

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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Lonny E. Baley, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	No. 01-591L
United States,	)	
	)	Hon. Marian Blank Horn
Defendant,	)	
	)	
and	)	
	)	
Pacific Coast Federation of	)	
Fishermen’s Associations,	)	
	)	
Defendant-Intervenor.	)	
_____	)	
John Anderson Farms, Inc., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	No. 07-194C
	)	
v.	)	Hon. Marian Blank Horn
	)	
United States,	)	
	)	
Defendant.	)	
_____	)	

**AMICUS CURIAE KLAMATH TRIBES’ MEMORANDUM**

**I. INTEREST OF AMICUS AS HOLDERS OF A WATER RIGHT SENIOR TO PLAINTIFFS' ALLEGED RIGHT<sup>1</sup>**

The amicus curiae Klamath Tribes (“Tribes”) are a federally recognized Indian tribe, whose “time immemorial” water rights are senior to all other water rights in the Upper Klamath Basin, including the water rights for the United States Bureau of Reclamation’s Klamath Irrigation Project (“Klamath Project” or “Project”), in which Plaintiffs assert an interest as the basis for their takings claim. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 2000); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1204 (D. Or. 2001).

Plaintiffs improperly seek compensation for alleged interference with their junior water rights<sup>2</sup> in 2001 without having shown that the Tribes’ senior water rights were satisfied, an outcome that would eviscerate the meaning and value of the Tribes’ senior water rights and turn the prior appropriation system of water rights on its head.

**II. ARGUMENT**

In their Posttrial Brief, Plaintiffs continue to treat the senior tribal water rights as irrelevant. But under the prior appropriation water rights system, senior water rights in a water source (especially during a drought) are never irrelevant to a junior water user, as the junior water user is not entitled to receive any water until all senior water rights are fully satisfied.

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<sup>1</sup> The Klamath Tribes were granted amicus status earlier in this case for reasons similar to those discussed here. Order Regarding Amicus Curiae Pets., ECF No. 126; Order, ECF No. 183; Order Granting Mot. for Leave to File the Accompanying Mem. as Amicus Curiae, Jan. 23, 2017; as well as in the proceedings on referral to the Oregon Supreme Court, Order Granting Appl. to Appear as Amicus Curiae, *Klamath Irrig. Dist. v. United States*, 348 Or. 15, 227 P.3d 1145 (2010) (No. Federal CC 2007–5115; SC S056275) (signed May 4, 2009).

<sup>2</sup> All references in this brief to “Plaintiffs’ rights” or “Plaintiffs’ water rights” are intended to mean Plaintiffs’ *alleged* rights to the use of water under the water right for the Klamath Irrigation Project. The Tribes do not concede the existence of such rights other than for purposes of argument here.

Plaintiffs' claim must be rejected because they have failed to show that the property interest they claim – a beneficial interest in the water right appropriated by the United States for the Klamath Irrigation Project – legally entitled them to receive any water in 2001.<sup>3</sup>

Three points from Plaintiffs' brief warrant brief discussion. First, water deliveries to Plaintiffs in years prior to 2001 are irrelevant because Plaintiffs received water in those years regardless of whether they (or Reclamation) were legally entitled to use the water. Second, simply because water may have been physically present in 2001 does not mean it was legally available for use by Plaintiffs (or Reclamation). Third, it matters not whether Reclamation was acting in 2001 to fulfill its tribal trust responsibility; Reclamation had no legal right to take water needed to fulfill the senior tribal rights and give it to the Project, and the quantity of water needed to fulfill the tribal water rights was greater than that required by the ESA in 2001.

#### **A. Water Deliveries To Plaintiffs In Years Prior To 2001 Are Irrelevant**

Plaintiffs attempt to create an alternative legal universe in which the United States – as trustee of both the beneficial interest alleged by Plaintiffs and the senior tribal water rights – may simply ignore controlling water law principles and the parameters defining the Project and tribal water rights (including priority date), and allocate water as it sees fit. But that was not the law in years prior to 2001, in 2001, or now. As explained in our prior amicus brief, the fact that Plaintiffs received water in prior years is irrelevant, as water deliveries to Plaintiffs took place in an essentially lawless environment insofar as enforcement of water rights was concerned.

Amicus Curiae Klamath Tribes' Mem. 10-13 (ECF No. 455-1). Plaintiffs, often with the collaboration of Reclamation, simply took such water as they wanted, without regard for the

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<sup>3</sup> To be clear, although we focus on the senior tribal water rights the same legal principle also applies with respect to water rights held by non-Indians that are senior to the Project water right. Neither Reclamation nor Plaintiffs have any legal entitlement to use water under the Project water right until all senior water rights have first been satisfied.

senior tribal rights. In this regard, the Klamath Basin is an instance of a wider, and widely noted, syndrome in which “[f]or political and institutional reasons, the United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1906, at 1257-58 (Nell Jessup Newton ed., 2012), citing, National Water Comm’n, Water Policies for the Future: Final Report to the President and to the Congress of the United States 474-75 (1973) (“In the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.”).

Plaintiffs assert that prior to 2001 “even in the driest years, Reclamation was able to provide full deliveries to Klamath farmers without violating any senior water rights or tribal trust responsibilities.” Pls.’ Br. 12, ECF No. 544. But the reality is that Klamath farmers received water regardless of whether senior tribal water rights or tribal trust responsibilities were being violated, and evidence of water deliveries in past years are irrelevant to prove Plaintiffs’ entitlement to any water in 2001.<sup>4</sup>

**B. Even If Water Was Physically Available In Upper Klamath Lake, That Does Not Mean It Was Legally Available For Use By Plaintiffs**

As described by the Ninth Circuit, the Tribes’ water rights are unusual in that they are non-consumptive rights that serve to keep water instream; rather than permitting the Tribes to withdraw water from a water source such as Upper Klamath Lake, the Tribes’ rights “consist[] of the right to prevent other appropriators from depleting the . . . waters below a protected level in

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<sup>4</sup> That Plaintiffs may have come to expect receiving water whether it was legally available to them or not is also irrelevant to the outcome of this case. The cognizable property interest Plaintiffs assert as the basis for their takings claim is their beneficial interest in the United States’ water right for the Klamath Project; thus Plaintiffs must show a taking of “that property interest,” not some unstated equitable interest based on reliance. *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011) (stating the two-part test for evaluating whether a government action constitutes a taking).

any area where the non-consumptive right applies.” *Adair*, 723 F.2d at 1411. Thus, under the law it does not matter whether, as Plaintiffs’ assert, Upper Klamath Lake was “almost full” in 2001. Pls.’ Br. 15, ECF No. 544. Simply because water may have been physically available in Upper Klamath Lake for delivery to Plaintiffs does not mean it was legally available. The only water from Upper Klamath Lake that could have been available to Plaintiffs in 2001 was the amount that exceeded the amount needed to remain in the Lake to fulfill the senior tribal water right in the Lake. Because Plaintiffs presented no evidence that there was any available water over and above that needed to fully satisfy the senior tribal water rights, Plaintiffs have failed to meet the burden of proving their claim.

**C. Reclamation’s Motivation In Not Allowing Plaintiffs To Use Water In 2001 That Neither Reclamation Nor Plaintiffs Were Legally Entitled To Is Irrelevant; Even If Done Solely For ESA Purposes, The Amount Of Water Reclamation Left In The Lake Was No More Than Was Needed For The Senior Tribal Water Rights**

Rather than engaging with the water law principles that govern the outcome of this case, Plaintiffs raise the red herring argument that the tribal water rights need not be considered because Reclamation’s failure to deliver water to them in 2001 was based solely on ESA considerations and “not to satisfy some undefined and unquantified tribal trust responsibilities.” Pls.’ Br. 23, ECF No. 544. While the United States has an obligation to operate the Klamath Project in a manner consistent with the United States’ trust obligations, as was confirmed in *Patterson* and *Kandra*,<sup>5</sup> whether the United States kept the water in Upper Klamath Lake in 2001 based on ESA concerns or tribal trust concerns is irrelevant. Reclamation had no legal right under its junior water right for the Reclamation Project to provide water to Project irrigators if the water was needed to remain in the Lake to fulfill the senior Tribal water rights. And the amount of water required to remain in the Lake, although unquantified in 2001, could not have

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<sup>5</sup> *Patterson*, 204 F.3d at 1214; *Kandra*, 145 F. Supp. 2d at 1201.

been less than that required by the ESA, as the ESA only seeks to avoid extinction whereas the Tribal water right is needed to promote species populations that can support tribal harvest. Approving federal actions through ESA biological opinions does not require conserving or recovering species or even avoiding harm; rather it means the proposed action must not harm the listed species more than is occurring under the status quo. *Cabinet Res. Grp. v. U.S. Fish Wildlife Serv.*, 465 Supp. 2d 1067, 1090 (D. Mont. 2006). In contrast to the ESA’s more limited “no jeopardy” standard, the legal standard applicable to the Tribes’ property rights protected through its 1864 Treaty requires much more, i.e., the quantity and quality of water to support fish populations that allow the Tribes meaningful harvest. *Adair*, 723 F.2d at 1409-10, 1412, 1414.

### **III. CONCLUSION**

Neither Plaintiffs, nor the United States, are above the fundamental Oregon water law principles that define and constrain the Klamath Project water right appropriated by the United States in which Plaintiffs assert a beneficial interest as the basis of their takings claim. Because Plaintiffs have failed to demonstrate that the senior tribal water rights were fully satisfied in 2001 such that there was remaining water that could have legally been delivered by the United States to Plaintiffs under the junior Klamath Project water right, Plaintiffs have failed to meet their burden of proof and their claim must be denied.

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DATED April 24, 2017.

Respectfully submitted,

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