

App. No. _____

In the
SUPREME COURT OF THE UNITED STATES

LONNY E. BALEY, et al.,
JOHN ANDERSON FARMS, INC., et al.

Petitioners,

v.

UNITED STATES, PACIFIC COAST FEDERATION
OF FISHERMEN'S ASSOCIATIONS,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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January 24, 2020

Corporate Disclosure Statement

Among the petitioners, there are five corporations: Hill Land & Cattle Co., Inc., John Anderson Farms, Inc., McVay Farms, Inc., Shasta View Produce, Inc., and Wong Potatoes, Inc. Each of these petitioners has confirmed to the undersigned that it has no parent companies and that no publicly held corporation owns 10 percent or more of its stock.

Parties to the Proceedings Below

Plaintiffs below, petitioners here, are the class representatives of certified opt-in class action, which consolidated two cases, as listed below:

Baley v. United States

Baley Trotman Farms

Baley, Lonny E.

Byrne Brothers

Byrne, Michael J.

Chin, Daniel G.

Chin, Deloris D.

Moore, Cheryl L.

Moore, James L.

Trotman, Mark R.

Wong Potatoes, Inc.

John Anderson Farms, Inc. v. United States

Buckingham Family Trust

Buckingham, Eileen

Buckingham, Keith

Buckingham, Shelly

Frank, John and Constance

Hill Land & Cattle Co., Inc.

Hunter, Jeff and Sandra

John Anderson Farms, Inc.

McVay Farms, Inc.

McVay, Barbara

McVay, Matthew K.

McVay, Michael

McVay, Ronald

McVay, Suzan

McVay, Tatiana V.

O'Keeffe, Henry and Patricia

Shasta View Produce, Inc.

Stastny, Edwin, Jr.

Defendant below, respondent here, is the United States. Defendant-intervenor below, respondent here, is the Pacific Coast Federation of Fishermen's Associations.

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, petitioners Lonny Baley, et al., respectfully request a 30-day extension of time, to and including March 13, 2020, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Federal Circuit entered judgment on November 14, 2019. Its opinion, which is reported at 942 F.3d 1312 (Fed. Cir. 2019), is attached as Appendix A.

Unless extended, petitioners' time to file a petition for a writ of certiorari will expire on February 12, 2020. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The respondent-intervenor Pacific Coast Federation of Fishermen's Associations has authorized the undersigned to state that it does not oppose this request for a 30 day extension.

The very recent substitution of new counsel in this case necessitates this extension request. This is a class-action takings case brought by farmers and ranchers who are owners of water rights in the Klamath River Basin in Oregon and California. Petitioners' water rights were eliminated by the United States in order to maintain reservoir water levels and river flows considered necessary for certain endangered and threatened fish. To prepare a petition for certiorari, petitioners' new counsel must master the complex procedural history of and record for the case, which was filed in 2001, and which has been ruled on twice by the Federal Court of Claims (which also conducted a 10-day bench trial), twice by the Federal Circuit, and once, on certified questions, by the Oregon Supreme Court. A 30-day extension will enable petitioners' new counsel to prepare a certiorari petition and appendix while also fulfilling his other obligations.

1. This case involves water rights and water rights administration on the Klamath River in south-central Oregon and northern California. It raises issues of exceptional importance concerning state and federal authority over the determination and administration of water rights in the American West, as well as issues of due process and tribal fishing rights.

2. In the Klamath River Basin, as in many western river basins, irrigation is essential for food security and sustaining farm families and communities. Federal irrigation projects like the United States Bureau of Reclamation's Klamath Project (Klamath Project) were constructed and are operated to deliver water for irrigation.

3. The legal rights to water delivered via federally-constructed irrigation projects, like those to water delivered through the Klamath Project in this case, are subject to state law pursuant to the Reclamation Act of 1902 § 8, 43 U.S.C. §§ 372, 383. Indeed, "[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California v. United States*, 438 U.S. 645, 675, 98 S. Ct. 2985, 3000-01 (1978).

4. As this Court has recognized for many years, in western states generally, the right to use water delivered by federal irrigation projects is a property right of the landowner, not of the operator of the federal project that diverts, carries, and distributes water.

In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada v. United States, 463 U.S. 110, 126, 103 S. Ct. 2906, 2916 (1983). Oregon law is in accord. *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1160 (2010).

5. In 2001, the United States Bureau of Reclamation (Bureau) halted all water delivery to farmers and ranchers served by the Klamath Project, including petitioners. The Bureau's action was taken to meet obligations under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA), to provide an increased amount of water to the shortnose sucker and the Lost River sucker and the coho salmon. Petitioners promptly filed this suit in the Court of Federal Claims alleging that the Bureau's action to eliminate their irrigation water rights, including rights to water stored in a reservoir, in order to augment instream flows and maintain reservoir elevations, constituted a taking of water rights without just compensation in violation of the Fifth Amendment of the Constitution.

6. The Court of Federal Claims dismissed petitioners' claims in 2005. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005). Petitioners' first appeal to the Federal Circuit resulted in certification of three questions to the Oregon Supreme Court, regarding the nature of property in water rights established under Oregon law. *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376 (Fed. Cir. 2008) (Certification Order). The certification decision by the Oregon Supreme Court affirmed that the petitioners were able to hold property right interests in water made available through the Klamath Project, leaving some questions to review on remand based on a larger record. *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1160 (2010) (Certification Decision). Upon receiving the Certification Decision, the Federal Circuit reversed and remanded the case to the Court of Federal Claims. *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 522 (Fed. Cir. 2011).

7. Following further proceedings and discovery, the Court of Federal Claims certified the case as a class action in 2017. Following a 10-day bench trial, the Court of Federal Claims ruled that the Bureau's actions in 2001 did not result in any taking, because

federal reserved rights reserved for tribal fishing were senior in priority to petitioners' water rights. *Baley v. United States*, 134 Fed. Cl. 619, 679-80 (2017).

8. The Federal Circuit affirmed. But, its decision allowing the Bureau to unilaterally adjudicate and administer federal reserved rights was in error, undermines a century of settled western water law principles recognized in this Court's precedents, and thwarts state water rights adjudications. Those are important errors that warrant this Court's attention.

In passing the Reclamation Act, Congress sought to make water rights available for the benefit of those persons who would use the water to reclaim the land. *See Ickes v. Fox*, 300 US 82, 95, 57 S. Ct. 412, 81 L Ed 525 (1937) ('Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners * * *').

Klamath Irrigation Dist. v. United States, 227 P.3d at 1159. Further, Congress waived the sovereign immunity of the United States and tribes to facilitate state court adjudications of water rights and administration of determined water rights by the states. *See McCarran Amendment* (Department of Justice Appropriation Act, 1953), 43 U.S.C. § 666; *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976). In Oregon, there is an ongoing general stream adjudication pending, to determine all water rights in the Klamath River basin system and source. *See United States v. Or. Water Res. Dep't*, 44 F.3d 758, 770 (9th Cir. 1994). The Federal Circuit Court's decision here upsets the Oregon adjudication and Congress's deference to state law procedures by concluding that federal agency staffs, or the trial court could in effect adjudicate and prioritize some water rights based on tribal fishing rights. It additionally held, contrary to the express holding of this Court in *Colo. River Water Conservation Dist. v. United States*, 424 U.S. at 809, that "state court[s have] jurisdiction over Indian water rights under the [McCarran] Amendment," that tribal water rights are not subject to determination in state proceedings. *Baley v. United*

States, 942 F.3d 1312, 1340 (Fed. Cir. 2019) (holding that “federal courts have consistently held that tribal water rights arising from federal reservations are federal water rights not governed by state law”).

9. The Federal Circuit purported to apply the western water law priority doctrine that recognizes seniority among water rights, but in doing so failed to examine all water uses in the Klamath River basin as directed by the McCarran Amendment. By picking and choosing some, but not all state law priority principles, the Federal Circuit unceremoniously eviscerated Oregon’s water statutes and state adjudication, contrary to Ninth Circuit precedent. *See Baley v. United States*, 942 F.3d at 1340 (Fed. Cir. 2019). As Oregon explained in its amicus brief below, the Ninth Circuit held that “the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment.” *United States v. Or. Water Res. Dep’t*, 44 F.3d at 770. The Federal Circuit decision, by contrast, authorized the Bureau to make its own adjudication outside the Oregon process, which subverts Oregon’s comprehensive adjudication and skirts the attributes of due process required for determination of property rights.

10. The Federal Circuit’s decision infringes state authority throughout the western United States by allowing the federal government unilaterally to take water rights that have been recognized under state law, and to do so to serve any different purpose and without the required state law processes that examine injury to other users. Allowing a federal agency to determine and administer water rights on a water system, let alone to prioritize unadjudicated rights, is contrary to the 1902 Reclamation Act and Oregon and California law. As this Court held in *Colo. River Water Conservation Dist. v. United States*, 424 U.S. at 819, “actions seeking the allocation of water . . . involve the disposition of property and are best conducted

in unified proceedings [T]he McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.” By upholding the Bureau’s unilateral determination and prioritization of water rights, the Federal Circuit thwarts those “comprehensive state systems for adjudication of water rights.”

11. After the Federal Circuit’s decision, the petitioner class representatives diligently began evaluating appellate options. Petitioners retained the undersigned new legal counsel, who was approved as substitute class counsel by the Federal Circuit on December 18, 2019. The undersigned has knowledge of the issues in this case and relevant legal experience, but insufficient familiarity with the specific contents of the court records created over the eighteen-year history of the case to prepare a certiorari petition within the allotted 90 days.

12. The current deadline to file a petition for certiorari is February 12, 2020. Petitioners seek this extension more than 10 days before that due date. Under the circumstances described above, good cause exists to grant an extension of time of 30 days. This extension will allow the undersigned to secure and study the full appellate record, and to prepare a petition for certiorari and appendix that may be properly presented to this Court.

13. The extension of time requested will not prejudice respondents or delay unduly the ultimate disposition of the petition, which with similar extensions for both sides would still be conferenced this Term.

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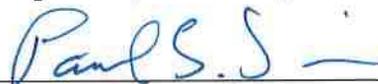
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14. For these reasons, the petitioners respectfully request that the February 12, 2020 deadline for filing a petition for certiorari be extended by 30 days, up to and including March 13, 2020.

Dated: January 24, 2020

Respectfully submitted,

A handwritten signature in blue ink that reads "Paul S. S." followed by a horizontal line.

PAUL S. SIMMONS

Counsel of Record

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