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## When Good Streams Go Dry: *United States v. Adair* and the Unprincipled Elimination of a Federal Forum for Treaty Reserved Rights

Ryan Sudbury\*

In 1864, the United States and the Klamath Indians entered into a treaty in which the tribe ceded its interest in over 22 million acres of land to the United States government, which also reserved 1.9 million acres for the Klamath Indians to “be held and regarded as an Indian reservation.”<sup>1</sup> By the terms of the treaty both parties recognized the importance of hunting and fishing to the tribe; thus, Article I reserved to the tribe “the exclusive right of taking fish in the streams and lakes (of the Reservation), and gathering edible roots, seeds, and berries within its limits.”<sup>2</sup> Ninety years later, when the 1954 Klamath Termination Act<sup>3</sup> divested the tribe of its reservation, that statute expressly stated that it did not “abrogate any fishing rights or privileges of the tribe or the members... enjoyed under Federal treaty.”<sup>4</sup>

The importance of the usufructuary rights to the Klamath tribe is illustrated by a 1905 Supreme Court pronouncement, “[t]he right to resort to the fishing places...were not much less necessary to the existence of the Indians than the atmosphere they breathed.”<sup>5</sup> The ideas contained in this statement by Justice Joseph McKenna served to shape the development of tribal fishing and water rights jurisprudence for years. Unfortunately, by the time of this pronouncement, damage to the Pacific Northwest salmon runs had already occurred. The influx of settlers, and the concurrent development of large-scale salmon processing and canning, drastically reduced the number of salmon in the streams.<sup>6</sup>

As a result of the severe decline in the salmon runs, and the importance of the resource to all the parties involved, a long series of court battles began throughout the twentieth century in the Pacific Northwest. The linchpin

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1. *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 756-57 (1985) (“*Oregon DFW*”).

2. *United States v. Adair*, 478 F. Supp. 336, 339 (D. Or. 1979) (“*Adair I*”) *aff’d* *United States v. Adair*, 723 F.2d 1394, 1398 (9<sup>th</sup> Cir. 1983) (“*Adair II*”). Note that the Supreme Court, in *Oregon DFW*, and the *Adair I* and *II* courts differ as to the size of the reservation. For the purposes of this paper, I will use the Supreme Court’s figures.

3. 25 U.S.C. § 564 (1954).

4. *Kimball v. Callahan*, 493 F.2d 564, 569 (9<sup>th</sup> Cir. 1974) (“*Kimball I*”) (holding that the 1954 Klamath Termination Act did not abrogate the hunting and trapping rights of the tribe or its members).

5. *United States v. Winans*, 198 U.S. 371, 381 (1905) (“*Winans*”) (ruling that the United States treaty with the Yakama Nation reserved the right to the tribes to take fish at their usual and accustomed places).

6. See Michael Blumm & Brett Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Col. L. Rev. 407, 434 (1998).

in the tribes' arguments over their right to take fish came from the Supreme Court's decision in *Winans*,<sup>7</sup> and a federal district court decision from Washington in *United States v. Washington*.<sup>8</sup> While these cases acknowledged the tribal right to take fish, such a right would be useless if the devastation of the economically valuable salmon runs could not be halted or reversed. Partly based on the holding of *Winans*, and partly on *Winters v. United States*,<sup>9</sup> tribes began to assert an implied right to habitat protection derived from their treaties. In Phase 2 of the *United States v. Washington* litigation, the tribes asserted this alleged habitat protection right and the district court concluded that the treaty fishing right included an implied right to habitat protection.<sup>10</sup> However, an en banc panel of the Ninth Circuit vacated the opinion as contrary to sound judicial discretion.<sup>11</sup> Because the en banc court did not reach the merits of right to habitat protection, its application in a case with a concrete set of facts remains an open question.

The *Adair* litigation began in September of 1975, when the United States filed suit in federal court "seeking a declaration of water rights within the Williamson River drainage."<sup>12</sup> Four months after the United States filed for the determination of water rights in the Williamson River drainage, the state of Oregon initiated formal proceedings to adjudicate all water rights in the Klamath Basin, which included the Williamson River drainage.<sup>13</sup> In 1979, in *United States v. Adair*, the District Court of Oregon ruled that the treaty guaranteed to the tribes an implied right to as much water on the reservation as necessary to protect their hunting and fishing rights, with a priority date of time immemorial.<sup>14</sup> The district court also retained jurisdiction over issues relating to construction, effectuation, modification or enforcement of

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7. *Winans*, 198 U.S. at 380-81 (holding that the treaties were "not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted," and thus there was "an exclusive right of fishing reserved within certain boundaries.").

8. *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (where Judge Boldt determined that the treaty phrase "the right to take fish...in common with all citizens of the Territory," meant that treaty fishermen had a right to take up to 50% of the harvestable number of fish).

9. 207 U.S. 564 (1908) ("*Winters*") (holding that tribes have reserved water rights to fulfill the purposes of the reservation).

10. *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (holding that "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.").

11. *United States v. Washington*, 759 F.2d 1353, 1357 (9<sup>th</sup> Cir. 1985) (en banc) (ruling that the "[l]egal rules of general applicability" announced by the district court were not proper because there was not a concrete set of facts before the court to base the rule on).

12. *Adair II*, 723 F.2d at 1398.

13. *Id.* Later in 1976, both the Klamath tribe and the state of Oregon intervened in the federal suit. Oregon argued that the federal suit should be dismissed in favor of the state adjudication pursuant to the rule announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) ("*Colorado River*") (holding that in situations of concurrent federal and state court jurisdiction, federal courts should abstain from exercising their jurisdiction where it would promote "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.").

14. *Adair I*, 478 F. Supp. at 345.

the standard that may arise.<sup>15</sup> The state of Oregon appealed, but in 1983, the Ninth Circuit largely affirmed the decision.<sup>16</sup> Relying on the Supreme Court's standards for federal court abstention under the McCarran Amendment, which creates a limited waiver of the United States' sovereign immunity,<sup>17</sup> as announced in *Colorado River*,<sup>18</sup> the Ninth Circuit noted that the lower court's approach would best serve to avoid "the duplication and waste of judicial effort that...the McCarran Amendment [is] designed to avoid."<sup>19</sup>

Sixteen years later, in 1999, the Oregon Water Resources Department belatedly announced the standard to use in quantifying the tribes' water right, stating that the tribes were entitled to the "minimum quantity of water necessary to protect treaty fish and wildlife resources as they existed in 1979."<sup>20</sup> In response, both the United States and the Klamath tribes petitioned the district court to exercise its continuing jurisdiction in order to clarify the legal standard announced in *Adair I* and *II*.<sup>21</sup> In *Adair III*, Judge Panner issued a short, five-page opinion holding that the tribes have a right to an allocation of water sufficient to fulfill the purpose of the reservation,<sup>22</sup> and this right must include enough water to support a productive habitat for fish.<sup>23</sup> This ruling appeared to create a right to habitat protection for treaty

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15. See *United States v. Adair*, 187 F. Supp.2d 1273, 1274 (D. Or. 2002) ("*Adair III*") *vact'd on other grounds* *U.S. v. Braren*, 338 F.3d 971 (9th Cir. 2003) ("*Adair IV*"). The *Adair I* court announced its retained jurisdiction in its unpublished declaratory judgment, stating that the court retains continuing jurisdiction "for the purpose of enabling the parties... to apply to this court at any time for such orders and directions as may be necessary or appropriate for the construction and effectuation of this judgment, for the modification of any of the provisions hereof, and for the enforcement of compliance with this judgment." *Id.*

16. *Adair II*, 723 F.2d 1394.

17. 43 U.S.C. § 666 (1976).

18. 424 U.S. 800 (holding that while federal courts have a duty to exercise the jurisdiction given to them in most circumstances, the courts should balance this duty against the need to preserve judicial resources and prevent piecemeal litigation by abstaining from exercising federal jurisdiction where there is a comprehensive state adjudication of water rights meeting the requirements of the McCarran Amendment).

19. *Adair II*, 723 F.2d at 1404 (commending the lower court's approach of addressing only the legal principles arising under federal law in balancing the preference for a federal forum in which to litigate Indian rights governed by federal law and the McCarran Amendment's express federal policy of avoiding piecemeal adjudication of water rights where a comprehensive state adjudication is available.").

20. *Adair IV*, 338 F.3d at 973 (quoting the preliminary standard established by the Oregon Water Resources Department, which was claims for instream flow to fulfill the purposes of the Klamath Tribes' treaty rights for hunting and fishing are proper if the record shows that the claimed amount is the minimum quantity of water necessary to protect treaty fish and wildlife resources as they existed in 1979..." and that "[c]laims for [water to support] gathering rights are improper.")

21. *Adair III*, 187 F. Supp. 2d at 1274-75.

22. *Adair II*, 723 F.2d at 1410 (stating that "the Government and the Tribe intended to reserve a quantity of 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.").

23. *Adair III*, 187 F.Supp.2d at 1275-76 (reasoning that water rights less than that which would support a productive habitat "would result in abrogating the Tribes' treaty right to hunt, fish, gather, and trap on the reservation lands," and only Congress can abrogate these rights).

fisheries, an issue that has been debated since it was first raised before Judge Boldt in Phase 1 of *United States v. Washington*.<sup>24</sup> A right to habitat protection of fish runs derived from Indian treaties could serve as a legal basis to restore the devastated salmon runs of the Pacific Northwest.<sup>25</sup> However, despite the *Adair I* court's express retention of jurisdiction to interpret and apply the federal quantification standard, the Ninth Circuit, in *Adair IV*, vacated the district court's decision on the grounds that the Water Department's interpretation of the federal standard was not ripe for judicial review.<sup>26</sup>

This note examines the legal and policy implications of both the *Adair III* and *IV* decisions. Part I begins with a brief history of the Klamath tribes, its treatment by the United States, and the importance of fish to the Klamath people, as well as a brief history of the Klamath Termination Act and the Klamath Basin Adjudication. Part II explores the factual and legal events, including the *Adair I* and *II* decisions and *United States v. Oregon*,<sup>27</sup> that provide the context for Judge Panner's decision in *Adair III*. Part III examines the decision by Judge Panner in *Adair III*, focusing on his determination that the legal standard for quantifying the tribes' water rights includes an implied right to habitat protection. Part IV of the paper then discusses the Ninth Circuit decision in *Adair IV* and concludes that the Ninth Circuit erred in vacating Judge Panner's decision on a number of grounds. Finally, this paper maintains that the legal standard for quantifying tribal reserved water rights announced by Judge Panner should be applied in other cases concerning tribal hunting and fishing rights that are dependant on reserved water rights. This is because Judge Panner properly interpreted and applied the canons of construction to determine that anything less than enough water to support a productive fishery would abrogate the treaty fishing rights, and abrogation is a power only Congress can exercise.

#### PART I: BACKGROUND

While the tribes viewed the right to take fish as vitally important for thousands of years, it was not until the twentieth century that they were forced into the courtroom to protect this central facet of their culture. The key to the tribes' court battles has been the treaty phrases that guarantee them the right to take fish, either expressly or implicitly.<sup>28</sup> The Supreme Court has noted that "contemporaneous documents" demonstrate that the

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24. 384 F. Supp. 312 (the habitat protection right was separated out and litigated in Phase 2 of that case).

25. For an enlightening discussion of the right to habitat protection, see generally Blumm & Swift, *supra* note 6.

26. *Adair IV*, 338 F.3d 971.

27. 44 F.3d 758 (9<sup>th</sup> Cir. 1994).

28. Article I of the Treaty that created the Klamath Reservation reserved to the Indians "the exclusive right of taking fish in the streams and lakes (of the reservation), and gathering edible roots, seeds, and berries within its limits." *Treaty with the Klamath*, 16 Stat. 707 (Oct. 14, 1864).

United States' treaty negotiators "recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries."<sup>29</sup> Despite the tribes' reliance on the treaties,<sup>30</sup> the development of the West frequently led to broken promises and crowding out of the tribes, both socially and economically.<sup>31</sup> In order to understand Judge Panner's *Adair III* decision, it is important to briefly examine the history of the Klamath tribes, and the effects of termination.

### A. A Brief History of the Klamath Tribes

The Klamaths, the Modocs and the Yahooskin comprise the consolidated group of tribes commonly referred to as the Klamath tribes.<sup>32</sup> These tribes occupied their ancestral lands, originally amounting to 22 million acres, in south central Oregon and northern California for fourteen thousand years before the first white person set foot in the territory.<sup>33</sup> The Klamaths believe that their creator provided them with all the riches they would need in the land east of the Cascades. For fourteen thousand years, the tribes' beliefs proved true, as the tribes once harvested tens of thousands of pounds of fish, sustaining them through the long winters.<sup>34</sup> The now endangered suckers, "called 'c'wam' by the Klamath Tribes, play an integral role in the Klamath Tribes' customs and traditions."<sup>35</sup> The c'wam, or sucker, fishery provided the tribes with significant sources of food and income until the declining population numbers forced the fishery to close in 1986.<sup>36</sup> Because of the effects caused by white settlers over almost two centuries of development, tribal members may now catch just one fish, for ceremonial purposes.<sup>37</sup>

The 1864 Treaty of Council Grove ended the reign of the tribes over their once massive land base and changed the tribes forever.<sup>38</sup> In the treaty, the

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29. *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658, 666, 686 (1979) ("*Passenger Fishing Vessel*") (stating further that it would be "inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of the accustomed places to fish").

30. *Passenger Fishing Vessel*, 443 U.S. at 667-68.

31. See generally Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219, 260-65 (1986).

32. The Klamath Tribes, *History*, [www.klamathtribes.org/history.html](http://www.klamathtribes.org/history.html) (accessed December 2, 2003).

33. The Klamath Tribes, *The Case for Tribal Lands Restoration*, [www.klamathtribes.org/tribal-lands-restoration.htm](http://www.klamathtribes.org/tribal-lands-restoration.htm) (accessed December 2, 2003).

34. The Klamath Tribes, *Suckers*, [www.klamathtribes.org/suckers.htm](http://www.klamathtribes.org/suckers.htm) (accessed December 2, 2003).

35. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001) ("*Kandra*").

36. *Id.*

37. The Klamath Tribes, *Suckers*, [www.klamathtribes.org/suckers.htm](http://www.klamathtribes.org/suckers.htm) (accessed December 2, 2003).

38. Holly Doremus & A. Dan Tarlock, *Fish, Farms and the Clash of Cultures in the Klamath Basin*, 30 Ecology L. Q. 279, 296 (2003).

Klamath tribes ceded the rights to their traditional homeland and reserved to themselves a 2.2 million acre parcel for the establishment of a reservation.<sup>39</sup> Because of the important role that hunting and fishing played in the lives of the Klamath,<sup>40</sup> Article I of the Treaty reserved to the tribes the “exclusive right of taking fish in the streams and lakes...and of gathering edible roots, seeds and berries within [the reservation].”<sup>41</sup> In return, Article 2 of the Treaty required the United States to pay “sums of money” to the tribes each year in five-year cycles, with the sum reduced each cycle, and included a one time payment of \$35,000.<sup>42</sup> The treaty assigned to the Indian agent the charge of spending the money for the “use and benefit of [the tribe]...to promote the well-being of the Indians, [and] advance them in civilization.”<sup>43</sup>

In the years after the treaty was implemented, the tribes were forced to endure a variety of trials and tribulations. First, the United States forced the Modoc tribe to occupy the reservation with the Klamaths, causing a brief war between the Modocs and the United States.<sup>44</sup> The insurrection’s leaders were caught and hanged, eventually opening the era of white settlement to the area.<sup>45</sup> To compound the problems, a dispute arose between the Klamath tribes and the United States over the boundaries of the reservation.<sup>46</sup> A boundary commission was eventually formed, and after interviewing a number of Klamaths with knowledge of the tribes’ history, the commission concluded that the United States erroneously excluded 617,000 acres from the reservation, thereby reducing the reservation to two-thirds the size agreed to by the parties to the 1864 Treaty.<sup>47</sup> Largely because the court deemed that the tribes were twice compensated for the error, first in a 1901 agreement with the United States and later in an Indian Claims Commission

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39. The Klamath Tribes, *The Case for Tribal Lands Restoration*, [www.klamathtribes.org/tribal-lands-restoration.htm](http://www.klamathtribes.org/tribal-lands-restoration.htm) (accessed December 2, 2003).

40. See *Klamath & Modoc Tribes and Yahooskin Band of Snake Indians of Klamath Reservation v. Maison*, 139 F. Supp. 634, 636-7 (D. Or. 1956) (describing the variety of animals that the Klamath tribes hunted, including: grizzly bear, brown bear, deer, elk, antelope, beaver, raccoon, badger; as well as the vast array of techniques the tribes used).

41. *Treaty with the Klamath*, 16 Stat. 707. The Ninth Circuit later interpreted the treaty as including the right to hunt and fish. See *Kimball I*, 493 F.2d at 566.

42. *Treaty with the Klamath*, 16 Stat. 707. The treaty required the United States to make annual payments of \$8,000 for the first five years, \$5,000 for the next five years, and \$3,000 for the final five years. *Id.*

43. *Id.* (stating further that the money was to be used primarily for “agriculture, and to secure their moral improvement and education”).

44. Doremus & Tarlock, *supra* note 38, at 296.

45. *Id.*

46. *Oregon DFW*, 473 U.S. at 756-57.

47. *Id.*

action,<sup>48</sup> the Supreme Court, in 1986, concluded that the tribes no longer retained their reserved hunting and fishing rights in the excluded lands.<sup>49</sup>

Despite the destabilization caused by the reservation era, the tribes continued to prosper. They relied heavily on the abundance of fish for food, and established successful cattle and timber industries.<sup>50</sup> The expansive trade network that the Klamath tribes established over the course of their existence allowed the tribes to build a productive freighting enterprise, with more than 20 teams working to supply the needs of Klamath County in 1889.<sup>51</sup> Over 880,000 acres of ponderosa pine on the reservation allowed the tribes to establish a successful sawmill, which supplied timber to the growing Klamath County economy.<sup>52</sup> By 1953, the Klamath tribal enterprises allowed the tribes to nearly reach parity with the majority culture, as tribal incomes were just seven percent lower than comparable white incomes.<sup>53</sup> The Klamath tribes were also the only tribes in the country able to pay their Bureau of Indian Affairs administrative costs, thereby representing very little cost to the American taxpayer.<sup>54</sup>

### *B. Termination of Federal Recognition of the Klamath Tribes*

#### *1. The Klamath Termination Act*

Despite the economic success of the tribes,<sup>55</sup> and possibly because of them, Congress terminated the Klamath tribes in the 1954 Klamath Termination Act,<sup>56</sup> which became effective in 1961.<sup>57</sup> The purpose of the Termination Act was to eliminate federal supervision over the tribes, to dispose of the federal property related to Indian affairs, and to abolish the federal services available to the tribes because of their Indian status.<sup>58</sup> To carry out this policy, the tribal roll was closed, leaving the existing tribal members with the choice of withdrawing from the tribe and receiving a cash payment, or to remain in the tribe, which would become a non-governmental

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48. However, neither of these forms of compensation included the value of lost hunting and fishing rights. In determining the value of the land, the boundary commission only considered the land as used for grazing and timber harvesting. *Id.* at 758.

49. See generally *Id.* at 755-774. The Indian Claims Commission compensated the tribe the second time because of the "unconscionably" low amount paid in 1901. *Id.* The Supreme Court's predicated its conclusion that the rights were lost on the existence of the compensation and the history, language and purpose of the 1901 agreement between the tribe and the United States. *Id.*

50. The Klamath Tribes, *History*, [www.klamathtribes.org/history.html](http://www.klamathtribes.org/history.html) (accessed December 2, 2003).

51. *Id.*

52. The Klamath Tribes, *The Case for Tribal Lands Restoration*, [www.klamathtribes.org/tribal-lands-restoration.htm](http://www.klamathtribes.org/tribal-lands-restoration.htm) (accessed December 2, 2003).

53. *Id.*

54. *Id.*

55. The Klamath Tribes, *Did You Know*, [www.klamathtribes.org/dyk.html](http://www.klamathtribes.org/dyk.html) (last accessed December 2, 2003).

56. 25 U.S.C. § 564.

57. *Kimball v. Callahan*, 590 F.2d. 768, 770 (9<sup>th</sup> Cir. 1979) ("*Kimball II*").

58. *Id.*

entity.<sup>59</sup> The Act provided for appraisal of tribal property, portions of which the government would sell in order to pay for the cash disbursements to the exiting tribal members.<sup>60</sup> The Act, which resulted in the elimination of much of the reservation, and the destruction of the tribes' social, economic and cultural way of life, expressly provided that the Act did not abrogate "any fishing rights or privileges...enjoyed under Federal treaty."<sup>61</sup>

Most of the Klamath Tribe opposed the Termination Act, objecting to the harm it would bring to the Klamath people.<sup>62</sup> The Department of the Interior and the independent Stanford Research Institute also opposed the termination of the Klamaths.<sup>63</sup> However, Congress did not seek a tribal vote, and imposed Termination despite the opposition.<sup>64</sup> The process eventually divested the tribes of their remaining ancestral lands, thereby devastating the tribal economy, based on timber and ranching, activities necessarily tied to the divested land.<sup>65</sup>

## 2. *Kimball v. Callahan: Recognizing the Klamath Tribes' Usufructuary Rights*

Fortunately for the Klamath people, not all was lost in the Termination Act, as the statute expressly left the treaty hunting, fishing and water rights untouched.<sup>66</sup> However, the state of Oregon questioned the significance of the savings provision in the Termination Act, and it was not until 1979, when the Ninth Circuit issued its second opinion in *Kimball*,<sup>67</sup> that the tribes' treaty hunting and fishing rights were judicially recognized.<sup>68</sup> Despite the importance of the *Kimball* decisions for Klamath usufructuary rights, the tribes continue to feel the lingering impacts of termination. In *Kimball I*, the Ninth Circuit ruled that hunting and fishing rights were no longer exclusive.<sup>69</sup> The same court later concluded that the state of Oregon

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59. *Id.*

60. *Id.*

61. 25 U.S.C. § 564m(b). The Act also expressly left unaffected the tribe's water rights. *See* 25 U.S.C. § 564m(a). The Ninth Circuit has interpreted this phrase as including hunting and gathering rights. *See Kimball I*, 493 F.2d at 569-70.

62. The Klamath Tribes, *Termination*, [www.klamathtribes.org/TerminationStatement.html](http://www.klamathtribes.org/TerminationStatement.html) (accessed December 2, 2003). Only a minority of Klamaths supported the Termination Act, and were led by a member that was close to Senator Watkins, the Act's sponsor. All of the Tribes' elected officials opposed the Act and many made the trip to Congress to testify in opposition. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* 25 U.S.C. § 564m(a) & (b). *See also Kimball II*, 590 F.2d. at 777; *Adair II*, 723 F.2d at 1412.

67. *Kimball II*, 590 F.2d 768.

68. *Id.* at 777-78.

69. *Kimball I*, 493 F.2d at 569-70. Article I of the Treaty of 1864 originally secured to the tribes the "exclusive right of taking fish in the streams and lakes...and of gathering roots, seeds and berries within [the reservation]." *Treaty with the Klamath*, 16 Stat. 707. The Ninth Circuit later interpreted the treaty as including the right to hunt and fish. *See Kimball I*, 493 F.2d at 566.

could regulate the treaty hunting and fishing rights in the name of conservation.<sup>70</sup>

Despite the fact that Congress restored the Klamath Tribes in 1986,<sup>71</sup> the tribal income, once almost on par with the majority society, is now among the lowest in the state.<sup>72</sup> On top of their depressed incomes, the Klamath people continue to suffer from the spiritual and cultural loss of their homeland, not to mention the loss of a significant economic base, as Congress failed to restore their former reservation lands, which currently make up much of the Winema National Forest.<sup>73</sup> In light of this inequitable history, the fight that the Klamath tribes have sustained for its federally guaranteed water rights is unsurprising. Concomitantly, the maltreatment that the tribes have suffered at the hands of the dominant society's government should put a thumb on the balance in favor of the tribes when federal courts consider legal issues surrounding the Klamath water rights, especially when the opponent to the rights represents another branch of the dominant society's government, in this case, the state of Oregon.

## PART II: PRELUDE TO THE *ADAIR III* DECISION

### A. *Reserved Water Rights and the Winters Doctrine*

Reserved water rights began with the *Winters* decision, the second major reserved rights case to come from the Supreme Court.<sup>74</sup> The issue in the case was whether the 1888 treaty creating the Fort Belknap reservation of Montana contained a reservation of water rights for the tribes inhabiting the reservation. The court determined that when the United States created the reservation, it sought to change the habits of "a nomadic and uncivilized people," to those of "a pastoral and civilized people."<sup>75</sup> Justice McKenna, writing for the court, held that it would not make sense to construe a treaty with the purpose of creating an agrarian people, as not containing water rights necessary to make the arid land useful and valuable.<sup>76</sup> This was especially true with most Indian tribes considering that prior to the treaty "the Indians had command of all the lands and waters," and that the canons of

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70. See *Kimball II*, 590 F.2d at 778.

71. See Klamath Restoration Act, 25 U.S.C. § 566.

72. Doremus & Tarlock, *supra* note 38, at 297.

73. *Adair I*, 478 F.Supp. at 340.

74. The first reserved rights case was *United States v. Winans*, where the Supreme Court concluded that treaty reserved rights were "not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted." The court held that the reserved fishing rights of the Yakama at their "usual and accustomed places," created an implied right of access to the fishing places. Two important developments resulted from this holding, first the Supreme Court created the canons of treaty construction, which required that Indian treaties be interpreted as the tribe would have understood them; and second, the court characterized these reserved rights as property rights. See generally *Winans*, 198 U.S. 371.

75. *Winters*, 207 U.S. at 576.

76. *Id.*

construction counsel interpretation of treaty provisions in the manner the tribes would have understood them.<sup>77</sup> This case stands for the proposition that when the federal government reserved land for the Indian tribes, it also reserved sufficient water rights to fulfill the purposes of the reservation.<sup>78</sup>

This principle creates the legal basis for the water rights at issue in the *Adair* litigation. In *Winters*, the court concluded that water rights were necessary to fulfill the purpose of the reservation, which was to create a pastoral people.<sup>79</sup> Thus, reserved water rights were impliedly reserved because otherwise the reserved land would be worthless.<sup>80</sup> In *Adair I*, the court considered whether implied rights to water were necessary in order to effectuate the purposes of the Klamath reservation.<sup>81</sup> The court concluded that one of the purposes of the reservation was to maintain the tribes' traditional fishing lifestyle; thus, the tribes reserved sufficient water rights to fulfill that purpose because otherwise the "hunting and fishing rights would be worthless."<sup>82</sup> The *Adair III* court further held that water rights were impliedly reserved at the level necessary to support a productive fishery, because otherwise the tribes' treaty fishing rights would be abrogated, a power that only Congress can exercise.<sup>83</sup>

### B. *Adair I*: Quantification Standard Announced

The *Adair* litigation arose at roughly the same time as Phase 2 of the *United States v. Washington* litigation,<sup>84</sup> and concerned similar issues: the implied treaty right to habitat protection.<sup>85</sup> *Adair I* began in 1975, when the

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77. *Id.*

78. This seems to be at odds with the *Winans* holding that tribes reserved all rights not given away, but *Winans* dealt with reserved rights to continue an old way of life. See *supra* note 74. Because the United States created a new way of life for the Fort Belknap Indians, it reserved the rights in the treaty, not the tribes. The *Winans* doctrine of tribal reserved rights applies where water rights are reserved to protect an old way of life. See *Winans*, 198 U.S. at 380-81.

79. *Winters*, 207 U.S. at 576.

80. Which does comply with the canons of treaty construction. See *Winans*, 198 U.S. at 380-81 (requiring that Indian treaties must be understood as the "unlettered" Indians would have understood them, and as "justice and reason demand, in all cases where power is exerted by the strong over those whom they owe protection").

81. *Adair I*, 478 F. Supp. at 345.

82. *Id.* at 346.

83. *Adair III*, 187 F. Supp. 2d at 1275-76 ("and it has not done so here") (quoting *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9<sup>th</sup> Cir. 1999) *cert. denied* 531 U.S. 812 (2000)).

84. Phase 2 of *US v. Washington* was the continuation of the case heard by Judge Boldt concerning harvest share under the Stevens' Treaties. In Phase 2, Judge Orrick limited the case to the legal issue surrounding whether the treaties contained an implied right to habitat protection. He determined that the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. Thus, he held that the treaty fishing rights have an implied right of habitat protection. *United States v. Washington*, 506 F. Supp. at 202. The Ninth Circuit, sitting en banc, reversed this decision, concluding that the case lacked a concrete set of facts, and the court would be practicing judicial imprudence if it ruled on the issue in the abstract. *United States v. Washington*, 759 F.2d at 1357.

85. However, *Adair I* was decided before the district court decision in *United States v. Washington*, and the Ninth Circuit decision in *Adair II* was decided before the en banc court ruled in *Washington*. For a brief description of *United States v. Washington*, see *infra* n. 171.

United States brought suit in the District Court of Oregon seeking a declaration of water rights in the Williamson River drainage. In 1976, prompted by the United States' initiation of the *Adair* suit, the state of Oregon initiated a comprehensive adjudication of the Klamath Basin, which included the Williamson River. Later that year, both the state and the Klamath tribes intervened in the federal suit.<sup>86</sup> A major impetus for initiating the suit revolved around the lack of water for the wildlife in the Klamath Marsh. The Marsh, and the surrounding rivers and lakes, were one of the main components of the old reservation lands, historically used by the tribes for hunting waterfowl and game, fishing, and gathering of edible plants.<sup>87</sup> Due to irrigation diversions, the Klamath Marsh now receives much less water than it did seventy-five years ago, and is currently only about 10% open water.<sup>88</sup> According to the court, a "50/50 balance" between open water and dry land is necessary in order to encourage the growth of animals and desirable vegetation.<sup>89</sup>

Seeking to obtain water to revive the Marsh ecosystem, the United States and tribes argued that the Klamath treaty reserved water rights to protect the tribes' hunting and fishing lifestyle.<sup>90</sup> Because Congress terminated the Klamath reservation in the 1954 Termination Act, the state claimed that the tribes no longer had a possessory interest in the land, thereby precluding the ownership of water rights that the state argued were appurtenant to the land.<sup>91</sup> Judge Solomon resolved this issue in favor of the tribes by citing to a savings provision of the Termination Act, which expressly left the tribes' water rights untouched.<sup>92</sup> Judge Solomon concluded that this interpretation of the Act was consistent with the Ninth Circuit's rationale in both *Kimball I* and *II*, where the court ruled that the Termination Act did not effect the tribes' hunting and fishing rights.<sup>93</sup> Because any water rights that the tribes had were appurtenant to the tribes' usufructuary rights, not the land, Judge Solomon disposed of the state's argument that termination eliminated water rights.<sup>94</sup>

Judge Solomon acknowledged that water rights exist where they are necessary to effectuate the primary purposes of the reservation.<sup>95</sup> However, he concluded that the primary purpose of the Klamath reservation "was to provide an area for the exclusive occupation of the Indians so that they could

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86. *Adair II*, 723 F.2d at 1399.

87. *Id.* at 339.

88. *Id.*

89. *Id.*

90. *Adair I*, 478 F. Supp. at 341-44.

91. *Id.*

92. *Id.* at 345 (citing Klamath Termination Act, 25 U.S.C. § 564m(a)).

93. *Id.* *Kimball I*, 493 F.2d at 569; *Kimball II*, 590 F.2d at 777 [holding that the Klamaths' hunting and fishing rights survived the Termination Act and that the state could regulate these rights only to support conservation].

94. *Adair I*, 478 F. Supp. at 346.

95. *Id.* at 345.

continue to be self-sufficient.”<sup>96</sup> According to the court, the treaty provided two means for the Indians to be self-sufficient: first, it guaranteed that they could continue their traditional way of life, which consisted of hunting, fishing, trapping and gathering; second, the treaty encouraged the Indians to adopt an agrarian way of life.<sup>97</sup> Because maintaining the tribes’ hunting and fishing lifestyle was a primary purpose of the reservation, the tribes hold reserved rights to effectuate this purpose.<sup>98</sup> These water rights have a priority date of “time immemorial,” and extend to as much water as necessary to protect the tribes’ hunting and fishing rights, even “[i]f the preservation of these rights requires that the Marsh be maintained as wetlands.”<sup>99</sup>

The state argued that the court should not have exercised its jurisdiction in the case because Oregon’s basin-wide adjudication required federal court abstention based on the Supreme Court’s *Colorado River* doctrine.<sup>100</sup> In *Colorado River*, the Supreme Court addressed the conflict between the McCarran Amendment’s goal of comprehensive water rights adjudication and the federal courts “virtually unflagging duty”<sup>101</sup> to exercise jurisdiction given them.<sup>102</sup> The core policy of the McCarran Amendment, according to the Supreme Court, is to avoid piecemeal adjudication of water rights in a river system.<sup>103</sup> Because of this goal, the Court developed a new doctrine of federal court abstention where concurrent jurisdiction between the federal and state courts exists over water rights adjudications. The Court thought this doctrine would promote wise judicial administration in the area of water rights litigation, “giving regard to conservation of judicial resources and comprehensive disposition of litigation.”<sup>104</sup> Thus the *Colorado River* doctrine directed lower federal courts to consider a number of factors in making the determination whether or not abstention is appropriate, and weigh

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96. *Id.*

97. *Id.* (finding further that the treaty provisions protecting the tribal members’ hunting, fishing and gathering rights were more important to the tribes’ than the provisions encouraging agriculture because hunting, fishing and gathering supplied the tribe with food and income, and supported their traditional culture).

98. *Id.* See also *supra* n. 74-80 and accompanying text.

99. *Id.* at 345-46 (stating that “without sufficient water to preserve the fish and wildlife on the reservation lands, Indian hunting and fishing rights would be worthless”). It is important to note that Judge Solomon misconstrued the nature of tribal reserved rights, stating that the federal government withdrew the lands from the public domain to create the reservation and protect the hunting and fishing rights. However, *Winans* made clear that the tribes’ reserved the rights in the treaties because they controlled all aspects of the land before it was ceded to the United States pursuant to the treaty. *Winans*, 198 U.S. at 380-81. Thus, the tribes reserved the land and the rights to themselves, while granting away the rest of their rights and title to the surrounding lands. Nevertheless, the court’s conclusion concerning priority dates and the water rights necessary to effectuate the purposes of the reservation was nonetheless accurate.

100. *Adair II*, 723 F.2d at 1399.

101. *Colorado River*, 424 U.S. at 817.

102. See generally *id.* The court characterized the primary issue in the case as whether the McCarran Amendment eviscerated federal court jurisdiction under 25 U.S.C. § 1345 (suits brought by the United States) in the area of water rights adjudication. *Id.* at 803.

103. *Id.* at 819.

104. *Id.* at 816.

these factors against the obligation to exercise jurisdiction in “a carefully considered judgment.”<sup>105</sup>

In *Adair I*, Judge Solomon concluded that he was not deciding issues that would conflict with the state’s adjudication or create piecemeal litigation because of the limited jurisdiction of the federal court, as the federal court was only going to decide the “broad questions[.]” leaving the state to “undertake the specific allocation of water.”<sup>106</sup> Consequently, instead of abstaining, he limited his ruling to the issues of federal law issues, such as the nature and priority of the federal water rights and the legal standard to be used in quantifying the water right.<sup>107</sup> But, following the guidance of *Colorado River*, he left the application of the standard, and the fact-intensive quantification of the tribes’ reserved water rights to the state.<sup>108</sup> However, the district court retained jurisdiction over issues relating to construction, effectuation, modification or enforcement of the standard that might arise.<sup>109</sup>

### C. *Adair II*: Incorporating the Supreme Court’s Moderate Living Standard

#### 1. The Colorado River Abstention Doctrine

In *Arizona v. San Carlos Apache Tribe of Arizona*,<sup>110</sup> a case decided while the *Adair* case was pending appeal, the Supreme Court refined and clarified the *Colorado River* doctrine. In *San Carlos Apache*, the Court stated that while federal court adjudication of the water rights may be practical and wise in the abstract, federal courts should not exercise jurisdiction in suits concerning water rights adjudication where doing so would create the “possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decision making, and confusion over the disposition of property rights.”<sup>111</sup> Avoiding tension between state and federal courts serves as the focal point for much of the

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105. *Id.* at 819. The court cited five factors weighing against the exercise of federal court jurisdiction: (1) the strong Congressional policy to avoid piecemeal litigation, (2) the posture of the federal suit, (3) the extent of involvement of state water rights, (4) the inconvenience of the federal forum, and (5) whether the United States is otherwise involved in state water proceedings. *Id.*

106. *See Adair II*, 723 F.2d at 1404.

107. *Id.*

108. *Colorado River*, 424 U.S. at 816.

109. *Adair III*, 187 F. Supp. 2d at 1274. This authority derives from the nature of declaratory judgments, which allow for supplemental relief. *See infra* n. 197.

110. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) (“*San Carlos Apache*”). The question before the Supreme Court in *San Carlos Apache* was whether federal courts must abstain in favor of state adjudications where the federal suits are brought by Indian tribes. The tribes argued that, unlike *Colorado*, the states at issue in this case (Arizona and Montana) had disclaimed jurisdictional authority over Indian property. The Supreme Court held that considerations of wise judicial administration found in *Colorado River* apply to this case; and further that the McCarran Amendment removed any limitations on state court jurisdiction of Indian water rights because to rule otherwise would eviscerate the Amendment’s objective due to “the ubiquitous nature of Indian water rights in the Southwest.” *Id.* at 563-67.

111. *Id.* at 569.

*Colorado River* abstention jurisprudence. However, the Court did discuss a number of scenarios where the dismissal of the federal suit in this situation may not be warranted.<sup>112</sup> The most important of these considerations in the *Adair* case was that by the time the state filed its motion to dismiss, the federal suit was "well enough along that its dismissal would itself constitute a waste of judicial resources."<sup>113</sup> However, the most heavily weighted element of *Colorado River* abstention continues to be the underlying McCarran Amendment policy of avoiding piecemeal adjudication of water rights.<sup>114</sup>

The United States and the tribes initially tried to avoid the abstention doctrine entirely, seizing on the argument they would later use in *United States v. Oregon*.<sup>115</sup> that the McCarran Amendment, which waives the United States' sovereign immunity,<sup>116</sup> does not apply because the Oregon adjudication was an administrative proceeding, not a "suit," within the meaning of the McCarran Amendment.<sup>117</sup> This argument raised an important policy consideration given the Supreme Court's declaration that the McCarran Amendment seeks to promote wise judicial administration and conservation of judicial resources.<sup>118</sup> Inclusion of administrative proceedings within the scope of *Colorado River* abstention could actually create more litigation by requiring the parties to litigate through the entire administrative process, then the state courts and the United States Supreme Court, rather than settling the federal law issue relatively quickly in federal court. Further, if any of the subsequent reviewing courts invalidate the legal findings of the Water Resources Department, then the Department would have to rework part of the almost thirty year process to fix the errors.

The possibility of having to revise the water allocations because of the flawed legal conclusions of an administrative body unschooled in the application of federal law defeats the goal of certainty and finality of water rights that a basin-wide adjudication theoretically promotes. Thus, while the *Colorado River* doctrine avoids piecemeal adjudication of water rights on the one hand—by limiting federal court involvement—there is, on the other hand, a resulting loss in certainty and finality in the administrative decision if later reviewing courts determine the legal conclusions of the administrative body are incorrect.

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112. *Id.* (the three situations are: (1) where the state agrees to stay its disposition of the issue pending federal disposition of the action, (2) where at the time the motion to dismiss is filed, the federal suit is well enough along that its dismissal would itself constitute a waste of judicial resources, (3) where arguments for and against deference are closely matched, the fact that a federal suit was brought by Indians on their own behalf for the disposition of only Indian rights should be figured into the balance).

113. *Id.*

114. *Id.*

115. See *infra* nn. 130-43 and accompanying text.

116. By stating that "consent is given to join the United States as a defendant in any suit." 43 U.S.C. § 666.

117. *Adair II*, 723 F.2d at 1405.

118. See *Colorado River*, 424 U.S. at 816.

Nonetheless, the Ninth Circuit rejected this argument, citing Supreme Court precedent for the principle of avoiding an “overly technical application of the McCarran Amendment.”<sup>119</sup> The court assumed, without deciding, that the Oregon water rights adjudication was not too informal to qualify as a “suit” within the meaning of the language of the McCarran Amendment, or as a comprehensive state adjudication within the meaning of *Colorado River* and *San Carlos Apache*.<sup>120</sup>

## 2. *The Ninth Circuit’s Resolution of the Colorado River Abstention*

Although the Ninth Circuit rejected the United States’ and tribal arguments that the McCarran Amendment did not apply, the court concluded that the district court did not err in deciding the case because the *Adair I* decision properly coordinated federal and state resolution of the water rights in order to avoid tension between the forums. The district court accomplished this by limiting its jurisdiction to “the legal principles governing the extent of and priority among water rights arising under federal law...[leaving the] quantification and administration of [those] rights” to the state.<sup>121</sup> The Ninth Circuit cited the limited nature of the district court decision and the posture of the case, which counseled in favor of federal court resolution of the *Adair I* issues because the state adjudication was at a very earlier stage in the proceeding, while the federal proceeding was already complete.<sup>122</sup> Further, the district court avoided the tension between the federal and state forums by only deciding federal law issues and avoiding state law matters, thereby allowing each forum to consider questions within their expertise.<sup>123</sup>

## 3. *Extending the Moderate Living Standard to Reserved Water Rights*

On the merits of the case the Ninth Circuit largely affirmed the district court’s decision, making only a small modification to the quantification

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119. *Adair II*, 723 F.2d at 1405 (citing *United States v. District Court for Eagle County*, 401 U.S. 520, 525 (1971)).

120. *Id.* The Ninth Circuit later determined that the Oregon adjudication procedures satisfied the requirements of a “suit” under the McCarran Amendment because the administrative findings were reviewable by Oregon courts and the intent of Congress was to encompass the water adjudication procedures that existed at the time the Amendment was passed. See *United States v. Oregon*, 44 F.3d 758, 765-67 (9<sup>th</sup> Cir. 1994). See *infra* nn. 130-143 and accompanying text.

121. *Id.* at 1404.

122. *Id.* at 1404-07.

123. *Id.* In making this determination the court relied heavily on the three situations that would allow the exercise of federal court jurisdiction in the face of a concurrent state proceeding as stated by the Supreme Court in *San Carlos Apache*. See *supra* n. 118. The court concluded that the state proceeding had, in effect, been stayed; because in the seven years since the state initiated the proceedings, it had not progressed past the investigation stage. The court concluded that the policies of the McCarran Amendment would not be served by dismissing the case because the Oregon adjudication was in a nascent state, and the federal suit was “well enough along [so] that its dismissal would itself constitute a waste of judicial resources.”

standard. The court affirmed the district court holding that the Klamath reservation was created to fulfill the dual purposes of creating an agricultural society and maintaining the traditional ways of life.<sup>124</sup> However, the court qualified Judge Solomon's determination that the reserved water rights entitled the tribes to enough water to protect the tribes' hunting and fishing rights, stating that the treaty entitled the tribes to only "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 were exercised by the Tribe in 1864."<sup>125</sup> The Ninth Circuit clarified this "livelihood standard," by quoting the Supreme Court, which held that the tribes' water rights "secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."<sup>126</sup> The court thought that this qualification avoided the "comprehensive environmental servitude" that concerned the Ninth Circuit panel in *United States v. Washington*.<sup>127</sup>

D. *United States v. Oregon: Questioning the Nature of Oregon's Adjudication Procedure*

1. *Arguing against the McCarran Amendment's Application to the Oregon Proceeding*

The state of Oregon initiated the Klamath Basin Adjudication in 1975, by issuing notices of intent to adjudicate to potential claimants.<sup>128</sup> Oregon's notice of intent to adjudicate came only months after the United States filed suit in federal court to determine water rights in the Williamson River drainage,<sup>129</sup> thereby raising the *Colorado River* abstention problems.<sup>130</sup> The Klamath tribes' reserved rights were among the rights at issue in the United States' suit. Despite the 1975 notice to over 25,000 potential claimants, the state took virtually no action to initiate the proceedings.<sup>131</sup> Consequently,

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124. *Id.* at 1409.

125. *Id.* at 1414-15 (emphasis added). The Ninth Circuit drew this qualification from the Supreme Court's final disposition of Phase I of *United States v. Washington*, in *Passenger Fishing Vessel*. The Supreme Court was persuaded to hear the case after the Supreme Court of Washington issued an opinion declaring that the State lacked the authority to implement the Boldt decision. Justice Stevens, writing for the court, largely affirmed Judge Boldt's fifty percent apportionment of the fish runs; but held that the apportionment could be adjusted downward if a challenging party could show that the full amount was not needed to provide the Indians with a moderate living. See *Passenger Fishing Vessel*, 443 U.S. at 686.

126. *Adair II*, 723 F.2d at 1415 (citing *Passenger Fishing Vessel*, 443 U.S. at 686).

127. *United States v. Washington*, 694 F.2d at 1381. See *supra* n. 84.

128. *United States v. Oregon*, 44 F.3d at 762-65. Oregon instituted its present system for adjudicating water rights in 1909. That system required that all post-1909 water rights would obtained through a permit system; leaving pre-1909 rights as undetermined vested rights. Only the pre-1909 vested rights would be required to participate in future adjudication proceedings to quantify the undetermined rights.

129. *Adair II*, 723 F.2d at 1399.

130. See *supra* nn. 107-114 and accompanying text.

131. *Adair II*, 723 F.2d at 1406.

the state had to reissue notices of intent adjudicate to potential claimants in 1990, some 15 years after the original notices went out.<sup>132</sup> The second round of notices prompted the United States to file suit in federal district court to challenge Oregon's adjudication procedure; shortly thereafter, the Klamath tribes intervened.<sup>133</sup>

The United States argued that the McCarran Amendment's waiver of the United States' sovereign immunity was not applicable to the Oregon adjudication procedure because the adjudication was not a "suit," and because it was not comprehensive.<sup>134</sup> The first argument seizes on the nature of the Oregon adjudication, where an administrative body, the Water Resources Department, handles the adjudication. Because of the role the Water Resources Department plays in the adjudication, the United States argued that Oregon's water rights adjudication "does not constitute a 'suit' but rather an 'administrative proceeding' outside the plain language of the McCarran Amendment."<sup>135</sup> Thus, the argument went, the McCarran Amendment's waiver of the United States' sovereign immunity did not apply to the Oregon adjudication.<sup>136</sup> The Ninth Circuit disagreed, concluding that Congress clearly intended to encompass a broad range of comprehensive adjudication procedures in enacting the McCarran Amendment because administrative agencies are "at the core of most 'comprehensive state systems for adjudication of water rights' contemplated by the McCarran Amendment."<sup>137</sup>

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132. *United States v. Oregon*, 44 F.3d at 762.

133. *Id.*

134. The Ninth Circuit, in *United States v. Oregon*, described the Oregon adjudication procedure as requiring those with undetermined claims to "appear and submit proof of their claims before" the Water Resources Department. The Department then

"accepts claims and objections to claims, surveys the river system, takes evidence and holds hearings regarding contested claims. [Or. Rev. Stat.] at §§ 539.070, 539.100, 539.110, 539.120. After these hearings, the OWRD makes findings of fact and an order determining the parties' water rights. *Id.* at § 539.130. This order is effective upon issuance unless a party wishes to contest the order and files a bond. *Id.* at § 539.130(4). After the order is filed, a judicial hearing is scheduled and notice of that hearing is given to the participants. *Id.* at § 539.130. Parties objecting to the department's order must file written exceptions with the court in order to preserve their objections. *Id.* at § 539.150. If no objections are filed, the court must enter a judgment affirming the order. *Id.* at § 539.150(3). Otherwise, a hearing is held at which contesting parties may offer evidence as in a normal civil case. *Id.* at §§ 539.150(1), 539.150(3). The court may remand the case to the OWRD or other referee for further findings, followed by another judicial hearing. *Id.* at § 539.150(3). At the final judicial hearing, the court reviews the exceptions and then enters a judgment affirming or modifying the order as it considers proper. *Id.* at § 539.150(4). This judgment is appealable to the Oregon Court of Appeals in the same manner as any other civil judgment." *Id.*

*United States v. Oregon*, 44 F.3d at 764.

135. *Id.* at 765.

136. *Id.*

137. *Id.* at 766 (stating further that "at the time the McCarran Amendment was passed, Oregon's adjudicatory scheme was firmly established...and had been duplicated in Arizona, California and Nevada (the home of Senator McCarran, author of the amendment)"). In support of its position that the McCarran Amendment's waiver of sovereign immunity did not apply to the Oregon adjudication, the United States argued that waivers of sovereign immunity must be "unequivocally expressed" in the statutory language; relying on the Supreme Court's holding in *United States v. Idaho*, 508 U.S. at 6. The

The United States' based its second argument against application of the McCarran Amendment's waiver of sovereign immunity on the adjudication's less-than-comprehensive nature.<sup>138</sup> This argument pointed out that not all water users in the basin were a party to the adjudication, since post-1909 permit holders were not included, and the adjudication did not involve all the water rights in the basin, as groundwater rights were not included.<sup>139</sup> The Ninth Circuit ruled that the adjudication did not have to include "settled determinations," concluding instead that the adjudication need only consist of "existing controversies."<sup>140</sup> The court similarly disposed of the groundwater claim, holding that the "greater legal recognition of the connection between ground and surface waters" was too recent to infer that Congress intended to include all "hydrologically connected" water rights in comprehensive stream adjudications under the McCarran Amendment.<sup>141</sup>

## 2. *The Klamath Tribes' Due Process Claim*

The Klamaths' due process claim rested on the Fourteenth Amendment, which guarantees a "fair trial before a fair tribunal."<sup>142</sup> The tribes argued that because the state opposed Klamath treaty rights in the past—citing the Oregon Department of Justice's vigorous argument against tribal reserved rights in *Adair I* and *II*—the tribes would not receive a "fair trial" before an Oregon administrative body. To prevail in this claim, the tribes needed to "show an unacceptable probability of actual bias on the part of those...who have power over their claims."<sup>143</sup> But the Ninth Circuit held the connection between the Department of Justice and the Water Resources Department was too tenuous to provide an "unacceptable probability of bias," because the tribes failed to show that the Oregon Department of Justice would have any significant role to play in the adjudication.<sup>144</sup> The court's holding turned on the Water Department's autonomous role in quantification of the water rights, and the possible review of its final decision by Oregon state court judges.<sup>145</sup> However, the Water Resources Department wholly adopted the position taken by the Oregon Department of Justice on the meaning of

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United States argued that the McCarran Amendment waived immunity for "suits," but not for administrative proceedings. *United States v. Oregon*, 44 F.3d at 765-66. The Ninth Circuit rejected this argument, stating that the McCarran Amendment expressly waived immunity, and concluding otherwise would ignore the intended scope of the McCarran Amendment, which was meant to encompass "comprehensive water rights adjudications." *Id.* (citing *United States v. Idaho*, 508 U.S. at 6).

138. *Id.* at 767-70.

139. *Id.*

140. *United States v. Oregon*, 44 F.3d at 768.

141. *Id.*

142. *Id.* at 771.

143. *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

144. *Id.* (stating further that "the legal issues with respect to the tribe's rights have already been decided by this court and we must presume that they will be followed by [the Water Resources Department] and the state courts").

145. *Id.*

*Adair I* and *II*.<sup>146</sup> Thus, the *United States v. Oregon* court may have overstated the independence of the Water Department, and its reliance on this assumption may have been misplaced.

PART III: CLARIFYING THE QUANTIFICATION STANDARD: JUDGE PANNER'S  
*ADAIR III* DECISION

Despite the quantification standard announced by the *Adair I* and *Adair II* courts, which recognized the tribes' reserved water rights as necessary to protect their hunting and fishing right at a level that would provide a moderate living, the state water resources department, aided by the Oregon Department of Justice, issued a preliminary standard for quantification of the rights that was at odds with the *Adair I* and *II* decisions. The preliminary standard stated that the tribes claimed water rights are "proper if the record shows that the claimed amount is the minimum quantity of water necessary to protect treaty fish and wildlife resources as they existed in 1979."<sup>147</sup> The Department of Justice and the Water Department extrapolated this standard from the "as currently exercised" language of *Adair II*.<sup>148</sup> The problem with this standard is that it severely limits tribal water rights because the tribes' fish resources were almost non-existent in 1979.<sup>149</sup> The state's quantification standard is an extremely narrow reading of the *Adair II* holding, and entirely overlooks the Ninth Circuit's moderate living standard, as well as Supreme Court precedent prohibiting anyone but Congress from abrogating tribal treaty rights.<sup>150</sup> In response to the announcement of this standard, the United States and the tribes petitioned the district court to exercise its retained jurisdiction over the case in order to clarify the standard announced in *Adair I* and *II*.<sup>151</sup>

A. *The Limited Scope of Jurisdiction*

Judge Panner's exercise of jurisdiction in *Adair III* was similar to that exercised by Judge Solomon in *Adair I*. The central holding of *Adair I* was to announce the quantification standard that Oregon would apply in the comprehensive water rights proceeding.<sup>152</sup> Judge Solomon characterized the tribes' water right as including as much water as necessary to fulfill the

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146. *Adair IV*, 338 F.3d at 973.

147. *Id.*

148. *Adair II*, 723 F.2d at 1405 (stating that the treaty entitled the tribes to only "the amount of water necessary to support hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights were exercised by the Tribe in 1864").

149. See *Kandra*, 145 F. Supp.2d at 1197, 1201 (stating that the fish harvest is severely reduced or "in the case of the suckers, non-existent").

150. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903). See also *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968).

151. *Adair III*, 187 F. Supp.2d at 1274-75.

152. *Adair I*, 478 F. Supp. at 345. For a brief summary of Judge Solomon's five holdings in the decision, see *Adair II*, 723 F.2d at 1399.

purposes of the reservation: to both maintain the traditional hunting and fishing rights, and encourage agriculture.<sup>153</sup> Therefore, Judge Solomon limited his jurisdiction to the federal law issues of the nature and priority of the reserved rights at issue in the case, and leaving the determination of the scope of those rights up to Oregon's basin-wide adjudication.<sup>154</sup> This bifurcation allowed each forum to determine the issues within its expertise, thereby satisfying the *Colorado River* doctrine's requirement of "wise judicial administration."<sup>155</sup>

Exercising the court's retained jurisdiction,<sup>156</sup> Judge Panter similarly limited his scope to the consideration of the federal law issues of whether the tribes had a water right to support reserved gathering rights, and "whether and to what extent the 'moderate living' standard applies in quantifying the tribes' water rights." Both of these issues were consistent with the *Adair I* and *II* holdings, but because of the dispute between the parties over the interpretation of those decisions, Judge Panter clarified the earlier decisions.<sup>157</sup> Judge Solomon anticipated such a problem and provided a means for its resolution, retaining jurisdiction in the district court "as may be necessary or appropriate for the construction and effectuation of this judgment."<sup>158</sup> The clarification that Judge Panter supplied in *Adair III* thus falls within the "construction and effectuation" that Judge Solomon envisioned as potentially necessary.

### B. The Gathering Right Reasserted

Because the state concluded that *Adair I* and *II* did not authorize water rights to protect gathering rights, the United States and the tribes also sought a declaration that the earlier court decisions included the protection of gathering rights, along with hunting and fishing rights. They argued that the treaty reserved to the tribes "the exclusive right of...gathering edible roots, seeds, and berries [within the reservation boundaries]."<sup>159</sup> The United States and the tribes also maintained that the declaratory judgment issued by the *Adair I* court repeatedly referred to the trapping and gathering rights.<sup>160</sup> The state's argument centered on somewhat inconsistent statements in the *Adair I* and *II* decisions concerning the nature and scope of the reserved rights.<sup>161</sup> In both cases, the courts definitively stated that the tribes

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153. *Id.*

154. *Id.*

155. *Adair II*, 723 F.2d at 1406-07.

156. *Adair III*, 187 F. Supp.2d at 1274-75.

157. *Id.*

158. *Id.* See *supra* n. 15.

159. *Treaty with the Klamath*, 16 Stat. 707 (reserving to the Indians "the exclusive right of taking fish in the streams and lakes...and gathering edible roots, seeds, and berries.").

160. *Adair III*, 187 F. Supp.2d at 1275.

161. Oregon Water Resources Department, *Attorney General advice relating to Bureau of Indian Affairs and Klamath Tribes' claims*, <[http://www.wrd.state.or.us/publication/pdfs/kba\\_v-vi\\_adv.pdf](http://www.wrd.state.or.us/publication/pdfs/kba_v-vi_adv.pdf)> (last accessed December 3, 2003). The inconsistent statements come from the lack of uniformity the

have reserved water rights to hunt and fish, but only sporadically included that the treaty also guaranteed reserved rights to gather, thereby creating confusion.<sup>162</sup> However, Judge Panner had little trouble determining that the tribes have reserved rights for gathering.

The state's arguments on this point represented a restrictive view of the *Adair I* and *II* decisions, the treaty language, and Supreme Court precedent concerning reserved rights. Article I of the Treaty clearly recognized the tribes' gathering rights.<sup>163</sup> The state's argument that the treaty adequately reserved hunting and fishing rights, but not gathering rights, failed to grasp the principles laid down in *Winans*, that treaties made with Indian tribes are to be interpreted as the tribe would have understood it at the time they signed the treaty.<sup>164</sup> This argument also overlooks the *Adair I* and *II* court's framing of the issue as whether the tribes had hunting, fishing and gathering rights,<sup>165</sup> as well as the *Adair I* court's repeated reference to the tribes' gathering rights.<sup>166</sup> Based on these factors, Judge Panner rightly held that the sporadic exclusion of "gathering rights," from *Adair I* and *II* resulted from an oversight, not a desire to exclude the gathering rights.

### C. Establishing A Right to a Productive Habitat

The primary dispute in *Adair III* revolved around applying the "moderate living" doctrine announced in *Adair II*.<sup>167</sup> Judge Panner concluded that "any argument that would have the practical effect of quantifying the Tribes' reserved rights at a level that would not support productive habitat is rejected."<sup>168</sup> Drawing on foundational aspects of federal Indian law, Judge Panner based his determination on the fact that this would "result in abrogating the Tribes' treaty rights...[and] 'only Congress can abrogate Indian

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courts used when discussing the reserved rights, as the courts interchangeably used the phrases "hunting, fishing and gathering rights," and "hunting and fishing rights," when referring to the reserved rights.

162. *Adair I*, 478 F. Supp. at 345 (stating that "the Indians are still entitled to as much water ...as they need to protect their hunting and fishing rights"). *But cf. Id.* (describing the purposes of the reservation, "[the treaty] ensured that the Indians could continue their traditional way of life which included hunting, fishing, trapping, and gathering...The treaty granted the Indians an implied right to as much water was necessary to fulfill these purposes").

163. See *supra* note 158 and accompanying text.

164. See *Winans*, 198 U.S. at 380-81 (requiring that Indian treaties must be understood as the "unlettered" Indians would have understood them, and as "justice and reason demand, in all cases where power is exerted by the strong over those whom they owe protection").

165. See *Adair I*, 478 F. Supp. at 345 (stating at the beginning of its discussion of the Indians' rights, that "the Indians have hunted, fished and gathered food on the reservation since time immemorial," and that the "Treaty of 1864 secured for the Indians the exclusive right to fish and gather."); and *Adair II*, 723 F.2d at 1408 (framing the issue in the subject heading of Part III, A, as "A Reservation of Water to Accompany the Tribe's Right to Hunt, Fish and Gather"). This argument also overlooks the Ninth Circuit's incorporation of the *Kimball* holdings into its decision; concluding that to deny reserved water for the "rights recognized in *Kimball I* and *II*...would effectively nullify the substance of those decisions." *Adair II*, 723 F.2d at 1412 (emphasis added).

166. See *Adair I*, 478 F. Supp. 336.

167. *Adair III*, 187 F. Supp.2d at 1275.

168. *Id.* at 1275-76.

treaty rights'... 'and it has not done so here.'"<sup>169</sup> Judge Panner concluded that the only meaningful way to fulfill the purposes of the reservation was for the state to quantify "the reserved water right so that productive habitat can be supported."<sup>170</sup> The court likely drew this conclusion from the district court's decision in Phase 2 of *United States v. Washington*,<sup>171</sup> however, *Adair III* differs from that case in that the United States and the Klamath tribes brought a suit with a concrete set of facts to which the habitat protection standard could be applied with certainty.<sup>172</sup> As a result, the judicial prudence argument that prevailed before in Phase 2 of *United States v. Washington*<sup>173</sup> should not apply to this case.

#### D. Clarifying The Quantification Standard

Although *Adair III*'s recognition of the treaty right to habitat protection may have arguably been the most important aspect of the decision, the clarification of the quantification standard, providing that the tribes were entitled to enough water to protect their hunting, fishing and gathering rights, as announced by the *Adair I* and *II* courts,<sup>174</sup> represents the core of the decision. Judge Panner determined that the *Adair I* and *II* courts created a two-step process to quantify the tribes' reserved water rights.<sup>175</sup> The first step of the process "does not involve an analysis of any actual beneficial use... or actual harvest... on a fixed day in history;"<sup>176</sup> instead, it determines how much water the tribes need in order to supply tribal members with a moderate livelihood from their hunting, fishing and gathering rights.<sup>177</sup> This is essentially the standard used to quantify the tribes' water rights. The quantification of the tribes' water rights must focus on fulfilling

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169. *Id.* (quoting *United States v. Dion*, 476 U.S. at 738; and *Klamath Water Users Protection Ass'n v. Patterson*, 204 F.3d at 1213).

170. *Adair III*, 187 F. Supp.2d at 1276 (finding that the purposes of the reservation include protecting the hunting and fishing rights as well as supporting agriculture).

171. In *United States v. Washington*, Judge Orrick concluded that the Stevens' treaties of the Pacific Northwest entitled the tribes to more than the opportunity to dip their nets into the waters and bring them out empty. His conclusion was based largely on treaty construction, concluding that the treaty negotiators assured the tribes that they would be able to continue their traditional way of life notwithstanding the impending westward expansion. Relying on the canons of construction, Judge Orrick held that the tribes have an implied right to productive habitat to effectuate the treaty fishing right and provide the tribes with a moderate living. See generally *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980) (Phase 2).

172. The Ninth Circuit vacated Judge Orrick's decision as violative of judicial prudence because the case did not contain a concrete set of facts to apply the habitat protection standard to. See *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc).

173. See *United States v. Washington*, 759 F.2d at 1357.

174. *Adair I*, 478 F. Supp. 336, *Adair II*, 723 F.2d 1394.

175. *Adair III*, 187 F. Supp.2d at 1276.

176. *Id.*

177. *Id.* (citing *Adair I*, 478 F. Supp. at 345-46) (stating that "[t]he Indians are still entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights. If the preservation of these rights requires that the Marsh be maintained as wetlands and that the forest be maintained on a sustained yield basis, then the Indians are entitled to whatever water is necessary to achieve those results").

the purposes of the reservation,<sup>178</sup> which was: to support Klamath agriculture and maintain the tribes' traditional way of life by supplying a fishery that supports the moderate living needs of tribal members.<sup>179</sup>

In *Adair II*, the Ninth Circuit modified the quantification standard, creating a second step in the allocation process derived from the Supreme Court's moderate living standard announced in *Passenger Fishing Vessel*.<sup>180</sup> The moderate living standard requires that the tribes receive only the amount of water that is necessary to provide the members with a moderate living.<sup>181</sup> Thus, tribes are not entitled to the amount of water that supported hunting, fishing and gathering at the time of the treaty, unless no lesser amount would supply the tribes with a moderate living.<sup>182</sup> In adopting this standard, the Ninth Circuit rejected Oregon's argument that the water rights will impose a "comprehensive wilderness servitude," a concern that led the Ninth Circuit to its avoidance of the habitat protection standard in *United States v. Washington*, Phase 2.<sup>183</sup> However, Judge Panner concluded that courts should not apply the moderate living standard until the adjudicator first quantifies the tribes' full water rights.<sup>184</sup> Finally, the burden of showing that the water rights allocated to the tribes' is excessive, in terms of the amount of water necessary to supply a moderate living, is on the party opposing the tribal rights.<sup>185</sup>

As applied to treaty harvest share in *Passenger Fishing Vessel*, the Supreme Court's moderate living standard serves as a reasonable method for dealing with the change in circumstances that occurred since the treaties were signed in 1855, while keeping the value of the rights largely intact. The moderate living standard recognizes that the treaty tribes are still entitled to a significant portion of the fish runs.<sup>186</sup> However, as applied to reserved water rights to protect fish and wildlife, the moderate living standard

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178. Because the Klamath reservation was terminated, the remaining reserved water rights for agriculture are for allottee and *Walton* rights.

179. *Id.* (citing and quoting *Adair II*, 723 F.2d at 1409). Consistent with the *Winters* doctrine, the Klamath tribes' would not have ceded away all their lands without reserving to the water that made the lands valuable and allowed them to survive on the smaller tract. *Winters*, 207 U.S. at 576. Therefore, following *Winters*, the *Adair III* court held that the appropriate quantification standard for the Oregon adjudication is one that allocates enough water to the tribes' to maintain a fishery that supplies tribal members with a moderate livelihood.

180. *See Adair II*, 723 F.2d at 1415. While initially quantified in the first step, the scope of the tribes' reserved water rights is not finally quantified until the Water Department applies the moderate living standard. In applying the moderate living standard, the Water Department adjusts the initial allocation of water to reflect the level required to meet the current tribal moderate living need.

181. *Adair II*, 723 F.2d at 1414.

182. *Id.*

183. *See United States v. Washington*, 694 F.2d at 1381 (9th Cir. 1983).

184. *Adair III*, 187 F. Supp.2d at 1246 (stating that "the initial quantification of water rights is a separate analysis from the 'moderate living' standard. The adjudicator is called upon to first quantify the Tribes' water rights to establish an allocation of water to fulfill the purpose of the reservation. Only after the quantification stage can the 'moderate living' doctrine be considered to possibly adjust the quantification").

185. *Id.* at 1277-78.

186. *Passanger Fishing Vessel*, 443 U.S. 658.

must be carefully applied so as to avoid abrogating the tribes' rights. Judge Panner was quick to note that the fishing rights at issue in *Passenger Fishing Vessel* "could be reduced without completely frustrating the purpose of the reservation."<sup>187</sup> He then concluded that the Klamath tribes' water rights for habitat do not lend themselves to such a reduction because "ultimately the water level cannot be reduced to a level below which is required to support productive habitat," regardless of the number of members the tribes maintain.<sup>188</sup> In so holding, Judge Panner avoided abrogating the tribes' treaty rights by narrowing the scope of the moderate living standard. Instead of applying to the whole water allocation, the Water Department would only apply the moderate living standard to the amount of water allocated to fulfill the purpose of the reservation that is beyond the level needed to support a productive habitat.

#### PART IV: CLOSING THE FEDERAL COURTHOUSE DOORS TO THE KLAMATH: *ADAIR IV*'S RIPENESS HOLDING

Following Judge Panner's decision, the state of Oregon and several water users appealed the case to the Ninth Circuit. The state and the individuals argued that the case was not ripe and claimed that the district court should have dismissed the case, on the basis of the Supreme Court's *Colorado River* abstention doctrine.<sup>189</sup> Writing for the Ninth Circuit, Judge Tallman agreed with Oregon's argument that the case was not ripe because the quantification standard issued by the Water Department needed further factual development before the court could deem it a final action.<sup>190</sup> The court concluded that because the standard could be modified at two different levels, in the Water Department's administrative hearings and in its final administrative findings, it was not a final decision and was not ripe for review.<sup>191</sup> By basing the decision on ripeness grounds, the Ninth Circuit avoided ruling on the merits of the habitat protection standard announced by Judge Panner.<sup>192</sup>

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187. *Adair III*, 187 F. Supp.2d at 1277.

188. *Id.* While the level of water needed to support a productive habitat is not self-evident, once biologists determine the proper level, the tribes' and the Water Department would have a fixed, easy to apply standard.

189. *Adair IV*, 338 F.3d at 974.

190. *Id.* at 975-76.

191. *Id.*

192. This is not the first time that the Ninth Circuit used procedural grounds to vacate a decision finding a treaty implied habitat protection right. In Phase 2 of *United States v. Washington*, the district court held that the Stevens' Treaties of the Pacific Northwest created an implied right to habitat protection, because "the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." On appeal, an en banc Ninth Circuit concluded that it would be judicially imprudent to announce this right without a concrete set of facts to base the decision on; stating, "the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute." *United States v. Washington*, 506 F.Supp. at 203; *United States v. Washington*, 758 F.2d at 1357.

More importantly, the federal courthouse doors were essentially closed to the Klamath concerning their water rights until the state completes the snail-like Klamath Basin adjudication. This is because all standards, findings and conclusions made by the agency and the state courts are subject to review by some higher authority.<sup>193</sup> Before that higher authority has ruled, the decision is not final, in the eyes of the Ninth Circuit, and thus not ripe for review in federal court.

### *A. Ducking the Habitat Issue Again*

#### *1. The Nature of the Klamath Basin Adjudication*

The Ninth Circuit's ripeness holding was a product of the nature of the Oregon water rights adjudication procedure. After the United States and the Klamath tribes filed their claims in the adjudication, the Water Department solicited advice from the Oregon Department of Justice,<sup>194</sup> which concluded that the tribes were entitled only to "the minimum amount of water necessary to support the tribes' fishing and hunting rights as they were exercised contemporaneously with the *Adair* decision."<sup>195</sup> The Water Department adopted this interpretation in a "Summary and Preliminary Evaluation" of water rights, which contained the preliminary standard to be applied in the quantification of the Klamath tribes' water rights.<sup>196</sup> The next step in the adjudication was the filing of contests against the claims for water made by parties to the adjudication.<sup>197</sup> An administrative panel will then hear the cases and issue proposed orders, which the Water Department will review.

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193. *Adair IV*, 338 F.3d at 974.

194. Cf. *United States v. Oregon*, 44 F.3d at 764 (where the court emphasized the separateness of the two agencies and assured the Klamath tribes that the Water Department would not be unduly influenced by the Oregon Department of Justice bias against tribal treaty rights).

195. *Id.* The Oregon Department of Justice (ORDOJ) reached this conclusion after considering the *Adair* decisions and concluding that they were open to interpretation on both the scope of the right and what time period serves as the basis for determining the level of fishing that the standard must protect. The ORDOJ decided that the *Adair II* court sought to place limits "on a right that might otherwise actually create a 'wilderness servitude' on the former reservation" by stating that the tribes were entitled to the minimum amount of water necessary "to support their hunting and fishing rights *as currently exercised*." While acknowledging the "force" of the Bureau of Indian Affairs argument to the contrary, the ORDOJ concluded that the "as currently exercised" language limited the water right to that which would protect the hunting and fishing rights as they were exercised in 1979, effectively ignoring *Adair II*'s invocation of the moderate living standard. See Oregon Water Resources Department, *Attorney General advice relating to Bureau of Indian Affairs and Klamath Tribes' claims*, <[http://www.wrd.state.or.us/publication/pdfs/kba\\_v-vi\\_adv.pdf](http://www.wrd.state.or.us/publication/pdfs/kba_v-vi_adv.pdf)> (last accessed December 3, 2003). However, the ORDOJ failed to acknowledge that the *Adair II* court specifically rejected the argument that the standard would create a wilderness servitude. 723 F.2d at 1414. Instead, the *Adair II* court held that the tribes are not entitled to the amount of water that existed at the time of the treaty, unless no lesser amount will supply the tribe with a moderate living. *Id.* Thus, the tribes *might be* entitled to the amount of water that existed at the time of the treaty, if no less would supply them with a moderate living, regardless of the level at which the tribes' currently exercise their hunting and fishing rights.

196. *Adair IV*, 338 F.3d at 973.

197. Over 5,654 contests have been filed and were consolidated into five cases so that proceedings could be initiated and heard by an administrative panel pursuant to OR. Admin. R. 137-003-0515. *Adair IV*, 338 F.3d at 973-74.

The Department will then issue a final determination of water rights that is subject to review in the Oregon courts, and possibly to the United States Supreme Court.<sup>198</sup> The extended timeline of the adjudication allowed the Ninth Circuit to frame the case as a challenge to a non-final administrative decision, which it found as being unripe. As a result, the Oregon District Court and the Ninth Circuit are likely no longer involved in resolving disputes that arise out of the Klamath adjudication. This leaves the tribes' with having to appeal to the likely unsympathetic Supreme Court<sup>199</sup> as the only federal forum to protect their federal reserved water rights from the probable narrow interpretations of state courts.

## 2. The Ripeness Ruling

Ripeness is a threshold hurdle that all cases must satisfy, and in *Adair II*, the Ninth Circuit held the ripeness test was not satisfied under the circumstances of the *Adair III* facts. Ripeness exists in two forms: prudential ripeness and constitutional ripeness. The court acknowledged that there was no doubt that the case satisfied the constitutional ripeness requirements, as there was a substantial controversy between the parties that was immediate.<sup>200</sup> The second component, prudential ripeness, is governed by two factors: first, "the fitness of the issues for judicial discretion," and second, "the hardship to the parties of withholding court consideration."<sup>201</sup> The ripeness doctrine functions to prevent the courts from prematurely entangling themselves in disagreements over administrative policies, while protecting administrative agencies from judicial interference until a decision has been formalized and its effects felt in a concrete way.<sup>202</sup>

In *Adair IV*, the Ninth Circuit stated that a claim is fit for review if it is primarily legal, does not require further factual development, and the challenged action is final.<sup>203</sup> The court then went on to hold that the case was not fit for review for two nearly identical reasons. First, further factual development was needed to "establish what standard Oregon will actually apply," because "Oregon has not yet applied any final standard to the water claims of the United States and the Tribes."<sup>204</sup> Second, there remained steps in the process where the standard could be administratively altered, thus the

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198. *Id.* This whole adjudication process has already taken more than twenty-seven years and will likely take many more.

199. See David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal L. Rev. 1573 (1996) (arguing that the Supreme Court has begun to depart from traditional Indian law principles, in favor of a subjective approach that twists tribal rights to fit the Court's perceptions of non-Indian interests).

200. *Id.* at 975.

201. *Id.*

202. *Winter v. California Medical Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1989).

203. *Adair IV*, 338 F.3d at 975 (quoting *Winter v. California Medical Review, Inc.*, 900 F.2d at 1325).

204. *Id.* at 976.

court deemed the agency action “nowhere near final.”<sup>205</sup> Essentially, both reasons that the issue was not fit for review turned on the characterization of the agency action as not being final.

The Ninth Circuit also concluded that the second aspect of prudential ripeness, hardship to the parties from withholding judicial review, was not satisfied.<sup>206</sup> The court concluded that if the Water Department applied the wrong standard, the parties could still seek review in the Oregon courts and the United States Supreme Court, and that a declaration of water rights from a federal court would not provide any immediate relief because the Water Department would still have to apply the standard in calculating the federal and tribal water rights.<sup>207</sup> Although the United States and the Tribes sought a clarification of the *Adair I* and *II* standard, the court characterized the relief sought as the distribution of water and concluded that there would be little hardship to the parties because no relief could be offered, as federal courts cannot quantify water rights where there is an ongoing comprehensive state adjudication that satisfies the requirements of the McCarran Amendment.<sup>208</sup> The Ninth Circuit failed to reconcile these statements with the reality that a clarified quantification standard from a federal court would supply the tribes with all the relief they needed. Because the Oregon Department of Justice and the Water Department read the *Adair II* quantification standard extremely narrowly, the tribes stand to lose a significant amount of water in the adjudication. A broader and more clearly defined federal standard, as supplied by Judge Panner in *Adair III*, would mandate that the Water Department allocate more water to the tribes’, thus granting immediate judicial relief.

### 3. *The Ninth Circuit’s Misapplication of the Prudential Ripeness Factors*

Commentators have criticized the ripeness doctrine on a number of fronts; for example, some argue that federal courts simply use ripeness to duck controversial issues,<sup>209</sup> while others point out that ripeness is a slippery doctrine that gives courts justification for their timeliness determinations.<sup>210</sup> The Ninth Circuit’s application of the ripeness principles in *Adair IV* seems to lend credence to these arguments. Claims for treaty water rights in the Klamath add fuel to a fire already hot because of over-appropriated water resources and endangered species concerns. Under these difficult circumstances, the possibility that a court would seize a doctrine that allows it to avoid considering controversial issues is hardly surprising. In *Adair IV*,

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* See *supra* nn. 107-114 (Discussing the *Colorado River* abstention doctrine).

209. Comment, David Floren, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 Or. L. Rev. 1107, 1130 (2001).

210. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 2.6.1 at 95 (1997).

the Ninth Circuit called on the ripeness doctrine as an expedient justification for its determination that the case should not be heard, a conclusion more likely influenced by the unique nature of the McCarran Amendment and the state-federal court tensions than anything else.<sup>211</sup>

a. *Fitness of the Issue for Review*

The Ninth Circuit concluded that the United States' and tribal claims were not fit for review because the quantification standard was not a final agency action.<sup>212</sup> This conclusion is troublesome for a number of reasons.

First, courts generally employ the ripeness doctrine to protect administrative agencies from judicial interference in agency decision-making that usually involves the interpretation and application of statutes and regulations.<sup>213</sup> The doctrine keeps the courts out of the process until a final decision is made; otherwise, courts could be asked to consider agency actions on an almost daily basis. Thus, one purpose of ripeness is to reduce burdens on federal courts.

But the United States and the Klamath tribes were not challenging an administrative decision based on statutory or regulatory interpretation; rather, they challenged the Water Department's interpretation of a federal court order. The United States and tribal claims in *Adair III* were a relatively unique form of action, involving the invocation of the district court's retained jurisdiction over issues relating to "construction, effectuation, modification or enforcement" of the quantification standard announced in *Adair I*.<sup>214</sup> The United States and the tribes needed the district court to interpret Judge Solomon's ruling because the state's interpretation seemed to run counter to the holdings announced in *Adair I* and *II*,<sup>215</sup> as well as the spirit of *Winans*.<sup>216</sup> The relief the tribes and the United States sought hardly warranted the use of a doctrine designed to prevent courts from interfering in the everyday functioning of administrative agencies because this type of action would rarely arise again. In fact, this scenario could only arise in cases where a previous federal court, foreseeing potential future problems,

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211. See *infra* Part V, § B, arguing that the *Colorado River* abstention doctrine was lurking behind the court's decision, and that had the court applied the doctrine, it would have counseled in favor of federal court determination of the issue.

212. *Adair IV*, 338 F.3d at 975.

213. See *Abbott Laboratories v. Gardener*, 387 U.S. 136, 148-49 (1967) ("*Abbott Laboratories*").

214. See *supra* n. 15.

215. Judge Solomon and the Ninth Circuit concluded that the treaty reserved enough water to the tribes to effectuate the purpose of allowing the tribes to continue their traditional hunting and fishing lifestyle in order to provide their members with a moderate living. See *supra* Part II, §§ B-C. The state's interpretation virtually eliminates any hope for continuing the tribes' hunting and fishing lifestyle because the level of fish harvested in 1979 was very low. See *infra* nn. 227-228 and accompanying text.

216. See 198 U.S. 371 (holding first, that treaty reserved rights are not grants to tribes, but rather, grants from them, with everything not granted away reserved to tribes; and second, that the canons of construction require that treaties between the federal government and the tribes should be interpreted as the tribes would have understood them).

retained jurisdiction over the case in order to see that the judgment is properly carried out.

That the final agency action requirement is largely derived from the Administrative Procedure Act<sup>217</sup> is important to note because the tribes' and the United States did *not* bring this action under the APA. Instead, the United States originally filed the claim under the jurisdiction of section 1345 of Title 28 of the United States Code, concerning suits brought by the United States. Thus, there was no need to insulate the federal agencies from outside pressure until there is a final action, as the APA instructs courts to do, because the federal government brought the suit.<sup>218</sup> So the Ninth Circuit essentially used ripeness, a doctrine related to a statute not at issue, to protect a state agency interpretation of a federal court order. Consequently, the need for the protection afforded from the ripeness doctrine was tenuous at best.

Second, when a federal court prematurely reviews an agency action, it interferes with agency decision-making. As a result, the court could breach the constitutionally created wall between the executive and judicial branches, created by the separation of powers.<sup>219</sup> Thus, courts use the ripeness doctrine as a matter of prudence: to avoid entangling themselves in abstract disputes and to protect agency decision-making from potentially unconstitutional interference. However, no such constitutional concerns were present in *Adair IV* because the Water Department did not make a decision or formulate policy; rather, it merely attempted to interpret the standard announced by the federal courts in *Adair I* and *II*. The posture of *Adair IV* is more analogous to Congress amending a statute that an agency is incorrectly interpreting, than a district court improperly interfering in agency decision-making. This is because the district court, in *Adair I*, already proclaimed the law with respect to the standard to be used in quantifying the tribes' water rights, and the Water Department appeared to misinterpret that standard. Just as Congress can amend a statute to correct an agency misinterpretation of what the law was meant to be without violating separation of powers, the Ninth Circuit should have allowed the district court to correct the Water Department's misunderstanding of the law. Because the prudential concerns over separation of powers did not exist in *Adair III*, there was no need for the final agency action requirement to protect the decision-making process.<sup>220</sup>

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217. 5 U.S.C. § 704 ("APA"). See *Abbott Laboratories*, 387 U.S. at 148-49.

218. There is no need to protect the federal government from itself.

219. See also R. George Wright, *The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines*, 11 Am. J. Trial Advoc. 83, 96-7 (1987).

220. See *Winter v. California Medical Review, Inc.*, 900 F.2d at 1325 (stating that finality insures that judicial review will not interfere with the agency's decision-making process). Agency decision-making requires a delicate balancing of competing interests and a resolution that the agency believes best serves all the interests and advances its goals. Ripeness protects the separation of powers by keeping the courts from interfering in this balancing process. However, there was no need for this protection

Third, finality and ripeness do not apply in *Adair III* and *IV* because the action was brought under the continuing jurisdiction of the *Adair I* court. In *Adair I*, the United States and the Klamath tribe sought a declaratory judgment of their water rights. Under the Declaratory Judgment Act, further necessary or proper relief, based on a declaratory judgment, may be granted.<sup>221</sup> A court may grant such additional relief long after the original declaratory judgment has been entered.<sup>222</sup> Judge Solomon seized on this facet of the declaratory judgment procedure by retaining jurisdiction in order to construe, effectuate, and enforce compliance with the judgment.<sup>223</sup> Because Judge Panner was enforcing compliance with the earlier judgment under the court's retained jurisdiction, there was no need for an additional ripeness inquiry. Requiring the United States and the Klamath Tribe to reestablish the ripeness of their claims, and presumably the other prima facie elements of jurisdiction, effectively eviscerates the retained jurisdiction of the *Adair I* court by essentially requiring a new trial on the quantification standard to be used in the adjudication. It is unlikely that the Ninth Circuit panel that affirmed Judge Solomon's retained jurisdiction in 1983 would have anticipated such an outcome.<sup>224</sup>

Further, in 1999, in *U.S. v. Alpine Land & Reservoir Co.*, the Ninth Circuit held that the reasons for providing continuing federal court jurisdiction are not the same as prerequisites for original jurisdiction.<sup>225</sup> Thus, while ripeness is a precondition for original jurisdiction, continuing jurisdiction presupposes that ripeness has already been established, and the role of the federal court is simply to "interpret and apply its own judgment to the future conduct contemplated by the judgment."<sup>226</sup> In *Adair III*, Judge Panner merely interpreted and applied the earlier judgments of the *Adair I* and *II* courts to the conduct contemplated by the judgment: the state's water rights adjudication. Therefore, the ripeness and finality doctrines should not apply

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in *Adair IV* because the agency was not engaged in the normal decision-making process, e.g., one resulting in a formal rule or policy, as it was merely interpreting a federal court order.

221. 28 U.S.C.A. § 2202 (stating that such relief may be granted "after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment").

222. Wright, Miller and Kane, *Federal Practices and Procedures: Civil*, 3d § 2771 (1998).

223. See *Adair III*, 187 F. Supp.2d at 1274 (quoting paragraph 15 of Judge Solomon's declaratory Judgment).

224. See *Adair II*, 723 F.2d at 1419-20.

225. 174 F.3d 1007, 1012 (9th Cir. 1999) ("*Alpine Land*"). The issue in *Alpine Land* was whether the state or federal court had jurisdiction over actions arising out of the federal court issued Alpine and Orr Ditch Decrees. These decrees attempted to settle the water rights of the Carson and Truckee River Basins, and provided that applications to change the place or manner of use should be directed in the first instance to the Nevada State Engineer. In the case, the United States Fish and Wildlife Service filed applications with the State Engineer to change the place and manner of use, and Churchill County appealed the Engineer's approval to the state court. The Engineer subsequently filed a motion to dismiss for lack of jurisdiction in federal district court because the Ninth Circuit had earlier held that appeals from the decisions of the State Engineer arising out of the Orr and Alpine Decrees go to the district court. *Id.* After losing in the district court, the county appealed to the Ninth Circuit, which held that the district court retained exclusive jurisdiction over actions arising out of the decrees. *Id.*

226. *Id.*

because Judge Panner properly limited his jurisdiction to interpreting and clarifying the earlier judgment under the district court's retained jurisdiction.<sup>227</sup>

In *Alpine Land*, the Ninth Circuit also concluded that when a district court retains jurisdiction over an action, the jurisdiction should almost always be interpreted as exclusive.<sup>228</sup> This is because having "state courts construing what the federal court meant in the judgment...would potentially frustrate the federal district court's purpose."<sup>229</sup> Further, the court determined that because the case involved interpreting court decrees concerning complex water adjudications, "conflicting federal and state constructions would be entirely unworkable, [thus] the district court's retention of jurisdiction was intended to be exclusive."<sup>230</sup> Based on this principle, the Oregon District Court should have exclusive jurisdiction over the interpretation and construction of the quantification standard announced in *Adair I* and *II*. This conclusion follows directly from the Ninth Circuit's reasoning in *Alpine Land*,<sup>231</sup> because *Adair I* involved a complex water adjudication, where conflicting state and federal constructions would be unworkable, and thus exclusive jurisdiction should be inferred. Therefore, the district court should not have been required to wait for final state agency action because under *Alpine Land*, only the district court has the authority to interpret and construe the quantification standard announced in *Adair I* and *II*.

While the United States and tribes' argued that the *Adair I* and *II* courts already had determined that the case was ripe, the Ninth Circuit incorrectly dismissed the argument by stating that the issue in *Adair I* and *II* was "whether the Tribes had any right to water."<sup>232</sup> In *Adair IV*, the Ninth Circuit concluded that the *Adair III* dispute related solely to the adjudication, holding that because *Adair I* was predicated on different legal and factual grounds than *Adair III*, the previous courts' ripeness determinations had no effect on the *Adair III* claim.<sup>233</sup> However, this is a mischaracterization of the *Adair I* and *II* holdings because in *Adair II*, the Ninth Circuit affirmed the district court's declaration of "the proper method for measuring the reserved water rights originally attached to the reservation."<sup>234</sup> The Ninth Circuit thus announced that the scope of the *Adair I* decision extended to the quantification standard the Water Department should use in the adjudication, a scope which goes well beyond "whether the tribes had any right to water," as the *Adair IV* court claimed. Allowing the Water Department to construe the standard announced in *Adair I* and *II* without review by the

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227. *Adair III*, 187 F. Supp.2d at 1275.

228. *Alpine Land*, 174 F.3d at 1013.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Adair IV*, 338 F.3d at 976.

233. *Id.*

234. *Adair II*, 723 F.2d at 1399, 1420 (emphasis added).

district court, under its retained jurisdiction, essentially made the retention of that jurisdiction a nullity. The Ninth Circuit has previously held that nullification of retained jurisdiction is inappropriate.<sup>235</sup>

Lastly, the other factors generally used determine if an issue is fit for review—whether the issue is primarily legal and whether it requires further factual development—counseled in favor of judicial consideration of the *Adair III* claim.<sup>236</sup> In *Abbott Laboratories*, the Supreme Court held that an issue was purely legal because it concerned whether a statute was properly construed by an agency.<sup>237</sup> Similarly, the issue in *Adair III* was purely legal because the United States and the tribes sought an interpretation of the quantification standard announced in *Adair I* and *II*. The standard announced in *Adair II*, that the Klamath Tribes are entitled to as much water as they need to protect their hunting and fishing rights to ensure the moderate livelihood of tribal members,<sup>238</sup> is unhelpfully vague. In *Adair III*, Judge Panter clarified this standard by concluding that the moderate livelihood of tribal members can be protected only if there is enough water to support a productive fishery.<sup>239</sup> No facts were at issue in Judge Panter's clarification because he made his decision based on the requirements of federal law.<sup>240</sup> Additionally, no further factual development was necessary because the issue in *Adair III* was how to interpret the legal standard laid down in *Adair I* and *II*: that the tribes are entitled to as much water as necessary to fulfill their hunting, fishing and gathering rights to supply a moderate living to the tribal members. Because the need for a final agency action was slight, as the agency was merely construing a federal court order, not interpreting a statute under delegated authority, and the issue was primarily legal with no need for further factual development, the Ninth Circuit should have concluded that the case was fit for review.

#### b. *Hardship to the Parties of Withholding Review*

Hardship to the parties exists where the effect of postponing review is immediate, direct, significant, and involves more than the possibility of financial loss.<sup>241</sup> The Ninth Circuit held that there would be no hardship to

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235. See *Alpine Land*, 174 F.3d at 1013 (stating further that "it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment. Such an arrangement would potentially frustrate the federal district court's purpose").

236. *Adair IV*, 338 F.3d at 975.

237. 387 U.S. at 149.

238. See *Adair II*, 723 F.2d at 1414-15.

239. See *Adair III*.

240. *Id.* (stating that if the water right was quantified at a level that would not support a productive habitat, the tribes' treaty right would be abrogated, which only Congress has the power to do). That no facts were at issue makes *Adair III* similar to Phase II of *United States v. Washington*, where the Ninth Circuit also vacated a district court opinion supporting a tribal treaty right of habitat protection. See *supra* n. 84.

241. *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1325-26 (9th Cir. 1992).

the parties in waiting for additional factual development.<sup>242</sup> However, this conclusion overlooked the significant hardship to all the parties that result from postponing judicial review of the quantification standard announced by Judge Solomon in *Adair I*. There are at least four hardships that befall the parties to the *Adair III* litigation.

First, all parties stand to lose a significant amount of money litigating the standard through the contested case hearings, in the state courts, and perhaps ultimately in the United States Supreme Court. While a significant loss of money is not enough to qualify as hardship alone,<sup>243</sup> it is an important consideration in this time of state budget shortfalls and a slow economy.<sup>244</sup>

Second, the tribes stand to effectively lose their water rights in the contested case hearings. The Water Department's preliminary standard interpreted the *Adair I* and *II* standard guaranteeing the tribes only "the minimum quantity of water necessary to protect treaty hunting and fishing resources as they existed in 1979."<sup>245</sup> Because the level of fish harvested in 1979 was very low, the level of water needed to protect those harvest levels would be very small.<sup>246</sup> This outcome also serves to eviscerate the Ninth Circuit's holding in *Adair II*, which stated that the tribes have a water right to enough water to supply tribal members with a moderate living.<sup>247</sup>

Third, the tribes unenforceable water right will continue for an even longer period of time, as the Oregon will not allow senior rights holders, like the Klamath Tribes, to bring claims against junior users until the adjudication is finalized.<sup>248</sup> Because a district court has already held the Water Department's standard to be flawed, the continued use of the standard to quantify the tribes' right in the adjudication will require the tribes to litigate the standard through the Oregon courts and United States Supreme Court, which could take many more years. Therefore, the injury to the tribes' cultural and religious lifestyles resulting from a lack of fish to harvest may continue indefinitely, as well as the accompanying loss of food, income, and economic opportunities.<sup>249</sup>

Finally, there would be very little hardship to the state and to the defendants by having a federal court exercise its expertise in interpreting federal

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242. See *Adair IV*, 338 F.3d at 976. See also *supra* nn. 181-183 and accompanying text.

243. *Municipality of Anchorage v. United States*, 980 F.2d at 1325-26.

244. See, e.g., *Revenue Blues Expected to Continue*, THE OREGONIAN (Portland), May 14, 2003, at A1 (reporting that with the Oregon economy still stalled, state budget shortfalls are likely to continue).

245. *Adair IV*, 338 F.3d at 976.

246. See *Kandra*, 145 F. Supp.2d at 1197, 1201 (stating that "the Klamath and Yurok Tribes rely on the fish as a vital component of the Tribes' cultures, traditions, and economic vitality," and that "many customs and traditions revolve around the fish harvest, which is now reduced, or in the case of the suckers, non-existent"). See also Reed Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 Tul. Envtl. L. J. 197, 202, 237 (2002).

247. *Adair II*, 723 F.2d at 1414-15.

248. See Reed Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rule of Prior Appropriation*, 28 Envtl. L. 881, 901-902 (1998).

249. See *Kandra*, 145 F. Supp.2d at 1201 (describing the importance of the fish to the Klamath Tribe, and the hardship suffered by Tribal members as a result of the decline of the fisheries).

law by clarifying the correct quantification standard. A clear standard would streamline the adjudication and perhaps require less litigation in the administrative hearings and in the courts. Further, a clear standard provides certainty and finality to all the parties, a central benefit of water rights adjudication.<sup>250</sup> Providing a streamlined adjudication, certainty, and finality would save all the parties time and money. Because judicial review of the standard now would eliminate these hardships, the Ninth Circuit should have held the case ripe for review.

*B. Unseen Effects of the McCarran Amendment and Colorado River Abstention*

The ripeness holding effectively ended the case for the Oregon District Court and the Ninth Circuit. Despite the Ninth Circuit's *Adair IV* holding, which did not reach the state's challenge to the district court's exercise of jurisdiction under the McCarran Amendment,<sup>251</sup> *Colorado River* abstention likely influenced the court enough to hold the case not ripe for review in order to avoid the merits reached in the *Adair III* decision.<sup>252</sup> Had the court examined the *Colorado River* doctrine's policy of furthering "wise judicial administration" through "conservation of judicial resources and comprehensive disposition of litigation,"<sup>253</sup> however, the *Adair IV* panel would likely have sided with the *Adair II* panel in finding that the district court properly exercised its jurisdiction. By vacating the judgment and staying the case until the adjudication and the subsequent judicial review are complete, the Ninth Circuit did a disservice to the policy and purposes underlying the *Colorado River* doctrine. In *Adair II*, the court held that were it to erase the district court's careful consideration of the federal water rights questions presented by the suit, the appellate court would effectively cause precisely the duplication and waste of judicial effort that *Colorado River* was designed to avoid.<sup>254</sup> Yet, the *Adair IV* court caused the precise results that the *Adair II* panel sought to avoid by necessitating relitigation of the quantification standard in administrative hearings, state courts, and perhaps the United States Supreme Court.

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250. See Benson, *supra* n. 254.

251. See *Adair IV*, 338 F.3d at 976.

252. See *supra* nn. 107-114 for a discussion of *Colorado River* abstention. The fact that the United States and the Klamath tribe brought the case under the retained limited jurisdiction of the district court from *Adair I*, signals that ripeness should not apply to determine the jurisdiction of the district court in *Adair III*; not to mention that the ripeness elements arguably counsel in favor of judicial review. Because of this, I argue that the Ninth Circuit sought to avoid the merits of the *Adair III* decision due to the *Colorado River* doctrine, which encourages state adjudication of water rights. Thus, the court may have used ripeness as a means to avoid the adjudication of the merits of the case.

253. *Colorado River*, 424 U.S. at 817.

254. *Adair II*, 723 F.2d at 1404 (stating that if the court vacated the district court decision, "thereby necessitating relitigation of the same issues in state court, we would in effect, 'throw the baby out with the bath' and create precisely the duplication and waste of judicial effort that *Colorado River* abstention and the McCarran Amendment are designed to avoid").

In *Colorado River*, the Supreme Court concluded that the avoidance of piecemeal litigation was important because such additional litigation would result in “inconsistent dispositions of property.”<sup>255</sup> By allowing the Water Department to rely on a faulty quantification standard, the *Adair IV* decision created the possibility of inconsistent disposition of water rights, a highly important property right in the west. While there is no “disposition” until the adjudication is finalized, correcting the Water Department’s erroneous quantification standard before it is applied increases the certainty of property rights. Due to the “highly interdependent” nature of water rights,<sup>256</sup> if the standard used to quantify the tribal water rights is later held incorrect, a significant number of the adjudication’s water rights determinations will also be incorrect, thereby creating inconsistency. This would necessitate reassessment of all the effected rights in another expensive and lengthy adjudication procedure. Therefore, upholding the district court’s clarification of the standard, announced in *Adair I* and *II*, would have furthered the purposes and policies of the *Colorado River* doctrine by avoiding conflicting “dispositions of property.”<sup>257</sup>

Concurrent federal proceedings in the Klamath adjudication would not create duplicative and wasteful litigation, offensive to the *Colorado River* abstention.<sup>258</sup> As explained by the *Adair II* court, allowing the federal court to announce the standard, and the state to apply and administer it, allows “each forum to consider those issues most appropriate to its expertise.”<sup>259</sup> The *Adair III* ruling promoted a streamlined adjudication because the United States and the Klamath tribes would not have to challenge the quantification standard in the 892 contests involving the tribes’ asserted rights.<sup>260</sup> The United States and the Klamath tribes also would not have to challenge the standard in the Oregon courts and potentially the Supreme Court, thereby cutting down on litigation and giving finality to the rights announced in the adjudication. Because Judge Panner carefully limited his jurisdiction to the clarification of the quantification standard already announced, the Ninth Circuit in *Adair IV* should have upheld the decision as promoting the policy of wise judicial administration that the McCarran Amendment was designed to promote, as the *Adair II* court did with Judge Solomon’s decision in *Adair I*.

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255. *Colorado River*, 424 U.S. at 819.

256. *Id.*

257. *Id.*

258. *San Carlos Apache*, 463 U.S. at 567.

259. *Adair II*, 723 F.2d 1406.

260. See *Adair IV*, 338 F.3d at 974 (stating that the United States filed four hundred and eighty contests, the Klamath tribes filed two hundred and forty two, while individuals filed one hundred and thirty four contests against the claims made by the Bureau of Indian Affairs, and 36 against the tribes’ claims).

## CONCLUSION

Since 1905, when Justice McKenna announced that the Indian tribes reserved rights to themselves in the treaty negotiations, the federal courts have slowly honored the promises made by the United States in the treaty documents. Judge Panter's *Adair III* opinion was a link in the chain of court decisions beginning to recognize the right to habitat protection implied in the treaties between the United States and the tribes.<sup>261</sup> However, Indian tribes seeking to assert this right now face an uphill battle. The Ninth Circuit's avoidance of the issue in *Adair IV*, based on the Water Department's interpretation of the federal quantification standard not being ripe for review, despite an express retention of jurisdiction to interpret and apply the standard by the district court in *Adair I*, should be glaring evidence of the hurdles that tribes continue to face in enforcing their treaty rights.

Despite this result, the quantification standard announced in *Adair III* may serve as persuasive precedent for courts considering tribal water rights involving reserved hunting and fishing rights because of its fundamental understanding of the need for water to fulfill the purposes of the former Klamath reservation.<sup>262</sup> Judge Panter properly interpreted and applied the canons of construction—which direct that Indian treaties be construed in favor of the tribes—as well as previous Supreme Court precedent,<sup>263</sup> in concluding that the treaties create an implied right to habitat protection. Without productive habitat to support fish to catch, the right to take fish, which the Supreme Court characterized as a property right in *Winans*,<sup>264</sup> may become worthless.<sup>265</sup>

By vacating Judge Panter's decision, the Ninth Circuit guaranteed that the water rights at issue in the Klamath region will not be settled for many more years. While some appropriators benefit from maintaining the status quo as long as possible, their gain comes at the expense of economic efficiency, which calls for certain and settled rights that are far from being obtained. In order for the contentious water issues in the Klamath Basin to be resolved,<sup>266</sup> the adjudication must be completed as soon as possible. Judge

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261. See Blumm and Swift, *supra* n. 6, at 462-480.

262. Because Judge Panter's decision was vacated on procedural grounds, the substantive merits of his decision—that reserved fishing rights entitle tribes to enough water to support a productive fishery—have not been overruled.

263. The Supreme Court has stated that the treaty negotiators understood the importance of fishing to the tribe's way of life, and that it would be "inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of the accustomed places to fish." *Passenger Fishing Vessel*, 443 U.S. at 686.

264. See *Winans*, 198 U.S. at 380-81.

265. A result that the Supreme Court concluded should not occur. See *Winters*, 207 U.S. at 576 (holding that the canons of construction mandate that courts imply reserved water rights to effectuate the purposes of the reservation because otherwise the tribes granted away valuable expanses of land to settle on unproductive and worthless land, an inequitable and unconscionable result).

266. For a discussion of the contentious nature of the issues, see generally Doremus and Tarlock, *supra* n. 38.

Panner's decision would have streamlined the process and brought resolution a few steps closer. Instead, the Klamath Basin adjudication continues into the end of its third decade with no end in sight.

