Appeal Nos. 18-1323, 18-1325

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LONNY E. BALEY, et al., JOHN ANDERSON FARMS, INC., et al.,

Plaintiffs-Appellants,
v.

UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS

Defendants-Appellees,

On Appeal from the United States Court of Federal Claims in Case No. 1:01-CV-00591-MBH (Hon. Marian Blank Horn)

AMICUS BRIEF OF LAW PROFESSORS SPECIALIZING IN INDIAN LAW AND WATER LAW SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE DECISION BELOW

[CORRECTED]

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FORM 9. Certificate of Interest **Form 9**
Rev. 10117

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Lonny E. Baley, et al **v.** United States, et al

Case No. 2018-1323

CERTIFICATE OF INTEREST

Counsel for the:

□ (petitioner) □ (appellant) □ (respondent) □ (appellee) ■(amicus) □ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Law Professors, See appendix	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Amici did not participate in trial court proceedings and only undersigned counsel will enter an appearance in this case.

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

October 23, 2018
Date

*/s/*Robert T. Anderson
Signature of counsel

Please Note: All questions must be answered

Robert T. Anderson
Printed name of counsel

cc: _____

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

SCHOLARLY AUTHORITIES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

The *amici curiae* submitting this brief, listed in the Appendix, are law professors who teach and write in the fields of federal Indian law, natural resources law, and water law. Through our teaching and scholarship, we promote the understanding of Indian and federal reserved water rights, as well as the water laws of the various states. This Brief in support of affirmance is filed pursuant to Federal Rule of Appellate Procedure 29(a) and Federal Circuit Rule 29.[1]

This case presents a fundamental question about the nature of water rights reserved by Indian tribes, and by the federal government on behalf of Indian tribes. Central to the decision in this case is the relationship between Indian reserved water rights and junior water rights established pursuant to state law and administered by the federal Bureau of Reclamation. The senior legal position of tribal instream flow water rights necessary for the fulfillment of federally-protected rights to fish is premised on original Indian ownership of the territory involved in this case. Further, the federal government's confirmation of those rights by treaty, statute or executive order supports the decision of the court below that any

[1] The undersigned counsel for Law Professors Specializing in Indian Law and Water Law is the sole author of this brief, and no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no other person cpontributed money that was intended to fund preparing or submitting this brief.

property rights in water held by appellants have always been subject to the senior legal position of tribal instream flow rights.

ARGUMENT

I. Original Indian Ownership of Land Included Water Rights to Support Aboriginal Activities Such as Fishing.

A. The Nature of Aboriginal Title to Land.

When European nations first encountered indigenous people in what is now the United States, "[t]he Indians had command of all the lands and the waters — command of all their beneficial use . . . ." *Winters v. United States*, 207 U.S. 564, 576 (1908). This statement acknowledged original Indian ownership of land and resources consistent with early international law and the foundational cases that make up federal Indian law. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 12 (Lexis/Nexis 2012) (hereinafter COHEN).

In *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), the Court considered a dispute over property between two non-Indians. Johnson traced his title to a pre-revolutionary war conveyance directly from a tribe, while M'Intosh claimed title to the same land by patent from the United States, which had acquired the land by treaty with the tribe. *Id*. at 571–72 and 593–94. *See* Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA . L. REV. 1065 (2000); LINDSAY ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005). Citing principles of international law, the Court refused to recognize tribal land transfers to private parties unless those transfers complied with the colonizing

nation's law. 21 U.S. at 592. Because the British Crown had not ratified the pre-revolutionary war conveyance from the tribe, United States courts would not recognize Johnson's claim of title. This confirmed the rule that any transfer of property from an Indian tribe to a third-party would require federal approval in the form of a treaty or statute. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985) (early federal statutes "codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio.*"); Indian Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, *codified as amended*, 25 U.S.C. § 177. And, as discussed below, reservations of Indian land include water rights to fulfill the purposes of the reservation.

B. Indian Reserved Water Rights Attach to Indian Reservations When Needed to Fulfill the Purposes of the Reservation.

Nearly a century passed after *M'Intosh* before the Supreme Court considered whether reserved Indian lands included rights to water. In *Winters v. United States*, *supra*, the federal government, carrying out its trust responsibility, filed suit to protect the water rights of the Gros Ventre and Assiniboine Indians, who occupied the Fort Belknap Indian Reservation in Montana pursuant to an agreement ratified by Congress in 1888. Act of May 1, 1888, ch. 213, 25 Stat. 113, 124 (1888). Winters was one of several private irrigators who argued that their water rights

were superior to any Indian rights under the state law of prior appropriation. If state law applied, the non-Indians had the better rights because they had actually put water to use for irrigation before the tribes, the determining factor under state law. But the Supreme Court rejected Winters' argument, ruling instead that the United States reserved the Indian water rights at least at the time Congress enacted the statute establishing the reservation, making the non-Indian rights junior in seniority.[2] The Court reasoned that acceding to state law would defeat the declared purpose of the tribes and the government, *i.e.* establishing a tribal homeland and assimilating Indians into a "pastoral and civilized people." *Winters*, 207 U.S. at 576. Those purposes were embodied in the Act establishing the Fort Belknap Indian Reservation, which ratified the 1888 agreement reserving tribal land that could be "adapted for and susceptible of farming and cultivation and the pursuit of agriculture." *Winters*, 207 U.S. at 566 (quoting Act of May 1, 1888, ch. 213, 25 Stat. 113, 124 (1888)).

Thus, the Supreme Court ruled that the Indian reservation included an implied right to water to grow crops and for other purposes necessary to fulfill the reservation's purposes. The Court reasoned that "[b]y a rule of interpretation of

[2] The Indian reserved right therefore dated to 1888 if the right was created by the agreement—or earlier if it was the tribe that reserved water held under aboriginal title—a point the court did not decide. *See* Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399 (2006). *See also* A. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 9:40 (2018).

agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id*. at 576. *See* COHEN, *supra*, at 1218-19. Since *Winters*, reserved waters for agricultural purposes have been recognized repeatedly. In *Arizona v. California*, the Supreme Court upheld the priority water rights of five tribes in Arizona and, citing *Winters*, described tribes' reserved water rights as 'present perfected rights.' *Arizona v. California*, 373 U.S. 546, 600 (1963). *See, e.g., Conrad Inv. Co. v. United States,* 161 F. 829 (9th Cir. 1908); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338–39 (9th Cir. 1939); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) ("when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation"); In re *Big Horn River Sys*., 753 P.2d 76 (Wyo, 1988), *aff'd by an equally divided court sub nom*, *Wyoming v. United States,* 492 U.S. 406 (1989); and COHEN, *supra*, at 1217-20 (discussing cases). It is thus settled law that Indian tribal reservations have property rights to water that are superior to subsequently established state-based water rights. As discussed below, tribes who relied at least in part on fishery resources to survive also have vested property rights to instream flows to support fish habitat.

C. Indian Rights to Fish Include Implied Habitat Protection Rights and Water Rights.

1. Implied Easements for Access and Habitat Protection.

Many, if not most, tribes in the Pacific Northwest relied heavily on fish and other aquatic resources for consumption and trade. They reserved homelands to facilitate new agricultural uses, but also intended that subsistence and commercial fishing opportunities continue. In *United States v. Winans*, 198 U.S. 371, 378 (1905), the Court considered the rights of the Yakama Nation, which had reserved in its treaty "the right of taking fish at all usual and accustomed places in common with citizens of the Territory, and of erecting temporary buildings for curing them . . . ." Treaty with the Yakama, 12 Stat. at L. 951, art. 3. The Winans were brothers who held title to ceded tribal lands conveyed to them by patent from the United States. 198 U.S. at 379. They objected to tribal members crossing their land to reach a tribal fishing site, pointing to the fact that their patent made no mention of any easements. *Id*.

The Court brushed the Winans' argument aside and held that the treaty reserved an implied easement for tribe members to cross private property to reach the fishing site. *Id*. The reserved property right to fish at off-reservation usual and accustomed places carried with it a federally-implied easement, *i.e*, a property interest that preempted state property law. *Id*. at 381 (The reserved treaty rights "imposed a servitude upon every piece of land as though described therein."). As

with other Indian property rights, they endure unless and until expressly abrogated by Congress. Even then, compensation for any abrogation of the rights is required by the Fifth Amendment. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (rejecting argument that federal termination legislation abrogated treaty fishing rights due in part to reluctance to expose federal government to takings claim without clear congressional action); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (rejecting arguments that Indian treaty rights had been implicitly extinguished by United States). *See* COHEN, *supra*, at 114 ("tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is unambiguous.").

The Court reasoned that the implied easement to cross private property was based on aboriginal Indian ownership of the territory, as access to fishing sites had not been ceded in the treaty. "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Winans*, *supra*, at 381. The Court recognized that interpreting the treaty not to recognize and affirm pre-existing tribal property rights would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Id*. The Court noted that the fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id*. at 380 (rejecting an argument that the treaty merely promised the

tribes equality of treatment under state or territorial law). Further, the *Winans* Court ruled that the state could not eliminate the Indians' right to harvest fish by granting a license for a fishwheel to non-Indian fishermen who might catch all the fish before they reached tribal fishing grounds. *Id*. at 381–82. Michael C. Blumm and James Brunberg, *'Not Much Less Necessary ... Than the Atmosphere They Breathed': Salmon, Indian Treaties, and the Supreme Court—a Centennial Remembrance of* United States v. Winans *and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 523 (2006). Once again, the Court followed the rule that state laws interfering with federally protected rights are invalid under the Supremacy Clause of the Constitution, U.S. Const. Art. IV, § 2.

The same treaty provision in *Winans* was at issue in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* in which the Court interpreted the "in common with" treaty language to mean that the tribes' retained the right to harvest up to 50% of the available fish for subsistence and commercial uses. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 686 (1979). In so ruling, the Court reiterated *Winans*' holding that the reserved tribal right was a property right protected under federal law which preempted conflicting state law. *Id*. at 680–81. The Court canvassed prior rulings involving treaty fishing rights and concluded as follows:

> Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive

> the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory."

Id. at 684.

Most recently, the Ninth Circuit vindicated the tribes' treaty fishing rights by holding that the State of Washington violated the treaty rights of the Yakama and other tribes in western Washington with reserved fishing rights when it constructed road culverts that blocked salmon and other fish from returning to the tribes' usual and accustomed fishing grounds. *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court*, *Washington v. United States*, 138 S.Ct. 1832 (2018). The State constructed or maintained over one-thousand culverts under state roads that were so poorly designed that they killed thousands of adult salmon and prevented them from reaching their spawning grounds. 853 F.3d at 966. The trial court found that "[i]f these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year." *Id*. In the court of appeals, the State argued that it might destroy all wild salmon runs in Washington without violating the treaties. *Id*. at 962. The Court of Appeals flatly rejected the State's one-sided interpretation of the treaties and upheld the district court injunction ordering the state to repair the most harmful barrier culverts within seventeen years, and the others on a more flexible schedule. *Id*. at 980. "As in *Winans*, the tribal treaty right to an opportunity

to harvest fish was recognized to be a property right protected by federal law. That right accordingly trumped state action that interfered with the tribes' rights. Because the state culverts prevented fish from reaching habitat necessary for the various life stages of the salmon, the court ordered the state to repair them.

In each of the foregoing instances, the courts upheld implied rights in order to accomplish the purposes of the reservation. This is also the rationale for recognizing implied water rights to support tribal fisheries.

2. Reserved Water Rights for Instream Flows.

Indian water rights for agricultural and tribal homeland purposes have a long pedigree. *Winters, supra*. The Ninth Circuit first addressed rights to tribal reserved instream flows in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Walton*), which was an action brought by the Tribes to limit non-Indian diversions of water that interfered with water needed instream to support on-reservation fisheries. The Colville Tribes reside on a reservation set aside by President Grant by Executive Order. Executive Order of July 2, 1872, *reprinted in* 1 KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES, 915-16 (2d ed. 1904). The court explained that:

> Salmon and trout were traditional foods for the Colville Indians, but the salmon runs have been destroyed by dams on the Columbia River. In 1968, the Tribe, with the help of the Department of the Interior, introduced Lahonton cutthroat trout into Omak Lake. The species thrives in the lake's saline water, but needs fresh water to spawn. The

> Indians cultivated No Name Creek's lower reach to establish spawning grounds, but irrigation use depleted the water flow during spawning season.

Walton, 647 F.2d at 45.

Walton was a non-Indian irrigator who diverted water from the creek pursuant to permits issues under state law. He argued that the Tribes did not possess a federally-protected right to water to maintain the tribal fishery. The court began its analysis by noting that it was "mindful that the reservation was created for the Indians, not for the benefit of the government." *Id*. at 47. Noting that the Tribes "traditionally fished for both salmon and trout" and that "fishing was of economic and religious importance to them" the court concluded that there was water reserved to provide a replacement trout fishery in No Name Creek. *Id*. at 48. Because the tribal reserved right was rooted in federal law and aboriginal ownership of the reservation (even though it was a replacement fishery), it was superior to any rights created under state law. The fact that the reservation was created by executive order rather than treaty or statute had no bearing on the existence of Indian reserved rights. *Id*. at 47–48. *See Arizona v. California*, *supra*, 373 U.S. at 598.

The Ninth Circuit next addressed rights to instream flows in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), a case brought by the United States on behalf of the Klamath Tribes, and one that bears directly on the waters involved in this

case. The Court concluded that "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle," and consequently recognized Indian reserved rights to water for fisheries habitat. *Id*. at 1409. The Klamath Tribes' rights have a time immemorial priority date. *Id*. at 1409.

The same holds true for the Hoopa Valley and Yurok Tribes, who continue to rely heavily on fish as did their ancestors. *See Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1214 (9th Cir. 2000) (tribal instream rights take precedence over alleged rights of junior irrigators); *Kandra v. United States*, 145 F.Supp.2d 1192 (D. Or. 2000) (same); and Solicitor Opinion M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes, October 4, 1993, p. 27 (Tribal reservations include sufficient fish to afford a moderate standard of living up to 50% of the total harvestable quantity). The right to fish "includes the right to certain conditions of water quality and flow to support all life stages of fish." Memorandum from Regional Solicitor to Regional Director, *Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan* at 5 (July 25, 1995). Thus, the Klamath' reserved fishing and gathering rights, and the Hoopa and Yurok executive order reservations include rights to sufficient water to maintain access to fish and habitat to produce those fish. This includes water in Upper

Klamath Lake needed for habitat in the lake, and also for water needed for fish downstream. *See* Br. of Hoopa Valley Tribe, § I.B. In *Winters*, *supra*, the on-reservation tribal water rights resulted in an injunction against upstream users who would interfere with the tribal reserved right. *Winters*, 207 U.S. at 208 (describing lower court injunctions). Similarly, if upstream waters were needed to satisfy tribal instream flow needs to maintain fisheries, the Bureau of Reclamation was required to manage the irrigation project in a way that satisfied those senior priority water uses.

Because the Klamath Tribes, Hoopa, and Yurok Tribes will be filing briefs in this case, *amici* will not detail the factual and legal basis for their reserved rights. But as the foregoing discussion demonstrates, well-established and long-standing doctrine fully supports the existence of tribal water instream flow rights to support tribal fisheries. As discussed in the next section, the Bureau of Reclamation's actions to fulfill its fiduciary obligations to ensure those treaty rights was not discretionary, and simply afforded tribal water rights their proper place as legally superior to Plaintiffs' rights.

II. The United States' Trust Obligation to Protect Indian Water Rights Required that the Bureau of Reclamation Manage the Klamath Project Consistent with Fish Habitat Needs.

A. The Bureau of Reclamation's Legal Obligation as Trustee to the Tribes.

Whether reserved for irrigation, fisheries habitat, or other purposes, Indian water rights are considered trust property. In other words, the United States holds legal title to the reserved water in trust for the use of the Indian tribes, just as the United States holds legal title to land in trust for the benefit of particular tribes. *See* Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.").

The Supreme Court recognized that water rights are held in trust when it ruled that state courts gain jurisdiction over Indian reserved water rights only where the United States is a defendant in state court general stream adjudications under the McCarran Amendment, 43 U.S.C. § 666. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n. 2 (1983) ("any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians"). Accordingly, the United States has legal obligations to protect that property and state court must respect the federal rights. *Id*. at 571 ("any state court decision alleged to abridge

Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment").

The federal restrictions on the alienation of tribal property, including water rights, create a trust responsibility on the part of the United States to protect that property and to act in the best interests of the tribe. COHEN, *supra*, at 1004 (federal government has trustee's title with tribe holding beneficial interest). *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (federal government has moral obligations of the highest responsibility and trust and its conduct "should therefore be judged by the most exacting fiduciary standards"); *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256-57 (D. D.C. 1972) (the Secretary of the Interior's obligation was to protect trust resources, not balance them against competing claims). While the United States' historic record in protecting and respecting Indian water rights is not admirable, the Bureau of Reclamation's actions here fulfilled the federal trust obligation to protect Indian property.[3] As water uses that

[3] Much has been written about the United States' failures to fulfill its trust obligations to Indian tribes in general, and in particular with regard to water. *See* NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 475 (1973) (failure to protect Indian water rights is one of the "sorrier" chapters in the treatment of Indian tribes by the federal government); Ann C. Juliano, *Conflicted Justice, The Department of Justice's Conflicts of Interest in Representing American Indian*

commenced after establishment of the tribal rights, any state-based property interests in water use for irrigation were always subject to the senior tribal rights. Plaintiffs' right to use water could only be satisfied after the reserved rights of the tribe were met.

Thus, the United States, through the Department of the Interior and its Bureau of Reclamation, was obliged to protect tribal reserved water rights. The Department determined that tribal fisheries would have been severely damaged without adequate instream flows. United States Response Br. at 39–42. *See also* Briefs of Klamath, Hoopa Valley, and Yurok Tribes (separate briefs of each tribe filed September 24, 2018). Consequently, the federal government made a carefully deliberated and reasoned decision to release water to fulfill the requirements of the Endangered Species Act, and also to meet the minimum required to preserve tribal

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Tribes, 37 GA. L. REV. 1307, 1331–33 (2003) (detailing the United States' water related conflicts of interest in advancing tribal water rights); COHEN, *supra*, at 1257–63. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Charles F. Wilkinson and John Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth—How Long a Time is That* ?, 63 CAL. L. REV. 601 (1975); Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 414–418 (2006). *Cf. Nevada v. United States*, 463 U.S. 110, 145 (1983) (tribe bound by United States' failure to assert water for instream flows in litigation over water rights to the Truckee River and Pyramid Lake). For a recent critique of federal government failings in this area, *see* WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES: A REPORT BY THE DEMOCRATIC STAFF OF THE HOUSE COMMITTEE ON NATURAL RESOURCES (October 10, 2016), *available at* [https://perma.cc/TLZ6-QGZ].

trust resources. United States Answering Br. at 44–46; Br. of Defendant-Appellee Pacific Coast Fishermen's Ass'n at 12–18. Although there are limits on tribal pursuit of damages for breaches of trust under the Tucker Act, *see, e.g.*, *United States v. Navajo Nation,* 537 U.S. 488 (2003), the rationale of that line of cases has no application when the United States acts consistently with its trust obligations to protect tribal assets. *See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (court acted appropriately in ordering release of water to protect habitat for treaty fishery).

Indeed, it has forcefully been argued that the federal government may be compelled to take, or refrain from, prospective actions to safeguard tribal assets. *See* Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003). Consistent with that argument, federal courts have required federal agencies to refrain from damaging Indian treaty rights, or upheld agencies when challenged for properly protecting tribal property rights. *See Umatilla v. Alexander*, 440 F. Supp. 553, 556 (D. Or. 1977) (the duty to protect fish and fishing rights reserved by treaties applies to federal agencies as well as state and local governments; Army Corps of Engineers may not destroy fishing grounds absent authorization by Congress); *No Oilport! v. Carter*, 520 F. Supp. 334, 372–73 (W.D. Wash. 1981) (ordering hearing on whether

sedimentation caused by proposed oil pipeline would adversely affect spawning habitat); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1515 (W.D. Wash. 1988) (proposed elimination of a portion of the usual and accustomed fishing ground where the Marina is to be built will deny the Tribes access to their usual and accustomed fishing ground and is enjoined); *Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) ("In carrying out its fiduciary duty, it is the government's, and subsequently the Corps', responsibility to ensure that Indian treaty rights are given full effect."). *Cf. Midwater Trawlers v. Dep't of Commerce*, 393 F.3d 994, 997-98 (9th Cir. 2004) (Federal regulations of fisheries under the Magnuson-Stevens Act must be consistent with tribal treaty rights and must be based on the "best available scientific evidence.").

The strongest claims for limits on federal discretion are in situations where the United States has taken control of trust property. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); COHEN, *supra*, at 424–255 and 426–29. That is exactly the situation here as the Bureau of Reclamation annually impounds water subject to Indian reserved rights and annually makes decisions as to whether and when that water should be released for irrigation project use, or dedicated to senior tribal instream flows. The Bureau was required to manage Klamath Project operations to account for Upper Klamath Lake levels and tribal instream flows necessary to support tribal fisheries. It is similar to the position the

agency was presented in *Pyramid Lake Paiute Tribe of Indians, supra*, where the court found that the Secretary of the Interior's obligation was to protect trust resources, not balance them against competing claims. 354 F.Supp. at 256–57. *See* COHEN, *supra*, at 412, 997–999.

B. Indian Water Rights Need Not Be Finally Quantified to Be Afforded Legal Recognition.

As *Winters* and its progeny recognize, Indian water rights are established at the creation of a reservation if needed to fulfill reservation purposes. Because the Klamath Basin water controlled by the Bureau of Reclamation was needed for aboriginal uses, the water needed to maintain fisheries habitat in Upper Klamath Lake and the rivers far predates any state law water rights. The tribal rights are vested rights that continue to exist until Congress extinguishes the rights (compensation would be due), and do not depend on quantification in order to exist. *Cf.* Brief of Oregon in Support of Neither Party at 26. As discussed above, Indian water rights to support historic tribal fisheries have a time immemorial priority date. *United States v. Adair*, *supra*. The tribal rights vested before the time of colonization, a position truly superior to any state-based water rights. Such rights continue to exist until limited by treaty, agreement, or congressional action. The Court in *Winters*, *supra*, did not finally quantify the water rights for the tribes of the Ft. Belknap Indian reservation—it merely enjoined non-Indian interference with water then needed by the tribes and left the door open for further expansion of

the right. *Winters, supra,* at 8. The reserved rights vested at the time the reservation was created, or when aboriginal rights were confirmed by treaty, statute, or executive order. As the court of appeals in *Winters* noted in describing another federal reservation, "When the government established the reservation, it owned both the land included therein and all the water running in the various nearby streams to which it had not yielded title. It was therefore unnecessary for the government to 'appropriate' the water. It owned it already. All it had to do was to take it and use it.'" *Winters v. United States*, 143 F. 740 (9th Cir. 1906), *quoting Story v. Woolverton*, 78 P. 589 (Mont. 1904) (describing reserved water rights for federal military reservation). *See also Conrad Inv. Co. v. United States,* 161 F. 829, 835 (9th Cir. 1908) (enjoining junior state law appropriators and giving tribe and United States leave to return for an increased amount if needed); *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. United States,* 832 F.2d 1127, 1132 (9th Cir. 1987) (federal project required to manage project waters to satisfy senior, but unquantified, tribal instream flow rights). The lack of a complete adjudication does not undermine the existence of the tribal rights, or preclude the United States from fulfilling its trust responsibility to protect senior Indian rights.

A quantification of the type involved in this case simply confirms the existence of the right in a judicial proceeding, and may determine the scope of the

right. The right existed long before this court proceeding, and the federal government as trustee to the tribes was bound to manage the Klamath Project in a manner that fulfilled the senior tribal rights.

CONCLUSION

For the reasons set forth above and as stated by the United States, the Pacific Coast Fishermen's Association, and the *amici* tribes, the Bureau of Reclamation was required to limit junior water uses by the plaintiffs to protect treaty trust resources. Because the water itself is held in trust for the benefit of the tribes with a time immemorial priority date, the right to keep it instream is superior to all other water rights in the Klamath Basin.

The judgment of the lower court should be affirmed. There was no taking, because any property interest in water owned by plaintiffs was subordinate to senior tribal rights.

Respectfully submitted this 23rd day of October, 2018.

/s/ *Robert T. Anderson*
Robert T. Anderson, Counsel of Record

Appendix — List of Amici Curiae:*

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on October 23, 2018 by:

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(Signature of Attorney)

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(State whether representing appellant, appellee, etc.)

In Support of Appellees United States and Pacific Coast Fed. of Fishermen's Associations

October 23, 2018

(Date)