

# United States Court of Appeals for the Federal Circuit

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**LONNY E. BALEY, ET AL., JOHN ANDERSON  
FARMS, INC., ET AL.,**  
*Plaintiffs-Appellants*

**v.**

**UNITED STATES, PACIFIC COAST FEDERATION  
OF FISHERMEN'S ASSOCIATIONS,**  
*Defendants-Appellees*

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2018-1323, 2018-1325

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Appeals from the United States Court of Federal Claims in Nos. 1:01-cv-00591-MBH, 1:07-cv-00194-MBH, 1:07-cv-19401-MBH, 1:07-cv-19402-MBH, 1:07-cv-19403-MBH, 1:07-cv-19404-MBH, 1:07-cv-19405-MBH, 1:07-cv-19406-MBH, 1:07-cv-19407-MBH, 1:07-cv-19408-MBH, 1:07-cv-19409-MBH, 1:07-cv-19410-MBH, 1:07-cv-19411-MBH, 1:07-cv-19412-MBH, 1:07-cv-19413-MBH, 1:07-cv-19414-MBH, 1:07-cv-19415-MBH, 1:07-cv-19416-MBH, 1:07-cv-19417-MBH, 1:07-cv-19418-MBH, 1:07-cv-19419-MBH, 1:07-cv-19420-MBH, Senior Judge Marian Blank Horn.

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Decided: November 14, 2019

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ROGER J. MARZULLA, Marzulla Law, LLC, Washington, DC, argued for plaintiffs-appellants Lonny E. Baley, Mark

R. Trotman, Baley Trotman Farms, James L. Moore, Cheryl L. Moore, Daniel G. Chin, Deloris D. Chin, Wong Potatoes, Inc., Michael J. Byrne, Byrne Brothers, John Anderson Farms, Inc., Buckingham Family Trust, Eileen Buckingham, Keith Buckingham, Shelly Buckingham, Constance Frank, John Frank, Hill Land and Cattle Co., Inc., Jeff Hunter, Sandra Hunter, McVay Farms, Inc., Barbara McVay, Matthew K. McVay, Michael McVay, Ronald McVay, Suzan McVay, Tatiana V. McVay, Henry O'Keeffe, Patricia O'Keeffe, Shasta View Produce, Inc., Edwin Stastny, Jr., All Plaintiffs. Also represented by NANCIE GAIL MARZULLA. Plaintiffs-appellants John Anderson Farms, Inc., Buckingham Family Trust, Eileen Buckingham, Keith Buckingham, Shelly Buckingham, Constance Frank, John Frank, Hill Land and Cattle Co., Inc., Jeff Hunter, Sandra Hunter, McVay Farms, Inc., Barbara McVay, Matthew K. McVay, Michael McVay, Ronald McVay, Suzan McVay, Tatiana V. McVay, Henry O'Keeffe, Patricia O'Keeffe, Shasta View Produce, Inc., Edwin Stastny, Jr. also represented by ALAN IRVING SALTMAN, Smith, Currie & Hancock LLP, Washington, DC.

JOHN LUTHER SMELTZER, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by ELIZABETH ANN PETERSON, ERIC GRANT, JEFFREY H. WOOD.

TODD D. TRUE, Earthjustice, Seattle, WA, argued for defendant-appellee Pacific Coast Federation of Fishermen's Associations. Also represented by STEPHANIE KATHLEEN TSOSIE.

CHARLES T. DUMARS, Law & Resource Planning Associates, PC, Albuquerque, NM, argued for amicus curiae The Middle Rio Grande Conservancy District. Also represented by TANYA L. SCOTT; LORNA M. WIGGINS, Wiggins, Williams & Wiggins, PC, Albuquerque, NM.

CRAIG A. PARTON, Price, Postel & Parma LLP, Santa Barbara, CA, for amici curiae City of Fresno, Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Terra Bella Irrigation District, Tulare Irrigation District, Kern Tulare Water District, Kaweah Delta Water Conservation District, Tea Pot Dome Water District, Fresno Irrigation District, Friant Water Authority.

DANIEL LUCAS, Office of the Attorney General, California Department of Justice, Los Angeles, CA, for amicus curiae California State Water Resources Control Board. Also represented by XAVIER BECERRA, ROBERT W. BYRNE, ERIC M. KATZ, MELINDA PILLING, San Francisco, CA; JOSHUA A. KLEIN, Oakland, CA.

JAMES HUFFMAN, Portland, OR, for amici curiae Family Farm Alliance, National Water Resources Association.

DAVID E. FILIPPI, Stoel Rives LLP, Portland, OR, for amicus curiae Oregon Water Resources Congress. Also represented by KIRK BENNY MAAG; STEVEN L. SHROPSHIRE, Jordan Ramis PC, Bend, OR.

DOUGLAS W. MACDOUGAL, Marten Law PLLC, Portland, OR, for amici curiae Oregon Farm Bureau Federation, California Farm Bureau Federation, Idaho Farm Bureau Federation, New Mexico Farm and Livestock Bureau, Colorado Farm Bureau, Nevada Farm Bureau, Utah Farm Bureau Federation, Wyoming Farm Bureau Federation. Also represented by SARAH ELIZABETH PETERSON,

Coblentz Patch Duffy & Bass LLP, San Francisco, CA.

DAVID R.E. ALADJEM, Downey Brand LLP, Sacramento, CA, for amicus curiae Association of California Water Agencies. Also represented by SAMUEL BIVINS, AVALON J. FITZGERALD, MEREDITH E. NIKKEL.

DENISE FJORDBECK, Oregon Department of Justice, Salem, OR, for amicus curiae State of Oregon. Also represented by BENJAMIN N. GUTMAN, ELLEN F. ROSENBLUM.

ROBERT T. ANDERSON, University of Washington School of Law, for amici curiae Robert T. Anderson, Reed D. Benson, Michael C. Blumm, Barbara Cosens, Sarah Krakoff, John D. Leshy, Monte Mills, Joseph William Singer, A. Dan Tarlock, Charles F. Wilkinson, Jeanette Wolfley. Amici curiae Michael C. Blumm, John D. Leshy, also represented by DAVID R. OWEN, Hastings College of Law, University of California, San Francisco, CA,

DAVID R. OWEN, Hastings College of Law, University of California, San Francisco, CA, for amici curiae Robert Abrams, Craig Anthony Arnold, Karrigan Bork, Lee P. Breckenridge, Michelle Bryan, Robin K. Craig, Daniel A. Farber, Richard M. Frank, Eric Freyfogle, Robert L. Glicksman, Sean B. Hecht, Oliver A. Houck, Blake Hudson, Christine A. Klein, Rhett Larson, Timothy M. Mulvaney, David R. Owen, Patrick Parenteau, Justin Pidot, Antonio Rossmann, J.B. Ruhl, Erin Ryan, Mark Squillace, David Takacs, Gerald Torres, Sandra Zellmer, Michael Pappas.

SUSAN Y. NOE, Native American Rights Fund, Boulder, CO, for amicus curiae Klamath Tribes.

THOMAS PAUL SCHLOSSER, Morisset Schlosser Jozwiak & Somerville, Seattle, WA, for amicus curiae Hoopa Valley Tribe. Also represented by THANE D. SOMERVILLE.

JOHN ECHEVERRIA, Vermont Law School, South Royalton, VT, for amicus curiae Natural Resources Defense Council.

AMY CHRISTINE CORDALIS, Yurok Tribe, Klamath, CA, for amicus curiae Yurok Tribe.

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Before NEWMAN, SCHALL, and CHEN, *Circuit Judges*.  
SCHALL, *Circuit Judge*.

#### INTRODUCTION AND DECISION

This case arises out of the Klamath River Basin reclamation project (“the Klamath Project” or “the Project”). The Project straddles the southern Oregon and northern California borders. Key features of the Project are Upper Klamath Lake in Oregon, where water is stored for the Project, and the Klamath River. The Klamath River rises at the south end of Upper Klamath Lake and flows from Oregon into California. The river eventually enters the Pacific Ocean near Klamath, California. The Project supplies water to hundreds of farms, comprising approximately 200,000 acres of agricultural land. The Project is managed and operated by the United States Department of the Interior’s Bureau of Reclamation (“the Bureau of Reclamation” or “the Bureau”). The Bureau of Reclamation also manages the Klamath Project to protect the tribal trust resources of several Native American Tribes.

In 2001, the Bureau temporarily halted water deliveries to farmers and irrigation districts served by the Project. It took this action in order to meet the requirements of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (2000) (“the ESA”), as outlined in Biological Opinions from the United States Fish and Wildlife Service (“the FWS”) and the United States National Marine Fisheries Service (“the NMFS”). It also took this action in order to meet its tribal trust obligations.

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