Case Nos. 18-1323, 18-1325

IN THE 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.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NOS. 1:01-CV-00591-MBH, 1:07 -CV-00194-MBH, 1:07-CV-19401-MBH, 1:07-CV-19405-MBH, 1:07-CV-19410-MBH, 1:07-CV-19402-MBH, 1:07-CV-19403-MBH, 1:07-CV-19404-MBH, 1:07-CV-19406-MBH, 1:07-CV-19407-MBH, 1:07-CV-19408-MBH, 1:07-CV-19409-MBH, 1:07-CV-19411-MBH, 1:07-CV-19412-MBH, 1:07-CV-19413-MBH, 1:07-CV-19414-MBH, 1:07-CV-19415-MBH, 1:07-CV-19416-MBH, 1:07-CV-19417-MBH, 1:07-CV-19418-MBH, 1:07-CV-19419-MBH, 1:07-CV-19420-MBH
(HON. MARIAN BLANK HORN)

BRIEF OF DEFENDANT-APPELLEE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS

TODD D. TRUE (WSB #12864)
STEPHANIE K. TSOSIE (WSB #49840)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Phone: (206) 343-7340
Fax: (206) 343-1526
ttrue@earthjustice.org
stsosie@earthjustice.org
Attorneys for Defendant-Appellee
Pacific Coast Federation of Fishermen's Associations

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Baley, et al. **v.** PCFFA, et al.

Case No. 18-1323, 1325

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

Pacific Coast Federation of Fishermen's Associations

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
Pacific Coast Federation of Fishermen's Associations	Pacific Coast Federation of Fishermen's Associations	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:

Earthjustice

Todd D. True, Esq.

Stephanie K. Tsosie, Esq.

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

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

9/17/2018
Date

s/Todd D. True
Signature of counsel

Please Note: All questions must be answered

Todd D. True
Printed name of counsel

cc: all parties

Reset Fields

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF RELATED CASES

Defendant-intervenor-appellee, Pacific Coast Federation of Fishermen's Associations, concurs in the Appellants' statement of related cases.

INTRODUCTION

Defendant-intervenor-appellee, Pacific Coast Federation of Fishermen's Associations ("PCFFA"), submits this brief in opposition to the brief of the plaintiff-appellants, Lonny E. Baley, *et al*. ("Baley plaintiffs") and the briefs of their allied *amici*.[1]

PCFFA first provides background about litigation under the Endangered Species Act ("ESA") regarding the water needs of listed species in Upper Klamath Lake and the Klamath River and about federally reserved tribal water rights. PCFFA then addresses the lower court's conclusion that satisfying the "superior water rights held by the Klamath, Yurok and Hoopa Valley Tribes" left no water to be taken from the Baley plaintiffs in 2001, *Baley v. United States*, 134 Fed. Cl. 619, 680 (2017), and explains why that is correct.

Because this Court may affirm the lower court on any ground fairly presented in the record, if the Court finds error in the decision regarding the effect of tribal reserved water rights (and it should not do so), PCFFA also addresses two additional issues that provide alternate grounds for affirming the lower court's

[1] In the court below, counsel for PCFFA also represented *amici*, WaterWatch of Oregon, The Wilderness Society, Klamath Forest Alliance, Oregon Wild, Northcoast Environmental Center, Institute for Fisheries Resources, and Sierra Club. *See Klamath Irrigation Dist. v. United States*, Order on Motion to Intervene (ECF 92, Feb. 28, 2005) (granting PCFFA's motion to intervene and allowing the above parties to participate as *aimici*). These *amici* joined all of PCFFA's filings below and do so again here.

decision. First, as PCFFA explained in briefs below, a background principle of Oregon law regarding public ownership of fish and wildlife precludes the Baley plaintiffs from asserting a property right to use water in a manner that would impair the State's paramount interest in protecting these resources. In the absence of a property interest, no taking can occur. Although the lower court did not address this issue, it was squarely presented. Second, the lower court's conclusion that the Baley plaintiffs' takings claim "'should be analyzed under the physical takings rubric,'" *Baley*, 134 Fed. Cl. at 660 (citation omitted), is wrong. Their claim should be analyzed as a regulatory taking under the multi-factor analysis of *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), and other cases. Because this case went to trial on the erroneous premise that it involved a *per se* physical takings, correcting this error is a second, independent basis for affirming the judgment below.

STATEMENT OF JURISDICTION

PCFFA accepts the Baley plaintiffs' statement to the extent it addresses the Court's jurisdiction of this appeal.

STATEMENT OF THE ISSUES

1. Whether the lower court correctly concluded that satisfying tribal reserved water rights in 2001 left no water to serve the Baley plaintiffs' water interests?

2. Whether background principles of Oregon law preclude the Baley plaintiffs from claiming a property right to use water in 2001 in a way that would harm the State's paramount interest in protecting its fish and wildlife?

3. Whether the lower court erred in concluding that the Baley plaintiffs' takings claim should be analyzed as a physical rather than a regulatory taking?

BACKGROUND

I. THE ESA AND KLAMATH PROJECT OPERATIONS

The Endangered Species Act ("ESA") requires that, before taking action, a federal agency must determine whether any threatened or endangered species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If it concludes that such species might be present and that the proposed action is likely to adversely affect them, the agency must engage in formal consultation with either the Fish and Wildlife Service ("FWS") (for terrestrial and freshwater species) or the National Marine Fisheries Service ("NMFS") (for marine and anadromous species). *Id.* at § 1536(a)(2). In this consultation, FWS or NMFS must prepare a biological opinion (or "BiOp"), which identifies the effects the proposed action will have on the listed species and its critical habitat. *Id.* at § 1536 (b)(3)(A). If either agency concludes that the action may cause jeopardy to a listed species or adversely modify its critical habitat, then it must propose "reasonable and prudent alternatives" ("RPAs"), if any exist, that would avoid jeopardy and adverse

modification. *Id.* The agencies are required to use "the best scientific and commercial data available" in this consultation. *Id.* at § 1536(a)(2).

NMFS listed Southern Oregon/Northern California Coast ("SONCC") coho salmon as threatened in 1997. 62 Fed. Reg. 24,588, 24,592 (May 6, 1997). SONCC coho spawn and rear in the Klamath River and its tributaries below Iron Gate Dam among other streams. In the late 1990s, the Department of the Interior retained Dr. Thomas Hardy to review the status of anadromous fish, including SONCC coho, in the Klamath Basin. Dr. Hardy's 1999 Phase I report recommended flow levels necessary to avoid jeopardy to SONCC coho and other species in the Klamath River. *PCFFA v. Bureau of Reclamation ("BOR")*, 138 F. Supp. 2d 1228, 1232-33 (N.D. Cal. 2001) ("*PCFFA I*").

In 1998, FWS listed two species of fish that inhabit Upper Klamath Lake and its tributaries – the Lost River and shortnose suckers – as endangered. 53 Fed. Reg. 27,130, 27,131-32 (July 18, 1988). FWS found that protecting these species from extinction requires maintaining adequate water levels in Upper Klamath Lake. *Baley*, 134 Fed. Cl. at 638.

II. ESA LITIGATION OVER KLAMATH PROJECT OPERATIONS

BOR did not consult with either NMFS or FWS before implementing its 2000 Annual Operations Plan for the Klamath Project. Fishing and conservation groups challenged this failure. In early 2001, a U.S. District Court found BOR in

violation of the ESA and enjoined it from permitting the use of Klamath Project water when Klamath River flows dropped below the minimums recommended in the Hardy Phase I report until it completed ESA consultation. *PCFFA I*, 138 F. Supp. 2d at 1247, 1251. BOR then consulted with FWS and NMFS on its 2001 Annual Operations Plan. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1198-99 (D. Or. 2001). In these consultations, FWS and NMFS concluded that operation of the Project in 2001 as proposed by BOR would jeopardize the continued existence of the listed fish in Upper Klamath Lake as well as the SONCC coho. *Id.* at 1198. In draft BiOps, the agencies recommended minimum water levels for Upper Klamath Lake and minimum flows for the Klamath River below Iron Gate Dam. *Id.* BOR informed the agencies that the forecasted water supplies for 2001 were inadequate to meet these requirements. *Id.* In their final BiOps, FWS and NMFS adopted modified minimum river flows and lake water levels that, after further assessment, they concluded would be sufficient to avoid jeopardy. *Id.* BOR then released its final operations plan for 2001, which, in order to comply with the ESA, adopted the flow requirements and lake levels of the RPAs in the BiOps under the extremely dry conditions that prevailed that year. This one-year decision on Project operations limited the Baley plaintiffs' exercise of their asserted water rights during 2001.

A number of irrigators challenged the Bureau's decision to implement the

RPAs in the FWS and NMFS BiOps. *Kandra*, 145 F. Supp. 2d at 1199. The court denied their motion for a preliminary injunction, holding that they were unlikely to prevail on their ESA claim. *Id.* at 1210. The irrigators argued that the flow recommendations in the BiOps were not based on the best available scientific evidence. *Id.* at 1208. The court rejected this argument, finding that the irrigation plaintiffs had not shown "that NMFS or FWS failed to consider relevant, available, scientific data" and that "plaintiffs simply disagree[d] with the scientific conclusions reached by FWS and NMFS." *Id.* at 1210. The *Kandra* plaintiffs subsequently dismissed their case and the Baley plaintiffs filed this one.

III. TRIBAL RESERVED WATER RIGHTS IN THE KLAMATH BASIN

The court of claims decision below describes the nature and origin of the federally reserved water rights held by the Klamath, Yurok and Hoopa Valley Tribes and the significance of these rights to these Tribes. *Baley*, 134 Fed. Cl. at 633-35, 636-37. The court subsequently describes the relationship between the water necessary to satisfy these reserved rights and the water required to comply with the ESA, *id*. at 668-679, and holds that because the Tribes hold the senior water rights in the Klamath Basin and these rights "were at least co-extensive to the amount of water that was required . . . under the Endangered Species Act . . . in 2001, plaintiffs had no entitlement to receive any water before the government had satisfied . . . its obligations under the Endangered Species Act and its Tribal Trust

responsibilities," *id*. at 679-680. PCFFA explains below why these findings and conclusions are correct.

STANDARD OF REVIEW

PCFFA accepts the Baley plaintiffs' statement of the standard of review. Baley Brief at 20. In addition, it is well established that this Court may affirm the judgment of the lower court on the basis of any issue fairly presented in the record. *See United States v. Am. R. Express Co.*, 265 U.S. 425, 435 (1924); *see also Jack Guttman, Inc. v. Kopykake Enters.*, 302 F.3d 1352, 1362 & n.1 (Fed. Cir. 2002) (same).

SUMMARY OF ARGUMENT

In its argument, PCFFA addresses three issues: (1) the court of claims correctly concluded that senior tribal reserved water rights in the Klamath Basin left no water for the Baley plaintiffs to use in 2001; (2) background principles of Oregon law precluded the Baley plaintiffs from establishing a protected entitlement to use Klamath Project water in 2001 in the first instance; and, (3) any claim the Baley plaintiffs may have had to use Klamath Project water in 2001 should be analyzed as a regulatory, not a physical, taking.

ARGUMENT

I. THE COURT OF CLAIMS CORRECTLY CONCLUDED THAT SENIOR TRIBAL RESERVED WATER RIGHTS IN THE KLAMATH BASIN LEFT NO WATER FOR THE BALEY PLAINTIFFS TO USE IN 2001

The court of claims held that the Baley plaintiffs were not entitled to compensation because their right to use water in the Klamath Basin in 2001 was junior to the federally reserved rights of the Klamath, Yurok, and Hoopa Valley Tribes (collectively "Klamath Basin Tribes"), and that all the water Baley plaintiffs could have used in 2001 was required to satisfy those rights. *Baley*, 134 Fed. Cl. 668-80. As explained below, there is no dispute that the Klamath Basin Tribes have federally reserved water rights and federally reserved fishing rights that exist independently of the Oregon Adjudication and state water law. These rights exist to ensure that there will be enough water in Upper Klamath Lake and the Klamath River each year to avoid impairing the Tribes' federally reserved and protected resources. In 2001, the United States correctly concluded that water from the Lake and River the Baley plaintiffs might have used was instead required both to avoid jeopardy to protected fish species and to preserve tribal trust resources.

A. The Tribes Have a Federally Reserved Right to Water to Fulfill the Purposes of Their Reservation.

1. The Implied Reserved Rights Doctrine Creates Federally Reserved Water Rights

The court of claims decision starts from the long-standing precedent that

tribes have federally reserved rights to enough water to fulfill the purposes of their reservation. The Supreme Court first affirmed this principle in *Winters v. United States*, 207 U.S. 564, 576-77 (1908), and has held to it since. In *Winters*, the Court recognized that the Indians had prior ownership of the lands and waters in the area, and that they had not intended to accept a reservation without a means to irrigate those lands. *Id*. at 576. The Court held that when their reservation was established it included an implied reserved water right to fulfill the agricultural purposes of that reservation. *Id*. at 577. Federally reserved rights vest on the date of the federal reservation, are senior to subsequent appropriation of water for other uses, and are sufficient to fulfill the purpose of the reservation. *Arizona v. California*, 373 U.S. 546, 595-600 (1963); *see also Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017).

The Baley plaintiffs' argument that because the Klamath Project did not exist at the time reserved water and fishing rights were created for the Klamath Basin Tribes, "neither Congress nor the President could have impliedly intended to create rights to water lawfully stored for the Klamath Project," Baley Brief at 27, 28-9, attempts to conflate the federal reservation of the Tribes' rights with the creation of the Klamath Project. Case law is abundantly clear that the Tribes' reserved rights were established when their reservations were created, whether by

treaty or otherwise. The only question is whether water was reserved for the Tribes at that time and this intent is inferred where water is necessary to accomplish the purposes of the reservation. *Winters*, 207 U.S. at 577; *Arizona*, 373 U.S. at 600; *see also Cappaert*, 426 U.S. at 139; *Agua Caliente*, 849 F.3d at 1269, 1272 (reserved rights exist from the time of the reservation if "the purpose underlying the reservation envisions water use"). Once established at the time of and by the purposes for the reservation, these rights exist into the future, *Arizona*, 373 U.S. at 600, and continue to exist whether or not they have been historically accessed, *Agua Caliente*, 849 F.3d at 1272. Moreover, federal courts have specifically confirmed these principles for the reserved water and fishing rights of the Klamath Basin Tribes as described below.

2. The Nature of the Klamath Basin Tribes' Reserved Water Rights

The court of claims correctly found that each of the Klamath Basin Tribes has federally reserved water rights pursuant to the *Winters* doctrine. *Baley*, 134 Fed. Cl. at 699-672. The Ninth Circuit definitively found the Klamath Tribes have federally reserved water rights, with a priority use date of time immemorial, sufficient to support exercise of the Tribes' "treaty hunting and fishing rights." *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983).[2] The priority date of

[2] The Baley plaintiffs incorrectly rely on *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770 (1985), to argue that any reserved water

time immemorial reflects that the Tribe's rights "were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." *Id*. at 1414. The court defined the scope of this water right as "non-consumptive," in that "the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1410-11. Indeed, the heart of the Tribes' non-consumptive right is to keep other irrigators from depleting water resources in ways that would impair their protected treaty fishing and other rights. This right includes preventing actions in areas not on or appurtenant to the reservation. For example, *Winters* itself was an action to restrain upstream irrigators from constructing or maintaining dams on the river, or otherwise preventing the river or its tributaries from flowing to the reservation. *Winters*, 207 U.S. at 565; *see also Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir.

---

rights of the Klamath Tribe are limited to the former Klamath Reservation. Baley Brief at 18, 26, 31. But the issue in *Oregon* was whether the Tribe "retained a special right to hunt and fish on the ceded lands free of state regulation." *Oregon*, 473 U.S. at 754-55. The Court did not address implied reserved water rights and the Baley plaintiffs' argument had previously been rejected in *Adair*. *See Adair*, 723 F.2d at 1414, n. 24 (citing *Kimball v. Callahan*, 493 F.2d 564, 569-70). Although *Adair* predates *Oregon*, the *Oregon* Court did not overrule *Adair* or reject its finding that the Tribe's hunting and fishing rights, guaranteed by treaty, can survive land transfers.

2015). Likewise, in *Adair* the tribal claim was for water in the Williamson River, which would eventually benefit the Klamath Marsh, the area that contains treaty resources. *Adair*, 723 F.2d at 1397-98. The Baley plaintiffs' argument that the Klamath Tribe must have a specific right to the water of Upper Klamath Lake, or the Klamath Project as it exists today, before it can assert any reserved water right for their treaty protected fishing rights, Baley Brief at 17, 26, 28, 31-32, is at odds with these established precedents. The court of claims correctly understood the nature of the Klamath Tribes' reserved water rights.

3. The Klamath Basin Tribes' Reserved Water Rights Are Sufficient to Protect Their Fishing Rights.

As the court of claims recognized, federal courts have repeatedly found that the Hoopa Valley and Yurok Tribes have vested federally reserved fishing rights. *See Baley*, 134 Fed. Cl. at 670 (citing *Parravano v. Babbit*, 70 F.3d 539, 541 (9th Cir. 1995)); *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 1999) (also recognizing the Klamath Tribes' federally reserved fishing rights).[3]

[3] The Baley plaintiffs attempt to diminish the status of the Hoopa Valley and Yurok Tribes' rights based on how their reservations were created and when the Tribes received federal recognition. Baley Brief at 27. But the Ninth Circuit has "long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute, or executive order, unless Congress has provided otherwise." *Parravano*, 70 F.3d at 545 (internal citations omitted).

These fishing rights and the reserved water rights necessary to support them exist because all the Klamath Basin Tribes have subsisted on fish since time immemorial, these fish need water to live, and the water for this purpose was reserved when the Tribes' reservations were established. The importance of salmon for the Hoopa Valley and Yurok Tribes "was 'not much less necessary to [their existence] than the atmosphere they breathed." *Parravano*, 70 F.3d at 542 (citing *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981)). And the Ninth Circuit "ha[s] never encountered difficulty in inferring that the Tribes' traditional salmon fishing was necessarily included as one of those '[Indian] purposes.'" *Parravano*, 70 F.3d at 546.

The Tribes' protected fishing rights explicitly include fishing for ceremonial, commercial, and subsistence purposes. *Eberhardt*, 789 F.2d at 1359. The Baley plaintiffs now claim that because the Tribes have not demonstrated a commercial fishery in the tribal trust species that are also listed under the ESA, the Tribes do not have reserved rights for these species. Baley Brief at 17, 24. But the Ninth Circuit has held that focusing exclusively on a commercial fishery to identify the scope of tribal rights is too narrow. *Eberhardt*, 789 F.2d at 1359. The court of claims correctly found that the tribal water rights must, at a minimum, prevent the endangerment and extinction of their trust resource. *Baley*, 134 Fed. Cl. At 672.

4. Tribes Use Their Federally Reserved Water Rights to Protect Treaty Resources.

Tribal treaty rights to water as well as fish are only as strong as the preservation of those resources. The Supreme Court in *United States v. Winans*, 198 U.S. 371, 381, recognized that tribal members could not be absolutely excluded from the taking of fish, nor could non-Indians have exclusive access to their treaty resource. *See also United States v. Washington*¸ 853 F.3d 946, 965 (9th Cir. 2017), *aff'd by an equally divided court, Washington v. United States*, __ U.S. __, 138 S.Ct. 1832 (Mem.) (discussing *Winters* and noting that "[j]ust as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish"). The Tribes' reserved water rights exist to prevent depletion of the fish resources that were federally reserved at the time these fishing and water rights were created.

These concepts have been repeatedly affirmed for the Klamath Basin Tribes. In *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), the Ninth Circuit found that the Bureau of Reclamation had a "responsibility to divert the water and resources needed to fulfill the Tribes' rights," and it recognized that these rights "take precedence over any alleged rights

of the irrigators." *Id*. at 1214. The Ninth Circuit has also upheld federal limits on offshore salmon fishing by private commercial fishing interests in order to preserve the salmon runs and tribal harvests in the Klamath River. *Parravano*, 70 F.3d at 547. The court concluded that "allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights" and "that the Tribes' federally reserved fishing rights are accompanied by corresponding duty on the part of the government to preserve those rights." *Id.*

The Bureau's actions in 2001 to keep water in Upper Klamath Lake and the Klamath River to preserve tribal trust resources (and comply with the ESA) is no different from the agency actions in *Parravano* and *Patterson*. It is but an example of how federal reserved rights should operate. The court of claims would have committed error had it concluded otherwise.

B. Federally Reserved Rights and Conservation Often Overlap and Are Complementary.

There is no conflict in this case (or in most cases) between protecting species listed as endangered or threated under the ESA and protecting the same species because it is also a tribal trust resource. Indeed, relying on both statutory requirements and federally reserved water rights and treaty trust resources for conservation makes sense. In *Parravano*, the United States, acting through the Secretary of Commerce, curtailed offshore salmon harvest as part of its trust

responsibility to the Hoopa Valley and Yurok Tribes to ensure tribal salmon harvests were protected. *Parravano*, 70 F.3d at 543, 547. But the Secretary of Commerce acted pursuant to statutory authority in the Magnuson Stevens Act, which has the purpose "to conserve ocean fishing resources and to protect these resources from foreign fishing." *Id.* at 542. The court also found that the federally reserved fishing rights were at least as extensive as the Secretary's authority under the Magnuson Stevens Act, allowing the Secretary to reduce offshore harvests on the basis that tribal fishing rights were a trust resource that required conservation. The federally reserved right supported and complemented conservation of species pursuant to statutory authority.[4]

The same is true for the ESA and reserved rights, especially when one of the purposes of the ESA is to avoid extinction, 16 U.S.C. § 1531, and the reserved right is intended to protect that species. Although the statutory and regulatory process of complying with the ESA is somewhat complex, the finding that operation of the Klamath Project in 2001 would jeopardize the continued existence and adversely modify the critical habitat of endangered fish species in Upper Klamath Lake and threatened salmon in the Klamath River is not in dispute.

[4] Even in other contexts, if conservation of a resource is necessary to meet the purposes of a reservation, then the conservation measures must be carried out. *Cappaert*, 426 U.S. at 141 (preservation of the Devil's Hole pupfish was necessary to maintain the purpose of federal withdrawal).

Baley, 134 Fed. Cl. at 674 (explaining that the agencies' jeopardy findings were well-supported and not at issue). Nor is the fact that these species are tribal trust resources. These facts led the BOR to take steps to avoid jeopardy and adverse modification of critical habitat under the ESA and confirmed that the agencies also had a duty to protect the Tribes' trust resources to ensure they were not impermissibly reduced or depleted.

The Baley plaintiffs attempt to identify differences between the ESA, the extent of the Tribes' federally reserved water rights, and the Tribes' trust resources, *see* Baley Brief at 22-24, but they ignore that all of these avenues lead to conservation of Tribal trust species. Their arguments also disregard the fact that avoiding jeopardy under the ESA is a *lower* threshold for protection than that required for tribal trust resources. ESA Section 7 is aimed at preventing federal agency action that increases the risk of extinction for species already imperiled. By contrast, tribal reserved rights are intended to protect trust resources so that, at the very least, they afford tribes a reasonable livelihood. *Washington v. Wash. Commercial Passenger Fishing Vessel*, 443 U.S. 658, 685 (1979). Rather than conflating the reasonable livelihood standard with the ESA, as argued by the Baley plaintiffs, Baley Brief at 22-23, the court of claims correctly (and logically) concluded that in order for the Tribes to have any trust resource whatsoever, they at least needed to be protected from an increased risk of extinction. *Baley*, 134

Fed. Cl. at 672. As the lower court correctly ruled, compliance with the ESA in 2001 provided the minimum protection for the Klamath Basin Tribes' trust resources.[5] *Baley*, 134 Fed. Cl. at 671-672.

C. Oregon State Water Adjudication Procedures Do Not Affect the Tribes' Federally Reserved Rights.

The Klamath Basin Tribes unquestionably have federally reserved water rights in the Klamath Basin that exist under and are defined by federal law. Those federally reserved water rights eventually may be quantified according to state law. But the Baley plaintiffs' and the State of Oregon's argument that those federally reserved rights were not legally enforceable in 2001 conflates federally reserved rights with state water law and must be rejected.

1. The Klamath Basin Tribes Federally Reserved Water Rights are Determined by Federal Law.

Federal courts have consistently held that tribal water rights arising from federal reservations are federal water rights not governed by state law. *Arizona*, 373 U.S. at 597; *see also Cappaert*, 426 U.S. at 145; *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985). The volume and scope of these federal rights remain federal questions. *Walton*, 752 F.2d at 400. States do,

[5] Quantification of the Tribes' federally reserved water rights would not afford the Baley plaintiffs the relief they sought in 2001 or the relief they seek in this Court. *See* Baley Brief at 23. If anything, for the reasons discussed in text, quantification of federally reserved rights to protect tribal trust species would be higher than the amount of water needed to avoid jeopardy under the ESA.

however, have the ability to adjudicate rights in a water or river system, and the McCarran Amendment waives federal sovereign immunity to join the federal government in the adjudication. 43 U.S.C. § 666. State adjudication of a federally reserved right is reviewable by the Supreme Court for consistency with federal law. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-12 (1976); *Arizona v. San Carlos Apache of Arizona*, 463 U.S. 545 (1983); *United States v. Braren*, 338 F.3d 971 (9th Cir. 2003). But state adjudications of water rights are also limited to waters within a state and the Supreme Court has construed the McCarran Amendment to prohibit a state from adjudicating, infringing, or extinguishing water rights in another state. *United States v. Dist. Court for Eagle County, Colo.*, 401 U.S. 520, 523 (1971) ("No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many states. The 'river system' must be read as embracing one within the particular State's jurisdiction").

Courts have also acknowledged that federally reserved rights are inconsistent with state water law. *Adair*, 723 F.2d at 1410. There is tension between reserved water rights and the doctrine of prior appropriation: "When reserved rights are properly implied, they arise without regard to equities that may favor competing water users." *Walton,* 752 F.2d at 405. The doctrine of beneficial use, which is common among prior appropriation states, is inapplicable to federal

reserved water rights. *United States v. Orr Water Ditch Co*., 309 F. Supp. 2d 1245, 1248 (D. Nev. 2004) ("[*Winters* and *Cappaert*] reveal that the basis, measure and limit of a federal reserved water right is the creation and purpose of the reservation for which the water was reserved"). The tension between federal reserved rights and state water rights is easily resolved, however: federal water rights preempt conflicting state law. *Agua Caliente*, 849 F.3d at 1272; *see also Cappaert*, 426 U.S. at 145 ("Federal water rights are not dependent upon state law or state procedures"); *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995). Further, federal reserved rights are "not subject to appropriation under state law, nor has the state power to dispose of them." *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 328 (9th Cir. 1956) (citing *Federal Power Comm'n v. State of Oregon*, 349 U.S. 435, 444 (1955); *see also Orr*, 309 F. Supp. 2d at 1249 (federal reserved water rights cannot be extinguished in a state forum).

2. Oregon Water Law Did Not Define the Klamath Basin Tribes' Reserved Rights in 2001.

Both the Baley plaintiffs and Oregon incorrectly rely on the argument that the Klamath Basin Adjudication somehow altered or extinguished the Tribes' existing federally reserved rights. This attempt to muddle the distinction between the federal right and the state process, and thus whittle away at the Tribes'

federally reserved water rights, must be rejected.[6]

a. The Hoopa Valley and Yurok Tribe's Federally Reserved Water Rights are Not Waived.

The court of claims, following an established body of case law, correctly rejected the argument that failure to submit a claim in the Klamath Adjudication extinguished the Hoopa Valley and Yurok Tribes' federally reserved water rights. *Baley*, 134 Fed. Cl. at 679. Nonetheless, the Baley plaintiffs and Oregon continue to argue that the Yurok and Hoopa Valley Tribes waived their claim to any reserved water rights in the Klamath River because they did not seek recognition of those rights earlier in this case or file a claim in Oregon's Klamath Adjudication. Baley Brief at 18, 27, 30; Oregon Brief at 22-26. This argument is still wrong. As an initial matter, the Oregon adjudication could not have infringed on the Yurok and Hoopa Valley Tribes' federally reserved rights because these Tribes reside downstream in California and the Supreme Court held that state adjudications are limited to waters within their state. *Eagle County*, 401 U.S. at 523. Nor does the Oregon Adjudication claim to determine rights to the use of water in California even if some of the water necessarily comes from upstream. Further, the court of claims correctly found that the Hoopa Valley and Yurok Tribes' rights were

[6] This argument was not presented to the court of claims. The Baley plaintiffs did not challenge the Tribes' priority dates or the extent of their water rights. *Baley*, 134 Fed. Cl. at 673.

federal rights arising out of federal law, and as such, failure to submit a claim "did not affect the existence or nature of their federal reserved rights." *Baley*, 134 Fed. Cl. at 679 (citing *Cappaert*, 426 U.S. at 145-46). Both the Yurok and Hoopa Valley Tribes have federally reserved water rights that have not been extinguished by the Klamath Adjudication.

b. Oregon Water Law Did Not Define or Limit the Existence of the Klamath Basin Tribes' Reserved Water Rights in 2001.

The Baley plaintiffs also attempt to disprove the existence of the Tribes' federal reserved rights by pointing to elements that would be determined in state adjudication. These repeated attempts incorrectly conflate the *existence* of the federal reserved right with the *operation* of state water law. For example, they argue that the early reservation of federal water rights could not have implied a right to use water from the later-built Klamath Project, or that if there were such an implied right it would have to be from a water source outside of the Klamath Project. Baley Brief at 29. These arguments, however, ignore the repeated findings that the Tribes have federally reserved water rights from the time their reservations were established. *See supra* at 8-10. Rather than focus on whether water was reserved to support tribal hunting and fishing rights when the Tribes' reservations were created, as directed by *Winters*, *Adair,* and other cases, the Baley plaintiffs incorrectly focus on the argument that the water to protect these rights

could not have come from the Klamath Project as it exists today. These federally reserved rights exist regardless of whether or not a state adjudication has identified particular sources to meet these rights.

The Baley plaintiffs and Oregon also attempt to incorrectly fuse the existence of the federal reserved water rights with specifics in the adjudication by arguing that the *Adair* case did not specifically address Upper Klamath Lake. Baley Brief at 31-32; Oregon Brief at 13-14. But the question in *Adair* was a legal question of whether there was an implied reserved water right, not from which specific waterbody water to protect that right would come or the quantification of that right. *Adair*, 723 F.2d at 1399; *see also United States v. Braren*, 338 F.3d 971, 976 (9th Cir. 2003) (clarifying *Adair*). The Oregon Adjudication would not affect the existence or scope of the Tribes' federally reserved rights or the need to protect those rights from diminution by ensuring there was enough water in Upper Klamath Lake and the Klamath River to serve the Tribes' rights. *Adair* still stands for the legal proposition that the Klamath Tribe (and other Basin tribes) have federal reserved water rights. The Baley plaintiffs similarly attempt to distinguish *Patterson* on the grounds that it did not actually adjudicate any water rights, Baley Brief at 32, but this argument fails for the same reason: the court in *Patterson* was not called on to adjudicate rights but to determine the existence of senior federally reserved tribal water rights, *Patterson*, 204 F.3d at 1213. The court of claims

correctly interpreted *Adair* and *Patterson* as establishing that the Klamath Basin Tribes have federally reserved water rights and correctly concluded that protecting those rights in 2001 left no water for the Baley plaintiffs to use. Consequently, they had no property interest to be taken.

The Baley plaintiffs further attempt to force the Klamath Basin Tribes' federally reserved water rights into a state water law scheme by claiming that the Klamath Project is governed only by state law pursuant to the Reclamation Act. Baley Brief at 18 (citing *California v. United States*, 438 U.S. 645, 678-9 (1978)). *California*, however, only addresses the process by which the Bureau of Reclamation must acquire water for state projects; it does not address the creation or protection of federally reserved water rights. In *United States v. New Mexico*, 438 U.S. 696, 702 (1978), the Supreme Court made this point clear and distinguished *California*. There the Court found that even where Congress has expressly addressed when federal entities must abide by state law to acquire water (as in *California*), "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, *even in the face of Congress' express deference to state water law in other areas*, that the United States intended to reserve the necessary water." *Id*. (emphasis added). While the McCarran Amendment allows for states to adjudicate water rights and to join the federal government in order to do so, it does not extinguish the existence

of federally reserved rights. The Klamath Basin Tribes' federal reserved water rights were reserved prior to the creation of the Klamath Project and exist today independently of the Project and the state adjudication.

The Baley plaintiffs and Oregon also point to Oregon water law to argue that non-quantified rights, or "rights of record," are not enforceable and thus the Tribes could not have exercised their right. Baley Brief at 36-38; Oregon Brief at 10. The court of claims soundly rejected this argument and correctly found the Tribes' rights did not need to be quantified in order to be enforced because, under the circumstances in 2001, the Tribes' unquantified rights were at least as large as the amount of water required to prevent jeopardy. *Baley*, 134 Fed. Cl. at 673. Undeterred, the Baley plaintiffs continue to argue that enforcing unquantified water rights to protect the Tribes reserved water rights would "turn[] western water law on its head[.]" Baley Brief at 33. Oregon similarly alludes to the necessity of a state adjudication before rights could be enforced as a matter of efficiency. Oregon Brief at 24-25. In their view, these federally reserved rights could only be asserted and protected through a state law process where the Tribes would first have to assert their senior water rights, then junior water rights would be curtailed, and only then would the rights of Baley plaintiffs be curtailed. Moreover, in their view, the Bureau of Reclamation could not have protected these reserved rights by using Klamath Project water except in accordance with state law and that, in any

event, the Tribes hold no instream rights to stored water under state law in the first place. Baley Brief at 33-43.

But these concerns simply do not negate the existence of the Klamath Basin Tribes' federally reserved water rights, and they are only relevant if these water rights must have been fully adjudicated under state law in order to be protected. As discussed above, that is simply not the case. *See supra* at 22-23 (discussing *Patterson* and *Adair*).

Courts have acknowledged the tension between state and federal water rights that the Baley plaintiffs and Oregon raise, but courts have also consistently sustained the exercise and protection of tribal reserved water rights. Indeed, the Ninth Circuit has found that the federal responsibility to divert water and resources to fulfill the Tribes' rights "take precedence over any alleged rights of the irrigators." *Patterson*, 204 F.3d at 1214. Or as the court ruled in *Ahtanum*:

> As in the *Winters* case, both here and in the Supreme Court, shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our *Conrad Inv. Co.* case [] held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the *Winters* case equaled the entire flow of the Milk River, the decree would have been no different.

Ahtanum, 236 F.2d at 327 (citing *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908)). In short, the exercise of the Klamath Basin Tribes reserved water right in 2001, where irrigation deliveries were curtailed to protect those rights, is

consistent with established federal law and not superseded by state water law procedures. The court of claims was correct in finding that the Baley plaintiffs' water rights were not impaired or taken in 2001 because there was no water available that year after the requirements of the senior tribal reserved rights had been met.

II. THE BALEY PLAINTIFFS DO NOT HAVE A PROPERTY RIGHT TO USE KLAMATH PROJECT WATER IN A WAY THAT HARMS THE STATE'S INTEREST IN FISH.

As an initial matter, prior to addressing whether (or what type of) taking might have occurred in this case, the lower court should have considered whether application of background principles of state law preclude the Baley plaintiffs from claiming a property interest in the use of Klamath Project water sufficient to support their takings claim. *See* PCFFA Memorandum re Motion in Limine at 11-19 (ECF 400, Nov. 30, 2015).[7] The court below specifically reserved the issue of whether the Baley plaintiffs have a compensable property interest in ruling on that motion, *see Klamath Irrigation Dist. v. United States*, 129 Fed. Cl. 722, 729-30 (2016), and PCFFA again raised the background principles argument in its post-trial brief, *see* PCFFA Post Trial Memorandum at 2-5 (ECF 543, Apr. 18, 2017).

[7] Indeed, the lower court should have considered the effect of the tribal reserved water rights discussed above on the scope of the Baley plaintiffs' property interests before it addressed whether a taking had occurred because the extent of a plaintiff's property also can be limited by background principles of federal law. *See Adams v. United States*, 391 F.3d 1212, 1219 (Fed. Cir. 2004).

The trial court, however, did not address this issue. *See Baley*, 134 Fed. Cl. at 652-659.

Nonetheless, it is an elementary legal principle that a successful takings claim requires the claimant to point to some vested property interest and then demonstrate that the property has been taken. If the claimant cannot meet this initial requirement, the takings claim fails at the threshold. *See M & J. Coal Co. v. United States,* 47 F.3d 1148, 1155 (Fed. Cir. 1995) (rejecting takings claim because the claimant "never acquired the right to mine in such a way as to endanger public health and safety"). An essential component of the threshold property inquiry is determining whether "background principles of the State's law of property" preclude a claimant from establishing a vested property entitlement. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). The courts have followed this approach in many cases.[8]

Here, Oregon's longstanding doctrine of sovereign public ownership of the State's wildlife resources is a background principle of state law that precludes the Baley plaintiffs' attempt to claim a property interest in water to the extent they

[8] *See, e.g., Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004); *Stevens v. Cannon Beach*, 854 P.2d 449, 456-57 (Or. 1994) (holding that Oregon's law of customary public use of beaches represented a *Lucas* background principle barring a takings claim); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 & n.5 (S.C. 2003) (applying public trust concept as a background principle); *Esplanade Properties, LLC v. Seattle*, 307 F.3d 978 (9th Cir. 2002) (same).

seek to use water in a way that would demonstrably harm public wildlife. In other words, this background principle excludes from the "bundle of sticks" they may otherwise hold in the use of Klamath Project water those uses that would harm the continued existence of wildlife species belonging to the public. This background principles defense applies regardless of whether their takings claim is analyzed under the physical or the regulatory taking framework. As the Supreme Court explained in *Lucas*, a background principles defense was available in that regulatory takings case, but also could appropriately be applied in a physical takings case. *See Lucas,* 505 U.S. at 1028-29 (preexisting federal navigation servitude will bar physical occupation taking claim); *accord John R. Sand v. United States*, 60 Fed. Cl. 230, 235 (2004), *vacated on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).

A. Oregon's Doctrine of Public Ownership of Wildlife Bars Plaintiffs from Claiming a Right to Use Water in a Way that Harms Public Fisheries.

One of the most venerable principles known to the law, recognized in every state, is that fish and wildlife "belong[] in common to all the citizens of the State." *Geer v. Connecticut*, 161 U.S. 519, 522 (1896). In 2015, the Supreme Court of Oregon restated and reaffirmed this principle under Oregon law:

> In *State v. Hume*, 52 Or. 1, 5-6, 95 P. 808 (1908), this court adopted the English common-law view that property rights in wild animals lie in the sovereign. The court employed, as had courts in many other states, the metaphor of a trust to describe the state's interest in

> wildlife. The court concluded that title to animals, "so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens[.]" *Id*. at 5, 95 P. 808; *see also Anthony et al. v. Veatch et al.*, 189 Or. 462, 487 (1950) ("'The fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity[.]'") (quoting *State v. Tice*, 69 Wash. 403, 404 (1912)). This court later affirmed that, although a "right of property," the state's interest in wildlife is a sovereign—not a proprietary—interest. *See Monroe v. Withycombe*, 84 Or. 328, 334–35 (1917) ("Fish are classified as *ferae naturae*, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, *not as a proprietor, but in its sovereign capacity* for the benefit of and in trust for its people in common[.]") (emphasis added).

State v. Dickerson, 345 P.3d 447, 453 (2015) (citations omitted).[9] This statement is consistent with rulings by numerous other courts, including this Court. *See American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004) (quoting *McCready v. Virginia*, 94 U.S. 391, 394 (1876)) ("[t]he principle has long been settled in this court, that . . . the States own the tide-waters themselves, *and the fish in them*, so far as they are capable of ownership while running" (emphasis added)); *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778 (Ct. Cl. 1968).

Because the public owns fish and wildlife, no individual member of the public can claim a property right to take action that will impair the public's fish

[9] As the *Dickerson* court explained, Oregon has codified the doctrine of sovereign ownership of wildlife without, however, altering the substance of the doctrine. *Dickerson*, 345 P.3d at 454.

and wildlife resources. Far from being the exercise of a legitimate private property right, such an action represents a trespass on public property. This principle was recognized most recently by the Supreme Court in *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419 (2015). There the Court ruled that regulations governing the marketing of raisins constituted a taking. However, the Court went out of its way to explain that application of a similar regulation to oysters (a form of wildlife) would *not* constitute a taking – because of the doctrine of sovereign public ownership of wildlife. The *Horne* Court distinguished its prior decision in *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929), in which the Court rejected a takings claim, on the ground that oysters, "unlike raisins, were '*feræ naturæ*' that belonged to the State under state law, and '[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire,'" *Horne,* 135 S.Ct. at 2431 (quoting *Leonard v. Earle*, 155 Md. 252, 258 (1928)). In the Supreme Court's words, "oyster packers did not simply seek to sell their property; they sought to appropriate the State's." *Id*. Because oysters are "public things subject to the absolute control of the state," *id*. (quoting *Leonard*, 155 Md. at 258), public regulation of oyster marketing was not a taking.

The Supreme Court's recognition that the doctrine of sovereign ownership of wildlife will defeat a takings claim based on the state's ability to protect wildlife is in accord with numerous other decisions from around the country, including

Oregon. *See Dickerson*, 345 P.3d at 455 (quoting *State v. Pulos*, 64 Or. 92, 95 (1913) ("[N]o person has an absolute property right in game or fish while in a state of nature and at large; . . . the taking of them is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the law-making power may see fit.")). Not surprisingly, given the preeminent social importance of fisheries, many prior takings cases applying the public ownership of wildlife doctrine have involved fish species. *See, e.g., Parker v. Illinois*, 111 Ill. 581, 588-89 (1884) ("The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use"). Similarly, in *People v. Glenn-Colusa Irrigation Dist.*, 15 P.2d 549, 553 (Cal. Dist. Ct. App. 1932), the California Court of Appeals enjoined an irrigation district from diverting water from the Sacramento River until it installed screens on the water diversion structure to prevent injury to fish because "[t]he fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state." *Id*. at 551. Continuing in the same vein, the court asserted:

> The right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the

> sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union.

Id.

Here, of course, had the Baley plaintiffs actually persisted in using Klamath Project water in 2001, notwithstanding the conclusion by NMFS and FWS that doing so would jeopardize the continued existence of three species of fish, *see Baley,*134 Fed. Cl. at 636-641, they would have not only been liable for unlawfully "taking" a listed species within the meaning of the ESA, 16 U.S.C. § 1538(a)(1), they also would have unavoidably caused great harm to fish resources that belong to the public and the State. It is beyond peradventure that they cannot assert a property right to use water in such a fashion.

B. The Lower Court's 2011 Decision in *Casitas* Does Not Alter the Application of Background Principles.

In *Casitas Municipal Water Dist. v. United States,* 102 Fed. Cl. 443 (2011), *reh'g and reh'g en banc denied,* 708 F.3d 1340 (Fed. Cir. 2013), the court of claims correctly recognized background principles of state law that protect public trust resources are inherent limits on the scope and extent of private rights to the use of such resources. *Id.* at 455-62. But it incorrectly concluded that the United States could not successfully raise a background principles defense because: (1) a defense based on a background principle of *state* law cannot be raised as a defense to a taking claim based on *federal* action; and, (2) even if it had authority to apply

a state-law-based background principles defense, the defense called for a balancing of the relevant competing interests. In reviewing this decision on appeal, this Court did not address either of these conclusions, *Casitas Municipal Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013), but both of them are wrong.

First, there is no basis for thinking that the scope and effect of a background principles defense varies depending on whether the takings claim is based on federal or state regulatory action. In either case the necessary predicate for a viable takings claim is that the claimants possess property. Background principles of state law may (or may not) limit the extent of a claimant's asserted property interest, depending on the content of state law and the nature of the regulated activity. But once the nature and scope of the property has been defined under state law, that definition applies in the same fashion regardless of whether the taking was allegedly committed by the state or federal government. *See, e.g.*, *Appolo Fuels, Inc.*, 381 F.3d at 1347 ("It is a settled principle of federal takings law that under the *Penn Central* analytic framework, the [federal] government may defend against liability by claiming that the regulated activity constituted a *state law* nuisance without regard to the other *Penn Central* factors." (emphasis added)).

Second, the court of claims was wrong to conclude that application of background principles in a takings case necessarily involves a balancing of competing interests. This reasoning improperly confuses how the doctrine of

sovereign ownership affects the authority of state (and federal) regulatory agencies to manage public resources with how this doctrine delimits the nature and scope of asserted private property interests. While regulators have a duty to consider the public rights in fish and wildlife in making decisions that may affect these resources, they sometimes also will have the authority to take action that may impair these resources to some degree. *Cf. National Audubon Society v. Superior Court*, 658 P.2d 709, 727 (Cal. 1983) (observing that the government has the authority to take actions that "may unavoidably harm" public trust resources). But the issue of how the sovereign ownership doctrine constrains *private* property interests represents a very different question. Under this doctrine, no citizen can claim an entitlement, as a matter of state property law, to act in a fashion that harms the public's wildlife. *See Id.* at 712, 720-21, 727-28. The application of a balancing test to determine the scope of the limitations that state background principles impose on private interests is simply wrong.[10]

In sum, Oregon's well-established and continuing interest in protecting the State's wildlife resources from harm serves as a background principle of state law

[10] The court of claims apparently also incorrectly allocated the burden of proof on the background principles issue to the United States. *See Casitas*, 102 Fed. Cl. at 452 (citing *John R. Sand & Gravel*, 60 Fed. Cl. at 240). Since establishing the existence of a property interest is an essential element of a plaintiff's claim, *they* must bear the burden of demonstrating that a background principle of property law does not bar the claim.

that limits the Baley plaintiffs' claimed right to use Klamath Project water—and excludes from any such right uses that would cause serious harm to protected fish species. Had they used Klamath Project water in 2001 for irrigation, as they assert they had a property right to do, their use of that water not only would have been illegal under the ESA but it also would have caused serious harm to protected wildlife. Consequently, application of background principles of Oregon law regarding the State's trust interest in protecting its wildlife resources – specifically including fish – leads to the conclusion that the Baley plaintiffs had no protected property right to use the water they claim was taken by the United States in 2001.

III. THE BALEY PLAINTIFFS' TAKINGS CLAIM SHOULD BE ANALYZED AS A REGULATORY, NOT A PHYSICAL, TAKING.

If the Court concludes that the Baley plaintiffs held a protected property interest to use Klamath Project water in the circumstances of this case, and that water was available to satisfy that right in 2001 (neither of which it should find), their takings claim based on restrictions on the exercise of that interest in 2001 should be evaluated as a potential regulatory taking, not a physical one. The court below erred in concluding otherwise. *Baley*, 134 Fed. Cl. at 660 (finding that the Baley plaintiffs' claim should be "analyzed under the physical takings rubric").

The court arrived at this incorrect conclusion by misinterpreting at least three aspects of this Court's decision in *Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008). As explained below, that decision is

narrow and does not conclude that any restriction, implemented by any means, on a right to use water is necessarily a physical taking. Yet that is the sum and substance of the lower court ruling. In reaching this result the court created a special takings rule for restrictions on water use, treating all such restrictions as *per se* physical takings, despite the fact that takings claims based on restrictions on the use of land, timber, minerals and other resources are routinely analyzed under the regulatory takings framework. This special rule cannot be squared with the decision in *Casitas,* and it also conflicts with the fact that "rights, property or otherwise, that are absolute against all the world are certainly rare, and water rights are not among them." *United States v. Willow River Power Co*., 324 U.S. 499, 510 (1945); *cf. Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, ___, 133 S.Ct. 511, 521 (2012) (rejecting argument that only permanent property inundation could give rise to a takings because "[t]here is . . . no solid grounding in precedent for setting flooding apart from all other government intrusions on property").

While a property right to use water is entitled to constitutional protection like other forms of property, *see Washoe County v. United States*, 319 F.3d 1320, 1327 (Fed. Cir. 2003), there is no justification for the idea that such use rights are entitled to *more* protection. Regulatory restrictions on the use of water have rarely given rise to takings claims but when they have, courts generally evaluated the

claims under the regulatory takings framework. *See Edwards Aquifer Auth. v. Day*, 369 S.W.23d 814 (Tex. 2012); *Allegretti & Co. v. Cnty. of Imperial*, 42 Cal. Rptr. 3d 122 (Ct. App. 2006), *cert. denied*, 549 U.S. 1113 (2007); *see also infra* at 38-40. Had the lower court correctly applied a regulatory takings analysis to the Baley plaintiffs' takings claim, their claims would have failed. *Cf., Casitas*, 543 F.3d at 1283 (plaintiffs in *Casitas* conceded that their takings claim for water use could not succeed "under the regulatory takings framework").

In the following sections, PCFFA reviews briefly the two analytic approaches to a takings claim and explains why the Baley plaintiffs' claims should be analyzed under the regulatory takings framework. We then describe three limiting aspects of this Court's 2008 *Casitas* decision before explaining how the court below misread or disregarded these limits in order to arrive at a decision that treats regulatory restrictions on water use in a unique and unsupportable way. Finally, we explain why three earlier Supreme Court decisions also do not support application of a physical takings framework to the Baley plaintiffs' takings claim.

A. A Regulatory Takings Analysis Should Apply When the Government Must Regulate Water Use to Comply with Statutory Requirements.

Takings precedents identify two frameworks under which a takings claim may be analyzed: a physical or a regulatory taking. "The paradigmatic [physical] taking requiring just compensation is a direct government appropriation or physical invasion of private property," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537

(2005). By contrast, the regulatory takings framework is designed to recognize the necessary balance between government action and private property interests: "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The regulatory takings framework thus generally involves an "ad hoc factual inquiry" into the economic impact of the regulation, the extent to which the regulation interfered with investment-backed expectations, and the character of the government action. *See Penn Central,* 438 U.S. at 124.

As described above, this case arose in 2001 when BOR, acting in accordance with the requirements of the ESA, imposed restrictions on the Baley plaintiffs' exercise of their water rights. *See supra* at 3-6. This kind of regulatory restriction is comparable to other kinds of restrictions on use that courts have analyzed under a regulatory takings framework. For example, the Supreme Court has applied regulatory takings analysis to government restrictions on the use air rights, *see, e.g., Penn Central*, 438 U.S. 124; underground resources, *see, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); and regulations on the use of land, *see, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In each of these contexts, the government has limited a citizen's ability to fully use a resource for their private benefit, just as the government limited the Baley

plaintiffs' ability to use their asserted rights to Klamath Project water in 2001.[11] In each instance, the Court treated the restriction as raising a regulatory takings claim and analyzed that claim under the multi-factor *Penn Central* framework. There is no basis in the decisions of this Court or the Supreme Court for treating regulatory restrictions on the use of water differently from regulatory restrictions on the use of other natural resources.[12]

---

[11] In similar settings, this Court too has recognized that regulatory requirements affecting water should be treated like any other kind of regulation. *See Brace v. United States*, 72 Fed. Cl. 337 (2006), *aff'd*, 250 Fed. Appx. 359 (Fed. Cir. 2007) (affirming "based upon the well-reasoned opinion of the trial court"), *cert. denied*, 552 U.S. 1258 (2008). As the lower court opinion in *Brace* concluded:

> If the mere recognition of a property owners' obligations under the [Clean Water Act] gave rise to a servitude and, in turn, a physical taking, then virtually every regulation of a piece of property . . . would result in a takings. Such is not the law. None other than *Penn Central* itself dismissed, as "fallacy," the contention that "a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Penn Central,* 438 U.S. at 130 n.27, 98 S.Ct. 2646.

72 Fed. Cl. at 366 (citations omitted); *see also Scott v. Oregon,* 541 P.2d 516, 519 (Or. App. 1975) (use regulations imposed by state Scenic Waterways Act was not easement for which compensation must be paid).

[12] If anything, precedent suggests that a more forgiving takings standard should apply to regulatory restrictions on the use of water, given the special public interest in and ownership of water resources. Thus, in *Hudson County Water Co. v. United States*, 209 U.S. 349 (1908), the Supreme Court rejected a takings claim based on government restrictions on water sales:

> [i]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it

B. The Court of Claims Misinterpreted This Court's 2008 Decision in *Casitas* and Erroneously Applied a Physical Takings Framework.

Notwithstanding the established framework for evaluating regulatory restrictions on the use of property under the Takings Clause, the lower court decision in this case relied almost exclusively on this Court's 2008 decision in *Casitas* to find that the limited restriction on the Baley plaintiffs' right to use water from Upper Klamath Lake and the Klamath River in 2001 should be analyzed as a physical, not a regulatory, taking. *See Baley*, 134 Fed. Cl. at 660-666; *see also Klamath Irrigation Dist. v. United States*, 129 Fed. Cl. 722, 730, 737 (ruling on motion in limine). In doing so, the lower court misinterpreted or disregarded key aspects of this Court's decision and reached a result that would effectively render any restriction on water use by the government subject to a physical takings analysis. To understand the lower court's error, PCFFA first reviews this Court's 2008 *Casitas* decision and then focuses on the crucial ways in which the lower court's decision disregards or misinterprets that decision.

> substantially undiminished, except by such drafts upon them as the guardians of the public welfare may permit for the purpose of turning them to a perfect use.

Id. at 356.

1. This Court's 2008 Casitas *Decision*

In its 2008 decision in *Casitas,* the Court reversed a court of claims ruling that the plaintiffs' takings claim should be analyzed as a regulatory taking and remanded for further evaluation of the plaintiffs' property rights (if any) as a physical taking. In doing so, however, the Court relied on a core group of inter-related facts that sharply narrowed the scope of its decision.

First, the Court's decision explains in some detail that the water at issue in *Casitas* had already been diverted from the Ventura River into the plaintiffs' irrigation canal and the government action at issue required some of the water in the canal to be re-diverted into a fish ladder the plaintiffs were required to build at a point along the canal so that fish could effectively pass up and downstream:

> The government [] admits that the operation of the fish ladder required water, which prior to the fish ladder's construction flowed into the Casitas reservoir via the Robles-Casitas canal to be physically diverted away from the Robles-Casitas Canal and into the fish ladder. . . . . Specifically, the government admits that the operation of the fish ladder includes closing the overshot gate . . . which is located in the Casitas-Robles Canal, and that the closure of this gate causes water that would have gone into the Casitas Reservoir via the Casitas-Robles Canal to be diverted into the fish ladder. . . . . These admissions make clear that the government did not merely require some water to remain in the stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal – after the water had left the Ventura River and was in the Robles-Casitas Canal . . . .

543 F.3d at 1291 (citations and footnotes omitted). As the Court saw it, "[t]he United States actively caused water to be physically diverted away from Casitas after the water had left the Ventura River and was in the Robles-Casitas Canal."

Id. at 1294.

This distinction between "not merely requiring some water to remain in the stream," (on the one hand) and requiring the plaintiff to re-divert water to a new fish ladder after the water had left the river and come under the plaintiffs' control, (on the other hand) was critical to the Court's ruling, *id.*, and limits the scope of that ruling. As the Court emphasized, in rejecting the government's argument in favor of a regulatory takings analysis, that analysis would apply where "[t]he government . . . did not seize, appropriate, divert or impound any water, but merely required water to be left in the stream." *Casitas*, 543 F.3d at 1290; *see also id.* at 1295 & n.16 (discussing an earlier court of claims decision in *Tulare Lake Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001), explaining that the Court was not expressing any view on that decision's finding of a physical taking for a restriction on water use, acknowledging considerable criticism of that decision, and concluding that in the Court's view in *Casitas*, "the government's admission made clear that it did not merely require water be left in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal and towards the fish ladder").

Second, the Court's *Casitas* decision also assumed, based on a concession by the government for the purposes of the case, that the plaintiffs actually owned all the water in the private Robles-Casitas Canal once they had diverted water from

the Ventura River and it flowed down their canal. As the Court put it: "the government has conceded that Casitas has a valid property right in the water in question." *Id*. at 1288. Or, as the Court said in a subsequent decision in the *Casitas* cases, it assumed in its 2008 decision that "Casitas had a property right in the water diverted from the Ventura River." *Casitas*, 708 F.3d at 1346; *see also id.* at 1352-53 (noting Casitas' argument that the Court's 2008 decision found "water diverted into the canal 'has become the property of Casitas'" but pointing out that this statement in its 2008 opinion was based on "certain temporary concessions [by the government] regarding the scope of Casitas' property interest").[13]

Third, the Court explained that "the water diverted away from the Robles Diversion Canal is permanently gone." 543 F.3d at 1296. As the Court said, "[t]he government caused diversion to the fish ladder has permanently taken away . . . water from Casitas." *Id*. The basis for this finding was the government's concession that, because of the construction and operation of the fish ladder, Casitas was required to "divert water from the Project to the fish ladder, resulting in a permanent loss to Casitas of a certain amount of water per year. *Id*. at 1282.

[13] Of course, the Court concluded in its 2013 *Casitas* decision that Casitas could not show that enforcement of the ESA resulted in any loss to Casitas of the beneficial use of any of its water and hence it could not show a property interest that could have been taken. *Casitas*, 708 F.3d at 1353-1358; *see also supra* at 27-36 (explaining that the Baley plaintiffs also had no property right to use water as they wished in 2001 because of state law background principles).

The Court's view that this loss of water would occur each year on a permanent basis as long as the fish ladder remained in place also played a key role in the Court's decision.

2. The Court of Claims Decision Misinterprets this Court's Casitas *Decision to Create a Sweeping Physical Takings Framework for Restrictions on Water Use.*

The court of claims decision in this case discusses and relies extensively on the Court's 2008 *Casitas* decision, and addresses each of the above aspects of that decision. But it does so in ways that misinterprets each and, in so doing, reaches a sweeping result that would require essentially every regulatory restriction on a right to use water, no matter how minor, to be evaluated under a physical taking framework. Such a radical outcome is at odds with this Court's decision in *Casitas* and takings law more generally.

a. The requirement to leave water in Upper Klamath Lake and the Klamath River in 2001 is not the same as the requirement in *Casitas* to re-divert water to a fish ladder after it entered a private canal.

The court of claims concluded that the government's direction to the irrigation districts to leave the Klamath Project diversion gates at the points of diversion from Upper Klamath Lake and the Klamath River closed for a period in 2001, so that water would remain in the Lake and River rather than enter the irrigation canal system in the first place, was indistinguishable from the requirement in *Casitas* to create a new point of diversion within the Robles-Casitas

Canal for a fish ladder some distance after water had already entered that canal from the Ventura River. In the lower court's view, "in both *Casitas* and the present cases, the government action was implemented by a similar physical means, in *Casitas* by closing an 'overshot gate' to divert water out of the canal used by the plaintiffs, . . . and, in the present cases, by using the Klamath Project works to prevent water from travelling out of Upper Klamath Lake and the Klamath River and into project canals used by the plaintiffs." *Klamath Irrigation Dist.*, 129 Fed. Cl. at 733 (citations omitted). By finding equivalence between regulatory direction to leave existing gates closed temporarily at points of diversion for irrigation so that water would remain in a lake and river to protect endangered fish (on the one hand), and a requirement to create a new diversion within a private irrigation canal for a new fish ladder after water had already been taken from a river (on the other hand), the lower court effectively erased the careful distinction drawn by this Court in *Casitas* between government direction to leave water in a stream and a requirement to repurpose through a new structure in a private canal water that already has been diverted.

This Court's distinction in *Casitas,* however, indicates that a regulatory takings analysis would have been appropriate if the government had simply required water to be left in the stream, but it had no need to decide that question because it ruled that a physical takings analysis was appropriate based on the

particular facts in *Casitas* as conceded by the government, i.e., it assumed the plaintiffs were being required to divert water they already owned through the fish ladder: "[t]hese admissions make clear that the government did not merely require some water to remain in stream but instead actively caused the physical diversion of water away from the Robles-Casitas Canal – after the water had left the Ventura river and was in the Robles-Casitas Canal – and towards the fish ladder[.]" *Casitas*, 543 F.3d at 1291-2; *see also id*. at 1295 & n.16 (explaining that the Court had no occasion to take a position on the court of claims decision in *Tulare Lake*).

The government actions in this case and those on which the Court relied in *Casitas* are simply not equivalent. In *Casitas*, the Court assumed water had already been removed from the river and was held in private ownership and under private control in a private canal and the government was requiring some of that water to be re-diverted away from the private canal (and private use) to a new use specified by the government. In *Baley*, the water had never left the river or come under private control and the government was simply protecting from loss, as required by law, a publicly-owned resource (endangered fish) by directing that enough the water remain in the lake or stream to comply with the law. Moreover, because water diversions for irrigation begin at a point of diversion from a river or stream, and involve some mechanism for opening and closing the diversion to control the capture and flow of water into the irrigation works, if any direction to

leave such a structure closed for a period of time for some government purpose amounts to more than a "mere[] require[ment] for some water to remain in a stream," and instead involves "actively caus[ing] the physical diversion of water away" from use for irrigation, the result would be that any government effort to restrict the initial diversion of water from a river or lake to comply with the law and protect public resources, no matter how limited, would lead to a takings claim that would have to be evaluated as a physical taking.[14]

Nothing in this Court's 2008 *Casitas* decision supports such a radical outcome. In fact, quite the opposite: by explicitly drawing a distinction between a government requirement to merely leave water in the stream and what it concluded was a requirement to actively re-purpose water for a new use once it has been taken from a stream and was under private control, and then relying on that distinction to conclude that the latter kind of action requires application of a physical takings framework, this Court sought to distinguish between ordinary regulatory restrictions and physical appropriations of property. The lower court's

[14] Indeed, as this Court explained in *CRV Enterprises v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), in rejecting application of a physical takings analysis, "the mere fact that the government's regulatory action included some sort of physical instrument does not change the fact that the government activity merely restricted the plaintiff's use of its property. *Id*. at 1248. The lower court decision misses this point and incorrectly relies on the fact that some physical event occurred rather than focus on whether that event merely required some water to be left in the stream.

finding of equivalency between what this Court identified as two different kinds of actions erroneously led it to conclude that the Baley plaintiffs' takings claim should be analyzed as a physical taking. More importantly, it also creates a precedent that would lead to a similar result for any government effort to leave water in a stream to protect public resources (or even allocate water among competing claimants in a drought). Such an outcome should be rejected as well beyond the bounds of established takings law. *See supra* at 38-40 (citing cases that treat regulatory restrictions on water use as ordinary regulatory takings).[15]

b. There is no basis for any claim that the Baley plaintiffs owned the water that was left in the lake and river to comply with the ESA.

As noted above, this Court grounded its 2008 *Casitas* decision in part on the government's concession that Casitas owned the water from the Ventura River once it was diverted and flowing down the Robles-Casitas Canal. The court of claims incorrectly relied on this discussion of who owned the water in *Casitas* to support its conclusion that any government regulatory restriction on an irrigator's use of water is an appropriation of that water and compels application of a physical takings framework. The lower court did this, however, by shifting its focus from

[15] Indeed, one fundamental problem with the court of claims analysis is it leads to a rule that the simple fact that a government regulatory mandate restricting use of property is implemented through some physical instrumentality would mean that the government has engaged in an appropriation or physical occupation, a rule that is not supported by how the Supreme Court has defined those terms.

the government's temporary concession that Casitas owned the water once it was in the Robles-Casitas Canal to whether an irrigator has a "right to divert" water in the first instance. *Baley*, 134 Fed. Cl. at 664 & n.20 (citing and quoting *Klamath Irrigation Dist. v. United States*, 129 Fed. Cl. at 733). The lower court's shift from this Court's focus on ownership of the water in *Casitas* to whether the Baley plaintiffs had a "right to divert water" bypasses a unique and important feature of the analysis in *Casitas* (that Casitas had already diverted and controlled the water) and replaces it with a feature common to every water right holder – that they have established a right to divert water from a stream and use it by actually doing so.

The consequence of this shift is enormous: it allowed the court of claims to conclude that the facts of *Casitas* and of this case are indistinguishable and compel application of a physical takings framework that could apply to *any* government limitation on water use once a claimant has acquired an initial right to divert and use water. Nothing in this Court's *Casitas* opinion suggests such an outcome.[16] On the contrary, the opinion in *Casitas* focused on the government's concession that Casitas purportedly owned the water once it was in the canal and the fact that a

[16] Indeed, as the Court subsequently made clear, just the opposite is the case. The Court's 2008 *Casitas* decision rests on the government's temporary concession regarding Casitas' ownership of the water in the canal, not on whether Casitas held a "right to divert" water. *See Casitas*, 708 F.3d at 1346-47 (explaining its 2008 *Casitas* decision and stating that "because of the government's concessions, it had not undertaken to decide 'if, under California law, there can be a right to divert water'" (citations omitted)).

portion of that water was then permanently diverted to another use through a new fish ladder in Casitas's canal. *Id*. at 1288-89. The opinion did not focus on the mere fact that Casitas had established an initial right to divert and use water.

The plain fact is that the court of claims narrow focus on whether the Baley plaintiffs' had a "right to divert" water from Upper Klamath Lake and the Klamath River in 2001 as confirmation that a physical taking had occurred led to an erroneous result in this case -- and an unsupportable and vastly overbroad rule for evaluating government actions that may affect water use rights, a rule at odds with controlling precedent.

c. The court of claims decision also disregards the difference between the re-diversion of a portion of the water in *Casitas* and the limitation on the use of water in 2001 in this case.

As noted above this Court also ruled that the government's action in *Casitas* was a permanent year-in-and-year-out appropriation of some of Casitas' water – i.e., there was no termination date and the use was not temporary in any sense. *Casitas,* 543 F.3d at 1296 ("[i]n this case . . . the water that is diverted away from the Robles-Diversion Canal is permanently gone."). The court of claims decision also disregards this point and concludes that the facts in *Casitas* and this case are the same. But treating any and all restrictions on water use, no matter how temporary, as *per se* takings, as the court of claims decision does, would lead to a sweeping theory of appropriation-type physical takings that would classify all

restrictions on water use as appropriations and therefore *per se* takings. The fact that the lower court's decision would lead to such a sweeping result counsels strongly against accepting it. Nothing in property takings law suggests such a broad prohibition of government regulation of water use in the absence of compensation is appropriate – and it is not. Nor is it required by this Court's decision in *Casitas*.

C. Prior Supreme Court Decisions Do Not Support the Court of Claims Decision.

Not surprisingly, given its mis-equation of key facts in *Casitas* with the facts in this case, the court of claims also erroneously concluded that a trilogy of older Supreme Court water rights cases supports application of a physical takings framework to the Baley plaintiffs' takings claim. *See, e.g.*, *Klamath Irrigation Dist.*, 129 Fed. Cl. at 730-33 (discussing *Dugan v. Rank*, 372 U.S. 609 (1963), *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950), and *International Paper v. United States*, 282 U.S. 399 (1931), and finding them controlling); *see also Baley*, 134 Fed. Cl. at 660 (same). However, the facts in these three cases are not like the facts in this case. In all three, all of the plaintiffs' water was actually physically appropriated by the government and transferred to new third parties for their private use. In two of the cases this governmental appropriation occurred because government construction of dams halted the downstream flow of water to the plaintiffs and their water was then transferred to other users. *See Casitas*, 543

F.3d at 1289-90 (describing the facts in *Dugan* and *Gerlach)*, and in the third, the plaintiffs' water was redirected from a canal to another party by order of the government, *id*. at 1289 (describing the facts in *International Paper)*, actions this Court found analogous to the action at issue in *Casitas* where it concluded that water was "withdrawn from the Robles-Casitas Canal and turned elsewhere (to the fish ladder) by the government," *id*. at 1292 (discussing *International Paper* in the context of whether the "active hand of the government" was at play in *Casitas* or whether the government had "merely require[d] some water to remain in the stream"). Although the Court in its 2008 *Casitas* opinion concluded that this trilogy of cases supported finding a *per se* physical taking on the facts of that case as the Court understood them, it does not follow that these cases support the same conclusion in this case which involves very different facts as discussed above.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the lower court's judgment. That court correctly concluded that the reserved water rights of the Klamath, Yurok and Hoopa Valley Tribes left no water for the Baley plaintiffs to use for irrigation under the conditions in 2001. Further, background principles of Oregon law preclude the Baley plaintiffs from claiming a protected entitlement to exploit Klamath Project water in the first place under the circumstances that existed in 2001. Finally, the Baley plaintiffs' claim that any right they had to use

water in 2001 was taken by the United States should be analyzed as a regulatory, not a physical, taking -- and their claim cannot succeed on that basis.

Respectfully submitted this 17th day of September, 2018.

/s/ Todd D. True
TODD D. TRUE (WSB #12864)
STEPHANIE K. TSOSIE (WSB#49840)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Phone: (206) 343-7340
Fax: (206) 343-1526
ttrue@earthjustice.org
stsosie@earthjustice.org

CERTIFICATE OF SERVICE

I hereby certify that on September 17th, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Todd D. True
Todd D. True

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations set forth in Federal Circuit Rule 28(d) and the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in Times New Roman 14 point, a proportionally spaced font using Microsoft Word. I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,867 words, excluding the parts of the brief exempted by Federal Rule Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b).

DATED: September 17, 2018.

s/Todd D. True
Todd D. True