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Baley v. United States: Federal Circuit Rules Against Irrigators in Long-Running Takings Case

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In *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019) the Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims' dismissal of breach of contract and Fifth Amendment takings claims asserted by irrigators in the Klamath Basin of Southern Oregon against the Bureau of Reclamation. While earlier stages of the case had waded into thorny issues of state law concerning the nature of the irrigators' rights based on the specific interpretation of their contracts with Reclamation, this decision turned on the Court's holding that tribal non-consumptive water rights—including un-adjudicated tribal water rights in California—were senior to the irrigators' rights to water from Reclamation's Klamath River Basin reclamation project, and that Reclamation did not, therefore, infringe on the irrigators' rights when it chose not to divert water for irrigation from the Upper Klamath Lake during "critical dry" water conditions in 2001.

In 2001, Reclamation developed an operation plan that provided for the delivery of water to the plaintiffs from the Upper Klamath Lake. Because of the critically low water projections and the presence of threatened and endangered species in the Upper Klamath Lake and the downstream Klamath River, Reclamation performed biological

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assessments for the shortnose and Lost River suckers (both endangered) as well as the Southern Oregon/Northern California Coast (SONCC) coho salmon (threatened).

In early 2001, Reclamation forwarded its biological assessments to the National Marine Fisheries Service (NMFS), which has jurisdiction over SONCC coho, and the United States Fish and Wildlife Service (FWS), which has jurisdiction over the endangered sucker species, and requested formal consultation under the Endangered Species Act (ESA). NMFS and FWS each issued biological opinions determining that Reclamation's operation plan would "jeopardize the continued existence" of the ESA-listed fish in the Klamath River.

In order to comply with the ESA, FWS proposed that Reclamation adopt a "reasonably prudent alternative" (RPA) under which it would "not divert water from [Upper Klamath Lake] for irrigation purposes if surface elevations are anticipated" to go below a certain level. NMFS proposed an RPA that required Reclamation to release certain amounts of water from Upper Klamath Lake to the Klamath River from April to September 2001. Reclamation could not meet both of RPAs while still providing water to irrigators, so it issued a revised operation plan that provided for limited deliveries of irrigation water. In addition to listing its obligations under the ESA, the revised operations plan also specifically mentioned Reclamation's trust obligation to Klamath River Basin tribes.

In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the Ninth Circuit held that the Klamath Tribes had a non-consumptive water right to support hunting and fishing within the bounds of the former Klamath reservation, which abuts the Upper Klamath Lake. That right was reserved in the treaty that the Klamath Tribes signed with the United States ceding claims of aboriginal title to the United States and therefore has a priority of "time immemorial."

The Hoopa Valley and Yurok Tribes each live on a reservation in California that abuts the Klamath River and was created by executive order. Their water rights are grounded in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), in which the Supreme Court recognized that when the federal government reserves land for a particular purpose, there is an implied reservation of sufficient water to accomplish that purpose. Because *Winters* rights have a priority date of the reservation of land by the federal government, Hoopa Valley and Yurok tribal rights have a priority date no later than the last executive order establishing their reservations, or 1891. The parties all agreed that if the Tribes' rights were valid and enforceable against water rights in

Oregon, then the irrigators had not suffered a compensable taking because the irrigators' rights would be junior to the Tribes' water rights.

The irrigators asserted three primary arguments in favor of reversing the Federal Court of Claims' decision: First, they argued that the court erred in holding that the tribal water rights required, at a minimum, as much water as was required to meet Reclamation's ESA obligations. The Court was not receptive to this argument, writing, "Given that the standard of the ESA is to avoid jeopardizing the existence of the suckers," the Court did "not see how, in this case, the 'reasonable livelihood' or moderate living' standard [required by the tribes' rights] constitutes a standard lower than the [ESA's] requirement that the very existence of this important tribal resource not be placed in jeopardy." *Baley*, 9442 F.3d at 1336. "At the bare minimum, the Tribes' rights entitle them to the government's compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy." *Id.* at 1337.

The irrigators next challenged the validity of the Hoopa Valley and Yurok Tribes' instream water rights, at least in relation to rights to divert water in Oregon, on the grounds that neither the tribes nor the United States had asserted those rights in Oregon's adjudication of the Klamath Basin, as the United States had done for the Klamath Tribes' instream water rights. The court held that because a state "cannot adjudicate water rights in another state," *Id.* at 1341, there was no need to assert those rights in the Oregon adjudication in order for them to be effective against Oregon water rights. The Court rejected the contention that there was a geographic limit to how far a reserved water right extends upstream. This ruling is consistent with *Winters*, which concerned an injunction of off-reservation diversions to protect downstream tribal rights.

The irrigators' final argument was that the tribes' water rights do not extend to artificially stored water as opposed to the natural flow of the river. Reclamation operates a dam at the outflow of Upper Klamath Lake that is used to store water from the wetter months and make it available to users. *Id.* at 1321. The irrigators argued that the Tribes' rights could not extend to waters stored by infrastructure that did not exist at the times their reservations were created. However, the United States explained in its merits brief to the Federal Circuit, that at least a portion of the "Upper Klamath Lake is a natural lake with natural storage capacity." Answering Brief for Defendant-Appellee United States at 58. Despite the parties' briefings, the court punted on this issue, holding simply that the lower court did not err in finding that the tribes had a right to

"Klamath Project water." In doing so, the Federal Circuit left it for another court to clarify the law concerning tribal rights in artificially stored water.

On March 13, the irrigators petitioned the Supreme Court for a writ of certiorari, raising numerous challenges to the Federal Circuit's analysis. If the Supreme Court grants the petition, it may have the opportunity to clarify important issues concerning the meaning of the *Adair* ruling, tribal rights to stored waters, and the enforceability of un-adjudicated tribal rights against upstream water users in other states.

New Klamath TMDLs: An Impossible Standard?

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During a week full of COVID-19-related uncertainty, a pair of new lawsuits are a reminder of one constant: disputes over Klamath Basin water. This past week, PacifiCorp and Klamath Water Users Association each filed petitions for review of Total Maximum Daily Loads (TMDLs) for temperature in the Upper Klamath and Lost River subbasins. Both petitions argue that the TMDLs, issued by Oregon Department of Environmental Quality (DEQ), set unachievable standards and are unlawfully based on California standards, among other arguments.

In the Upper Klamath TMDLs, DEQ set temperature standards for various portions of the Upper Klamath River and its tributaries at levels intended to protect certain cold-water fish species, such as salmon, which generally cannot survive high water temperatures. In setting the TMDLs, DEQ evaluated both human and natural causes of high water temperatures, including climate change impacts. The TMDLs set by DEQ generally allow for no or very little increases in water temperatures. EPA approved the TMDLs on September 30, 2019.

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[2] This piece was originally published at Beveridge & Diamond's Western Resources Center.

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PacifiCorp owns and operates the Klamath Hydroelectric Project on the Klamath River and its tributaries in Oregon and California. PacifiCorp is in the process of decommissioning some of the dams in the Klamath Hydroelectric project. In its petition, PacifiCorp asserts that DEQ violated the Clean Water Act in multiple ways, such as by setting unachievable load allocations, setting TMDLs based on water quality standards applicable to the portion of the Klamath River located in California, rather than Oregon, and setting TMDLs that are unsupported by substantial evidence.

The Klamath Water Users Association, together with a number of irrigation districts that use water from the Klamath basin, also challenged the TMDLs.
Their petition makes similar allegations as PacifiCorp's, arguing, among other things, that the TMDLs put the irrigation districts in the position of enforcing water quality standards, that the load allocations set by the TMDLs are unreasonable, and that DEQ unlawfully applied California standards in setting the TMDLs.

It remains to be seen whether the two cases, which were filed in different county courts, will be consolidated. It is also possible that additional parties will file separate petitions for review, or will join these suits. As prior litigation shows, a lot of parties have interests in the Upper Klamath TMDLs.

The Upper Klamath TMDL itself is the result of a series of lawsuits by Northwest Environmental Advocates (NWEA) against EPA. NWEA successfully challenged the criteria the TMDLs were based on. *See NWEA v. EPA*, 855 F. Supp. 2d 1199 (D. Or. 2012). While that suit was pending, DEQ continued to submit temperature TMDLs for Klamath to EPA, which EPA approved until 2010. EPA never approved DEQ's 2010 TMDL, which DEQ withdrew in 2015. NWEA had by that time filed suit challenging EPA's failure to approve or disapprove the TMDL within 30 days. As a result of the second suit, DEQ agreed to submit, and EPA agreed to approve, temperature TMDLs for Upper Klamath within two years. *See NWEA v. EPA*, Case No. 3:12-cv-01751, 2017 Lexis 56505, *32 (D. Or. April 11, 2017). Those TMDLs are now being challenged in these new cases.