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Beyond Constitutional Frontiers: Tribal Rights, Resources, and Reform

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Constitutional Frontier: Federalism, Separation of Powers, and How Federal, State and Tribal Governments Are Reshaping Environmental Law
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Abstract.
The current era arguably poses the most complex and challenging environmental dilemmas in human history. With climate change, increasingly scarce resources, and exponentially expanding demand, traditional legal notions of standing, harm, and liability are being stretched and reshaped to accommodate a shifting set of values regarding natural resources and potentially respond to the moment. While these novel and innovative approaches are modestly reshaping the fields of natural resources and environmental law, however, the historical and time-honored claims of Indian tribes are also presenting avenues for rethinking the foundations of those areas of law. Arising both within and outside of the constitutional framework, these claims also pose the potential to usher in a new era of more responsible and sustainable environmental stewardship that innovates beyond the limiting legal regimes operating today.

This paper profiles an ongoing matter that highlights this potential, *Baley v. United States*, currently pending before the United States Court of Appeals for the Federal Circuit. Though not yet resolved, *Baley* illustrates how tribal claims, based on long-standing legal principles but antithetical to the historical push to commodify and develop natural resources, may present the opportunity to rethink and reshape the how natural resources are managed going forward.

Introduction.
Since time immemorial, Indian tribes and their members have relied on and been intimately connected to the lands and resources of North America.[1] Despite centuries of oppression and dispossession, those connections remain an important part of modern tribal existence and continue to inform the distinct tribal cultures, governments, laws, and actions of the nation's 573 federally recognized Indian tribes.[2] Though examples abound, these connections gained national and international attention during the recent tribally-led challenges to the Dakota Access Pipeline and tribal efforts to protect the sacred areas of Southeastern Utah through the designation of Bears Ears National Monument.[3]

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[1] Because this essay focuses on the claims made by federally recognized Indian tribes based on their status as such under the field of law known as "federal Indian law," I use the term "Indian tribe" and "Indian" to minimize confusion. In doing so, however, I do not mean to exclude or diminish the experiences or claims of other indigenous groups, including state-recognized tribes; or disrespect anyone who is offended by the term "Indian" and would prefer "Native American," "indigenous," or another descriptor less steeped in settler-colonialism than "Indian."
[2] *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019) (listing federally recognized tribes).
[3] *See, e.g.*, James Estrin, *Land, Loss and Rebirth in Standing Rock*, N.Y. TIMES, Sept. 4, 2017, https://lens.blogs.nytimes.com/2017/09/04/land-loss-and-rebirth-in-standing-rock/; Dino Grandoni, *The Energy 202: Here's a Closer Look at what Trump Cut Out of Bears Ears*, WASH. POST, Apr. 3, 2019, https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2019/04/03/the-energy-202-

Though perhaps garnering more attention from non-Indians beyond reservation boundaries, these recent conflicts are representative of the longstanding disjunction between tribal connections to the environment and the interests and priorities of others seeking to acquire, use, or develop those natural resources. Indeed, the story of the "New World" is one of non-Indian colonialism premised on the dispossession of land and resources from Indian people. Despite nearly 500 years of history since that effort began, many of the nation's laws and legal structures still reflect that foundational premise.

Take, for example, the laws and policies that Professor Charles F. Wilkinson termed "the lords of yesterday," which form "the heart of what can be called the law of the American West."[4] These lords represent historic approaches to natural resources: the Hardrock Mining Law of 1872, federal policies related to grazing and timber on public lands, the decimation of salmon and their habitat through hydropower development, and the prior appropriation doctrine that is the core of most Western states' water law. Though perhaps not explicitly targeting tribes or tribal resources, the lords of yesterday were premised on the removal of Indian people from the landscape and incentivized the development of the West by non-Indian settlers. These laws and policies continue to represent "fundamental policy judgments . . . made long ago by a distant society," but, as Wilkinson notes, despite the age of these policy judgments and all we know about their continuing impacts, they "now work with a momentum of their own [to] drive development."[5] That momentum pushes forward projects that, like the Dakota Access Pipeline or potential exploitation of the area around Bears Ears, often conflict with tribal values and indigenous connections to those resources. Thus, although the lords of yesterday have sunk so deeply into America's legal system and psyche that they are now largely invisible,[6] they continue to effectuate the dismissal, dispossession, or denial of tribal rights embodied by the old policies that originally supported them.

Confronting the continuing momentum of the lords of yesterday, tribes continue to assert a broad array of legal claims that define the ongoing conflict between their own cultural values and the timeworn presumptions on which many natural resources and environmental laws were based. In the last few years, for example, the United States Supreme Court has been called upon to resolve two cases brought by tribes or their allies that featured claims based on historical treaties with the United States and the competing interests of states in constructing roads or managing wildlife resources.[7] In each of those cases, the Supreme Court had to consider the nature of traditional tribal activities, protected by treaty promises imbued with the weight of the Constitution's supremacy clause, against the more modern interests of states and local citizens opposed to the scope or continuation of those activities. Each of those cases highlighted the core challenge presented by tribal claims: can the American legal system, despite its historical focus on

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[4] CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST, 20 (1992).

[5] *Id.* at 24.

[6] *See id.* at 23 ("In spite of their antiquity and pervasive influence, the lords of yesterday have operated mostly out of the sunlight …[with p]ublic scrutiny into the[ir] full impacts …deflected by a mystique, instilled by the beneficiaries of the existing system, that these issues are so complex that they are beyond the ken of average citizens.")

[7] *See, e.g.*, Washington v. United States, 584 U.S. ___, 138 S.Ct. 1832 (2019) (*aff'g by an equally divided Court* U.S. v. Washington, 853 F.3d 946 (9th Cir. 2016)); Herrera v. Wyoming, ___ U.S. ___, 139 S.Ct. 1686 (2019).

dispossession and deprivation of tribal interests, honor tribal claims that protect their ongoing connections to important and increasingly scarce natural resources?

In light of the momentum and continuing relevance of the lords of yesterday,[8] answering that challenge while acknowledging that historical context and respecting tribal interests presents an important opportunity to fundamentally reshape the future of environmental and natural resources law. Perhaps there is now a path to realign natural resources law and policy with tribal rights in a cohesive and mutually-reinforcing relationship that better reflects our modern understanding of natural resources and their value.

This essay profiles an ongoing conflict that illustrates this fundamental challenge and the important potential offered by tribal claims, especially as they relate to western water rights. *Baley v. United States* is a takings case currently pending before the United States Court of Appeals for the Federal Circuit in which irrigators in the Klamath Basin are asserting that their water rights, rooted in the reclamation boom of the early 1900s, were taken by the United States in order to provide water to honor treaty-reserved tribal rights to fish and protect endangered species.[9] The tribal rights at issue in *Baley* would, if sustained, ensure a continuing right to keep water in the Klamath River, which could maintain and enhance a depleted ecosystem, protect threatened and endangered species, and protect traditional tribal activities central to cultural survival.[10] But, those rights are running up against long-standing and well-accepted state and local interests seeking to protect their continued use and development of those water resources for irrigation—the same purposes that have dominated Western water use since the early 1900s. Though such fights over water rights are nothing new, especially in the increasingly arid American West, this case raises a much deeper challenge to the fundamental assumptions behind the dominant legal schemes for allocating water and protecting endangered fish. By doing so, therefore, it presents the potential to spark reassessment of those assumptions and the laws based upon them, which could prompt a new era of reform away from that history and toward laws that would ensure a more sustainable and viable future.

The Lords of Yesterday in the Klamath Basin.

In their comprehensive history and overview of the complex and ongoing battle over irrigation, endangered fish, and competing priorities in the Klamath Basin of southern Oregon and northern California, law professors Holly Doremus and A. Dan Tarlock point to the lack of a coherent and holistic vision for the Basin as a continuing reason for the intensity of the conflict.[11] Part of the problem with constructing such a vision is the compartmentalized and historical scheme of natural resources law, which they describe as a "fossilized geological formation . . . [in which] . . . layer after layer of law has been piled one on top of the last with no serious effort at integration or correction."[12] For Doremus and Tarlock, the bottom layer of this sedimentary accretion is Wilkinson's lords of yesterday, which endure "[d]espite decades of reform efforts and widespread recognition that the conditions that justified them are long past."[13] In both Doremus and Tarlock's

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[8] *See, e.g.*, Sandra B. Zellmer, *Mitigating Malheur's Misfortunes: the Public Interest in the Public's Public Lands*, 31 GEORGETOWN ENVT'L. L. REV. 509, 541 (2019) ("[T]he Lords of Yesterday continue [in 2019] to hold an iron grip on federal policy, and even more so on the public imagination.")

[9] Baley v. United States, 134 Fed. Cl. 619 (2017).

[10] *See, e.g.*, Jose A. Del Real, *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?action=click&module=Editors%20Picks&pgtype=Homepage.

[11] HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS, 192 (2007).

[12] *Id.* at 193.

[13] *Id.*

assessment, and for the *Baley* litigation that has continued well past their review of Klamath issues, the Reclamation Act of 1902 and the policies that drove it are "the most relevant."[14]

The history and policy of the reclamation era are at the heart of the *Baley* litigation because some of the plaintiffs in that case trace their claims to water rights directly back to the creation of the Klamath Project, which Congress authorized in 1905 pursuant to the Reclamation Act of 1902.[15] Although private (mostly non-Indian) citizens farmed and irrigated their lands prior to the creation of the Project, the United States quickly assumed control of the waters delivered through the Project and, pursuant to a variety of agreements, promised to deliver water to those farmers and the many more who would (hopefully) homestead and develop the federal lands to be served by the Project.[16] For some of these homesteaders, their deed from the United States included both a small tract of land for a farm *and* "the right to the use of water from the Klamath Reclamation Project as an appurtenance to the irrigable lands in said tract."[17] By providing land and water for yeoman American farmers, along with what turned out to be some hefty subsidies to continue construction, operation, and maintenance of the Project, the reclamation policy promoted the federal government's vision of a settled and productive West tilled by "a critical mass of self-sufficient farmers."[18] The farmers and irrigation interests asserting their rights to water in the *Baley* litigation are the direct (and sometimes lineal) descendants of that history and policy.

In addition to the Reclamation Act, another lord of yesterday also plays an important role in the *Baley* litigation and the claims made therein by farmers and irrigators. The doctrine of prior appropriation is a foundational legal concept for much of the West's water law and, like reclamation, is rooted in the history of settlement and development of the West by non-Indians. Originally a legal concept pursuant to which miners could acquire and protect their use of water, prior appropriation quickly evolved to promote settlement by protecting those who first put water to "beneficial use."[19] Consistent with the policies of the era, these uses were traditionally diversionary, consumptive uses that diminished or even eliminated stream flows.[20] By doing so, the policy of the prior appropriation doctrine incentivized use for human benefit and, in combination with legal wrangling confirming a primary role for state law in defining the terms of prior appropriation, secured priority for those claiming their property rights to water based on the earlier date of such use.[21] In the Klamath Basin, the combination of the rights to water established by irrigators pursuant to those state laws (whether in Oregon and California) and the terms on

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[14] *Id.*
[15] Baley v. U.S., 134 Fed. Cl. 619, 626–627 (2017).
[16] *See, id.* at 627-628.; DOREMUS & TARLOCK, *supra* note 11, at 47–49.
[17] *Baley*, 134 Fed. Cl. at 628 (quoting patent deeds entered into evidence at trial).
[18] DOREMUS & TARLOCK, *supra* note 11, at 44. Like other large reclamation projects, this policy was implemented in the Klamath Basin despite natural factors, such as geology, that potentially severely limit the Project's utility. *See id.* at 53–54.
[19] *See, e.g., id.* at 38–39.
[20] *See, e.g.*, Wilkinson, *supra* note 4, at 234 ("To rise to the level of being beneficial, a use had to be consumptive, usually extractive.")
[21] DOREMUS & TARLOCK, *supra* note 11, at 40–41. Not only did the federal government allow states to define the rules of wate ruse, it has adopted a longstanding policy of deferring to state law when implementing federal policies, absent a clear contrary mandate from Congress or direct conflict between the two regimes. *See, e.g.*, Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241 (2006).

which they agreed to delivery of water by the United States (through the Project) have been the dominant regime for the use of water in the Basin for much of the last century.[22]

Tribal Interests in the Klamath Basin.
Both the reclamation policy and the prior appropriation doctrine sought to ignore, if not erase, the continent's first and longest continuous users of water resources. In the Klamath Basin, the Klamath Tribe has lived since time immemorial in the upper parts of what is now southern Oregon, while the tribes of the lower Basin, where the Klamath River reaches the Pacific Ocean, include the Yurok and Hoopa, among others. Though each uniquely sovereign and with distinct histories, these tribes all inhabited the region and relied on its waters, including their fisheries, long before the non-Indian miners, settlers, farmers, or irrigators ever laid claim there. But, to pave the way for that invasion and the lords of yesterday that would hasten and insulate it, the United States, through treaties and the exercise of plenary authority over Indian affairs sanctioned by the U.S. Supreme Court, had to remove tribes from their lands and isolate them on reservations. For the Klamath, an 1864 Treaty marked the cession of a vast territory across southern Oregon and the creation of a much smaller reservation to which the Tribe would remove.[23] The shifting winds of federal Indian policy would eventually blow that reservation away during the termination era of the 1950s, with the Tribe ultimately securing restoration of its tribal status—though not its lands—in 1986, 32 years later.[24] Farther down the river, the Yurok and Hoopa Valley Tribes were removed from their lands and confined to reservations created by reservation-specific Presidential actions authorized by Congress, including an 1855 Executive Order establishing a Klamath River Reserve, and subsequent actions establishing and extending a Hoopa Valley Reservation.[25]

Despite federal efforts to limit, if not destroy, tribal rights and connections to the waters of the Klamath, however, the legal principles enshrined in the United States Constitution and their interpretation by the U.S. Supreme Court helped protect certain tribal rights throughout the reclamation era. From the earliest decisions establishing the foundations of federal Indian law, the Supreme Court had recognized and protected the exclusive and protective relationship between the federal government and tribes, largely expressed through treaties between those sovereigns.[26] But, during the late 1800s, the increasing animosity of the federal government toward tribes called into question whether that relationship would remain. Nonetheless, however, in 1905—the same year that Congress authorized the Klamath Project—the Supreme Court reaffirmed the continuing supremacy of rights reserved by tribes in treaties with the United States, protecting the exercise of those rights from interference by non-Indians and state authority.

In *U.S. v. Winans*,[27] the Court denied efforts on the part of non-Indians, buoyed by the State of Washington, to exclude tribal fishermen from continuing to take fish in one of their usual and accustomed places, a right expressly reserved to them by an earlier treaty. The power to protect

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[22] *See, e.g.*, DOREMUS & TARLOCK, *supra* note 11, at 76 ("The Klamath farmers derive much of their political power from their water entitlements, water rights perfected by hard work under the doctrine of prior appropriation and protected by state and federal law").
[23] Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707.
[24] *See* Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1886).
[25] *See* Fishing Rights of the Yurok and Hoopa Valley Tribe, U.S. Dep't. of the Interior Solicitor Memorandum M-36979, 4–7 (Oct. 4, 1993), *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-36979.compressed.pdf.
[26] *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 520 (1832) ("The whole intercourse between the United States and the [Cherokee] nation, is by our constitution and laws, vested in the government of the United States.")
[27] United States v. Winans, 198 U.S. 371 (1905).

those rights from subsequently admitted states or their settlers was, in the Court's words, "surely within the competency of the nation."[28] Just three years later, the Court drew on those same principles to ensure that tribes would retain water rights sufficient to fulfill the purposes of the reservations on which they were located by the federal government. That decision, *Winters v. U.S.*,[29] refused to recognize the authority of state law to control tribal water rights, finding instead that the creation of a reservation pursuant to an agreement between a tribe and the United States reserved water rights to the tribe under federal law. As a result, those rights must be respected by other water users and, under a system of prior appropriation, carry a priority date as of the date of the reservation's creation.[30] When combined with the notion from *Winans* that treaties represented the reservation of rights by the tribes rather than a grant of rights to them,[31] the continuing use of water for traditional purposes could carry with it a priority date dating to time immemorial. Thus, by the end of the first decade of the Twentieth Century, although the ideals of the reclamation era dominated federal water policy and largely ignored tribal interests, these important Supreme Court decisions established critical avenues for tribes to potentially protect their rights to fish in and use waters being put to use in developments like the Klamath Project.

The weight of federal priorities toward developing the West for non-Indians bore heavily on tribes in the early 1900s, especially as it related to tribal rights to water. As the National Water Commission famously noted, the federal government's failure to protect tribal water rights during the first half of that century is "one of the sorrier chapters" in a long, often dark, history of federal-tribal relations.[32] Thus, it would take nearly a century for the tribes in the Klamath Basin to begin asserting their legal rights to protect water and their traditional and treaty rights to fish. But, through a series of cases evolving from the late 1970s to the 1990s, the tribes and their federal trustees asserted those rights and secured their recognition in the Klamath.[33] Those rights were limited, however. As the Ninth Circuit described the rights of the Klamath in *U.S. v. Adair*, they were pre-emptive, not necessarily substantive,[34] and still subject to a mix of federal and state law standards.[35] Though important victories recognizing tribal rights, those decisions demonstrate the struggle to incorporate tribal rights into the framework of legal priorities established under the lords of yesterday. As Professors Doremus and Tarlock noted in 2007, while the doctrine related to Indian water rights "continues to evolve, it remains biased in favor of the status quo, and less protective of Indian rights than it appears."[36]

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[28] *Id.* at 384.
[29] United States v. Winters, 207 U.S. 564 (1908).
[30] *Id.* at 577.
[31] *Winans*, 198 U.S. at 381.
[32] NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION, at 475 (1973).
[33] *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1412-14 (9th Cir. 1983) (relying on *Winans* to find that the Klamath Tribe reserved water rights sufficient to protect its rights to hunt and fish, with a priority date of time immemorial and that the rights survived the Tribe's subsequent termination); United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986) (recognizing Yurok and Hoopa tribal rights and excluding them from state regulatory authority); Mattz v. Superior Court, 758 P.2d 606, 617 (Cal. 1988) (upholding federal power to reserve and protect Yurok fishing rights on portions of the Hoopa Valley Reservation); *see also* U.S. Dep't. of the Interior Solicitor Memorandum M-36979, *supra* note 20, at 12-16.
[34] *Adair*, 723 F.2d at 1411 (describing the tribal right as "the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies").
[35] *Id.* at n.19 (despite the unique status of the Tribe's in-stream and non-consumptive rights, they are not "unaffected by state law").
[36] DOREMUS & TARLOCK, *supra* note 11, at 76.

Compounding the challenges to tribal rights in the Klamath were the ongoing dominance of irrigation in the Basin and the significant detrimental effects of that use on the fisheries. Like reclamation projects across the major water basins of the West, the Klamath Project's design and use bore little regard for its impacts on the local riverine ecosystems and, as a result, fish populations were devastated.[37] With the dawn of the new environmental era of the 1960s and 70s, however, concern over those impacts translated into action under the Endangered Species Act (ESA), which Congress passed in 1973.[38] Like rights asserted by tribes, the ESA's obligations to ensure protection of threatened and endangered species took some time to address in the context of the Klamath Project. Eventually, a number of fish species within or around the Basin were listed as endangered and, in 1992, the United States Fish and Wildlife Service issued a "Biological Opinion" or "BiOp" pursuant to the ESA, which concluded that the Project should maintain certain water levels in order to protect those species.[39] When irrigators challenged that action, the Ninth Circuit Court of Appeals determined that the Bureau of Reclamation (BOR), the federal agency managing the Link River Dam that controls some flows to the Project, could manage the Dam to meet the requirements of the ESA, which "override the water rights of the [i]rrigators."[40] The court's reasoning focused only on those irrigators receiving project water by federal contracts or other legal instruments that specifically recognized the applicability of federal acts related to "the preservation and development of fish and wildlife resources,"[41] and, in that decision, the court also noted that the BOR *could* "direct operation of the Dam to comply with Tribal water requirements."[42] But, because the decision applied to the BOR's annual operating plan decisions, which involve discretionary decisions by the agency, it left room for BOR to argue that it was still bound by other non-discretionary duties to deliver water established by other contracts or agreements that might supersede or overshadow tribal rights or ESA interests.[43]

***Baley v. United States*: Turning the Tables?**

Thus, by the dawn of the Twenty-First Century, though tribes and environmental interests concerned with protection of endangered species had established important inroads to pursue and protect their rights, the dominant policies of the reclamation era remained. While conflict and litigation would continue to swirl like the waters of the Klamath, the events of 2001 set the stage for what could be a final showdown over the preeminence of those policies and potentially reshuffle the priority of legal rights governing the use and delivery of water from the Klamath Project.

In early 2001, the BOR, relying on a BiOp suggesting that the severe drought conditions would harm endangered fish and interfere with tribal rights unless more water stayed in the river, determined that it could not deliver water to irrigators on the Project.[44] That decision spawned immediate outcry and protest from the irrigators, who initially sought to enjoin the agency's decision as a violation of the ESA as well as the various contracts they or their predecessors had entered with the United States to ensure delivery of Project water.[45] Those initial efforts at

[37] *Id.* at 76-78.
[38] 16 U.S.C. §§ 1531, et seq. (2018).
[39] *See* Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1209 (9th Cir. 1999).
[40] *Id.* at 1213.
[41] *Id.* at 1209.
[42] *Id.* at 1214.
[43] *See* DOREMUS & TARLOCK, *supra* note 11, at 98–100 (*citing* National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007), in which the Supreme Court upheld a similar interpretation of the ESA).
[44] *See Baley*, 134 Fed. Cl. at 639–40.
[45] *See* Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001).

litigation were rebuffed.[46] Others sought to take matters into their own hands and, spurred on by their belief in the righteousness of the lords of yesterday, repeatedly—and illegally—opened the irrigation gates to try and override the BOR's decision.[47] Later that year, however, a group of irrigators pursued a different path toward reestablishing the preeminence of their temporarily denied rights to water. Rather than challenge the BOR's decision-making process or foment further insurrection and rebellion, the irrigators instead alleged that the 2001 operations plan constituted a taking of their property in violation of the constitution's Fifth Amendment.[48] In doing so, the irrigators relied upon the terms of their agreements with the United States, including, in some instances, the original property deeds that included rights to the delivery of Klamath Project water as appurtenances to their lands.[49] While years of complex litigation and procedure would follow that initial filing, by 2017, the matter had boiled down to a 10-day trial focused on whether the irrigators possessed a constitutionally-protected property right to water that would guarantee its delivery or, at the very least, due compensation for its loss.[50]

To decide that question, Judge Blank Horn of the Court of Federal Claims analyzed the various documents that created or embodied the irrigators' right to Klamath Project water.[51] These included applications for water from the Project's inception, known as Form A or Form B, relating to the rights contained in original homesteading property deeds or private lands included in the Project respectively; repayment contracts with irrigation districts using water from the Project; and leases for water used within National Wildlife Refuges in the Project area. According to Judge Blank Horn's analysis, among these different instruments, some of the contracts with irrigation districts and all the Refuges leases contemplated the effect of future water shortages and expressly excluded the United States from liability in those events.[52] Those provisions eliminated the basis on which any takings claim could be pursued. Other instruments, however, including both Form A and Form B, as well as contracts with other irrigation districts in the Project, did not expressly condition or otherwise impair the water users' rights to water, opening the door for further takings analysis.[53]

Having found that certain irrigators retained cognizable property interests, Judge Blank Horn then determined how to analyze their takings claims, concluding that, despite the BOR only deciding on the terms of the 2001 operations plan but not actually closing the headgates to the irrigators, that action constituted a physical taking akin to the government's seizure of private property.[54] In addition, despite only losing water for the 2001 irrigation year, the Judge concluded that the irrigators had been permanently deprived of their right to that water, rendering the taking a "permanent physical taking" for purposes of the Judge's opinion.[55] Thus, Judge Blank Horn's

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[46] *Baley*, 134 Fed. Cl. at 640.
[47] *See, e.g.*, Patty Wentz, *The Good Americans: Is Klamath Falls the Wellspring of a New Sagebrush Rebellion?*, WILLAMETTE WEEK (Aug. 14, 2001), *available at* https://www.wweek.com/portland/article-261-the-good-americans.html.
[48] *Baley*, 134 Fed. Cl. at 641.
[49] *Id.* at 627-28.
[50] *Id.* at 645.
[51] *See id.* at 653-59.
[52] *Id.* at 656-659.
[53] *Id.* at 653-56.
[54] *Id.* at 663-64.
[55] *Id.* at 668. Physical takings are among the easiest on which plaintiffs could prevail, as they are considered *per se* takings. Analyzing a taking under the Supreme Court's decision in Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978), on the other hand, would have allowed much greater flexibility in the context of a particular dispute. For more on takings and water rights, *see* Josh Patashnik, *Physical takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365 (2011).

analysis recognized the sanctity of the irrigators' water rights as constitutionally protected property interests, likely predicting an ultimate decision that would lock in the primacy of those rights and insulate them from any future interference by BOR, especially where such interference sought to protect other, competing rights, like those of the tribes and fisheries.

Based on that analysis alone, it seemed the lords of yesterday would prevail. If the irrigators' rights to water were constitutionally protected property rights taken by the BOR to serve other interests, then they would be entitled to deference by the court. Unlike those historically protected uses, the competing tribal rights that the BOR had instead honored were not quantified,[56] so how could the BOR even figure out whether or how much water to deliver? Furthermore, as the irrigators strenuously argued, the lower basin Tribes had not participated in Oregon's adjudication of water rights in the Basin.[57] The traditional prior appropriate doctrine, which sought to provide certainty and ensure the priority of state law to determine water rights, would suggest that the lack a clearly quantified tribal water right and failure to comply with the state law should confirm the unlawful taking of the irrigators' water. But, despite the pull of the lords of yesterday, Judge Blank Horn's decision took a different path.

Relying on the precedent established by the tribal claims brought in the last quarter of the 1900s, the Judge outlined the water rights of the Klamath, Yurok, and Hoopa Valley Tribes, which have been variously recognized by treaty or confirmed, pursuant to *Winters*, via the creation of their reservations.[58] Based on those decisions, these rights carry priority dates of time immemorial, in the case of the Klamath and, at the latest, 1891 for the Tribes of the lower basin.[59] When compared to the earliest possible date by which appropriations were made for the Klamath Project—1905—Judge Blank Horn noted that "the priority dates of remaining plaintiffs' water rights must be at least a decade or more later than the latest possible priority date for any of the Tribes' water rights."[60] In addition, recognizing that the tribal rights to water are connected to their ongoing rights to take fish—activities dating back to the beginning of time—the Judge then linked those water rights to the threats posed to fish by lower water levels. Rejecting the irrigators' arguments that tribal rights could be ignored as unquantified, Judge Blank Horn instead held that the amount of water necessary to honor the Tribes' rights corresponded with the amount of water needed to protect the three species of endangered fish that the BOR determined would be harmed if irrigation deliveries were made in 2001.[61] That connection headed off any arguments that the BOR had not considered tribal rights, only the ESA, in rendering that determination. After dismissing the irrigators' quibbles with the BOR's analysis of the science behind determining those amounts, Judge Blank Horn outlined the bottom line of her decision in clear terms:

> The fact is that the Tribes' reserved water rights are senior to the water rights held by the plaintiffs and, therefore, plaintiffs had no entitlement to receive any water until the Tribes senior rights were fully satisfied. Any obligations the government had or might have had towards other users cannot affect the extent or nature of the Tribes' reserved rights . . . . While this result may seem unfair to the plaintiffs, who have perfected their water rights under state law and relied upon those rights,

[56] *Baley*, 134 Fed. Cl. at 673
[57] *Id.* at 679.
[58] *Id.* at 669-72.
[59] *Id.* at 670.
[60] *Id.*
[61] *Id.* at 672-73.

> '[t]his merely reflects the tension between the doctrines of prior appropriation and Indian reserved rights.'[62]

That bottom line confirmed that the BOR did not unconstitutionally take or impair the property rights of Klamath Project irrigators and represented an important rejection of the long-dominant philosophies of development, reclamation, and prior appropriation. In fact, by recognizing the true seniority and federal nature of tribal water rights without regard to state law deference or a need for quantification, the Court of Claims' decision returned to important Indian law concepts announced in *Winans* and *Winters*; foundational doctrines that, until more recently, have gone largely ignored by courts and lawmakers in favor of the lords of yesterday.

Looking Ahead (Toward Redemption)?

Beyond the current bottom line of Judge Blank Horn's decision,[63] the case offers the opportunity to think more broadly about the legacy of bygone eras and the potential for a different tomorrow. While current attempts at collaboration in the Klamath Basin face the hurdles of competing political and legal demands,[64] and litigation regarding ESA compliance or other details of Project management continues,[65] solutions rendered through those processes and dictated in the specific context of litigation are unlikely to crack the deep, iron-fisted grip of the lords of yesterday across the West. Nonetheless, however, the import of this particular decision and its consideration of the Tribes' rights, their connection to the policies and standards of the ESA, and reliance on those rights as the primary and senior rights within the Klamath Basin opens the door to reconsidering how the Klamath Project and the many other legacies of America's colonial history should be addressed. Rather than the "mostly business as usual" approach of much of the prior century that continued to allocate "most wet water …to the beneficiaries of the classic prior appropriation doctrine,"[66] recognizing tribal rights to protect traditional practices and endangered fish suggests the possibility of a new regime. Though that possibility will have to account for the complex effects of water use and other resource management decisions, the promise of promoting tribal rights and interests offers a different perspective and new philosophies divorced from the lords of yesterday to lead the way forward. Indeed, the very presence of tribal rights in these discussions, surviving as they have through repeated attempts to defeat and destroy them, provides an important rejection of the assumptions on which the lords were developed. Beyond that symbolic presence, however, recognizing the value of tribal voices to guide resource management more broadly—not just in Indian Country and not just as other voices among the cacophony of stakeholders—would also mark a critical rejection of the philosophies that have underwritten the marginalization or destruction of tribal rights for over a century, including one of the "sorrier chapters" in the history of federal-tribal relations.[67] By doing so, tomorrow's laws and policies governing resource management in the American West would no longer ignore Supreme Court

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[62] *Id.* at 679 (citations omitted).

[63] That decision has been appealed to the Court of Appeals for the Federal Circuit and, as of this writing, it remains pending a decision. *See* Baley v. United States, Docket No. 18-01323 (Fed. Cir. 2017).

[64] *See, e.g., Two New Klamath Basin Agreement Carve out Path for Dam Removal and Provide Key Benefits to Irrigators*, U.S. Dep't of Interior Press Release (Apr. 6, 2016), https://www.doi.gov/pressreleases/two-new-klamath-basin-agreements-carve-out-path-dam-removal-and-provide-key-benefits (announcing new agreements for dam removal while describing 2010 Klamath Basin Restoration Agreement and its subsequent expiration).

[65] *See, e.g.*, Yurok Tribe v. Bureau of Reclamation, 231 F. Supp. 3d. 450 (N.D. Cal. 2017); Hoopa Valley Tribe v. Nat'l Marine Fisheries Svc., 230 F. Supp. 3d 1106 (N.D. Cal. 2017); Order Transferring Venue and Denying Motion for Preliminary Injunction without Prejudice, *Klamath Tribe v. Bureau of Reclamation*, 2018 WL 3570865 (N.D. Cal., 2018) (No. 18-cv-03078-WHO).

[66] Wilkinson, *supra* note 4, at 286.

[67] *See supra* note 32 and accompanying text.

precedent recognizing tribal rights in favor of the priorities of the reclamation era. Instead, we could begin to reclaim a new legacy, one that might solve, instead of cause, some of the most challenging natural resource management dilemmas of our current era. Reframing the laws of the American West around the rightful claims of tribes and tribal perspectives would offer a new way to approach those challenges without the force of the lords of yesterday pushing in one direction only. Though not a panacea, the decision in *Baley* (and others like it), offer the chance to conceive a different legacy for the future, one untethered from the misguided perspectives of the past.