On February 6, the U.S. District Court for the Northern District of California issued a ruling on several summary judgment motions "in a case that, at its core, involves the limited water supply of the Klamath River and the important, often-competing interests of the people and wildlife who depend on it." (*Yurok Tribe, et al. v. Bureau of Reclamation et al.*, #19-cv-04405).

The court determined that the purpose and objectives of the Endangered Species Act (ESA) preempt state water law in Reclamation's operation of the Klamath Project, notwithstanding Section 8 of the Reclamation Act (43 U.S.C. § 383) which states: "Nothing in this act shall be construed as affecting or intended to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

In 2014, the Oregon Department of Water Resources (ODWR) issued a provisional determination in the Klamath Basin Adjudication that the Bureau of Reclamation (Reclamation) owned a right to store 486,828 acre-feet of water in the Upper Klamath Lake to benefit irrigators. ODWR further determined that Reclamation and the beneficial users (irrigators) co-owned another water right to divert both natural flow from the Upper Klamath Lake and the water stored there for beneficial use.

In the severe drought conditions of 2020, Reclamation did not fully allocate Klamath Project water to irrigators, but released water from the Upper Klamath Lake in an effort to comply with the ESA and the biological opinion for the project, in an attempt to protect endangered species of fish. The Klamath Irrigation District (KID) filed a notice of dispute with OWRD. OWRD issued an order prohibiting Reclamation from releasing stored water from the Upper Klamath Lake except in accordance with the state water rights. KID also filed for an injunction in the Marion County Circuit Court. The state court ordered the watermaster to stop the release of water from the Upper Klamath Lake until determining that the distribution of water was for a "permitted purpose by users with existing water rights of record or determined claims to use the stored water…." OWRD began monitoring releases from the Upper Klamath Lake.

In March 2021, Reclamation notified KID and OWRD that water from the Upper Klamath Lake was unavailable to fulfill the irrigation purposes of the Klamath Project. In April 2021, OWRD issued an order to Reclamation to preclude the release of stored water in excess of amounts that could be put to beneficial use by the irrigators. The OWRD included language noting that the order did not alter other duties or obligations under state or federal law. This OWRD order was the relevant state water law at issue in the motions for summary judgement. In September 2021, the United States filed a crossclaim challenging the OWRD order, noting that compliance with the ESA "may require Reclamation to release water from [the Upper Klamath Lake] regardless of the water's classification under state law." (The underlying case began in 2019 over the 2019 biological opinion and the consultation process between Reclamation and the National Marine Fisheries Service.)

The court reviewed ESA section 7(a)(2) and the ESA's prior legislative history and subsequent court interpretation, and determined that Congress explicitly intended for agencies to place endangered species as the highest priority. The court said: "The question for the purposes of preemption is whether it is physically impossible for [Reclamation] to comply with both the ESA and the OWRD Order, or whether the Order stands as an obstacle to the accomplishment and execution of Congress's purpose in enacting the ESA." The court found the order at least posed an obstacle to "preserve and restore endangered species, 'whatever the cost'" and that the order itself was conflicted because it "simultaneously prohibits [Reclamation] from distributing, using, or releasing certain amounts of stored water, while still binding [Reclamation] (a federal agency) to its duties arising from other sources of law (the ESA)." The court found that OWRD acknowledged that "its own Order must give way to the ESA…."

Further, the court found the Congressional mandate in the Reclamation Act to be broad, and that nothing in the Reclamation Act was inconsistent with compliance with ESA obligations. "Congress granted the Secretary of the Interior the authority to 'perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect'…[and] authorizing and directing the Secretary to 'use the reclamation fund for the operation and

maintenance of all reservoirs and irrigation works constructed under the provisions of this Act.' Taken together, these provisions show that Congress granted the Secretary of Interior—and by proxy, [Reclamation]—a broad mandate that did not direct [Reclamation] 'to perform any specific nondiscretionary actions' but instead is 'better characterized as directing [Reclamation] to achieve particular goals'" (citations omitted). The court found that under 9th Circuit and Supreme Court precedents, Reclamation's discretion meant that ESA section 7(a)(2) applies to operations of the Klamath Project.

The court declined to rule on whether the OWRD order was invalid under the intergovernmental immunity doctrine. The federal government and the plaintiffs argued that state authority under section 8 of the Reclamation Act is limited to the acquisition and use of water rights within relative priorities, but does not extend to the overall operations of the Reclamation project. OWRB argued that the terms of section 8 "provide that the Reclamation Act does not affect each state's right to regulate water within its own borders" and that the order was within OWRD's "authority and duty to regulate water users' respective rights." OWRD argued that the only questions was "…where the line is drawn between OWRD's lawful regulation of the Klamath Project and Reclamation's independent obligations under the Endangered Species Act, which are not subject to state law." The court held: "As posed by the parties, the arguments related to intergovernmental immunity go beyond the OWRD Order itself and explore the scope of OWRD's authority under section 8 of the Reclamation Act. I need not define the parameters of that authority to resolve whether the OWRD Order is invalid under the Supremacy Clause. It is because it is preempted." Relevant to this absence of decision on immunity, the court held that the ESA preempted the OWRD order under principles of *obstacle* preemption rather than *conflict* preemption.

The court also declined to grant an injunction requiring Reclamation to provide information to OWRD about releases through the Link River Dam to establish the quantity of water required to meet the obligations of the ESA. "OWRD has not identified any law requiring the Bureau to give it the information that it desires. It points to section 8 of the Reclamation Act and two state administrative rules directing the watermaster to 'investigate and respond to all complaints of water shortages or unlawful use based on a review of appropriate records and performance of field inspections' and allowing the OWRD director to 'investigate to determine if a violation' of statutes, rules, orders, permit conditions, or standards occurred. But neither of the cited provisions obligate [Reclamation] (or any water user, for that matter) to provide OWRD with the information it seeks. They only stand for the proposition that OWRD may investigate alleged violations, and that the watermaster's review is based on records and inspections. They are not, as OWRD asserts, evidence of 'Reclamation's legal obligation to comply with [its] information requests.' As a matter of comity, it makes sense for [Reclamation] to cooperate with OWRD in providing information reasonably requested. Indeed, [Reclamation] is doing so. But OWRD has not shown that it was injured by [Reclamation's] failure to provide the sought-after information because it has not shown that it was legally entitled to that information."