California Water Rights

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State Water Resources Control Board

Overview

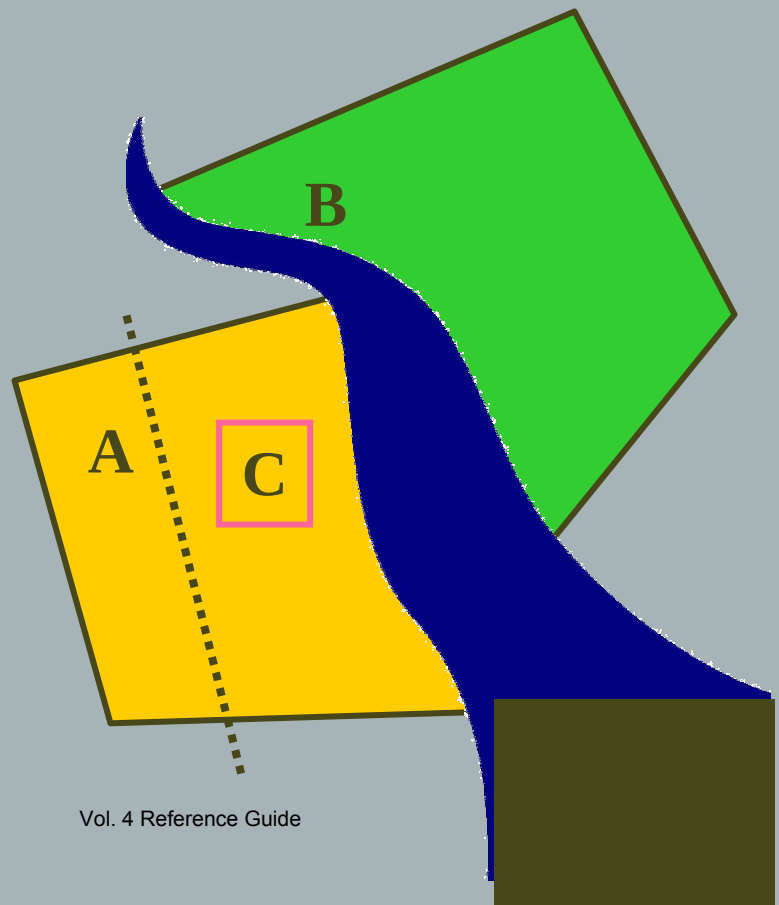
- *Evolution of Law*
- *Types of Water Rights*
- *Permit Process*
- *Beneficial Use/Waste*
- *Instream Flows/Public Trust*
- *Federal Preemption*
- *Klamath Case Study*

Evolution of Water Rights Law (1)

- *Riparian Law Rights Law dominates in the Eastern US*
  - *Attach to land adjacent to stream*
  - *Works with Plenty of Water*

Riparian Water Rights

- *Natural Flow*
- *Correlative Share*
- *Use within watershed*
- *Not Lost by Non-Use*
- *Unity of Title Rule*

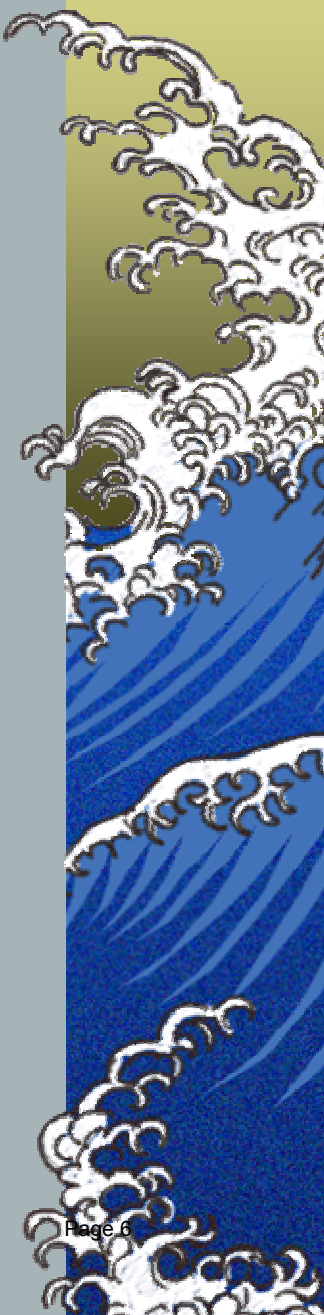


Evolution (2)

- *Mining Customs and Prior Appropriation*
  - *Rule of Capture*
  - *More adapted to arid climates*
  - *First in Time, First in Right*

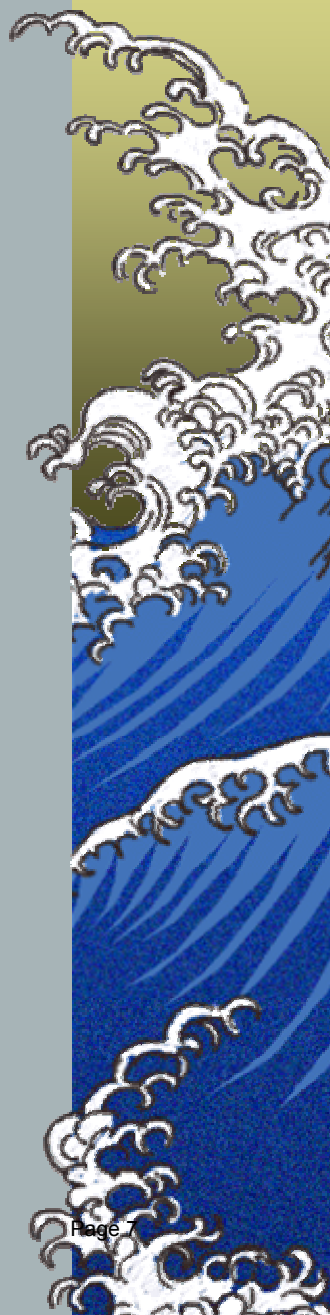
Appropriative Water Right

- *Priority System*
- *Notice/Due Diligence/Beneficial Use*
- *Quantified*
- *Transferable*
- *Use It or Loose It!*



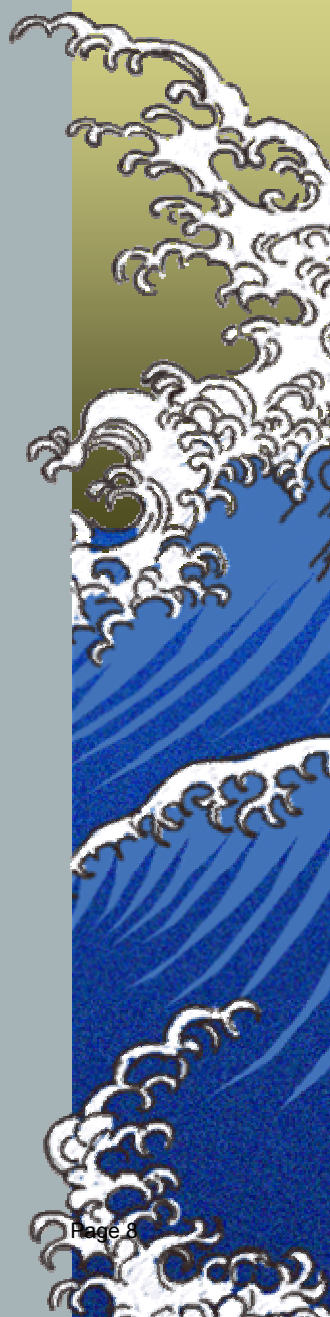
Beneficial Use

- *Types*
  - *Domestic*
  - *Municipal*
  - *Irrigation*
  - *Industrial*
  - *Hydropower*
- *More Recently:*
  - *Recreation*
  - *Groundwater Recharge*
  - *Fish and Wildlife*



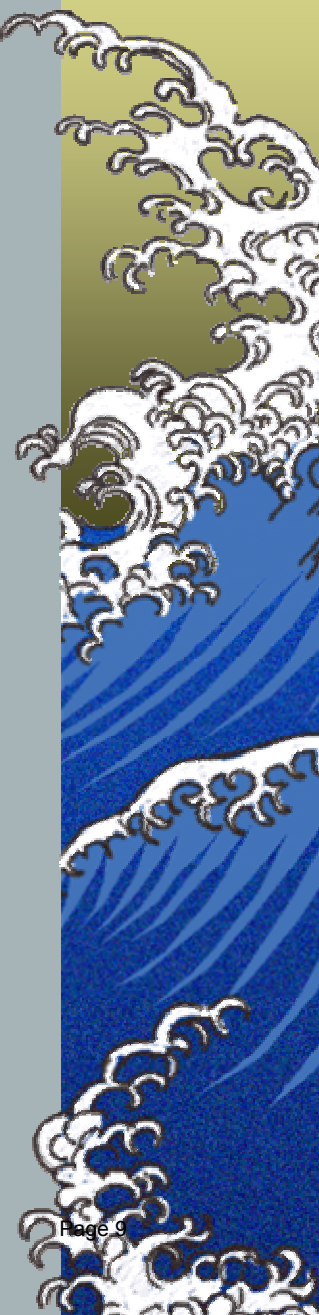
Codification of the Law

- *1872 Civil Code Provisions*
  - *Notice establishes priority date*
  - *Not the exclusive method*
  - *Forfeiture (Use it or Loose it!)*
- *1914 Water Commission Act*
  - *Permit System*
  - *Creates Administrative Agency*



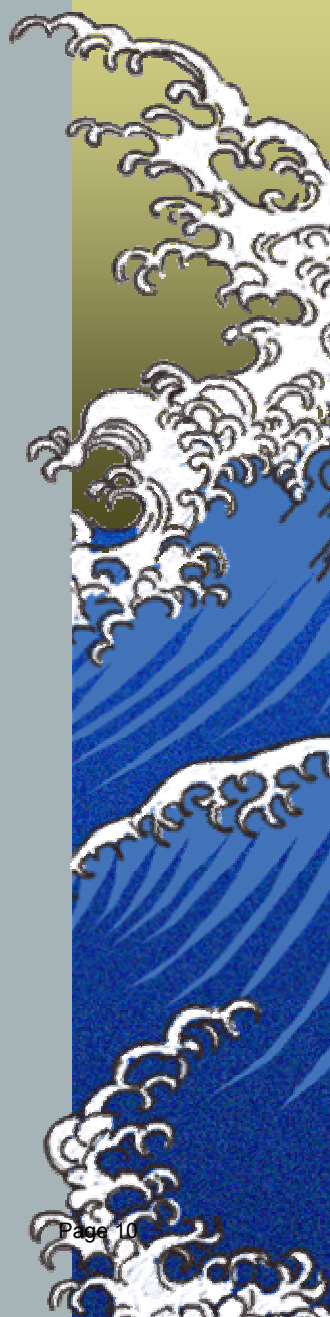
Reasonable Use—No Waste

- *1928 Constitutional Amendment--Article 10, Section 2*
- *All water use must be reasonable and waste is prohibited (both riparian and appropriative)*
- *Evolving Doctrine--Case by Case Determination*
- *What is Reasonable or Wasteful may change over time*
  - *Gravel mining*
  - *Frost protection*
  - *Leaky ditch*



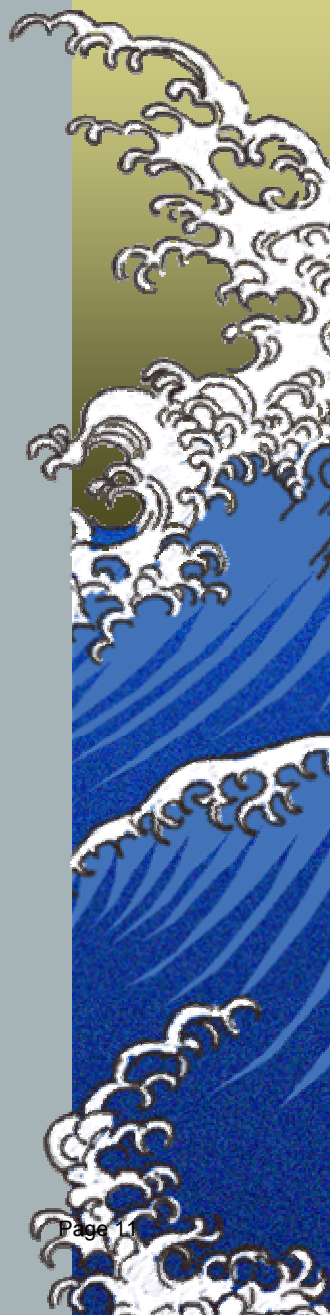
SWRCB Permit Process

- *Applies to:*
  - *Appropriations after 1914*
  - *Subterranean Stream*
- *Process:*
  - *Application/Notice*
  - *Water Availability*
  - *Protests/Hearing*
  - *Permit*
  - *Due Diligence/Time Extension*
  - *License*
- *SWRCB Continuing Authority*



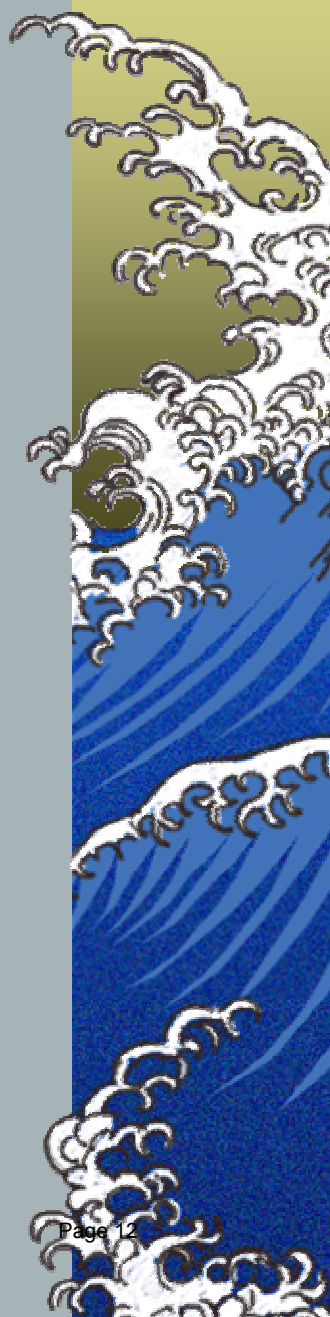
In-Stream Flows

- *Water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use*
- *SWRCB considers in water availability analysis*
- *No permit but may transfer*
- *Public Trust Doctrine*



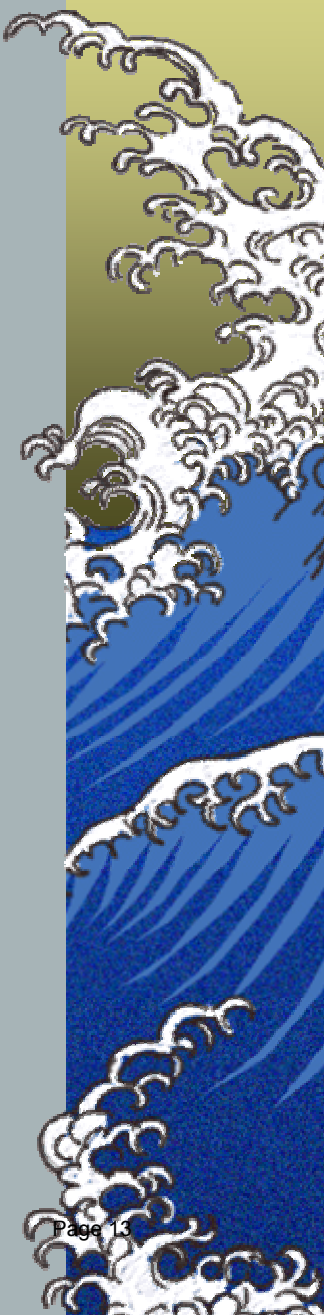
Evolution (3)

- *Dual Water Right System in California*
  - *Reasonable and Beneficial Use*
- *State Retains Ownership and Control*
  - *Water is a "Common Resource"*
  - *Water Right is "Usufructory"*
  - *SWRCB has "Continuing Authority"*
  - *Public Trust Doctrine*



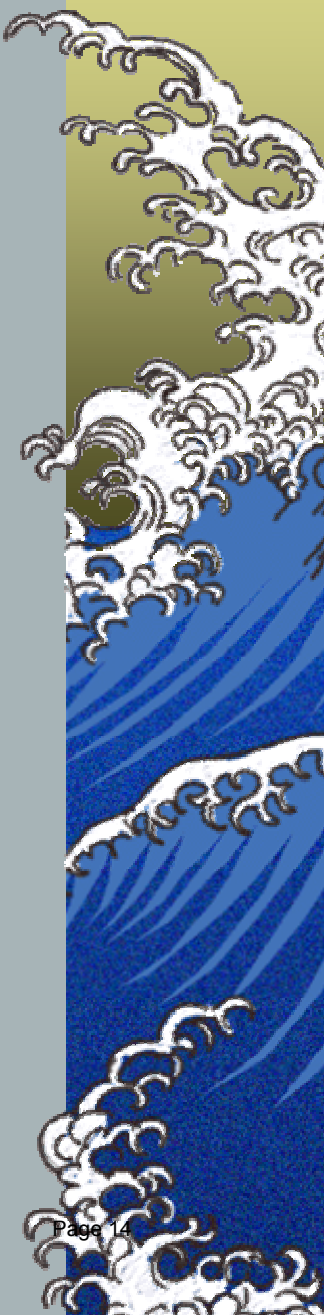
Other Types of Surface Water Rights

- *Pueblo*
- *Prescriptive*
- *Federal Reserved Rights*



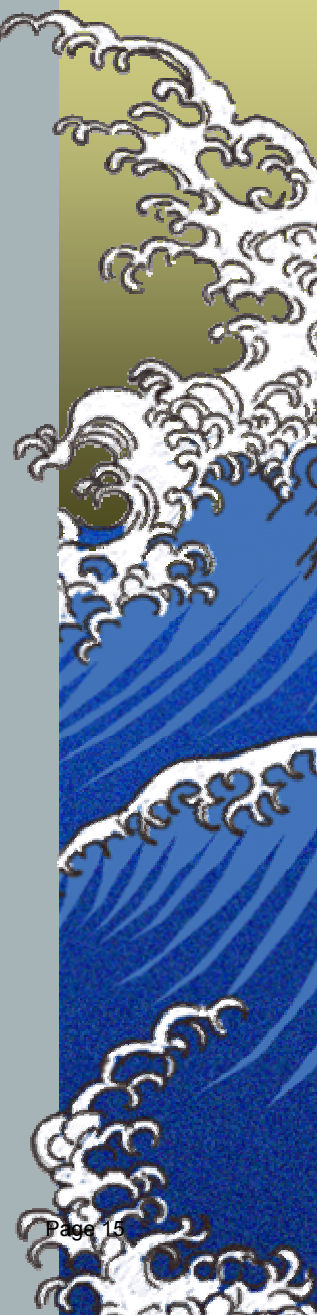
Reserved Rights

- *Winters v. US (1908)—Tribe has right to water sufficient to serve purpose of reservation*
- *Priority Date of Reservation*
- *Not Lost by Non-Use*
- *Extended to other federal reservations- National Parks and Forests, military bases, Wildlife Refuges, Wilderness Areas*



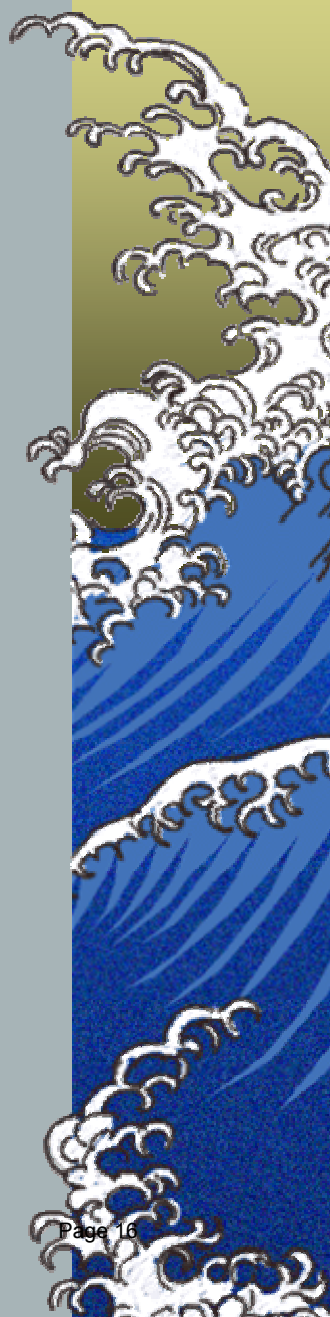
"Primary" Purpose of Reservation

- *Antiquities Act 1906—to preserve areas of scientific and archeological significance*
- *Organic Act 1897—creates National Forests to "furnish timber and protect watershed"*
- *Wilderness Act 1964—to preserve land in its natural condition*



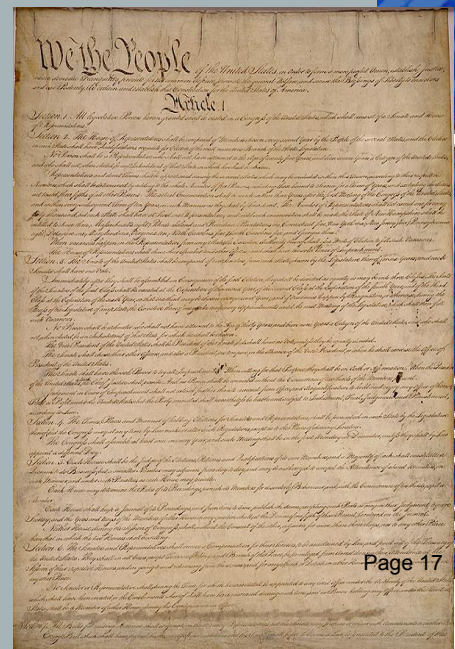
Adjudications

- *All water users on a stream system*
- *Quantify amount and priority date*
- *All types of rights (may include groundwater)*
- *California—28 adjudications*
  - *Court Reference*
  - *Statutory*



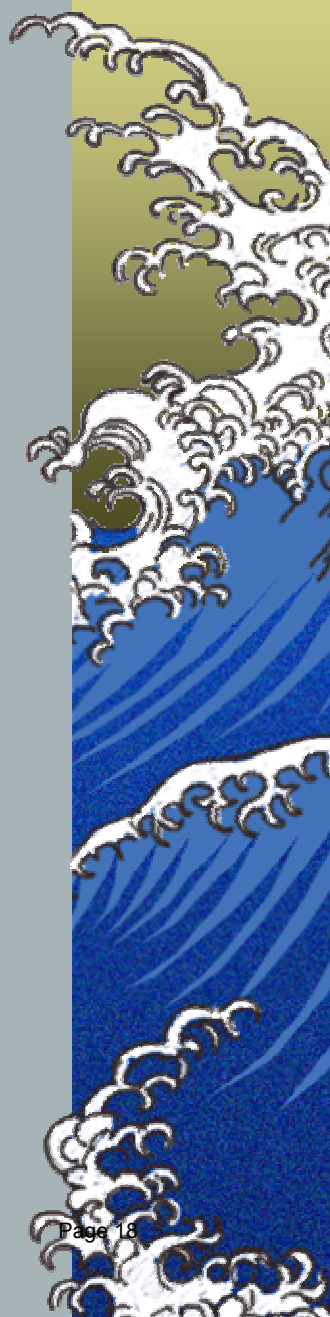
Sources of Federal Power

- *Treaty Power (art 1, § 8)*
- *Commerce Clause (art 1, § 8)*
- *Property Clause (art IV, § 3)*
- *Supremacy Clause (art VI, cl. 2)*



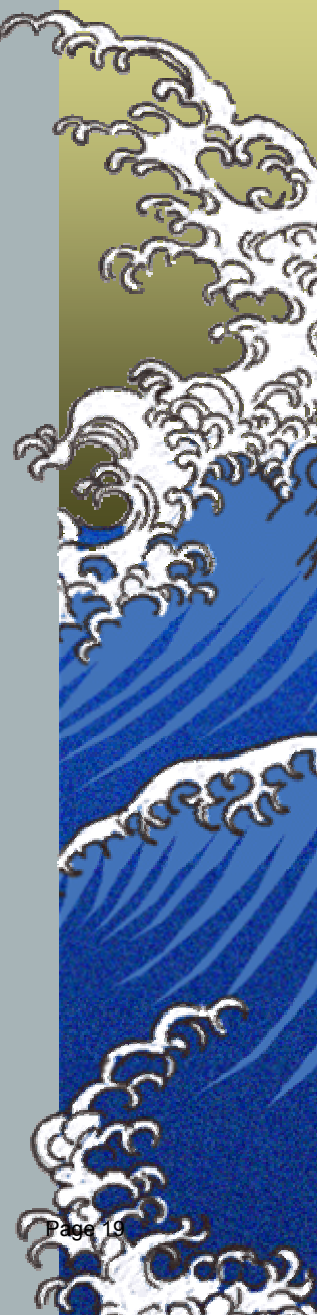
Federal Water Projects

- *1902 Reclamation Act*
  - *Dep't. of Interior, Bureau of Reclamation*
- *1920 Federal Power Act*
  - *Federal Energy Regulatory Commission (FERC)*
- *Rivers and Harbors Act, Flood Control Act*
  - *Army Corps of Engineers*



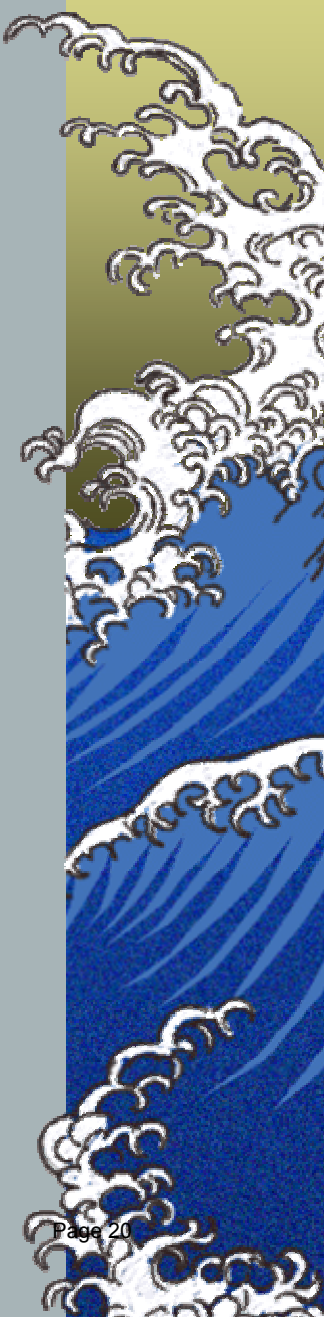
Federal Preemption

- *No state law may conflict with a federal law (Supremacy Clause)*
- *Question of Intent*
- *Field preemption v. direct conflict*



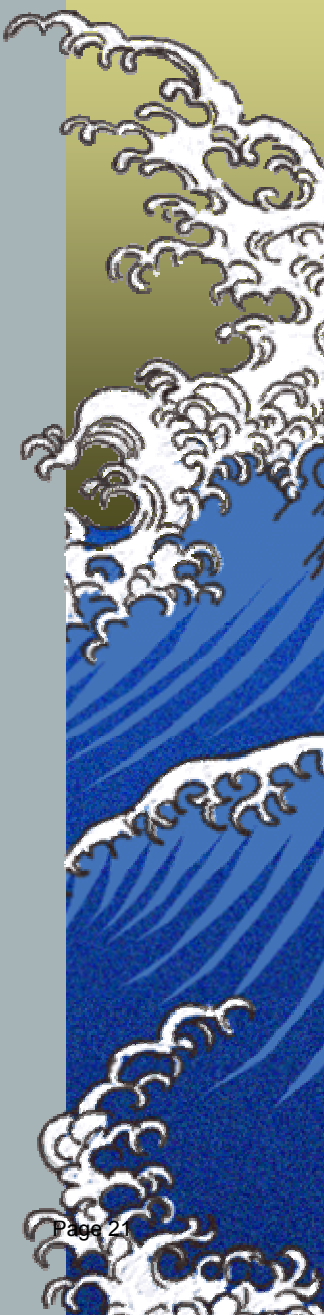
§ 8 Reclamation Act

"That nothing in this Act shall be construed as affecting or intended to affect or to 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…."



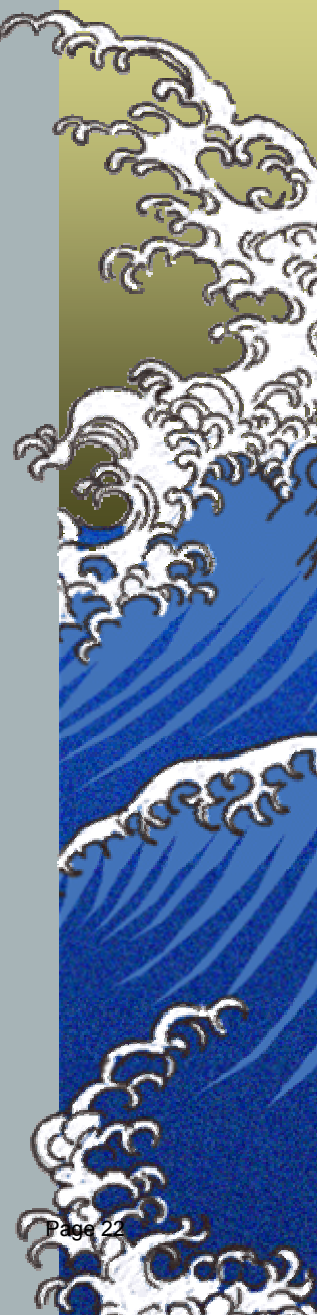
§ 27 Federal Power Act

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."



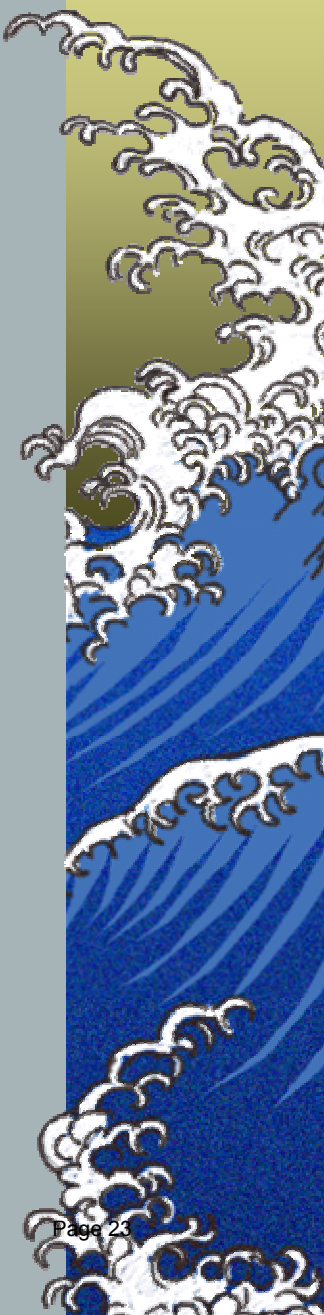
Federal Preemption continued

- *Cal. v. US (1978)--Section 8 protects state water law. SWRCB may condition water rights of project unless a direct conflict*
- *Cal. v. FERC (1983)—FPA preempts the field. SWRCB may not condition water rights of the project*



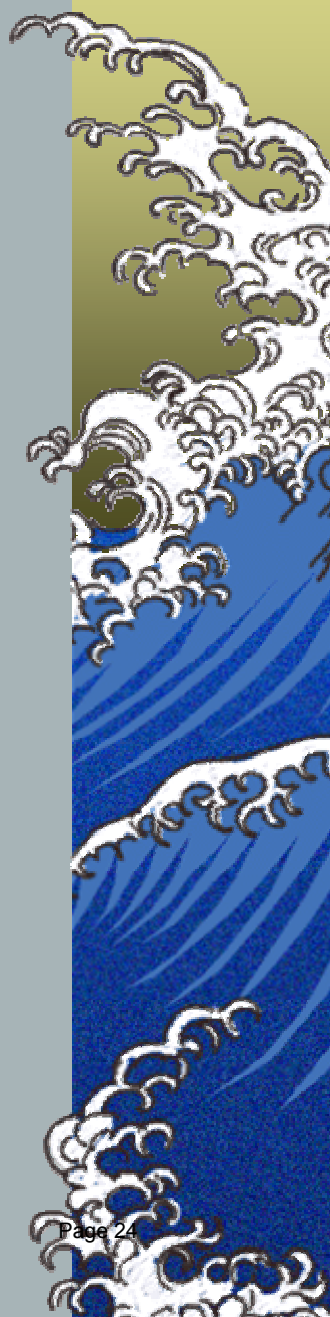
Water Quality Certification

- *Clean Water Act § 401*
- *State must certify that federal project complies with state's Water Quality Plan*
- *PUD#1 v. Jefferson County (1994)*
- *Water Quality Standards/ Beneficial Uses*
- *Minimum flows upheld*

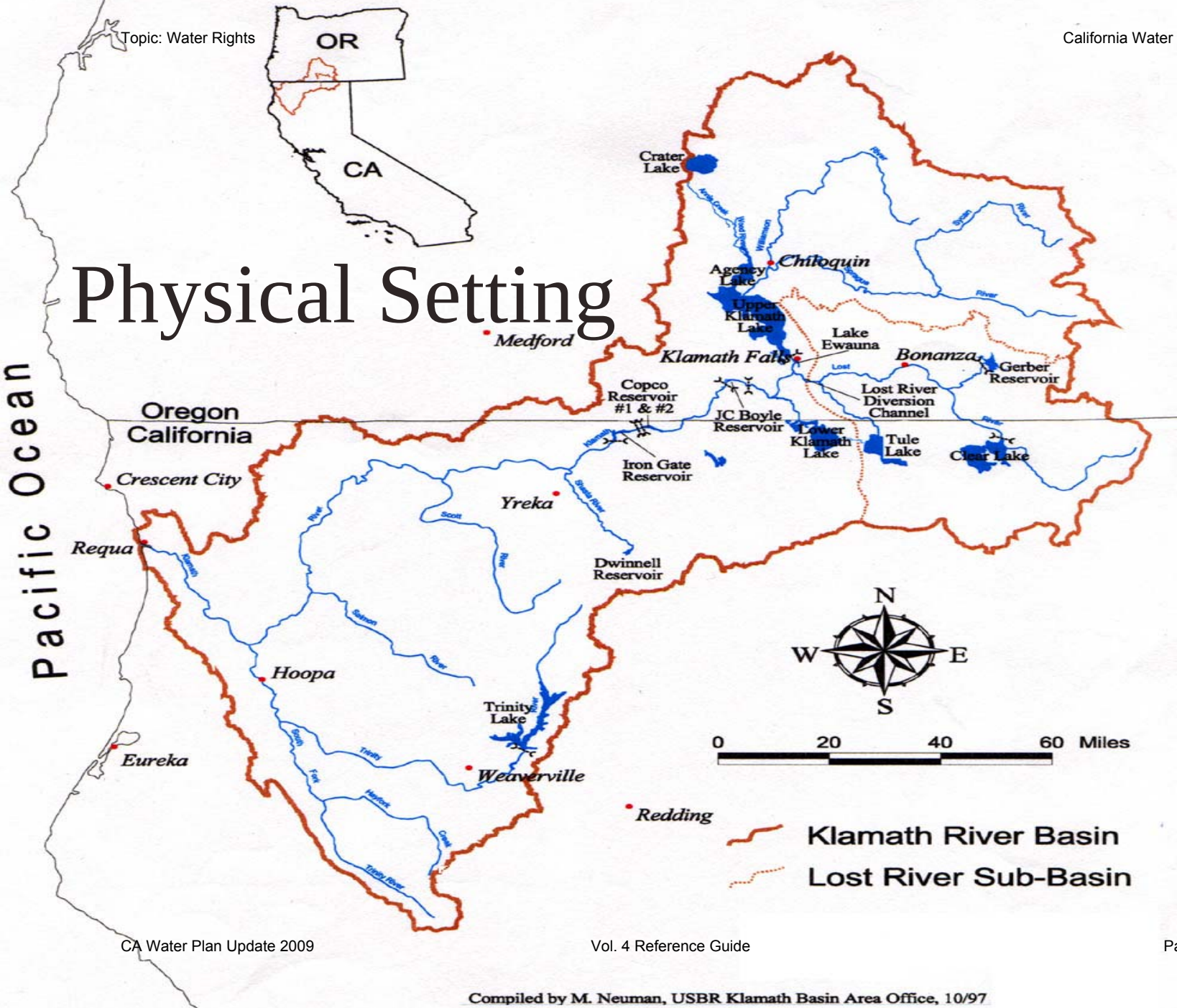


Klamath Case Study

- *Interests:*
  - *Farmers*
  - *Tribes*
  - *Fishermen*
  - *Environment*
- *Issues:*
  - *Extent of Tribal rights?*
  - *Who's on the hook for ESA?*
  - *Water Quality*
  - *How to balance needs*

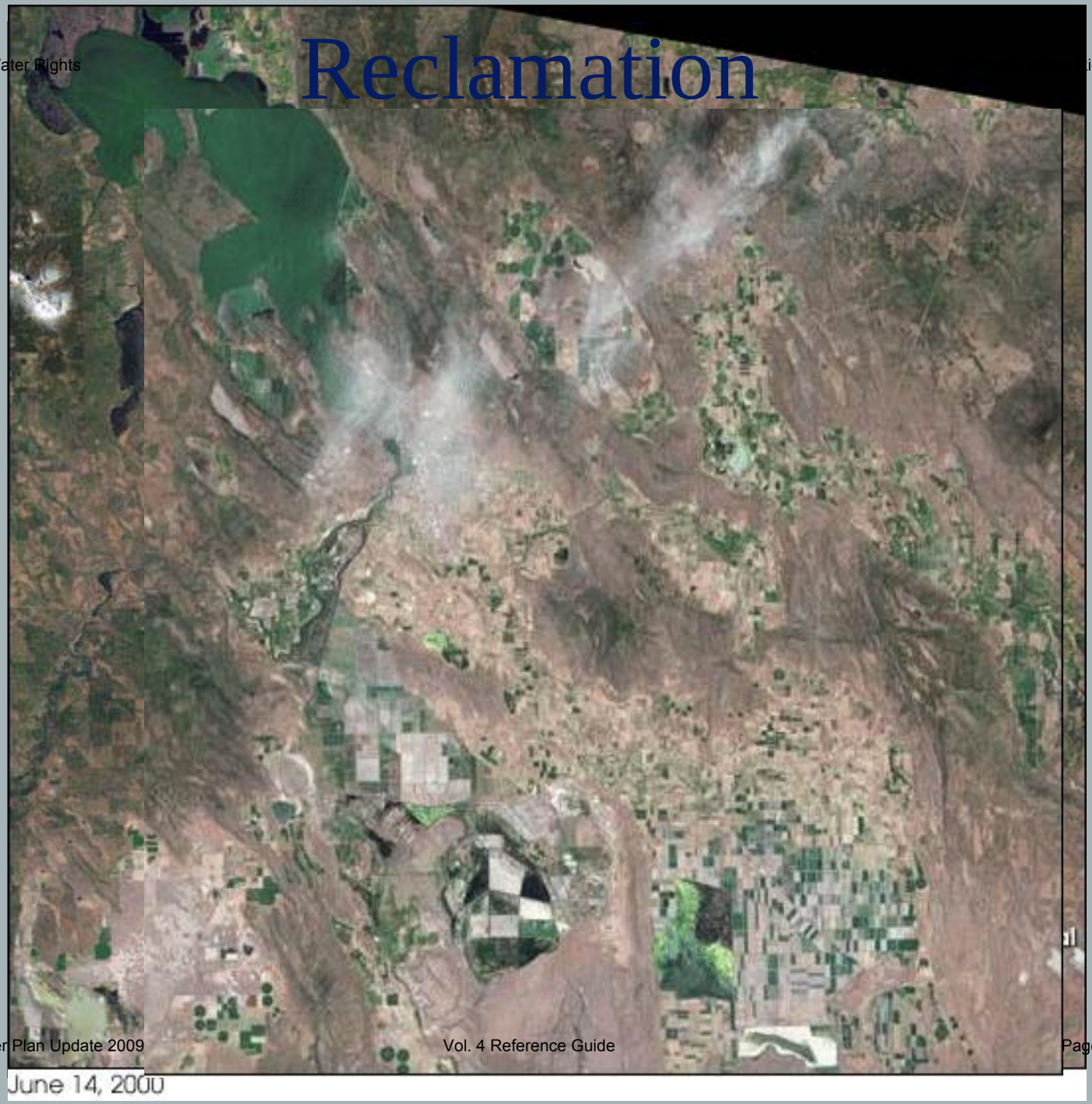


Physical Setting



J.C.Boyle Dam

Reclamation



Wildlife Refuges

Klamath Fisheries

- *Anadromous fish*
  - *Lost River and shortnose suckers*
  - *Coho*
  - *Chinook*

"V-J Day" Sportsmens Fleet ride the tide
Chinook Salmon Fishing at
Klamath River Mouth.

Water Quality

- *Eutrophication*
  - *Phosphorus*
  - *Nitrogen*
- *SWRCB water quality certification*
  - *Collaborative*
  - *Hearing*

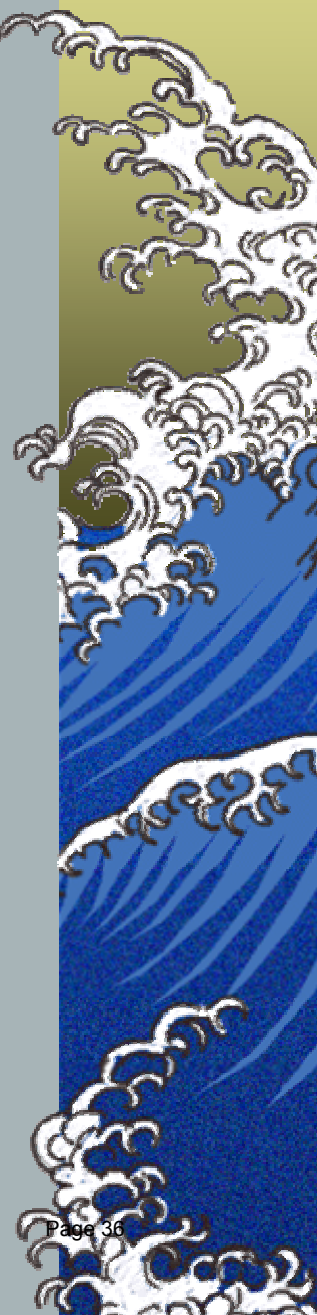
Reasonable Use?

- *Inefficient irrigation methods*
- *Subsidies encourage waste*
  - *Water*
  - *Electricity*

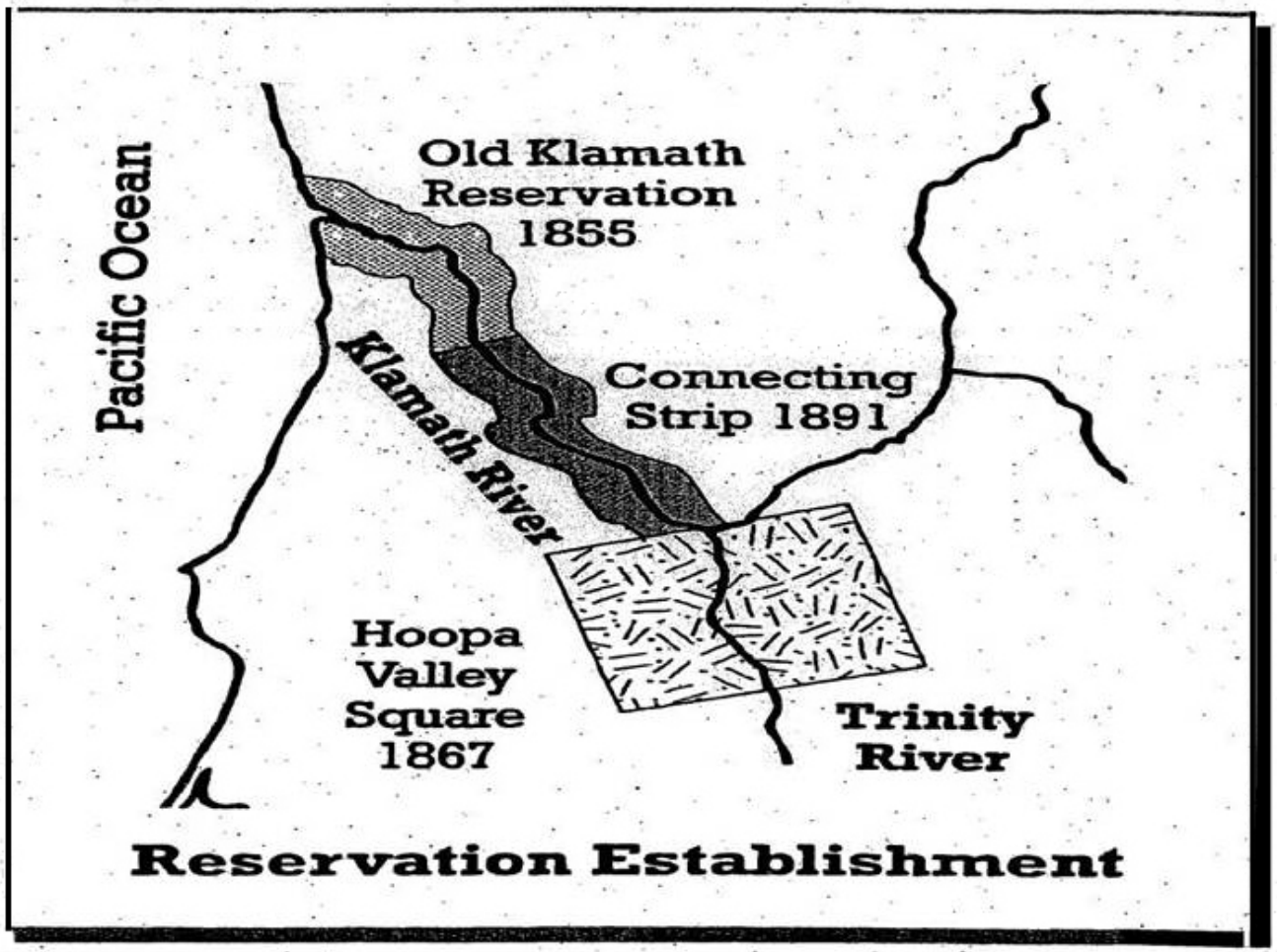
Upper Basin Tribal Water Rights

Upper Basin Tribal Water Rights

- *Implied water right to preserve hunting and fishing rights (Instream water right!)*
- *Not abrogated by Klamath Termination Act*
- *Priority date "Time Immemorial"*
- *Reserved right for agriculture on remaining parcels with 1864 priority*
- *Must be quantified in State adjudication*

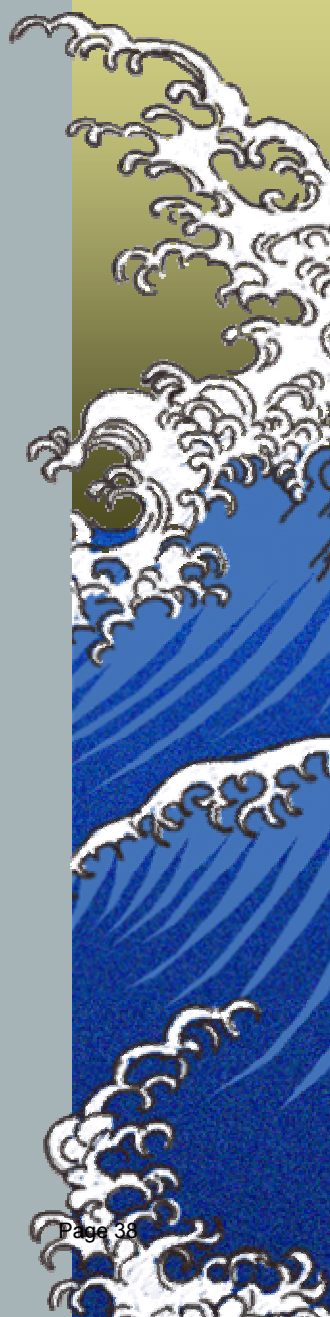


Lower Basin Tribal Water Rights



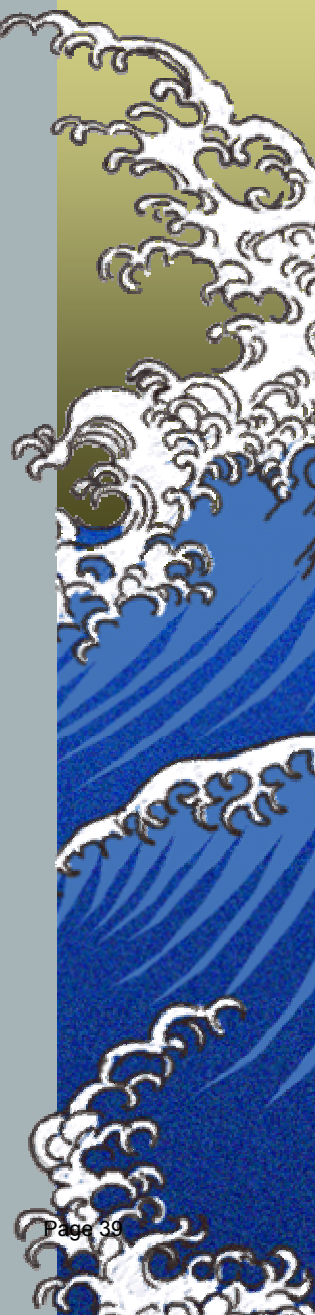
Klamath Water Rights Adjudication

- *Began 1975*
- *All pre-1909 users*
- *All federal claims*
  - *Department of Interior*
    - *Tribes (Bureau of Indian Affairs)*
    - *Klamath Project (Bureau of Reclamation)*
    - *Wildlife Refuges (US Fish and Wildlife Service)*



Klamath Water Project Order of Priority

- *ESA requirements*
- *Tribes*
- *Irrigators*
- *Wildlife Refuges*



Tule Lake

2001: Train Wreck!

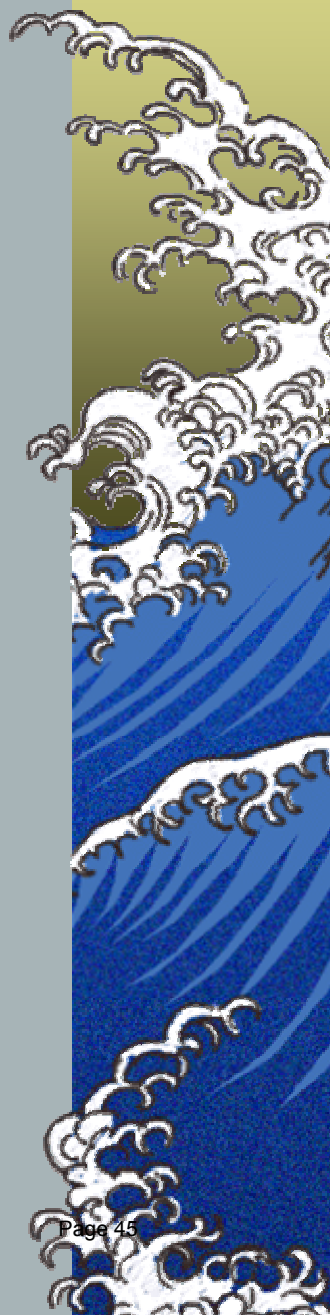
2001 Bucket Brigade

BROKE
LOGGERS & FARMERS
AMEND ESA

2002 Fish Kill

Potential Solutions

- *Klamath River Compact Commission*
- *Water Bank/Fallowing*
- *Wetlands Restoration*
- *Dam Removal*
- *Open Scott and Shasta Adjudications*

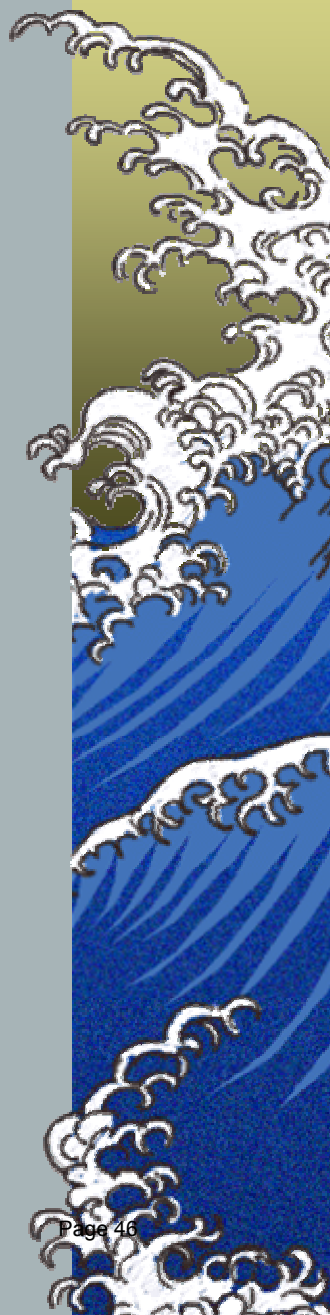


- *"Uncertainty allows for the possibility of improving the future in a way that certainty doesn't."*

  Mike Wills (1946–)

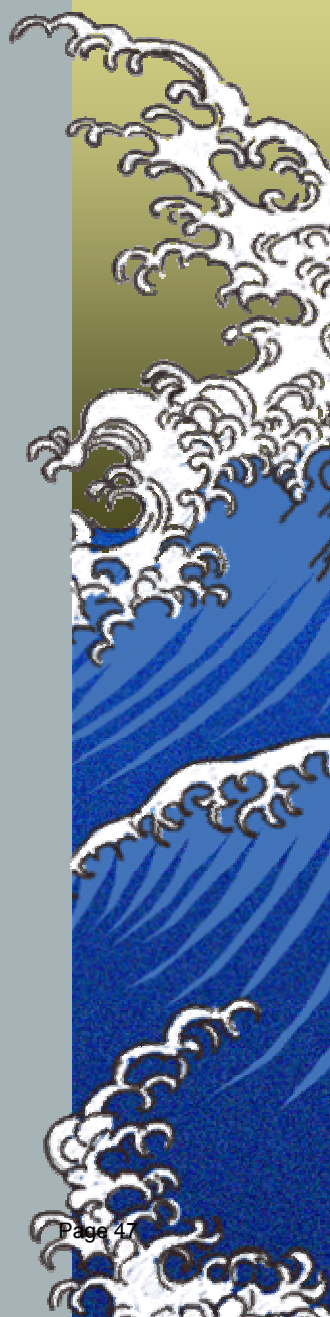
- *"We trained hard... but it seemed that every time we were beginning to form into teams we would be reorganised. I was to learn later in life that we tend to meet any new situation by reorganising... and a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency and demoralisation."*

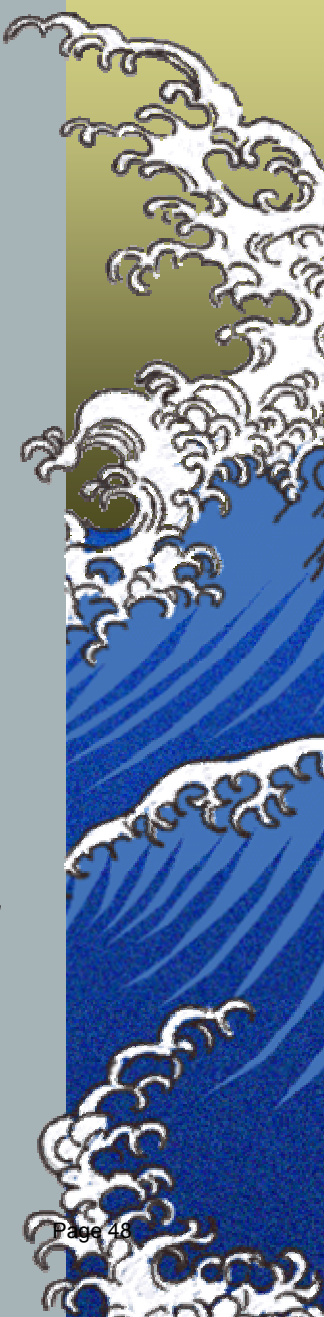
  Petronius (died AD 65)



"Whiskey is for drinking; water is for fighting over."

-Mark Twain



Additional Information

- *SWRCB website:www.waterrights.ca.gov/*
- *William Attwater and James Markle, "Overview of California Water Rights and Water Quality Laws," intro to West's Annotated Water Code sections 1 to 6999 (pocket part)*
- *Marc Reisner, Cadillac Desert: The American West and Its Disappearing Water*
- *Holly Doremus, "Fish, Farms, and the Clash of Cultures in the Klamath Basin," 30 Ecology Law Quarterly, 279 (2003)*