

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-
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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)

**AMICUS BRIEF OF YUOK TRIBE
SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE
[CORRECTED]**

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CERTIFICATE OF INTEREST

Counsel for the amicus curiae Yurok Tribe certify that the following information complies with Rule 47.4 of the Federal Circuit Rules of Procedure:

1. The full name of the party/amicus represented by me is: Yurok Tribe
2. The name of the real party in interest represented by me is: N/A
3. There are no parent corporations and no publicly held companies that own 10% or more of stock in the Yurok Tribe, a federally recognized Indian tribe.
4. The names of all law firms and the partners and associates that have appeared for the party/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: None.

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5. There is no 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.

Dated this 24th day of September, 2018.

/s/ Amy Cordalis
Signature of Counsel

Amy Cordalis
Printed Name of Counsel

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STATEMENT OF INTEREST

This amicus curiae brief is filed on behalf of the Yurok Tribe. In 1855, the United States reserved the Klamath River Reservation, which later became the Yurok Reservation, as a permanent homeland for the Yurok people. The Klamath River legally defines breadth of the Yurok Reservation—one mile either side of the River for approximately forty-five river miles—and its fishery is the most important resource the Yurok Tribe and its members have. The Yurok Reservation is located wholly within California and downstream from the Oregon Klamath Irrigation Project, which diverts water for agricultural purposes that would otherwise support fishery habitat in the Klamath River and through the Yurok Reservation.

Since time immemorial, Yurok people have fished the Klamath River for salmon, including coho and Chinook, as well as other species of fish. Under federal law, the Tribe retains reserved fishing rights and reserved water rights to support and maintain its fishery so that the Tribe and its members may fulfill the purpose of the reservation—a permanent homeland supported by a fishing way of life. The United States has an obligation under federal law to protect the Tribe's reserved fishing and water rights. Since the establishment of the Klamath Project and associated dams on the Klamath River, the Klamath River fishery has been in

decline, and now coho salmon, a Yurok trust species, wallows on the endangered species list while other Klamath River species fight to stay off the list.

Recently in this lawsuit, the Court of Federal Claims relied on the existence of the Tribe's reserved fishing rights and its reserved water rights to support its conclusion that all of the water available for appropriation in 2001 was reserved for the Yurok and other Klamath Basin tribes' senior water rights. Plaintiffs-Appellants and their supporting amici make assertions that are factually and legally incorrect regarding the existence, scope, and enforceability of the Yurok Tribe's federal reserved rights. The Tribe presents this brief to provide necessary information regarding its federal reserved fishing and water rights.

No party's counsel authored any portion of this brief. No party, party's counsel, or any other person or entity besides the Yurok Tribe contributed money to fund preparation or submission of this brief. This brief is filed with leave of court pursuant to FRAP 29(a)(2).

ARGUMENT

Since the beginning of time, the Yurok Tribe has lived on the Lower Klamath River in northern California, fishing for the many species that the river held and basing its tribal culture around the Klamath River fishery. The United States understood this and created the Yurok Reservation so the Tribe could maintain its fishing and river-centric way of life, reserving to the Tribe through the Reservation's creation fishing and water rights to support that lifestyle and conferring a legal duty on the federal government to protect those rights. But since the building of the Klamath Irrigation Project in the early 1900s, the fishery has gradually collapsed. The Lower Klamath River is now managed not by natural hydrologic events, but by the Bureau of Reclamation, who schedules and releases water below the Klamath Project and the four mainstem Klamath River dams to—literally—keep water in stretches of the river so fish can survive. Accordingly, the Bureau's operation of the Project through water releases from Iron Gate Dam (the most downriver dam the Bureau operates) is the most important factor with respect to water management in the persistence of the Klamath River fishery and in protecting the Tribe's fishing rights. And while there may be many factors contributing to the decline of the Klamath River fishery (including to the endangered coho salmon), “[i]t is the Bureau's responsibility and obligation to ensure that its actions do not jeopardize the Coho salmon, after taking factors

outside its control, such as environmental variability, into account.” *Yurok Tribe v. Bureau of Reclamation*, 231 F. Supp. 3d 450, 483 (N.D. Cal. 2017).

In 2001, the Bureau released water from Upper Klamath Lake to support the Lower Klamath fishery and to avoid jeopardy to the endangered Coho salmon. The Yurok Tribe’s senior federally reserved water rights demands that the Bureau undertake this action to support its federally reserved fishing rights, and the Bureau’s reliance on the Yurok and other basin tribes’ water rights to make such releases was appropriate. The fact that there was no water legally available to satisfy the Plaintiff irrigators’ junior water rights in 2001, a dry year, is a consequence of the long-settled prior appropriation water law doctrine, not legal error. The court of claims’ decision that the basin tribes’ federally reserved water rights are senior to the Plaintiff Irrigators’ water rights and that the Bureau made the 2001 releases pursuant to the tribes’ senior water rights should be affirmed.

I. THE YUROK RESERVATION WAS CREATED TO SUPPORT THE TRIBE’S FISHING WAY OF LIFE

A. The Yurok People

The Yurok Tribe is a federally recognized Indian tribe whose reservation is located on the Lower Klamath River in northern California, spanning from the river’s mouth at the Pacific Ocean upriver to the Yurok village of Weitchpec. With more than 6,200 tribal members, the Yurok Tribe is the largest Indian tribe in California. The fishery resources of the Klamath and Pacific Ocean are the

mainstay of the life, economy, and culture of the Yurok Tribe. *See Mattz v. Arnett*, 412 U.S. 481, 486-87 (1973).

Yurok people have always lived on their sacred land along the Pacific Coast and inland on the Klamath River. The Spirit People, Woge', made the land for them and the Creator, Ko-won-no-ekc-on Ne-ka-nup-ceo, put them there. Yurok people believe they were placed on the Klamath River to care for it and they have a cultural covenant to protect the river. The Tribe's creation story tells that the river was made to support the Yurok People and as long as they do not take more resources than they need from the river, it would always provide for their livelihood. Today, the Tribe's Constitution imposes this duty on the Yurok government, to protect and "to restore, enhance and manage the tribal fishery, tribal water rights, tribal forest, and all other natural resources" of the Yurok Reservation. Yurok Const., Preamble.

The Yurok people are a fishing people—placed on the Klamath River and coast of the Pacific Ocean by the creator to be a fishing people—and the Ninth Circuit has acknowledged that the Klamath River Indian fishery is "not much less necessary to the existence of the [Yurok] Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (internal citation omitted). The many fish species found in the Klamath River on the Yurok Reservation have been staples of Yurok culture and are tribal trust species: Coho

salmon; spring and fall Chinook salmon; pacific lamprey; summer and winter steelhead; green and white sturgeon; cutthroat trout; rainbow trout and eulachon. *See Appx20.* Throughout the year, Yurok people go to different locations on the Klamath River within the reservation to fish for these fish species. Right now, mid-September 2018, the Klamath River and its banks are dotted with Yurok fishers, young and old, harvesting fall Chinook for subsistence purposes, often at traditional family fishing spots that have been used continuously by that family for thousands of years. This is an act of self and cultural preservation and how Yurok people connect to each other and their homeland.

At one time, prior to upper-basin development, the Klamath River had the third-most productive salmon run on the west coast. The Yurok and other Klamath basin Indian tribes managed the river and fishery sustainably, and it was a resource that provided for the basin's native peoples for thousands of years.¹ Fish were used for subsistence, ceremonial, and trade purposes. Accounts from the mid-1800s exclaimed that the Klamath salmon "crowded in numbers" all the way up the river

¹ *See generally* U.S. Dep't of Interior, *Current Effects of Implementing the KHSA and KBRA on Indian Trust Resources and Cultural Values V.1.1* 1-3 (Feb. 2012).

² In 1997, the National Marine Fisheries Service listed Coho as threatened under the ESA due to the decline from 150,000 to 400,000 fish spawning annually to approximately 10,000. 62 Fed. Reg. 24,588 (May 6, 1997); Appx2616, Appx2634 (2001 Klamath Project BiOp) (discussing Coho abundance decline).

³ *See* Bureau of Reclamation, *Record of Decision: Long-Term Plan to Protect Adult Salmon in the Lower Klamath River Final Environmental Impact Statement*

from the river mouth to Klamath Falls, Oregon—salmon occupied the entire river basin. Memorandum from Office of the Solicitor, U.S. Dept. of the Interior, to the Secretary of the Interior, Fishing Rights of the Yurok and Hoopa Valley Tribes 8 (Oct. 4, 1993) (hereinafter *Solicitor’s Opinion*) (citing U.S. Dept. of the Interior, *Environmental Impact Statement—Indian Fishing Regulations 2* (Hoopa Valley Reservation, California) (April 1985)). One estimate is that prior to non-Indian settlement, the Klamath Basin tribes consumed over two million pounds of salmon from runs with over 500,000 fish. *Id.* In fact, “the salmon fishery permitted the [basin tribes] to develop a quality of life which is considered high among native populations.” *Id.* at 8 (quoting *Anthropological Study of the Hupa, Yurok, and Karok Indian Tribes of Northwestern California: Final Report* 10, (American Indian Technical Services, Inc., Jan. 1982)).

But significant fishery habitat degradation and habitat loss due to early 1900s upper-Klamath basin land-use changes from open wetlands to irrigated agriculture and the building of four major dams on the Klamath River has devastated the Klamath River fishery. *See* Appx2634-2635. These changes have caused some fish species to go extinct (eulachon, or, “candlefish”), while others struggle for survival on the Endangered Species List (Coho salmon²), and still

² In 1997, the National Marine Fisheries Service listed Coho as threatened under the ESA due to the decline from 150,000 to 400,000 fish spawning annually to

others try to avoid yearly disease catastrophes through highly coordinated management (Chinook salmon³). The negative impact on the fishery has been extraordinary, as has the impact to the Yurok people. *See* Appx2655. Fish kills in the lower Klamath River during the late summer were already a concern during development of the Bureau's 2001 Klamath Project Biological Opinion, Appx2639, Appx2649-51, and in 2002, more than 70,000 adult salmon died, as they were returning to spawn, from a parasite infection related to low, warm flows in the Lower Klamath River. This fish kill occurred entirely within the Yurok Reservation and was the single most tragic event in the history of the Tribe. In 2014 and 2015, 81% and 90%, respectively, of the sampled outmigrating juvenile Chinook salmon⁴ below Iron Gate Dam were infected by the fish disease *Ceratanova shasta* that proliferates in low river flows and poor water quality

approximately 10,000. 62 Fed. Reg. 24,588 (May 6, 1997); Appx2616, Appx2634 (2001 Klamath Project BiOp) (discussing Coho abundance decline).

³ *See* Bureau of Reclamation, *Record of Decision: Long-Term Plan to Protect Adult Salmon in the Lower Klamath River Final Environmental Impact Statement* (April 2017) (describing coordinated federal/state/tribal plan to protect salmon in the lower Klamath River, in part to protect tribal trust resources, using supplemental releases from Lewiston Dam on the Trinity River when disease rates spike and Klamath River flows are insufficient to combat fish disease), *available at* https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=28314.

⁴ Chinook salmon are used as a surrogate for Coho salmon for disease monitoring on the Klamath River due to small Coho population and Chinook's similar susceptibility to certain fish disease. *See Yurok Tribe*, 231 F. Supp.3d at 473, n.5.

caused in part by the Bureau's water-restrictive management of the Klamath Project. *See Yurok Tribe*, 231 F. Supp. 3d at 473.

In 2016, the Yurok Tribe closed its commercial fishery due to record-low salmon returns. Then again in 2017, for the first time in history, due to the lowest returning salmon run ever, the Yurok Tribe closed its tribal salmon fishery to both commercial and subsistence fishing, meaning that no Yurok tribal member could legally fish for salmon within the Yurok Reservation. In 2018 the trend continues, another record low returning salmon run forced the Tribe to cancel the commercial fishery for a third year in a row. The Tribe and the State of California have declared the Klamath fisheries collapse a commercial fisheries disaster. The result of the low salmon returns is that what was once a critical source of local economy for the Tribe—in an extremely economically depressed area—and its members has been painfully absent. The effect of the current fishery crises on the Yurok people is devastating and clear connections have been drawn between the depressed fishery and substance abuse, mental health calamities, and suicide.⁵ As the health of the Klamath fishery goes, so does the health of the Yurok people.

⁵ *See* Joe Mozingo, *How a Remote California Tribe Set Out to Save Its River and Stop a Suicide Epidemic*, L.A. TIMES, May 19, 2017, available at <http://www.latimes.com/local/california/la-me-salmon-demise-yurok-suicides-20170519-htlmstory.html>; Jose A. Rel Deal, *Sick River: Can These California Tribes Beat Heroin and History?*, N.Y. TIMES, Sept. 4, 2018, available at <https://www.nytimes.com/2018/09/04/us/klamath-river-california-tribes-heroin.html>.

B. The Yurok Reservation

With an understanding of the river’s central role in Yurok culture and life, “a strip of territory one mile in width on each side of the (Klamath) river” was set aside for the Yurok people by Executive Order in 1855 as the “Klamath River Reservation.” C.J. Kappler, 1 *Indian Affairs Laws and Treaties* 816-17 (1904); *see also Mattz*, 412 U.S. at 483. That reservation was “ideally selected for the Yuroks,” and “[n]o place can be found so well adapted to these Indians, and to which they themselves are so well adapted.” *Mattz*, 412 U.S. at 486, n.6. The federal government created the reservation to ensure the Yurok people could continue their fishing and river-centric way of life on their ancestral homeland—it was no accident that the Klamath River was the geographical heart of the 1855 reservation and continues to be so today.

Following the reservation’s establishment, the Lower Klamath River fishery was understood to be in Yurok control. Non-Indians had to negotiate with Yuroks for the right to fish—fish heads, holding prized fish cheeks, could be kept only if Yurok individuals specifically waived their right to them—or participate in the canneries at the mouth of the river. *Solicitor’s Opinion* at 11. The Klamath River fishery was protected as the most important resource of the Yurok Reservation and

when the first non-Indian commercial fishery was established on the Klamath in 1876, the federal government responded by sending military to protect the Yurok fishery “because under no circumstances were the Yuroks to be deprived of the Salmon as it is their main subsistence.” *Id.* at 11-12 (internal quotations omitted).

The present-day Yurok Reservation extends for one mile on each side of the Klamath River approximately forty-five river miles to just upstream of the confluence of the Klamath and Trinity Rivers at the Yurok village, Weitchpec. *See Mattz* 412. U.S. at 485-94 (describing history of Yurok Reservation); *Solicitor’s Opinion* 4-7 (same).

II. THE YUROK TRIBE HAS FEDERALLY RESERVED FISHING RIGHTS AND WATER RIGHTS NECESSARY TO SUPPORT THE RESERVATION’S PURPOSE AND THE UNITED STATES HAS A DUTY TO PROTECT THOSE RIGHTS

It is uncontested that Indian tribes have federally reserved rights to accomplish the purposes for which the Indian reservation was created. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968) (Indian tribe has reserved hunting and fishing rights to fulfill purpose of reservation); *Winters v. United States*, 207 U.S. 564 (1908) (Indian tribe has implied water right to accomplish agricultural purpose of reservation); *see also United States v. New Mexico*, 438 U.S. 696, 698 (1978) (federally reserved water rights attach to land withdrawn from public domain for specific federal purpose). Indian tribes have been found to hold reserved rights to fulfill many reservation purposes, including but not limited

to water, fishing, agriculture, timber, minerals, and hunting. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 n.10 (9th Cir. 1981) (citing cases).

Relevant here, the Yurok Tribe has federally reserved fishing rights and water rights necessary to fulfill the fishing purpose—as well as other purposes not at issue here—of the Yurok Reservation, including water sufficient to support the existence and persistence of tribal trust fish species. These water rights, while unquantified, have a priority date of time immemorial, are enforceable against junior water rights holders, and support the Yurok reserved fishing right. The court of claims was correct the Yurok water rights “prevent junior appropriators from withdrawing water from Klamath River and its tributaries in amounts that would cause the endangerment and extinction of their tribal trust resource,” the Coho salmon of the Klamath fishery. Appx55.

A. The Yurok Tribe’s Reserved Fishing Right Includes Fish for Subsistence, Commercial, and Ceremonial Purposes

Given the central importance of the Klamath River and its fishery to the Yurok people, courts have had no trouble concluding that the Executive Orders creating the Yurok Reservation vested the tribe with federally reserved fishing rights. *See, e.g., Parravano v Masten*, 70 F.3d 539, 547 (9th Cir. 1995) (“this court and the Interior Department have recognized a trust obligation to protect the Yurok ... rights to harvest Klamath Chinook”); *United States v. Eberhard*, 789 F.2d 1354, 1359 (9th Cir. 1986) (“The right to take fish from the Klamath River was reserved

to the Indians when the reservation was created”); *see also Solicitor’s Opinion* at 18 (“The history of the creation of the [Yurok Reservation] ... plainly shows a purpose by the United States to reserve for the Indians what was necessary to preserve and protect their right to obtain a livelihood by fishing.”).

Plaintiff Irrigators are mistaken that the Yurok fishing right includes only Chinook salmon and not Coho salmon. Plaintiff’s Br. at 23. In aboriginal times and when the reservation was first established, Yurok fishers harvested Coho salmon, Chinook, steelhead, lamprey eel, sturgeon, and other species. Simply because the Coho are now protected under the Endangered Species Act does not strip the species’ trust status, it only affects the ability of the Tribe to harvest the fish while it is a listed species. The Ninth Circuit in *Eberhard* explained that Yurok trust species are not limited to only commercial fish, but includes ceremonial and subsistence fish harvests. 789 F.2d at 1359 (“[T]he right reserved [to take fish from the Klamath river] includes fishing for ceremonial, subsistence, and commercial purposes.”).

B. The Yurok Tribe’s Reserved Water Rights Include Klamath River Water to Maintain the Klamath River Fishery

Indian tribes have implied water rights to fulfill the purposes of their reservation. *See Arizona v. California*, 373 U.S. 546, 595-600 (1963); *Winters*, 207 U.S. at 576-77. A federally reserved water right protects against both on- and off-reservation junior water uses that impair that right. *See Winters*, 207 U.S. at 565

(tribal water right precluded diversions by upstream, off-reservation, non-Indian irrigators). Unlike state water rights, federally reserved rights are not subject to state law principles like beneficial use, appurtenance, or abandonment. *Cappaert v. United States*, 426 U.S. 128, 145 (1976) (“federal water rights are not dependent upon state law or state procedures”). Federally reserved water rights are implied to support traditional activities the reservation was created to support. In *United States v. Adair*, 723 F.2d 1394, 1408-11, 1415 (9th Cir. 1983), the court held that the Klamath Tribes held federally reserved water rights to support the tribe’s several purposes, including hunting, gathering, and fishing rights.⁶ The Yurok Tribe has water rights to accomplish the same purposes.

The court of claims was correct that the Yurok Tribe has an implied water right arising under *Winters*.⁷ Appx52-53. The Court held the right vested no later than 1891, but the Tribe, however, continues to assert a time immemorial water right. The court in *Walton*, 647 F.2d at 48, concluded the Colville Tribe retained an

⁶ Reserved rights arise whether the reservation is created by treaty, executive order, or other agreement. *Arizona*, 373 U.S. at 598. The Executive Orders creating the Yurok Reservation have been held to have vested the Yurok Tribe with federally reserved rights equal to those created by treaties. *Masten*, 739 F. 3d at 544.

⁷ The Court of Claims also correctly noted that the Yurok Tribe asserts a “time immemorial” water right as the tribe has lived on and fished its ancestral lands since time immemorial. Appx17. The 1891 date comes from an Executive Order that extended the Hoopa Valley Reservation to include the Klamath River Reservation. *Mattz*, 412 U.S. at 492. This Executive Order was made to comply with a statute that allowed only four Indian reservations in California, requiring the joining of the two reservations.

analogous water right and because fishing was one purpose for creation of the Colville Reservation, “the Colvilles have a reserved water right of the quantity necessary to maintain the Omak Lake Fishery.” *See also United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982) (as fishing was one purpose for creating reservation, “the [Spokane Indian] Tribe has the reserved right to sufficient water to preserve fishing in the Chamkokane Creek.”). Here, fishing was a purpose in the Yurok Reservation creation and that purpose requires an associated water right to maintain the Klamath River fishery. Somewhat obviously, but importantly, the Yurok reserved water right includes instream water in the Klamath River between Iron Gate Dam and the Yurok Reservation to support critical fishery habitat in the stretch of river upriver that is largely supported by water releases at Iron Gate dam initiated by the Bureau in its management of the Klamath Project. *PCFFA v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1085 (9th Cir. 2005) (“The flows past the Iron Gate dam into the Klamath River determine to a great extent the quantity of water available in the river.”). Salmon are an anadromous fish that rear in freshwater habitat and outmigrate to the ocean for several years before migrating back to the river to spawn and die. The majority of the fish that comprise the Yurok fishing right depend on habitat within the entire Klamath River basin—at least what is not blocked by dams—through their lifecycle. Therefore, water that flows downstream from Upper Klamath Lake to

and past the Yurok Reservation is critical to preserve the Lower Klamath River fishery.⁸

While not at issue and unnecessary to the disposition of this case, the quantity of the Yurok water right to support the Tribe's reserved fishing right must include sufficient water to allow fish to propagate in quantities that allow tribal members to exercise their reserved fishing right. Somewhere below this threshold—and all that this court need affirm in this instance—is that the exercise of the Yurok water right includes water sufficient to ensure the *survival* of trust fish species, in this case the ESA-listed Coho salmon. In *Adair*, the court quantified the amount of water necessary to fulfill the Klamath Tribes' water right included an instream flow necessary to maintain the fishery at harvestable quantities sufficient to provide the tribe a “moderate living” based off fish. *Adair*, 723 F.2d at 1415 (citing *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979)). This standard, already applied to basin tribes, clearly envisions more water than avoiding extinction, the Bureau's ESA-management goal on the Klamath, it requires water to maintain commercial, subsistence, and ceremonial fisheries. *Eberhard*, 789 F.2d at 1359. But when there is only enough water legally

⁸ The Tribe's water right is not to “Klamath Project water” as Plaintiffs characterize it, Plaintiffs' Br. at 17, it is “Klamath River water.” “Klamath Project Water” can refer only to water that is legally obligated to the Klamath Project after the Bureau accounts for senior water rights, such as the Yurok Tribe's, and other federal obligations.

available to keep a fish species alive, the Tribe's water right requires the use of the water to ensure the fish's persistence.⁹

C. The Federal Government Must Take Affirmative Action to Protect Yurok Reserved Rights

Accompanying a federally reserved right is a parallel duty on the federal government to protect and preserve that right. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999); *Masten*, 70 F.3d at 546-47. In *Masten*, the Ninth Circuit upheld federal emergency regulations reducing commercial ocean salmon fishing to protect the Klamath River tribal fishery, stating that “the federal government is the trustee of the Indian tribes' rights, including fishing rights,” and “that the Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.” 70 F.3d at 546-47. Similarly, in *Patterson*, the same court concluded that the Bureau of Reclamation, in operating the Klamath Project, and “as a trustee for the Tribes, has a responsibility to protect their rights and resources,” and “has a responsibility to divert the water and resources needed to fulfill the Tribes' rights.” 204 F.3d at 1212-14. In *Patterson*, reminiscent of the present dispute, Klamath

⁹ The Bureau's annual Operations Plan, including the 2001 plan, does not schedule water releases and minimum instream flows below Iron Gate Dam designed to fulfill the tribes' fishing or water rights; they are flows proscribed only to avoid jeopardy to the Coho salmon under the ESA. Nevertheless, the water releases are consistent with, while not fulfilling, the Yurok Tribe's reserved water right to support and maintain the Klamath fishery.

Project irrigators challenged the Bureau's authority to release water from Upper Klamath Lake to protect tribal trust species. The irrigators claimed the basin tribes' (Yurok, Klamath Tribes, and Hoopa) federally reserved water rights were irrelevant to that determination. The court disagreed, concluding that the tribes' reserved water rights "take precedence over any alleged rights of the Irrigators."

Id.

In this instance, the Bureau retained water in Upper Klamath Lake and made water releases to the Klamath River pursuant to the tribes' water rights to protect the Klamath River tribal trust fishery, including the ESA-listed Coho salmon. Courts have consistently upheld such water releases to protect tribal fisheries. In *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033 (9th Cir. 1985), the Ninth Circuit affirmed an order mandating release of water to preserve salmon eggs threatened by low post-irrigation season water flows, for the purpose of protecting tribal fishing rights. Then, in *Joint Bd. of Control v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987), the same court held that the federal government had the duty to establish and implement minimum stream flows and water levels for Indian fishery before providing water to project irrigators. The court held that the duty to provide flows for the fishery existed despite lack of quantification of the tribe's reserved water rights, like in the present case in regards to Yurok. *Id.* And in *Yurok Tribe*, 231 F. Supp. 3d at 490, Yurok

successfully argued that the Bureau must release additional water below Iron Gate Dam to improve fish habitat and combat fish disease that severely impacted Coho and Chinook salmon, threatening their persistence and violating the ESA. *See id.* at 486 (“the requested relief would protect the Tribes’ fishing rights, which hold a priority over the irrigator rights”).

In sum, the creation of the Yurok Reservation reserved to the Tribe fishing rights and vested the Tribe’s water rights, the latter includes enough water to maintain the Tribe’s fishing right in the Klamath River and the conservation of the species within the scope of that right, including Coho and Chinook salmon. The federal government also has a corresponding duty to protect the Tribe’s reserved rights. *See Appx2618-2619* (“Reclamation is obligated to ensure the Project operations do not interfere with the tribes’ senior water rights.”) (2001 BiOp). Thus, the federal government has a duty to protect the Tribe’s senior water right against any junior water rights, including the Project Irrigators.

III. THE YUROK TRIBE’S WATER RIGHTS REQUIRED WATER RELEASES BELOW IRON GATE DAM TO MAINTAIN THE YUROK FISHERY AND YUROK WATER RIGHTS TOOK PRIORITY OVER PROJECT DELIVERIES IN 2001

The Yurok and other basin tribes have reserved water rights to protect the Klamath fishery that are senior to Klamath Project irrigators. *Patterson*, 204 F.3d at 1214; *Yurok Tribe*, 231 F. Supp. 3d at 486. According to prevailing first-in-time, first-in-right western prior appropriation water law, the Bureau must satisfy these

senior tribal water rights before it may satisfy any water rights junior to them. Water law is a law of scarcity and a consequence of the prior appropriation doctrine is that in dry years, such as 2001, junior water users in the Klamath River basin may be precluded from receiving any water due to the tribes' senior water rights. The court of claims correctly held that the Yurok and other Klamath tribal water rights were senior to the Plaintiff irrigators' water rights and that the Bureau properly retained and released water in 2001 to satisfy those tribal water rights to avoid jeopardy to ESA-listed species and to maintain the Klamath River fishery.¹⁰ Appx55-56; *see also Joint Bd.*, 832 F.2d at 1132 ("To the extent that the Tribes enjoy [reserved fishing rights], they can prevent other appropriators from depleting the streams (sic) waters below a protected level." (internal quotation omitted)).

On the Klamath River, the Bureau's water releases below Iron Gate Dam determine the health of the Lower Klamath fishery and the preservation of fish species and the Yurok fishing right. The water releases are of paramount importance to the fishery and when releases are insufficient—as the court found in *Yurok Tribe* where “compelling evidence [shows] that the Coho salmon are in a

¹⁰ Plaintiffs' assert that the federal government has not always adhered to its duty to provide water releases from Upper Klamath Lake to support the tribes' fishing rights, even in low water years, insinuating that the 2001 action was done only to satisfy the ESA and not tribal rights. Plaintiffs' Br. at 36. While Yurok agrees that the federal government has failed to uphold its duties to protect the fishery in some years (e.g., 2002), the duty to do so exists every year and the Yurok Tribe and other basin tribes continuously press the federal government to protect their reserved rights.

precarious state following years of high [disease] rates” in part due to low water releases—additional water releases below the dam are needed to support the fishery. 231 F. Supp. 3d at 483. Because Klamath Project irrigators divert water away from the Lower Klamath River and its fishery, tension between tribal water and fishing rights and irrigators’ water rights is palpable. Simply stated, “the Klamath Project is a complex system.” *Id.* at 485. Nevertheless, water law and Indian law principles dictate that because Yurok and other tribal reserved water rights are senior water rights to the Plaintiff Irrigators’ water rights, the tribes’ water rights “must be accorded precedence over irrigation rights.” *Id.* at 486. And as the court declared in *Walton*, 752 F.2d at 405, “[w]here reserved rights are properly implied, they arise without regard to equities that may favor competing water users.”

The court of claims correctly held that the Yurok and Klamath basin tribes’ senior water rights required all of the legally available water in 2001 to be used to support the tribes’ reserved fishing rights. The government has a duty to protect the Yurok Tribe’s reserved water and fishing rights and, in 2001, the Bureau did so through making releases to protect the ESA-listed Coho salmon and other Klamath River fish species.

IV. THE YUOK TRIBE DID NOT WAIVE ITS WATER RIGHTS BY NOT PARTICIPATING IN THE KLAMATH BASIN ADJUDICATION NOR DOES OREGON LAW AFFECT THE TRIBE'S FEDERAL WATER RIGHTS

Plaintiff Irrigators and Amicus Oregon are mistaken that the Yurok Tribe and the federal government's option to not submit claims to the Oregon Klamath Basin Adjudication somehow waives Yurok's Klamath River water rights claims. Plaintiffs' Br. at 18, 27, 30; Oregon Br. at 22-26. While the court of claims easily and correctly concluded that the Plaintiffs' argument was meritless, Appx62, Plaintiffs continue to press their unique theory, turning a blind eye to the Supreme Court decision in *United States v. Dist. Court for Eagle County, Colo.*, 401 U.S. 520 (1971), that has already addressed the present situation. In that case, the Court held that McCarran Amendment (defining a "river system") prohibits one state from infringing or extinguishing water rights in another state. *Id.* at 523. The Court stated, "[t]he 'river system' must be read as embracing one within the particular State's jurisdiction," and that "[n]o suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many states." *Id.* Plaintiffs' argument would create chaos in past and future western stream adjudications.

Further, Yurok's federally reserved water and fishing rights based in federal law. Oregon state law cannot alter these rights or adjudicate them in the absence of the Tribe. *Cappaert*, 426 U.S. at 145 ("Federal water rights are not dependent upon

state law or state procedures”). By its own jurisdictional limitations, the Oregon Water Code does not allow Oregon to reach into California to meddle with Yurok water rights through its Oregon state adjudications. *See* Or. Rev. Stat. § 539.021 (authorizing the Oregon Water Resources Department upon petition by any “appropriator[] of surface water from any natural *watercourse in this state*,” to determine the “relative rights of the various claimants to the waters of *that watercourse*.”) (emphasis added). It would be an egregious extension of the Oregon state courts jurisdiction to reach hundreds of miles below the California-Oregon boarder to the Yurok Reservation to adjudicate the Yurok federal water right. The court of claims correctly concluded that neither Oregon law nor the Oregon Klamath Basin Adjudication waived or somehow affected the Yurok Tribe’s federally reserved water rights.

CONCLUSION

In 2001, the Bureau followed bedrock principles of water law when it provided water pursuant to the Yurok and other basin tribes’ senior water rights with the only water available for appropriation. The water was used to support the Yurok Tribe’s fishing rights by providing Klamath River instream flows necessary to protect fish, including the endangered Coho, from harmful conditions that could have further impaired the fishery. Plaintiff Irrigators, as junior water rights holders,

were precluded from receiving water in a dry year as no water was available for appropriation.

Conflicts over water in the Klamath River Basin have generally left unsatisfied the basin's fish species and the communities that depend on them. This instance where the harm of the Bureau's Klamath Project operation falls on the irrigation community does not require that the legal underpinnings of the Bureau's action are wrong, however. Rather, the court of claims correctly concluded that the Yurok and basin tribes' water rights required all the available water to support the tribes' fishing rights and that the Plaintiff Irrigators' were entitled no water. For all of the foregoing reasons, the Court should affirm the court of claims' judgment.

Respectfully submitted this 24th day of September, 2018.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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1. I certify that this brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 29(a)(5), because this brief contains 5745 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Date: November 15, 2018

/s/ Amy Cordalis
Signature of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, I served a copy of the foregoing brief on counsel of record by: Electronic Means (by CM/ECF).

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