Klamath Water Users Association

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ARGUMENT SCHEDULED IN WATER "TAKINGS" CASE

A federal appeals court has set July 8, 2019 as the date for oral argument in a lawsuit of critical importance to Klamath Project irrigators that was filed 18 years ago.

"This hearing will provide local irrigators with an opportunity to explain why the federal government should be required to compensate Klamath Project farmers and ranchers when it re-allocated irrigation water to threatened and endangered species in 2001," said Nathan Ratliff, the attorney coordinating local efforts in the case

The case, titled *Baley, et al. v. United States*, has had a long history since it was filed that year. It has been the subject of several rulings, including one in 2010 by the Oregon Supreme Court when it answered questions about state law upon request of the federal court. The actual trial in the case occurred in early 2017, and U.S. Court of Federal Claims judge Marian Blank Horn issued her ruling after trial in September of 2017. That decision denied the water users' claims, and the decision was appealed to the U.S. Court of Appeals for Federal Circuit.

In April of 2001, the U.S. Bureau of Reclamation announced that there would be no irrigation water at all for water users who rely on water from Upper Klamath Lake and the Klamath River. Reclamation had received biological opinions from the National Marine Fisheries Service and Fish and Wildlife Service that stated that all water in the system had to coho salmon and suckers protected by the federal Endangered Species Act (ESA). The controversial decision caused severe local hardship and it received international attention.

"The *Baley* lawsuit relies on the fact that rights to use water are property rights owned by landowners," said Mr. Ratliff. "The Fifth Amendment to the U.S. Constitution requires that the government provide just compensation for any taking of private property."

Judge Horn ruled that some landowners do not have compensable property interests due to particular language in some districts' water delivery contracts. She also concluded that un-adjudicated and senior tribal instream water rights must be at least as great as the ESA-based Klamath River flows and lake elevations, and therefore the water users did not have the right to the water under the western prior appropriation doctrine.

“This ruling was a disappointment, to say the least,” said Lower Klamath farmer Lynn Long.

Mr. Long, who testified in the case, said that the damages in 2001 are less important now than the principle.

“We’re family farms; we want to farm and irrigate,’ he said. “But if the federal government decides to allocate irrigation water to another social purpose, the greater public should pay for what it is taking.”

The case is certified as a class action. Marzulla Law, LLC a Washington, D.C. law firm specializing in Fifth Amendment cases, represents the class. Ratliff said that the issues have generated interest from many other parties in the country.

“We’ve seen ‘friend of the court’ briefs filed by parties as diverse as the State of Oregon and the Middle Rio Grande Conservancy District in New Mexico,” said Mr. Ratliff. “That’s important in helping the appellate court understand western water law, adjudication, and water rights administration that we believe are critical.”

Mr. Ratliff said there is no deadline for a decision by the appellate court after the oral argument occurs.

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