

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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| Klamath Irrigation District, <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. | |) | |
| <hr/> | |) | |
| | |) | |
| John Anderson Farms, Inc., <i>et al.</i> , | |) | |
| | |) | |
| Plaintiffs, | |) | No. 07-194C |
| | |) | |
| v. | |) | Hon. Marian Blank Horn |
| | |) | |
| United States, | |) | |
| | |) | |
| Defendant. | |) | |
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AMICUS CURIAE KLAMATH TRIBES’ MEMORANDUM IN SUPPORT OF UNITED STATES’ MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE NATURE OF PLAINTIFFS’ BENEFICIAL INTEREST IN THE USE OF KLAMATH PROJECT WATER AND THE SUBJECT CONTRACTS

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I. INTEREST OF AMICUS AS HOLDERS OF A WATER RIGHT SENIOR TO PLAINTIFFS' ALLEGED RIGHT.¹

The amicus curiae Klamath Tribes (“Tribes”) are a federally recognized Indian tribe that reserved various rights, including water rights, in the Treaty of 1864 with the United States. Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707, *reprinted in* 2 Charles J. Kappler, INDIAN AFFAIRS: LAWS AND TREATIES 865 (1904); *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983). The Tribes have resided in the Klamath Basin for millennia relying upon the Basin’s natural resources, including its water and water-dependent resources, to sustain themselves. Among these resources are fisheries protected to the Tribes by the Treaty of 1864. *Adair*, 723 F.2d at 1408. The fish are of enormous importance to the physical, economic, and spiritual well-being of the Tribes. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001). Due to the Tribes’ nativity and longevity in the Basin, their water rights have been confirmed to hold a “time immemorial” priority date. This makes them senior to all other water rights in the 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. *Adair*, 723 F.2d at 1414.²

The seniority of these tribal water rights over all other rights in the Basin has been repeatedly and consistently recognized by the courts, including in cases involving some of the Plaintiffs in the instant case. *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206,

¹ 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.

² 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.

1214 (9th Cir. 2000); *Kandra*, 145 F. Supp. 2d at 1204. More recently, this seniority was again recognized by the State of Oregon in its Klamath Basin Adjudication (“KBA”). Corrected Findings of Fact and Order of Determination, *In re Waters of the Klamath River Basin*, No. WA1300001 (Or. Klamath Cir. Ct. Feb. 28, 2014), <http://www.oregon.gov/owrd/Pages/adj/ACFFOD.aspx>. Thus the Tribes’ water rights “take precedence over any alleged rights of the [Klamath Project] Irrigators,” such as Plaintiffs here, *Patterson*, 204 F.3d at 1214, and, conversely, Klamath Project irrigation rights have been accurately described as being “subservient” to those of the Tribes, *id.* at 1213.

Plaintiffs improperly ask the Court to resolve this case without considering the senior tribal water rights and the water rights priority/seniority system that is the foundation of the Oregon water law on which Plaintiffs found their claim. Plaintiffs seek compensation for interference with their junior water rights in 2001 without showing that the Tribes’ senior water rights were satisfied. This outcome would eviscerate the meaning and value of the Tribes’ senior water rights. In addition, the Tribes’ water and fishing rights are affected by the Bureau of Reclamation’s management of the Klamath Project. As trustee for the Tribes, the United States must operate the Project consistent with the Tribes’ treaty-based senior water rights, an obligation complied with in part through the state prior appropriation system. Were the United States liable to Project irrigators for a “taking” whenever it discharges its trust duty to protect tribal water and fishing rights, its ability to carry out its duty to the Tribes would be gravely affected. In addition, a fundamental principle of Oregon water law that protects tribal water rights would be deeply compromised.

II. INTRODUCTION AND SUMMARY OF ARGUMENT.

In Section III, below, we explain that under the “prior appropriation” system under

Oregon water law, Plaintiffs are holders (at most) of an interest in the *junior* Klamath Reclamation Project water rights. As such, they must show that the *senior* Tribal water rights were fully satisfied in 2001, in order for them to have been entitled to the water they claim was taken from them. In Section IV, we apply that fundamental Oregon water law to Plaintiffs' claims. In Section IV.A, below, we explain that, contrary to Plaintiffs' contention, enforcing the tribal water rights was part of Defendant's decision-making in 2001, as by law it was required to be. Moreover, regardless of *why* Defendant kept water in Upper Klamath Lake in 2001 rather than providing that water to Plaintiffs, keeping the water in the Lake did serve to fulfill the senior tribal water right. Defendant's motive in retaining water in Upper Klamath Lake is irrelevant to Plaintiffs' claim. In Sections IV.B and IV.C, below, we explain how neither the facts that (IV.B) the tribal water rights and Project water rights were unquantified in 2001, nor (IV.C) that Plaintiffs received Project water in years prior to 2001, release Plaintiffs' water rights from the fetters of their junior status. Nor do they excuse Plaintiffs from having to prove that the senior Tribal water rights were satisfied in 2001, such that Plaintiffs were entitled to receive the water they claim was denied them.

III. PLAINTIFFS MUST SHOW THAT IN 2001 THE TRIBES' SENIOR WATER RIGHTS WERE FULLY SATISFIED, SUCH THAT PLAINTIFFS WERE ENTITLED TO THE WATER THEY ALLEGE WAS TAKEN.³

In order to demonstrate a taking, Plaintiffs must show that they have an interest in the Project water rights that *actually entitled them to receive water in 2001*. The United States' failure to deliver water to Plaintiffs cannot constitute a taking unless Plaintiffs were legally entitled to receive the water. To determine entitlement to receive water, it is necessary to

³ In light of the fundamentals of the prior appropriation doctrine in Oregon law as explained below, this is true: (a) whether the alleged taking is evaluated as a "physical" or "regulatory" taking; and (b) regardless of any contract language that may modify Plaintiffs' rights.

examine both the nature of the rights asserted by Plaintiffs and the law that governs when a water right entitles a water right holder to actually receive water. In the present context, Plaintiffs must show that in 2001 the senior tribal water right was fulfilled such that the junior Plaintiffs were entitled to receive the water they allege was taken.

To decide this case the Court must focus on the specific property interest alleged by Plaintiffs as the basis of their takings claim. Plaintiffs assert that “[i]n 2001 each of the individual Plaintiffs had a beneficial interest in the water rights that the United States had appropriated for the Klamath Project.” Revised Joint Statements 2, ECF No. 395. The United States appropriated these rights under state law. *See Klamath Irr. Dist. v. United States*, 635 F.3d 505, 518 (Fed. Cir. 2011) (noting that “[P]laintiffs have consistently argued that the beneficial/equitable rights to project water which they claim arose by operation of state law”); *see also Klamath Irr. Dist. v. United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certifying three state law questions to the Oregon Supreme Court for resolution because “[t]he answer to [Plaintiffs’] takings question depends upon complex issues of Oregon property law”).⁴ This litigation, then, must evaluate Plaintiffs’ claims in the context of Oregon water law that defines the Klamath Project water rights in which Plaintiffs assert an interest.

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

- (a) Quantity of water appropriated; (b) time, period, or season when the right to the use exists; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of the use or the purpose to which the

⁴ While the questions certified to the Oregon Supreme Court largely focused on the United States’ appropriation of water for the Klamath Project under Oregon’s 1905 Act (Oregon General Laws, Chapter 228, § 2 (1905)), any and all Klamath Project water rights in which Plaintiffs assert an interest are necessarily junior to the Tribes’ time-immemorial priority date rights which, as we explain, must have been fully satisfied in 2001 before any water rights of Plaintiffs could have entitled them to receive water.

right of use applies, such as irrigation, domestic use, culinary use, commercial use, or otherwise; (e) the place where the right of use may be applied; [and] (f) *the priority date of appropriation or right as related to other rights and priorities.*

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

Regarding the priority date stick in the water right bundle, like most Western states Oregon follows the prior appropriation doctrine, which can be characterized as “first in time means first in right.” *See* 1 WATERS AND WATER RIGHTS § 12.01 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2015); *Teel Irr. Dist. v. Water Res. Dep’t*, 919 P.2d 1172, 1174 (Or. 1996). Consequently, the entitlement to water under a water right in Oregon depends on the date on which a water right holder acquired the right, known as the “priority date.” *See, e.g., McCall v. Porter*, 70 P. 820, 823-24 (Or. 1902). In times of shortage, the right holder with the most senior date is entitled to receive the full amount of his or her water right before the next-in-time user receives any. As stated in *Benz v. Water Res. Comm’n*, 764 P.2d 594, 599 (Or. Ct. App. 1988), “[a] junior appropriator’s water right cannot be exercised until the senior appropriator’s right has been satisfied.”

Plaintiffs must address the issue of relative priorities to water because the requirement is a fundamental, embedded attribute defining *and limiting* the very water rights in which they assert an interest in this case. If Plaintiffs do not account for priority dates and senior water rights, Plaintiffs’ claim is nothing less than a demand that Reclamation should have delivered water to them even if senior water rights holders had a better claim to that water. Again, this would be a species of water right totally incompatible with Western water law. If Plaintiffs do not show satisfaction of the senior tribal water rights in 2001, then Plaintiffs cannot show that their alleged rights entitled them to the water they claim was taken from them.

The report of Plaintiffs' expert Mr. Van Camp, which Plaintiffs assert shows there was water to which Plaintiffs were entitled in 2001, is defective as a matter of law.⁵ One searches that expert report in vain for any reference to or analysis of the Tribes' water rights within the context of Oregon water law's priority system. The report is instead contextualized to some alternate legal world in which Plaintiffs' junior water rights should receive water regardless of whether senior water rights have been satisfied.

In sum, Plaintiffs must satisfy the court that their junior water rights entitled them to the water they assert was taken from them in 2001. They cannot do so in a vacuum that ignores senior water rights like those of the Tribes.

IV. PLAINTIFFS' EFFORTS TO ELIDE THE REQUIREMENT THAT THEY SHOW THAT THE TRIBES' SENIOR WATER RIGHTS WERE SATISFIED IN 2001 MUST FAIL.

A. Contrary To Plaintiffs' Assertion, The Tribes' Water Rights Were A Factor in Reclamation's 2001 Water Management; But Even if They Were Not, Plaintiffs Still Cannot Recover For A Taking Unless They Were Legally Entitled to Receive The Water.

Plaintiffs contend that the tribal water rights need not be considered in this case, because, in 2001 "the Government was refusing to release water [from Upper Klamath Lake] to the Plaintiffs solely to protect endangered species, not because of tribal interests or because of drought." Revised Joint Statements 13, 15, ECF No. 395. Plaintiffs' assertion is both irrelevant and incorrect. Regardless of *why* Reclamation retained water in Upper Klamath Lake, Plaintiffs as junior water rights holders must demonstrate that senior tribal rights were satisfied, such that there was water available to which Plaintiffs were entitled. If Plaintiffs' junior water rights did not entitle them to receive water in 2001, then it does not make any difference *what* the United

⁵ Though Plaintiffs have not filed the report with the Court, Plaintiffs rely on this report in their Revised Joint Statements 2, ECF No. 395, therefore we, too, feel at liberty to refer to it.

States' thinking was in not allowing them to take water. The United States' keeping water in Upper Klamath Lake served to fulfill the senior tribal water right in Upper Klamath Lake regardless of the United States' expressed motives. But in any case, the tribal water rights *were* a factor in Reclamation's water management in 2001.

First, Plaintiffs' assertion that tribal water rights were irrelevant to Reclamation's decision making in 2001 is squarely contradicted by the federal court's decision in *Kandra*. There the court denied the request of Klamath Project irrigators to enjoin Reclamation from reducing Project water deliveries in 2001, in part because, the court said, Reclamation was required to "consider the rights of Indian tribes" and to "protect tribal trust resources." *Kandra*, 145 F. Supp. 2d at 1197. The court affirmed as settled law that the rights of the Indian tribes "take precedence over any alleged rights of the Irrigators." *Id.* at 1204 (citing *Patterson*, 204 F.3d at 1214⁶).

Second, Plaintiffs' sole focus on the 2001 Biological Opinion⁷ ("2001 Biological Opinion"), Revised Joint Statements 13, 15, ECF No. 395, is misplaced because the Biological Opinion must be considered in tandem with Reclamation's 2001 Operations Plan,⁸ the latter

⁶ In *Patterson*, Klamath Project irrigators sued PacifiCorp and the Bureau of Reclamation to prevent them from operating Link River Dam to provide water for endangered and threatened species, including those in Upper Klamath Lake, and to protect tribal fishing and water rights in Upper Klamath Lake and the Klamath River. *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 992-93 (D. Or. 1998). The court upheld Reclamation's operation of the Dam, in part because of the Klamath Tribes' water rights. *Id.* at 993 (observing that the Tribes hold water rights with a "time immemorial" priority date that are "senior to any water rights obtained by the United States or irrigators in the Klamath Project").

⁷ Klamath Falls Fish and Wildlife Office, Biological/Conference Opinion Regarding the Effects of Operation of the Bureau of Reclamation's Klamath Project on the Endangered Lost River Sucker (*Deltistes luxatus*) Endangered Shortnose Sucker (*Chasmistes brevirostris*) Threatened Bald Eagle (*Haliaeetus leucocephalus*) and Proposed Critical Habitat for the Lost River/Shortnose Suckers (U.S. Fish and Wildlife Service, Apr. 2001).

⁸ Bureau of Reclamation, Klamath Project, 2001 Annual Operations Plan (Apr. 6, 2001), Attach. 2 to Williams Decl., ECF No. 129 ("2001 Annual Operations Plan").

being the operative document of whose execution Plaintiffs complain. Indeed, from the very passage in the 2001 Biological Opinion quoted by Plaintiffs in the Revised Joint Statements, it is clear that while the tribal water rights were not assessed as part of the Biological Opinion, the tribal rights were to be considered by Reclamation as it used the Biological Opinion to develop its 2001 Annual Operations Plan for the Project:

In its [Biological Assessment], Reclamation did not assess whether the proposed operation of the Klamath Project is consistent with its trust responsibility to the Klamath Tribes, including what lake levels comprise the water necessary for the tribal trust resources in Upper Klamath Lake. This [Biological Opinion] does not make that assessment either, as it only concerns whether the contemplated action by Reclamation will jeopardize the listed sucker species. *This trust responsibility issue will be addressed in Reclamation's annual operations plan and during the long-term planning process for the Klamath Project.*

Revised Joint Statements 13, 15, ECF No. 395 (quoting 2001 Biological Opinion § II, Part 1, at 43) (emphasis added). Reclamation's 2001 Annual Operations Plan refers directly to Reclamation's attention to tribal rights and their protection, demonstrating that what was contemplated in the Biological Opinion was in fact done. "The United States has a trust responsibility to protect rights reserved by or for federally recognized Indian tribes by treaties, statutes and executive orders. Reclamation must operate the Project consistent with its trust obligations to the tribes in the Klamath River basin." 2001 Annual Operations Plan at 1.

In sum, the legal and factual context surrounding Reclamation's management of water for the Klamath Project in 2001 and years prior to 2001 demonstrates that Plaintiffs are wholly incorrect in suggesting that tribal water rights are not relevant to Plaintiffs' entitlement to water in 2001, and in their insistence that somehow this case can be decided without consideration of senior water rights like those of the Tribes.

B. That In 2001 The Water Rights Of Both Plaintiffs And The Tribes Were Unquantified Does Not Excuse Plaintiffs From Having To Show That Senior Tribal Water Rights Were Fulfilled Such That Plaintiffs' Junior Rights Entitled Them To Water.

In 2001 the water rights of both the Plaintiffs and the Tribes had not yet been quantified by any relevant authority.⁹ Despite being unquantified, in 2001 the Tribes' senior water rights and Plaintiffs' rights "subservient" to those Tribal rights existed, and stood in their relative priority. *Patterson*, 204 F.3d at 1213; *Kandra*, 145 F. Supp. 2d at 1201. The lack of quantification does not mean that the tribal water rights did not exist, any more than the lack of quantification of the Project rights means those rights did not exist. Nor does it mean that the tribal water rights were not senior to Plaintiffs' rights, that they could be disregarded, or that their relative seniority could be ignored. *Kandra*, 145 F. Supp. 2d at 1201. *See also*, *Winters v. United States*, 207 U.S. 564 (1908) (enjoining off-reservation irrigation in favor of tribe's unquantified rights); *Joint Bd. of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987) (upholding Bureau of Indian Affairs water management of an irrigation project to protect unquantified tribal water rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032, 1033-35 (9th Cir. 1985) (ordering release of reservoir water to protect unquantified tribal fishing and water rights); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1097 (Mont. 2002) (ruling no new groundwater permits

⁹ Enforceable quantification of both the Tribal water rights and the Klamath Project water rights did not occur until March 2013, when the Oregon Water Resources Department ("OWRD") issued its Findings of Fact and Order of Determination ("FFOD") concluding the administrative phase of the Klamath Basin Adjudication. On February 28, 2014, OWRD issued an Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD") to address certain technical errors in the FFOD. Pursuant to Oregon's statutes governing general stream adjudications, Oregon Revised Statutes chapter 539, OWRD filed the ACFFOD with the Klamath County Circuit Court, where it is now undergoing judicial review. Under Oregon law, water rights quantified in the ACFFOD are enforceable by OWRD while judicial review is pending. ORS 539.130.

could be issued until tribe's water rights were quantified; until then impossible to tell if water available for new permits).

More importantly here, absence of quantification does not mean that the water rights asserted by Plaintiffs are by some mysterious means not fettered by their junior status such that Plaintiffs had an entitlement to water whether or not the senior tribal water rights were satisfied. A determination otherwise, holding that the senior, unquantified rights of the Tribes did not have to be fulfilled in 2001, but that the junior, unquantified rights of Plaintiffs did have to be fulfilled, would turn the priority system on its head, and would create an entirely new species of right.

C. If Plaintiffs Received Water In Derogation of the Tribes' Water Right In Years Prior to 2001, That Does Not Excuse Plaintiffs From Having To Show That Senior Tribal Water Rights Were Fulfilled in 2001 Such That Plaintiffs' Junior Rights Entitled Them To Water.

Simply because Plaintiffs received water from the Klamath Project in years prior to 2001 does not mean that Plaintiffs were legally entitled to receive water in 2001. For one thing, hydrological conditions change from year to year and 2001 was a year of drought. Every year is different. Nor does the receipt of water prior to 2001 mean that those receipts were themselves legally proper, as we describe below.

Reclamation's management of the Klamath Project, and Plaintiffs' receipt of water, in years prior to 2001 must be understood in light of the state regulatory environment – or more accurately, the lack thereof – that existed at that time. Until the 2013 completion of the necessary phases of the KBA, Oregon simply did not enforce water rights in the Klamath Basin. Its policy was explained by the Oregon Department of Justice as being one of “regulat[ing] neither in favor of nor against unadjudicated water rights.” Letter from Stephen E.A. Sanders, Assistant Attorney General, Oregon Department of Justice to Martha Pagel, Director, Oregon

Department of Water Resources (Mar. 18, 1996), Pls.’ Reply to Def.’s Opp’n to Pls.’ Mot. for Partial Summ. J. Ex. 43 at 290 (p. 5 of the exhibit itself), ECF No. 123. “Once the rights have been adjudicated,” the Department explained, “the state will regulate between users based on priority date.” *Id.* at 289 (p. 4 of the exhibit itself). *See also Kandra*, 145 F. Supp. 2d at 1202 (accepting the government’s recitation of Oregon’s position). Earlier in the present case Oregon further explained its position that “claimants in the adjudication [a group that includes Reclamation and many Plaintiffs, as well as the Tribes], do not, at this time, have the right to state regulation in their favor to exclude persons generally from their use of water.” Br. of Amicus Curiae State of Or. Regarding Defs.’ Mot. for Stay and Pls.’ Opp’n Thereto 14, ECF No. 61.

This lack of enforcement, like the lack of quantification discussed above, does not operate to negate, suspend, or modify the relative priorities or the ultimate quantities of the respective Tribal, Plaintiff, and other water rights in the Klamath Basin. And it certainly does not absolve Plaintiffs of the requirement that they show that the senior Tribal water rights were satisfied in 2001 such that Plaintiffs’ junior rights entitled them to water.¹⁰

When understood in the context of this reality, it is clear that the water deliveries to Plaintiffs prior to 2001 *are not* indicative of how much water they were entitled to receive by virtue of their water right in 2001; water deliveries in prior years only indicate how much Plaintiffs *took* in those years, not how much their water rights, whatever they may be, entitled

¹⁰ Whether the lack of enforcement by the State or Reclamation’s management of the Project in years prior to 2001 violated the Tribes’ water rights is an issue beyond the scope of the present brief.

them to take.¹¹

Reclamation's shift away from this policy, and toward a policy more attentive to its non-irrigation obligations, including providing water for Tribal resources and Endangered Species Act requirements, triggered Project Irrigators' challenges in *Patterson*, 15 F. Supp. 2d at 993 (noting Plaintiffs' objection to Reclamation introducing a "new operating plan for the Klamath Project"), and *Kandra*, 145 F. Supp. 2d at 1204 (observing that Plaintiffs complained of Reclamation's "change in operations" but holding this was in fact just bringing Reclamation's activities closer in line with its "responsibilities").

To any extent that Plaintiffs seek to support their claim by pointing to their receipt of water in years prior to 2001, their claim amounts to a request *not* for a taking of their interest in the Klamath Project water right, but for a taking of some *other interest* – an unstated and unproven interest – that is based on nothing more than having taken water, without any regulation, in the past.¹²

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

¹¹ This is quite similar to the situation of numerous junior water users in the Klamath Basin whose water use of many years – water that they had come to consider as "theirs" even though it never was – was curtailed in favor of the senior Tribal water rights for the first time in 2013.

¹² Plaintiffs sometimes seem to be asserting a right that is somehow compensable outside the fabric of rights established by Oregon water law, because it is "equitable" instead of "legal." Such a right would have to be based on some kind of equitable principle that (i) would be a breathtaking addition to Western water law, superseding the fundamental seniority element of such law, and (ii) remains so far unarticulated by Plaintiffs.

until after the senior tribal water rights were completely fulfilled.¹³

V. CONCLUSION.

The underlying law on which Plaintiffs rely for their alleged “rights” – Oregon water law – requires that Plaintiffs, as junior water rights holders claiming they were entitled to water in 2001, show that the senior tribal water rights, including the Tribes’ water rights, were fully satisfied. Any other outcome compensating Plaintiffs without this showing is contrary to the fundamental seniority system on which Oregon water law – and Western water law in general – is based. In addition, any other rule would be contrary to federal law, which recognizes the time immemorial priority of the Tribes’ rights. *Adair*, 723 F.2d at 1414. In evaluating the Plaintiffs’ arguments in this case, the Tribes respectfully urge the Court to bear in mind the junior status of Plaintiffs’ water rights vis-à-vis the Tribes’ water rights and the context surrounding Reclamation’s water management for the Project in 2001 and the years leading up to 2001, and require Plaintiffs to adhere to the fundamental Oregon water law principles that define and constrain Plaintiffs’ entitlement, if any, to water in 2001.

DATED August 24, 2016.

Respectfully submitted,

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¹³ Plaintiffs are not bereft of access to information on the topic. The public records of the KBA are rife with information on the water right quantities of all KBA parties.