

Appeal No. 18-1323

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

LONNY E. BALEY, et al and JOHN ANDERSON FARMS, INC., et al
Plaintiffs-Appellants,

v.

UNITED STATES and PACIFIC COAST FEDERATION OF FISHERMAN'S
ASSOCIATIONS,
Defendants-Appellees.

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

**Amicus Curiae Brief of the Klamath Tribes
Amicus in Support of Affirmance for the Defendants-Appellees**

SUSAN Y. NOE
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760
suenoe@narf.org

*Attorney for
Amicus Curiae Klamath Tribes*

September 24, 2018

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Baley v. United States

Case No. 18-1323

CERTIFICATE OF INTEREST

Counsel for the:

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

Klamath Tribes

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
Klamath Tribes	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:

Alexander, Berkey, Williams & Weathers LLP: Curtis G. Berkey, Scott W. Williams;
 Klamath Water Project: Carl Ullman;
 Native American Rights Fund: Walter R. Echo-Hawk.

FORM 9. Certificate of Interest

Form 9
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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

9/24/2018

Date

/s/ Susan Y. Noe

Signature of counsel

Susan Y. Noe

Printed name of counsel

Please Note: All questions must be answered

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TABLE OF CONTENTS

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... v

INTEREST OF AMICUS CURIAE KLAMATH TRIBES1

ARGUMENT4

A. The Tribes Have Treaty-Based Time Immemorial Water Rights In Upper Klamath Lake (“UKL”).....5

1. The 1864 Treaty reserved the Tribes’ hunting, fishing, trapping, and gathering right within the Klamath Reservation to enable the Tribes to continue its traditional way of life5

2. The 1864 Treaty reserving the Tribes’ right to hunt, fish, trap, and gather within its Reservation, impliedly reserved the water necessary to support that treaty harvest right.....7

3. Because the waters of UKL are essential to support the Tribes’ treaty right to fish, the 1864 Treaty impliedly reserved sufficient quantities of UKL water to adequately support the fishing right.....8

4. The Tribes’ reserved water rights have a time immemorial priority date.....13

5. The Tribes’ Treaty fishery’s current health does not defeat the Tribes’ water right.....13

B. The Prior Appropriation Doctrine Only Entitles Plaintiffs To Water After The Klamath Tribes’ Senior Water Rights Have Been Fulfilled15

C. The Lack Of Quantification And Oregon’s Lack Of Enforcement Of The Tribal Water Right In 2001 Is Irrelevant; Reclamation Owed A Trust Obligation To Ensure The Tribes’ UKL Water Right Was Protected And Was Required To Manage The Project Accordingly21

CONCLUSION.....26
CERTIFICATE OF COMPLIANCE.....27
CERTIFICATE OF SERVICE.....28

TABLE OF AUTHORITIES

Cases:

Arizona v. California,
 373 U.S. 546 (1963)..... 7, 12

Baley v. United States,
 134 Fed. Cl. 619 (2017) 11, 15, 19, 24

Benz v. Water Res. Comm’n,
 764 P.2d 594 (Or. Ct. App. 1988) 17

Cappaert v. United States,
 426 U.S. 128 (1976)..... 18

Carson-Truckee Water Conservancy Dist. v. Clark,
 741 F.2d 257 (9th Cir. 1984)..... 12

Colo. River Water Conservation Dist. v. United States,
 424 U.S. 800 (1976)..... 4

Colville Confederated Tribes v. Walton,
 752 F.2d 397 (9th Cir. 1985)..... 18

Joint Bd. of Control of Flathead Mission & Jocko Irrig. Dists. v. United States,
 832 F.2d 1127 (9th Cir. 1987)..... 12, 17, 18

Kandra v. United States,
 145 F. Supp. 2d 1192 (D. Or. 2001)..... 1, 2, 14, 23

Kimball v. Callahan,
 493 F.2d 564 (9th Cir. 1974)..... 7

Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.,
 763 F.2d 1032 (9th Cir. 1985) 12

Klamath Water Users Protective Ass’n v. Patterson,
 204 F.3d 1206 (9th Cir. 2000)..... 2, 3, 12, 23

McCall v. Porter,
 70 P. 820 (Or. 1902)..... 16

*Montana ex rel. Greely v. Confederated Salish &
 Kootenai Tribes*,
 712 P.2d 754 (Mont. 1985) 18

Morris v. Bean,
 146 F. 423 (C.C.D. Mont. 1906) 18

Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe,
 473 U.S. 753 (1985)..... 11

Rocky Ford Canal Co. v. Cox,
 59 P.2d 935 (Utah 1936) 16

Teel Irrig. Dist. v. Water Res. Dep't,
 919 P.2d 1172 (Or. 1996) 16

Tudor v. Jaca,
 164 P.2d 680 (Or. 1945) 16

United States v. Adair,
 723 F.2d 1394 (9th Cir. 1983)..... *passim*

United States v. Braren,
 338 F.3d 971 (9th Cir. 2003)..... 4, 5

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,
 443 U.S. 658 (1979)..... 14, 25

In re Waters of the Klamath River Basin,
 No. WA1300001 (Or. Klamath Cir. Ct. filed Mar. 7, 2013)..... *passim*

Winters v. United States,
 207 U.S. 564 (1908)..... 7, 17

Statutes:

Treaty between the United States of America and the Klamath and
 Moadoc Tribes and Yahooskin Band of Snake Indians,
 Oct. 14, 1864, 16 Stat. 707..... 1, 5

25 USC § 564..... 7

25 USC § 566..... 7

Or. Rev. Stat., ch. 539 2

Or. Rev. Stat. § 539.130(4)..... 4

Or. Rev. Stat. § 539.170 4

Other Authorities:

1 WATERS AND WATER RIGHTS § 12.01
(Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2015) 16

INTEREST OF AMICUS CURIAE KLAMATH TRIBES

Amicus curiae the Klamath Tribes (“Tribes”) are a federally-recognized Indian tribe that reserved various rights, including water rights, in an 1864 treaty with the United States. Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707 (“1864 Treaty” or “Treaty”); *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983). The Tribes have resided in the Klamath Basin for millennia, relying upon the Basin’s natural resources, including its water and water-dependent resources, to sustain themselves. The 1864 Treaty protects these resources, including fisheries, which are of enormous importance to the physical, economic, and spiritual well-being of the Tribes. *Adair* at 1409; *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001). The Tribes’ water rights to support these fisheries and other treaty resources hold a “time immemorial” priority date. *Adair* at 1414. This makes them senior to all other water rights in the Basin, including the water rights for the United States Bureau of Reclamation’s (“Reclamation”) Klamath Irrigation Project (“Klamath Project” or “Project”), in which Lonny E. Baley et. al, Plaintiffs-Appellants

(“Plaintiffs”) assert an interest as the basis for their takings claim. *Adair* at 1414.

The seniority of these time immemorial tribal water rights over all other rights in the Basin has been repeatedly and consistently recognized by the courts, including in cases involving some of the Plaintiffs in this case. *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000) (“*Patterson*”); *Kandra*, 145 F. Supp. 2d at 1204. More recently, this seniority was also recognized by the State of Oregon in its Klamath Basin Adjudication (“KBA”). Amended and Corrected Findings of Fact and Order of Determination, *In re Waters of the Klamath River Basin*, No. WA1300001 (Or. Klamath Cir. Ct. filed Mar. 7, 2013) (“ACFFOD”),¹

¹ Available at

<https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx>.

At the conclusion of the KBA’s 38-year-long administrative phase in March 2013, the Oregon Water Resources Department (“OWRD”) issued its Findings of Fact and Order of Determination (“FFOD”) determining all water-right claims at issue in the KBA, including the tribal water-right claims filed by the United States and the Klamath Tribes as well as all claims related to the Klamath Project water rights. On February 28, 2014, OWRD issued the ACFFOD to address certain technical errors in the FFOD. The ACFFOD is now undergoing judicial review in the Klamath County Circuit Court under Or. Rev. Stat., ch. 539, Oregon’s general stream adjudication statute.

KBA_ACFFOD_04946.² The Tribes' water rights "take precedence over any alleged rights of the [Klamath Project] Irrigators," such as Plaintiffs here, *Patterson*, 204 F.3d at 1214, and, conversely, Klamath Project irrigation rights are "subservient" to those of the Tribes, *id.* at 1213.

Nonetheless, Plaintiffs in this case have sought compensation for interference with their junior water rights in 2001, without showing that any water was available after the Tribes' senior water rights were satisfied. Under the water rights priority/seniority system that is the foundation of the Oregon water law on which Plaintiffs found their claim, Plaintiffs were not entitled to any water until the senior rights of the Tribes were fulfilled. The Tribes have a vital interest in ensuring their rights are properly taken into account in this action.

The Tribes file this brief pursuant to Fed. R. App. P. 29(a)(2) in which all parties have consented to the filing of this brief. No party's counsel authored any portion of this brief. No party, party's counsel, or any other

² References in this brief to the KBA determination of water rights in the ACFFOD adhere to the KBA court's bates numbering format, e.g., KBA_ACFFOD_00000.

person besides the Klamath Tribes and the Klamath Tribes' counsel contributed money to fund the preparation of this brief.

ARGUMENT

It is essential to be clear about what is not involved in this case. This is not a case to determine the existence or nature of the Tribes' rights. The nature and extent of the Tribes' rights have been decided in other fora. *Adair* set forth the legal principles governing the Tribes' water rights, and then held that the quantification of those rights was to occur in state proceedings (the Klamath Basin Adjudication), striking a balance between a federal court's duty to address matters before it, and the deference shown to states in water rights adjudications. *Adair* at 1406. *See also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (comity or abstention may at times require deference to state adjudications). Those state proceedings have reached a point, contrary to Plaintiffs' assertions (Pls.' Br. 31-33) where rights have been quantified and are enforceable by the state of Oregon.³ The Court below weighed the effect of these tribal

³ Water rights determined in the ACFFOD are required to be enforced by OWRD while judicial review of the ACFFOD is pending. Or. Rev. Stat. § 539.130(4); Or. Rev. Stat. § 539.170. *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003), cited by Plaintiffs for the proposition that nothing has been

rights, which have existed since time immemorial, on Plaintiffs' taking claim - and correctly found they defeat such a claim.

Plaintiffs' briefing here demonstrates a fundamental misunderstanding of the nature of the Tribes' treaty rights, the trust relationship between the Tribes and the United States, and the doctrine of prior appropriation. The Tribes files this brief to provide crucial context, legal history, and legal analysis to assist the Court in assigning the proper legal effect to the Tribes' rights.

A. The Tribes Have Treaty-Based Time Immemorial Water Rights In Upper Klamath Lake ("UKL")

- 1. The 1864 Treaty reserved the Tribes' hunting, fishing, trapping, and gathering right within the Klamath Reservation to enable the Tribes to continue its traditional way of life**

At the time of the United States' expansion to the Klamath Basin, the Klamath Tribes had been self-sufficient for millennia. *Adair* 723 F.2d at 1409 nn.14-15. In the 1864 Treaty, the Tribes ceded roughly 20 million acres to the United States in order to pave the way for non-Indian settlement of southern Oregon and northern California. In return, Article I of the 1864 Treaty reserved the Klamath Indian Reservation ("Reservation") as a

determined as to the Tribes' rights (Pls.' Br. 33 n.130), is inapposite because the Tribes' rights have been determined in *Adair* and in state orders entered after *Braren* was decided. KBA_ACFOD_04946.

permanent homeland for the Tribes and also reserved to them the right to continue to hunt, fish, trap, and gather on the Reservation to provide their material support.

The Klamath Tribes and the United States knew that hunting, fishing, gathering, and trapping were vital to the survival of the Tribal members. *Adair*, 723 F.2d at 1409 nn.14-15, 1414 n.22. Thus, the 1864 Treaty "was to guarantee continuity of the Indians' hunting and gathering lifestyle," *id.* at 1409, and in view of the Treaty, "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." *Id.* Further, when the Reservation was established, "the Government and the Tribe intended to reserve a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribes' treaty right to hunt and fish on reservation lands." *Id.* at 1410. The federal courts have explicitly confirmed that the Klamath Tribes retain their treaty-reserved hunting, fishing, trapping and gathering

right on their former Reservation lands. *Kimball v. Callahan*, 493 F.2d 564, 569-70 (9th Cir. 1974).⁴

2. **The 1864 Treaty reserving the Tribes' right to hunt, fish, trap, and gather within the Reservation impliedly reserved the water necessary to support the Tribes' treaty harvest right**

The creation of an Indian reservation by the United States includes an implied reservation of water sufficient to fulfill the purposes for which the reservation was created. *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Winters v. United States*, 207 U.S. 564, 576 (1908). The implied reservation of water protects the tribal water rights against any junior water user, even when the rights are unquantified. *See Arizona*, 373 U.S. 546; *Winters*, 207 U.S. 564 (United States sued to protect tribes' unquantified water rights).

As the *Adair* court summarized:

Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian title" to all of its vast holdings. Aboriginal title is considered as sacred as the fee simple of the whites....The

⁴ The Klamath Reservation is now referred to as the "former Reservation" as the Tribes no longer own all of the Reservation lands as a result of implementation of the Klamath Termination Act terminating federal recognition of the Klamath Tribes government-to government relationship with the United States in 1961, 25 U.S.C. § 564, although the government-to-government relationship was later restored in 1986, 25 U.S.C. § 566.

Tribe's title also included aboriginal hunting and fishing rights, and by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland....

...There is no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself....Nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home....Accordingly, we agree with the district court that within the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.

Such water rights necessarily carry a priority date of time immemorial.

Adair, 723 F. 2d at 1413-14 (internal quotations and citations omitted).

3. **Because the waters of UKL are essential to support the Tribes' treaty right to fish, the 1864 Treaty impliedly reserved sufficient quantities of UKL water to adequately support the fishing right**

Plaintiffs misunderstand the federal reserved water rights doctrine and attempt to end run the Klamath Basin Adjudication when they erroneously assert in their brief that the Tribes have no water right in UKL.⁵ Pls.' Br. 31-33. The ACFOD affirmed that the Tribes' treaty-

⁵ Plaintiffs' interests are represented in the state Klamath Basin Adjudication proceedings by the Klamath Project irrigation districts, which

reserved time immemorial water rights require the maintenance of minimum UKL levels for a healthy and productive habitat to support the Tribes' fishing right on the former Reservation lands.

KBA_ACFOD_04946. Noting the various United States Supreme Court and Ninth Circuit cases supporting boundary waters as eligible for federal reserved water rights, the ACFOD confirmed the Tribes' water right in UKL as a water source forming part of the boundary of the former Reservation. KBA_ACFOD_04940.

A tribal water right in UKL is essential to the continued survival of the fish species upon which the Tribes have relied. Because of the relevance of the ACFOD's determination, we quote it at length here:

VI. Claimants have demonstrated certain lake elevations in Upper Klamath Lake are necessary to establish and maintain a healthy and productive habitat for the target species.

[T]he purpose of this adjudication is the quantification of water rights within the Klamath Basin. Specifically at issue here is the quantification of the Tribes' water rights in Upper Klamath Lake to support the on-reservation exercise of Treaty harvest rights. In this case, such water rights are limited by the amount of water necessary to allow the Tribes to exercise their Treaty protected fishing rights within the boundaries of the former

districts were also the initial plaintiffs in this action, prior to class certification.

reservation. This is the amount of water necessary to establish and maintain a healthy and productive habitat that will enable the Tribes to exercise their aboriginal rights.

* * *

A healthy and productive habitat is one that will support a viable and self-renewing population of all Treaty species to enable the Tribes to exercise their Treaty protected rights. In the context of this case, that means lake elevations that will allow the target species to reproduce and subsist in numbers sufficient to allow harvest by the Tribes within the former reservation. As identified previously, Claimants' burden in this matter is to prove, by a preponderance of the evidence, the lake level necessary in a given month to establish and maintain a healthy and productive habitat for Treaty species....*[The Tribes] have satisfied their burden.*

KBA_ACFOD_04970-71 (Proposed Order Section VI. incorporated without modification in the ACFOD at KBA_ACFOD_04939, 04941) (emphasis added).

The ACFOD concluded as a matter of law that:

1. Claimants are entitled to claim water rights within Upper Klamath Lake to fulfill the purposes of the reservation.
2. The claimed lake levels are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' on-reservation fishing rights guaranteed by the Treaty of 1864.

KBA_ACFOD_04960 (Conclusions of Law incorporated in their entirety in the ACFOD at KBA_ACFOD_04939). The ACFOD's conclusions are

based on volumes of technical hydrological evidence and on the well-established legal principle that the treaty right to fish reserves sufficient water to support the fish.

The trial court properly applied *Adair* in finding that “Klamath Tribes’ aboriginal right to take fish entitles them to prevent junior appropriators from withdrawing water from Upper Klamath Lake and its tributaries in amounts that would cause the extinction of the Lost River and short nose suckers.” *Baley v. United States*, 134 Fed. Cl. 619, 671 (2017) (“*Baley*”). That the UKL was not involved in *Adair* is beside the point; it is the legal principles enumerated in *Adair* which govern the outcome on UKL.⁶ This too is consistent with the ACFFOD. KBA_ACFFOD_04939-40; KBA_ACFFOD_04960.

⁶ *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (“*ODFW*”), in no way contradicts the Tribes’ water right in UKL. *ODFW* was limited to the geographic scope within which the Tribes may exercise their right to hunt, fish, trap, and gather; the case has nothing to do with the location of the source of water needed to support the Tribes’ on-reservation Treaty fishing rights, as was explicitly confirmed by OWRD in the ACFFOD in its confirmation of the Tribal water right in UKL. OWRD’s suggestion in its brief that *ODFW* has any bearing on the existence of the Tribes’ UKL water right (OWRD’s Amicus Br. at 14, n.5) cannot be reconciled with the State agency’s confirmation of that right in the ACFFOD, and we can only assume that any such suggestion was made in error.

Plaintiffs also argue, without any supporting case law, that the Tribes' UKL water right could not be satisfied from water stored in UKL, because the Klamath Project did not exist in 1864. Pls.' Br. 31. But this argument runs contrary to the facts, as well as established law. UKL is a naturally occurring water body, which existed prior to the Project. KBA_ACFOD_04956. The Project modified the outlet of UKL to allow it to better store water for Project purposes and to allow the UKL to be drawn down further, which has harmed the Tribes' fisheries. *Id.* Ample legal precedent establishes that Indian reserved water rights may be satisfied from sources not available at the time the Indian reservations were established, including water stored in Reclamation facilities. *See Arizona*, 373 U.S. 546; *Patterson*, 204 F.3d 1206; *Joint Board of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987) ("*Joint Board*"); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985) ("*Kittitas*"); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 260-61 (9th Cir. 1984). Thus, the federal courts, including the United States Supreme Court in *Arizona*, have consistently held that water viewed as "stored," even in federal facilities developed after the establishment of an Indian reservation, may be used to satisfy tribal water rights.

4. **The Tribes' reserved water rights have a time immemorial priority date**

As pointed out earlier, the Tribes possessed aboriginal title to a vast area before signing the 1864 Treaty. That aboriginal title was based on the intensive use of the area by the Tribes for hunting, trapping, fishing, and gathering for more than a thousand years prior to the Treaty. For that reason, the federal courts have determined that the Tribes' right to water to support those purposes has a time immemorial priority date. *Adair*, 723 F.2d at 1414. Plaintiffs acknowledge that the Tribes have water rights with a priority date of "time immemorial," which is senior to the Project rights' priority date of May 19, 1905, in which they claim an interest. Pls.' Br. 8-9. As explained in section B below, the seniority of the Tribes' rights is fatal to Plaintiffs' case.

5. **The Tribes' Treaty fishery's current health does not defeat the Tribes' water right**

As noted above, the Tribes' water right in UKL has been confirmed and quantified in the KBA ACFFOD. KBA_ACFFOD_04946. Despite this, and with no citation to any authority, Plaintiffs baldly assert that the Tribes lack a water right in UKL because the Tribes do not presently harvest the

endangered sucker fish that depend on the Lake habitat.⁷ This argument should be rejected out of hand for two reasons. First, it is contrary to the determinations of the ACFFOD, and this court should not countenance a collateral attack on that proceeding here. Second, it is largely due to the operation of the Project that the Tribes' ability to harvest these fish has been curtailed. The Project and other agricultural uses have diverted water away from fishery needs and catastrophically degraded the water quality of UKL. These actions have imperiled the very existence of the c'waam and koptu. *Kandra*, 145 F. Supp. 2d at 1196 ("In 1988, two fish, the Lost River and shortnose suckers, were listed as 'endangered' due to a decline in the species population resulting from a fragmentation of aquatic habitat through damming, flow diversion, and decreased water quality."). The Tribes reserved more than this in the 1864 Treaty. *Cf. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 n.22 (1979)

⁷ The Klamath term for the Lost River sucker is c'waam and the shortnose sucker is koptu, also spelled "qapdo" in other briefs. These fish are two critically endangered species, which are essential treaty-protected resources for the Tribes. In an effort to protect the imperiled fish species in UKL, the Tribes voluntarily suspended their harvest of c'waam and koptu in 1986, two years before their Endangered Species Act listing. Since then, the Tribes have been limited to the harvest of two fish every year for ceremonial purposes.

(“*Fishing Vessel*”) (although at time of case tribes harvested only approximately 2% of available fish harvest, Court confirmed to the tribes their full fishery allocation not limited by current harvest amount).

B. The Prior Appropriation Doctrine Only Entitles Plaintiffs To Water After The Klamath Tribes’ Senior Water Rights Have Been Fulfilled

A water right is not an absolute guarantee to receive water. Rather, it is a right to the use of water that is superior to those whose priority dates come after it, but inferior to those with earlier (senior) priority dates. It is a fundamental principle of Oregon water law and western water law generally that Plaintiffs’ claimed property interest in the junior Project water right did not entitle them to receive any water in 2001, if that water was needed to fulfill senior water rights such as those of the Tribes. The trial court correctly focused on the specific property interest claimed by Plaintiffs as the basis of their takings claims – a beneficial interest in water rights appropriated by the United States for the Klamath Project – and the effect of the Tribes’ time immemorial right on those interests. *Baley* at 652. By failing to account for priority dates and senior water rights, Plaintiffs essentially contend that Reclamation should have delivered water to them

even if senior water rights holders had a superior right to that water. This is unsupportable.

Under Oregon law, a water right, like that for the Klamath Project, is defined by specific elements or parameters at once supporting and constraining its exercise, including:

(a) Quantity of water appropriated; (b) time, period, or season when the right to the use exists; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of the use or the purpose to which the right of use applies, such as irrigation, domestic use, culinary use, commercial use, or otherwise; (e) the place where the right of use may be applied; [and] (f) *the priority date of appropriation or right as related to other rights and priorities.*

Tudor v. Jaca, 164 P.2d 680, 686 (Or. 1945) (quoting *Rocky Ford Canal Co. v. Cox*, 59 P.2d 935, 939 (Utah 1936)) (emphasis added).

Regarding the priority date stick in the water right bundle, Oregon – like most Western states – follows the prior appropriation doctrine, which can be characterized as “first in time means first in right.” See 1 WATERS AND WATER RIGHTS § 12.01 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2015); *Teel Irrig. Dist. v. Water Res. Dep’t*, 919 P.2d 1172, 1174 (Or. 1996). Consequently, the entitlement to water under a water right in Oregon depends on the date on which a water right holder

acquired the right, known as the “priority date.” *See, e.g., McCall v. Porter*, 70 P. 820, 823-24 (Or. 1902). In times of shortage, the right holder with the most senior date is entitled to receive the full amount of her water right before the next-in-time user receives any. As stated in *Benz v. Water Res. Comm’n*, 764 P.2d 594, 599 (Or. Ct. App. 1988), “[a] junior appropriator’s water right cannot be exercised until the senior appropriator’s right has been satisfied.”

When federal reserved water rights are involved, the doctrine of prior appropriation applies whether or not the water rights in question have been quantified. *Winters*, 207 U.S. at 564. *Joint Board* is particularly instructive here. In that case, non-Indian irrigators objected to the Bureau of Indian Affairs’ (“BIA”) withholding water from Reclamation project diversions in favor of satisfying the unquantified time immemorial instream flow water rights of the Confederated Salish and Kootenai Tribes (“CSKT”), arguing that the BIA was obligated to follow the principle of “just and equal distribution” instead of straight priority. *Joint Board* at 1129. The Ninth Circuit rejected this argument, noting that “[i]n order to determine the proper allocation of water in short supply, the relative priorities of the water rights of the claimants are obviously of great

relevance.” *Id.* at 1130. The court of appeals held that the court below erred by ignoring the existence of the CSKT’s time immemorial priority date. *Id.* at 1131. “It was error, therefore, for the district court to hold that water claimed under potentially prior tribal fishing rights must be shared with junior appropriators, and that the requirement of equitable sharing could be imposed without addressing the Tribes’ claim of aboriginal fishing water rights.” *Id.* The court also squarely rejected the contention that CSKT’s fishing rights could not be protected in full if the effect of doing so would deprive the irrigators of needed water.

This contention ignores one of the fundamental principles of the appropriative system of water rights. See e.g., *Morris v. Bean*, 146 F. 423 (C.C.D. Mont. 1906) (Montana water law requires that senior rights be fully protected, even though more economic uses could be made by junior appropriators). “Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users.” *Walton*, 752 F.2d at 405 (citing *Cappaert v. United States*, 426 U.S. 128, 138-39, 96 S. Ct. 2062, 2069-70, 48 L. Ed. 2d 523 (1976)). To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can “prevent other appropriators from depleting the streams (sic) waters below a protected level.” *Adair*, 723 F.2d at 1411; see *Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985).

Joint Board at 1131-32.

Like the irrigators and the district court in *Joint Board*, Plaintiffs below simply focused their attention on whether they had a property interest, and ignored the existence of the Tribes' rights and the impact of the Tribes' rights and Oregon's prior appropriation doctrine on their asserted interest. However, as the trial court described, the importance of the tribal water rights "should not have come as a surprise to plaintiffs." *Baley*, 134 Fed. Cl. at 676 n.27. Plaintiffs had every opportunity to make arguments about the effect the tribal water rights has on their claims, but failed to do so.⁸

To the extent that Plaintiffs seek to support their claim by pointing to their receipt of water in years prior to 2001 (Pls.' Br. at 11, 36, 39), they are arguing for a right based not on their asserted interest in waters appropriated by the United States for the Project, but for a taking of some *other interest* – both unstated and unproven – that is based on nothing more than having taken water, without any regulation or clear legal authority, in the past. The Court should reject this effort.

⁸ Given the ACFFOD determinations of relative rights and the public records of the KBA rife with information on the water right quantities claimed by all KBA parties, Plaintiffs' failure to engage with the issue of the impact of the prior appropriation doctrine and the existence of senior water rights on their takings claim cannot be due to a lack of access to information on the topic.

As described by the Ninth Circuit, the Tribes' water rights are non-consumptive rights that serve to keep water instream; rather than permitting the Tribes to withdraw water from a water source such as UKL, the Tribes' rights "consist[] of the right to prevent other appropriators from depleting the . . . waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411. Thus, under the law it does not matter whether, as Plaintiffs assert, UKL was "full" in 2001. Pls.' Br. at 40. Simply because water may have been physically available in UKL for delivery to Plaintiffs does not mean it was legally available. The only water from UKL that could have been available to Plaintiffs in 2001 was the amount that exceeded the amount needed to remain in UKL to fulfill the senior tribal water right in UKL.⁹ Yet Plaintiffs presented no evidence that there was any available water over and above the quantity needed to fully satisfy the Tribes' senior water rights.

⁹ Although OWRD argues that the Court's finding "that the irrigators who had beneficial or equitable interests in the water delivered by [Reclamation] had no right to receive water in 2001 'based on the superior water rights held by the Klamath, Yurok, and Hoopa Valley Tribes,' was in error," OWRD's Amicus Br. 28, OWRD itself has confirmed in the ACFFOD that the Klamath Tribes have a water right in UKL that is superior to the Project water right. KBA_ACFFOD_04946.

In sum, Plaintiffs' alleged property interest has to be evaluated in light of the state-law elements that define the nature of *that* property interest. One of those elements is the junior priority date of Plaintiffs' rights, which under fundamental principles of the State's prior appropriation system means that Plaintiffs were not entitled to receive any water in 2001 until after the senior tribal water rights were completely fulfilled.

C. The Lack Of Quantification And Oregon's Lack Of Enforcement Of The Tribal Water Right In 2001 Is Irrelevant; Reclamation Owed A Trust Obligation To Ensure The Tribes' UKL Water Right Was Protected And Was Required To Manage The Project Accordingly

Plaintiffs argue that the Tribes' right in UKL was not entitled to enforcement in 2001 because it was not yet quantified, and that if Reclamation wanted to protect the Tribes' UKL water right in 2001, it should have made a call for enforcement of the right with OWRD.¹⁰ Pls.' Br. 10, 12, 18, 33-38. However, the unquantified nature of the Tribes' water right and Oregon's lack of enforcement of the Tribes' water right in 2001 is irrelevant. What is relevant is that in 2001 Reclamation was required to

¹⁰ Amicus Klamath Tribes concur with the United States' treatment of the irrelevant temporary stipulation entered into in 2009 (as amended in 2012), more than 7 years after the filing of these claims at issue. U.S.' Br. 45-46.

manage the waters of the Klamath Project and Reclamation's management of UKL must be understood in light of the prior appropriation system and its trust obligations to the Tribes and its obligations under the Endangered Species Act ("ESA") that existed at that time.

Until the March 7, 2013 completion of the necessary administrative phase of the KBA, Oregon simply did not enforce water rights in the Klamath Basin. Its policy was explained by the Oregon Department of Justice as being one of "regulat[ing] neither in favor of nor against unadjudicated water rights." Letter from Stephen E.A. Sanders, Assistant Attorney General, Oregon Department of Justice to Martha Pagel, Director, Oregon Water Resources Department (Mar. 18, 1996), Pls.' Reply to Def.'s Opp'n to Pls.' Mot. for Partial Summ. J. Ex. 43 at 290 (p. 5 of the ex. itself), ECF No. 123. *See also* OWRD's Amicus Br. 18 ("There was no statutory authority allowing the Water Resources Department to regulate in their favor."). However, this lack of Oregon administrative enforcement, like the lack of quantification discussed above, does not negate, suspend, or modify the relative priorities or the ultimate quantities of the water rights in the Klamath Basin. And it certainly does not absolve Plaintiffs of the

requirement that they show that there was water remaining for their use after the senior Tribal water rights were satisfied in 2001.¹¹

In 2001, it was Reclamation's responsibility to ensure compliance with both the ESA and its trust responsibility to the Tribes, and thus Reclamation was required to manage the Project accordingly. *Patterson*, 204 F.3d at 1213-14; *Kandra*, 145 F. Supp. 2d at 1197, 1211 (rejecting request by irrigators to enjoin Reclamation's implementation of its 2001 Operation Plan because Reclamation has a duty to protect tribal trust resources such as the sucker fish and salmon – "The law requires the protection of suckers and salmon as endangered and threatened species and as tribal trust resources, even if Plaintiffs disagree with the manner in which the fish are protected or believe that they inequitably bear the burden of such protection.").

Moreover, Plaintiffs' argument that the trial court erred in concluding that the senior tribal water rights in the Klamath Basin are at least as large as the quantity of water the Reclamation believed was necessary in 2001 to

¹¹ Whether the lack of enforcement by the State or Reclamation's management of the Project in years prior to 2001 violated the Tribes' water rights is an issue beyond the scope of the present brief.

comply with its obligations under the ESA to the c'waam, koptu and SONCC coho salmon, is based on both a distortion of the trial court's opinion and a gross mischaracterization of the legal principles governing Indian reserved water rights.

Contrary to Plaintiffs' assertion, the lower court did not state that the species' needs under the ESA and tribal water rights were measured by "the same standard." Pls.' Br. 23. Rather, the court reached the unremarkable conclusion that an Indian reserved water right necessary to support the treaty fishery requires keeping at least enough water in a source (such as UKL) so as to prevent the fish from becoming extinct. *Baley*, 134 Fed. Cl. at 672-73. The court reasoned that this irreducible minimum amount of water in UKL necessary to avoid jeopardy to the c'waam and koptu under the ESA is not more than the Tribes' water right. *Id.*

As explained above, under the prior appropriation system Reclamation had no legal right under its junior water right for the Project to provide water to Project irrigators when the water was needed in UKL to fulfill the senior tribal water right. The amount of water required to remain in the Lake to satisfy the senior tribal right, although unquantified in 2001,

could not have been less than that required by the ESA, as the ESA only seeks to avoid extinction, whereas the tribal water right is needed to promote species populations that can support the successful harvest of fish by the Tribes' members. *See* KBA_ACFFOD_04970-72.

In contrast to the ESA's more limited "no jeopardy" standard, the legal standard applicable to the Tribes' property rights protected through its 1864 Treaty requires much more, i.e., the water necessary to support fish populations that allow the Tribes' a meaningful harvest. *Adair*, 723 F.2d at 1409-10, 1412, 1414; KBA_ACFFOD_04970-72 (recognizing Tribes' right to minimal lake elevations to allow target fish species to reproduce and subsist in numbers sufficient to allow harvest by the Tribes within the former reservation).

Fishing Vessel is not to the contrary. The "reasonable livelihood" language from that case invoked by Plaintiffs (Pls.' Br. 23) occurs in the context of a discussion about Indian and non-Indian shares in a fish run, not about the water rights necessary to support those runs in the first place. *Fishing Vessel*, 443 U.S. at 685-86. Even if the reasonable livelihood standard were directly relevant here, it would support rather than undercut the lower court's decision. A complete absence of fish is plainly

insufficient to provide a tribe's members with a reasonable livelihood, and a tribe – such as the Klamath Tribes – with a treaty-based right to fish is entitled to sufficient water to support that fishery. The lower court's determination that the Tribes' UKL water right is at least large enough to equal the amount of water necessary to avoid jeopardy to the c'waam and koptu is sound.

CONCLUSION

Therefore, for all of the foregoing reasons, the trial court's decision should be affirmed and Plaintiffs' appeal should be denied.

Date: September 24, 2018

Respectfully Submitted,

/s/Susan Y. Noe _____

SUSAN Y. NOE
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760
suenoe@narf.org

Attorney for Amicus Curiae Klamath Tribes

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Name of Counsel

Signature of Counsel

Law Firm	Native American Rights Fund
Address	1506 Broadway
City, State, Zip	Boulder, CO 80302
Telephone Number	(303) 447-8760
Fax Number	(303) 443-7776
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