

# Native American Rights Fund

## Indigenous Peoples' Rights

<https://www.narf.org/cases/baley-v-us/>

## Campaign and Advocacy

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Status: Archived

**After the Bureau of Reclamation curtailed Klamath Project water deliveries in 2001 during a severe drought, irrigators in Oregon's Klamath River Basin sued the government for nearly \$30 million in compensation. NARF represented the Klamath Tribes, which have senior water rights in the region, as amicus curiae (friends of the court) in the case. In this case the Klamath Tribes treaty water rights were confirmed once again as the most senior water rights in the basin; rights which are critical to protect the Tribes fisheries and traditional way of life for future generations.**

In 2001, a massive drought struck California and Oregon's Klamath River Basin. During the drought, the United States government followed federal and Oregon law, which required that water levels be maintained to protect imperiled coho salmon in the Klamath River and two species of sucker fish in the Upper Klamath Lake. The sucker fish, known in the Klamath language as *cwaam* (Lost River suckers) and *qapdo* (shortnose suckers), are of enormous importance to the cultural, economic, and spiritual well-being of the Klamath Tribes. Salmon, historically an important treaty resource for the Klamath Tribes, have been blocked by dams from reaching the Upper Klamath Basin since the early 1900s.

The Klamath Tribes have resided in the Klamath Basin for millennia, sustaining themselves upon the Basins fish and other water-dependent resources. In an 1864 treaty with the United States, the Klamath Tribes relinquished millions of acres of their aboriginal homeland but retained, among other things, a guarantee of their right to take fish in the Klamath Indian Reservations streams and lakes. The Klamath Tribes water rights have been previously confirmed to hold a time immemorial priority date, which makes them senior to all other water rights in the Basin. The seniority of these tribal water rights has been repeatedly and consistently recognized by the courts and, more recently, this seniority was again recognized by the State of Oregon in its Klamath Basin Adjudication.

On June 22, 2020, the United States Supreme Court declined to hear the Klamath Project irrigators Fifth Amendment water rights takings case *Baley v. United States*. This is a tremendous victory for the Klamath Tribes as well as for the other Klamath Basin tribes, the United States, and environmental groups. In this case the Klamath Tribes treaty water rights were confirmed once again as the most senior water rights in the basin; rights which are critical to protect the Tribes fisheries and traditional way of life for future generations.

Klamath Tribes Chairman Don Gentry stated, We were pleased to have this case put to rest and the seniority of the Klamath Tribes water rights recognized and reinforced. The courts in this case were correct about our treaty rights, which include protecting and sustaining the endangered Cwam and Koptu in Klamath Lake. We look forward to healing and restoring our tribal fisheries.

NARF [Executive Director John Echohawk](#) praised the outcome, We were proud to represent the Klamath Tribes throughout this 19-year-long litigation. The law is very clear about the Klamath Tribes senior water rights in the region. The courts have been very clear as well. We are glad the courts reached the right outcome in this case and that tribal rights and sovereignty have been affirmed.

Klamath Project irrigators sought nearly \$30 million in compensation from the United States government for the Bureau of Reclamations curtailment of water deliveries during a severe drought in 2001. The water restrictions were made to meet Endangered Species Act requirements and fulfill tribal trust responsibilities. Although the decision hinged on recognition of the senior tribal water rights, the case technically was between the irrigators and the United States. The Klamath Tribes participated as *amicus curiae* (friends of the court) to assure that the courts did not ignore the role of tribal water rights.

In 2017, the US Court of Claims confirmed that the Klamath Tribes and downriver Klamath Basin tribes have senior water rights that take priority over those of the Project irrigators. Thus, the irrigators were not entitled to receive any Project water in 2001 under the western water law system of first in time, first in right. In 2019, the US Court of Appeals affirmed that decision and went on to declare that the Klamath Tribes water rights include Upper Klamath Lake waters and that, in 2001, the Klamath Basin tribes were entitled to at least the amount of water required to meet Endangered Species Act requirements. With the Supreme Courts refusal to review the lower courts decision, the case is closed, and the decisions from the lower courts stand.

On November 14, 2019, [the United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims decision in \*Baley v. United States\*](#), denying compensation to Klamath Project irrigators for a claimed 2001 taking of their water rights by the United States government. The decision hinged on recognition of the senior tribal water rights of the Klamath Tribes and other downriver Klamath Basin tribes. This is a tremendous victory for the Klamath Tribes, which NARF represented as amicus curiae in the case, as well as for the other Klamath Basin tribes, the United States, and environmental groups.

In this long-running case, Klamath Project irrigators sought nearly \$30 million in compensation from the United States government for the Bureau of Reclamations curtailment of Project water deliveries during a severe drought in 2001. The water restrictions were made to meet Endangered Species Act requirements and fulfill tribal trust responsibilities. Among other things, the irrigators claimed that tribal water rights were not relevant to Reclamations water management decisions. In late 2017, the US Court of Claims confirmed that the

Klamath Tribes and downriver Klamath Basin tribes have senior water rights over other water interests in the Klamath Basin. Thus, the Project irrigators, as junior water rights users under the western water law system of first in time, first in right, were not entitled to receive any Project water in 2001.

In appealing the case, the irrigators disputed whether the tribal water rights included all of the water Reclamation withheld from delivery in 2001. The irrigators also argued that the Klamath Tribes do not have water rights in Upper Klamath Lake, which is outside of and forms part of the boundary of the Klamath Tribes former reservation. With this weeks ruling, the US Court of Appeals declared, once again, that the Klamath Tribes water rights are the most senior in the region, with a priority date of time immemorial, and that the senior tribal water rights entitle the tribes, at the least, to the amount of water withheld by Reclamation to meet Endangered Species Act requirements. The court also affirmed that the Klamath Tribes water rights include waters in Upper Klamath Lake that secure the Tribes treaty fishing rights.

Klamath Tribes Chairman Don Gentry stated, We are pleased that the court affirmed the lower court decision and once again recognized the seniority of the Klamath Tribes water rights. Most importantly, this decision again recognizes the significance of our treaty rights, which include protecting and sustaining the endangered *Cwam* and *Koptu* and our other treaty resources in Klamath Lake.

NARF [Staff Attorney Sue Noe](#) was not surprised by the courts ruling, The courts continue to rule in favor of the Klamath Tribes water rights because it is the only interpretation that makes sense. The Tribes have lived in the Klamath Basin for millennia. In an 1864 treaty they relinquished millions of acres of their homeland to the United States in exchange for guarantees, including protections for the tribal right to harvest fish in their streams and lakes. There is no expiration date on those treaty promises, and they cement the Tribes top water rights in the region.

#### **September 2017: U.S. Court of Claims Re-affirms Klamath Senior Water Rights**

On September 29, 2017, US Court of Claims Judge Marian Blank Horn resoundingly re-affirmed the superiority of the senior water rights of the Klamath Tribes and downriver Klamath Basin tribes over other water interests in the Klamath Basin.

In the case decided Friday, the Klamath Reclamation Project irrigators sought nearly \$30 million in compensation from the United States government because of the Bureau of Reclamations curtailment of Project water deliveries during a severe drought in 2001. The irrigators argued that the governments actions constituted a taking of their property under the Fifth Amendment to the United States Constitution, by depriving them of their alleged rights to use Klamath Project water. In accordance with briefs filed by the Native American Rights Fund (NARF) on behalf of the Klamath Tribes (download the Tribes briefs: dated [April 24, 2017](#) and [August 24, 2016](#)), the court denied the irrigators claims, ruling the irrigators were not legally entitled to receive any Project water in 2001, because the water was needed to fulfill the senior water rights of the tribes.

Klamath Tribes Chairman Don Gentry stated, We are pleased with the decision. This affirmation of the Tribes water rights should be another positive step towards the healing and restoration of our tribal treaty fisheries. NARF [Staff Attorney Sue Noe](#) noted, The Project irrigators took the position that the tribal water rights were irrelevant to their claims. Thankfully, the Court has made clear that the days of junior water users ignoring the senior tribal rights is over.

Judge Horns decision confirmed yet again the seniority of the Klamath Tribes rights and their superiority under the Western water law doctrine of prior appropriation in which water users with junior rights are not entitled to receive any water until all senior rights have been fully satisfied first in time, first in right. A ruling for the junior Project irrigators would have turned Western water law on its head, declared Noe.

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