in light of the terms of the 1943 contract and the use of Project water, especially under current drought conditions."

  In 2022, the Bureau informed all interested parties, including KDD, that only 62,000 AF of water was available for Project contractors, and directed KDD to not divert any water during the 2022 irrigation season. KDD proceeded to divert water under its 1977 Permit. In order to maintain minimum flows, the Bureau had to cease delivery to other, more senior contract holders.

The Bureau brought an action in federal court to enjoin KDD from diverting water under its 1977 state permit, asserting that its 1943 contract with KDD "prohibits diversions from the Klamath River not authorized by Reclamation regardless of whether those diversions would otherwise be permissible, so the [1977 Water] Permit is irrelevant." After finding that the Bureau could, under the terms of the 1943 contract, allocate zero Project water to KDD, the court turned to the question of whether the terms of the 1943 Contract and KDD's status as a Project contractor preclude KDD from diverting water pursuant to the 1977 Water Permit.

Citing Section 8 of the Reclamation Act, which requires the Secretary of the. Interior to comply with state law regarding the appropriation of water for irrigation, to the extent such law is not inconsistent with federal law, KDD argued that the Bureau should have made a senior priority call with OWRD to prevent KDD from diverting water pursuant to its 1977 Water Permit. The court rejected such a requirement, finding that "expecting Reclamation to wait until OWRD investigates the water shortage would render Reclamation's ability to plan for an irrigation season impossible … Reclamation can make no definite plans if it must wait until OWRD investigates a water shortage before Project contractors can be prevented from diverting water pursuant to a state permit."

Finding that "KDD's diversions pursuant to its 1977 Water Permit hinder Reclamation's ability to operate the Klamath Project, and that the "Ninth Circuit has determined that irrigators' rights are 'subservient' to the Tribes' rights and Reclamation's ESA responsibilities," the court concluded that "[a]llowing KDD to sidestep Reclamation's water allocation under the terms of the 1943 Contract would disturb Reclamation's careful balance" of the competing interests the Bureau was obligated to protect, including ESA obligations and Tribal federal reserved water rights. Further. given its contract with the Bureau, KDD was "unlike" private water users diverting non-Project water—in short, "KDD cannot reap all the benefits of being a Project contractor without assuming obligations." Thus, applying the four-part injunction test, the court "permanently enjoined [KDD] from diverting water from the Klamath River when Reclamation has not authorized such diversions under the terms of the 1943 Contract."

- **Relevant (2023) Deskbook Section**: 8:15

- **Comment:** All parties in this case consented to decision by the U.S. Magistrate judge. Footnote 9 of the opinion refers to a concurrently filed Findings and Recommendation in *Klamath Tribes v. U.S. Bureau of Reclamation*, et al., No. 1:22-cv-00680-CL (D. Or. filed May 9, 2022), a case brought by the Tribes challenging the Bureau's decision to allocate 62,000 AF of water to irrigation contract holders in 2022.