

## Recognizing the Limits of Water Rights: Rejecting Takings Claims in *Klamath Irrigation District v. United States*

by Esther L. Westbrook

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*Editors' Summary: The Klamath Basin of southern Oregon and northern California is the setting of a water rights conflict that is about much more than just water. In this Article, Esther Westbrook examines a recent decision of the Court of Federal Claims, Klamath Irrigation District v. United States, that addresses some of the legal issues implicated when water rights, unsustainable land use, and endangered species collide. The case reminds us that water rights in the West come with legal restraints and limitations and that the government must work toward developing water policies that meet the needs of a changing society.*

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### I. Introduction

In the arid West, few natural resources are as sought after—or as fought over—as water. The paradigm example may be Klamath River Basin, a 10.5 million-acre area in southern Oregon and northern California<sup>1</sup> containing numerous lakes, six major rivers and their tributaries, and ecologically important freshwater wetlands. In the Klamath Basin, competing claims for water and diametrically opposed views about the best and wisest use of the available water have engendered conflict so intense that it threatens to tear communities apart.<sup>2</sup> This ongoing conflict has played out not only in the courts and the political arena, but also on the soil and water of the basin, as the people who have come to rely on those resources for food, livelihood, and spiritual sustenance struggle to preserve their way of life.

The laws governing the use of water in the Klamath Basin are largely vestiges of 19th century ideas, products of an era in which land, water, and other natural resources were apparently abundant, and the law was a means of facilitating economic growth and social progress.<sup>3</sup> The Reclamation

Act of 1902<sup>4</sup> directed the U.S. Bureau of Reclamation (Bureau) to build and maintain reclamation project facilities throughout the West, including the Klamath Basin, consistent with the Act's goals of promoting the growth of an agricultural society in the region and limiting water rights speculation.<sup>5</sup> Although the Bureau's main focus remains serving its irrigation customers, the agency has recently become more sensitive to other water uses, such as municipal and industrial uses, tribal needs, and maintaining stream flows necessary to support fish and wildlife, water quality, and recreation.<sup>6</sup>

When the Bureau has restricted water deliveries in order to protect other uses, irrigators, many of whom appear to believe their water rights are absolute and superior to other important claims to reclamation project water, have sought to enforce their rights in court.<sup>7</sup> Further, owners of water rights have asserted that under the U.S. Constitution's prohibition against taking private property for public use without paying just compensation, they are entitled to compensation when the government restricts their water deliveries in favor of protecting species listed under the Endangered Species Act (ESA).<sup>8</sup> In *Klamath Irrigation District v. United States*,<sup>9</sup> the Court of Federal Claims decisively rejected one of these claims, holding that irrigators' rights to reclamation project

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1. Oregon Natural Resources Council, *Klamath Basin* (2005), <http://www.onrc.org/programs/klamath.html> (last visited June 28, 2006).
2. See Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 321-22 (2003) (describing protests and acts of civil disobedience resulting in response to the Bureau's restriction of water deliveries to irrigators in 2001).
3. See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (Island Press 1992).

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4. Ch. 1093, 32 Stat. 388 (codified, as amended, at 43 U.S.C. §§371 et seq.).

5. Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 365-66 (1997).

6. *Id.* at 364.

7. See, e.g., *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990 (1998); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 31 ELR 20648 (2001).

8. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

9. 67 Fed. Cl. 504 (2005).

water are not property rights that enjoy constitutional protection; instead, they are ordinary contractual rights having no such protected status.<sup>10</sup>

This Article examines *Klamath* in the context of the Klamath conflict, comparing it with an earlier case that came to the opposite conclusion, and contemplating its potential consequences. Part II begins with a discussion of the situation in the Klamath Basin, including its geographical setting, the people and cultures involved, and its environmental conditions. Part III presents background principles of water and reclamation law, the Takings Clause, and the ESA relevant to understanding these decisions. Part IV discusses *Tulare Lake Basin Water Storage District v. United States*,<sup>11</sup> a 2001 case in which the Court of Federal Claims held that water use restrictions imposed under the ESA constituted a physical taking, compensable under the Fifth Amendment. Part V evaluates *Klamath*, in which the same court (although a different judge) came to the opposite conclusion on the constitutional takings issue, suggesting that the *Klamath* decision stands on more solid ground than *Tulare Lake*. Part VI examines the implications of the *Klamath* decision on the future of the Klamath Basin, including the more accurate description of the water rights held by irrigators and the ability of the Bureau and other agencies to provide water for important nonagricultural uses without fear of subjecting the government to takings suits. The Article concludes that the *Klamath* decision is a significant development in water law because it resolutely acknowledges the legal restraints and limitations that have always come with water rights in the West and recognizes the government's capacity to set water policy that meets the needs of a changing society.

## II. Surveying the Landscape

The Klamath Basin is a study in contrasts. It contains dissimilar terrains, conflicting cultures, and incompatible land uses. This section explores those differences with the objective of putting the conflict in its proper perspective.

### A. The Geographical Setting

The Klamath River,<sup>12</sup> which flows from the southern end of Upper Klamath Lake near Klamath Falls, Oregon, to the Pacific Ocean in Humboldt County, California, is the dominant feature of the vast watershed that straddles Oregon and California. The area is generally divided into an upper and lower basin: the upper basin extends north and east from the Iron Gate Dam, just inside the California border on the river's main stem; the lower basin extends south and west from that point.<sup>13</sup> The upper and lower basins differ in many

respects, including geology, topography, climate, and diversity of plants and wildlife. The upper basin's large valleys, which contain large natural lakes and wetlands, were formed by volcanic activity and are characterized by a high desert climate.<sup>14</sup> In contrast, the lower basin is populated by rugged mountains bearing dense forests of conifer and fir trees, fertile river valleys, and a climate that is milder and much wetter than that of the upper basin.<sup>15</sup> In the upper basin, the Klamath River is fed primarily by the Williamson and Wood Rivers and their tributaries, which drain into Upper Klamath Lake, and Lost River, which has been connected to the Klamath River through engineering as part of the Klamath Irrigation Project.<sup>16</sup> The main tributaries of the Klamath in California are the Salmon, Scott, and Trinity Rivers.<sup>17</sup>

The current appearance and condition of the basin's water bodies bear little resemblance to their natural state. Six dams operate on the main stem of the Klamath River, five of which produce hydropower.<sup>18</sup> There are also several diversion dams on tributaries, as well as an elaborate system of diversion channels, canals, laterals, drains, and tunnels in the Klamath Project.<sup>19</sup> Water is stored in Upper Klamath Lake, Clear Lake, and Gerber Reservoir for agricultural use, and water that has not been used is returned to the river through Tule Lake, Lower Klamath Lake, or Lost River.<sup>20</sup>

The Klamath Basin contains six National Wildlife Refuges, the largest of which is the Lower Klamath National Wildlife Refuge, established in 1908 by President Theodore Roosevelt as the country's first refuge for waterfowl.<sup>21</sup> The refuge is home to bald and golden eagles, pelicans, ibis, numerous species of ducks and geese, and many other bird species.<sup>22</sup> According to the U.S. Fish and Wildlife Service (FWS), 433 species of wildlife have been observed on or near the Klamath refuges.<sup>23</sup> One visitor offered this description:

I've seen sandhill cranes, their plumage adorned (or camouflaged) with ruddy clay, dancing in mountain meadows. I've seen snow geese arrive from the North, their bodies dazzling, their pristine wings trimmed ele-

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*Science*: Truth and Consequences for Endangered Species in the Klamath Basin and Beyond, 32 *ECOLOGY* L.Q. 73 (2005).

14. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 19.

15. *Id.*

16. *Id.* at 20.

17. Doremus & Tarlock, *supra* note 2, at 289.

18. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 23. These dams are owned and operated by PacifiCorp pursuant to agreements with the Bureau. *Id.*

19. See U.S. Bureau of Reclamation, *Klamath Project*, <http://www.usbr.gov/dataweb/html/klamath.html#plan> (last visited June 28, 2006).

20. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 21. The beds of Tule Lake and Lower Klamath Lake are farmed and used for drainage purposes, existing as wetlands only when inundated. *Id.* at 22.

21. U.S. Fish & Wildlife Service (FWS), *Lower Klamath National Wildlife Refuge*, <http://www.fws.gov/klamathbasinrefuges/lowerklamath/lowerklamath.html> (last visited June 28, 2006).

22. *Id.* The Klamath Basin hosts the largest population of bald eagles in the continental United States each winter, and the area serves as a rest stop for most of the birds who migrate along the Pacific Flyway. Doremus & Tarlock, *supra* note 2, at 293.

23. FWS, *Refuge History*, <http://www.fws.gov/klamathbasinrefuges/history.html> (last visited June 28, 2006). Only 25% of the historic wetlands remain due to the Bureau's conversion of these areas into farmland. *Id.*

10. *Id.* at 540.

11. 49 Fed. Cl. 313, 31 ELR 20648 (2001).

12. The river's name comes from the Indian word *klamet*, meaning "swiftness." Wikipedia, *Klamath River, History*, [http://en.wikipedia.org/wiki/Klamath\\_River](http://en.wikipedia.org/wiki/Klamath_River) (last visited June 28, 2006).

13. NATIONAL RESEARCH COUNCIL, *ENDANGERED AND THREATENED FISHES IN THE KLAMATH RIVER BASIN: CAUSES OF DECLINE AND STRATEGIES FOR RECOVERY* 19 (Nat'l Academic Press 2004). For a discussion of the scientific and policy considerations involved in the council's preparation of this study and its predecessor, see Daniel J. McGarvey & Brett Marshall, *Making Sense of Scientists and "Sound*

gantly with black. These western spaces are inhabited by geese, by cranes almost the size of humans. Water and grain attract them as they stage for their journey. If we allow it, a few inches of water can contain all of history. Whole worlds can shimmer in layers and folds just above the marsh.<sup>24</sup>

The refuges are not immune from the environmental problems plaguing the basin; low water levels and poor water quality significantly impair the value of the refuges to birds and other wildlife.

### B. The Human Element

Before the arrival of white settlers, numerous Native American tribes and their ancestors had inhabited the Klamath Basin for 11,000 years. The Klamath and Modoc Indians lived in the upper basin and subsisted mainly on suckerfish.<sup>25</sup> The lower basin was home to four Indian tribes—the Hoopa, Karuk, Shasta, and Yurok—which relied on salmon and coastal resources to varying extents.<sup>26</sup> The Lost River and shortnose suckers, called *c'waam* and *qapdo* by the Klamath Tribes, also have spiritual significance—their return each spring is celebrated with a Return of *c'waam* Ceremony on the Sprague River, where *gmok'am'c*—the Creator—began the tradition ages ago.<sup>27</sup> Beginning in the 1820s, the lives and cultures of these people were forever changed by the sequential influxes of trappers, then gold miners, and then farmers and ranchers to the area. The once prosperous tribes of the Klamath Basin have been relegated to life on reservations, where the social, cultural, and economic conditions are bleak.<sup>28</sup> The situation is even worse for the Klamath Tribe. It was legally terminated in 1954, resulting in the loss of its reservation lands.<sup>29</sup>

The farming and ranching culture dominates the Klamath Basin. According to a 1999 study by the U.S. Department of Agriculture, there are 2,239 farms in the upper basin, with an average size of 896 acres, about four-fifths of which are sole proprietor farms where the operator lives on the land.<sup>30</sup> In the lower basin, there are 974 farms with an average size of 653 acres, 61% of which are owned by sole proprietors.<sup>31</sup> Although the image of the small family farmer epitomizes the traditional view of the Klamath Basin, it no longer reflects the economic and social reality. A 2001 study prepared by ECONorthwest found that in 1998 the farm sector was responsible for just 10% of the employment in

Klamath County, Oregon, and only one-half a percent of the net income.<sup>32</sup>

The basin's struggling farms were dealt a heavy blow when the Bureau cut off their irrigation water to comply with biological opinions prepared by the FWS and the National Oceanic and Atmospheric Administration (NOAA) Fisheries in April 2001, which concluded that higher water levels were needed to protect three ESA-listed fish species—endangered shortnose and Lost River suckers and threatened coho salmon.<sup>33</sup> As more than 200,000 acres of farmland dried up, farm workers and other locals left, businesses closed, and communities crumbled.<sup>34</sup> The farmers viewed the issue largely as them against everyone else, and also as proof that the ESA is a draconian statute that values insignificant species above people.<sup>35</sup> Cutting off the flow of irrigation water for the summer of 2001 led to protests, instances of lawlessness, and even crimes against other people. On several occasions, farmers illegally opened the locked head gates at Upper Klamath Lake and released water into the canal, supported by crowds of protestors and the local sheriff's department, which refused to interfere.<sup>36</sup> Feelings of animus toward Native Americans were pervasive, as farmers and their allies perceived them as the impetus for the listings.<sup>37</sup> The U.S. Department of the Interior (DOI) later discovered an accounting error, allowing it to release some irrigation water, but the farmers maintained that it was too late in the growing season to help matters.<sup>38</sup>

The other main group vying for limited resources in the Klamath Basin is commercial fishermen.<sup>39</sup> Coho and chinook salmon were once abundant and widely distributed throughout the basin. By the early 20th century, commercial harvests of salmon had been decimated by over-harvesting

24. JOHN R. CAMPBELL, *ABSENCE AND LIGHT: MEDITATIONS FROM THE KLAMATH MARSHES* 20-21 (Univ. of Nevada Press 2002).

25. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 58.

26. *Id.* at 58-59.

27. The Klamath Tribes, *Klamath Tribes History*, <http://www.klamathtribes.org/history.html> (last visited June 28, 2006); The Klamath Tribes, *Lost River Suckers and Shortnose Suckers*, <http://www.klamathtribes.org/suckers.htm> (last visited June 28, 2006). The website includes the following statement by Allen Foreman, Chairman of the Klamath Tribes: "Harvesting *c'waam* is our heritage and our legal right. These fish are as much a crop to the Klamath Tribes as potatoes are to the farmers. We used to harvest thousands of fish. Now we are restricted to a single fish each year for ceremonial purposes." *Id.*

28. See Doremus & Tarlock, *supra* note 2, at 297.

29. *Klamath Tribes History*, *supra* note 27. Although the tribe regained its legal recognition in 1986, its lands were not restored. *Id.*

30. NATIONAL RESEARCH COUNCIL, *supra* note 13, tbl. 2-5.

31. *Id.* tbl. 2-11.

32. ERNIE NIEMI ET AL., *COPING WITH COMPETITION FOR WATER: IRRIGATION, ECONOMIC GROWTH, AND THE ECOSYSTEM IN THE UPPER KLAMATH BASIN* tbl. 9 (2001), available at <http://www.econorthwest.com/resourcereports.html>. These statistics reflect a national and regional trend in the agricultural sector. *Id.* at 76. The study cited data from the Bureau of Economic Analysis that showed that in Oregon, farm income as a percentage of total income dropped from almost 4% in 1974 to less than 0.9% in 1998. *Id.*

33. For a detailed discussion, see *infra* Part V.

34. See Douglas Jehl, *Cries of "Save the Suckerfish" Rile Farmers' Political Allies*, N.Y. TIMES, June 20, 2001, at A1.

35. For the irrigators' perspective, see the Klamath Basin Crisis website at <http://www.klamathbasincrisis.org/index.htm> (last visited June 28, 2006).

36. *Farmers Force Open Canal in Fight With U.S. Over Water*, N.Y. TIMES, July 6, 2001, at A10. The police and district attorney's office saw the acts of trespass, property damage, and theft as a federal matter that only federal authorities could enforce. Douglas Jehl, *Officials Loath to Act as Water Meant for Endangered Fish Flows to Dry Western Farms*, N.Y. TIMES, July 9, 2002, at A8. In response, the Bureau stationed federal police at the head gates and installed a \$900,000 security system consisting of a security fence, video cameras, and motion sensors. *Video Security for Canal That Farmers Fought to Use*, N.Y. TIMES, Jan. 2, 2002, at A12.

37. In December 2001, three men from the Klamath Falls area went on a racially motivated shooting rampage in the predominately Indian town of Chiloquin, in which they fired shotguns at signs and structures and shouted "Sucker lovers!" *3 Accused of Shooting Up Oregon Town; Water Dispute Cited*, N.Y. TIMES, Dec. 21, 2001, at A25.

38. See *infra* note 114 and accompanying text.

39. The Pacific Coast Federation of Fishermen's Associations (PCFFA) has served as the voice of the commercial fishing industry throughout the Klamath conflict. See PCFFA's website at <http://www.pcffa.org/> (last visited June 28, 2006).

and habitat destruction.<sup>40</sup> Lower river and coastal harvests of coho and chinook have been kept on life support by hatchery programs, and many fishermen argue that the federal government's water policies are to blame for crippling the fishing industry.<sup>41</sup> Fishermen have resorted to the legal process to protect their interests in harvestable fish runs.<sup>42</sup>

### C. *The Environmental Consequences*

The transformation of the Klamath Basin from its natural state as forests, wetlands, lakes, and meandering rivers to its current state as predominately farmland and cattle range began with the efforts of the Bureau at the turn of the 20th century. The Bureau achieved its goal of "making the desert bloom" by draining ecologically important wetlands and flooding dry areas in order to convert them to "productive" use. Unfortunately, such practices have wreaked havoc on the land, water, fish, and wildlife.

Water quality in the Klamath Basin is particularly problematic. The Oregon Department of Environmental Quality determined that the basin's standing water bodies are highly eutrophic, meaning they have high levels of nitrogen and phosphorous, promoting the growth of plankton, algae, and aquatic plants, and, in turn, causing variations in pH (hydrogen ion concentration) and oxygen levels harmful to other aquatic species.<sup>43</sup> The source of these nutrients is primarily runoff from fertilizer applications and animal husbandry. Ranching operations also impair water quality because grazing animals defecate and urinate in or near streams, increasing the possibility of bacterial contamination, and they destroy riparian vegetation, leading to erosion, sedimentation, and increased water temperatures, all of which are harmful to fish and other aquatic species.<sup>44</sup>

Massive fish kills are a dramatic indication that the waters of the Klamath Basin are ailing. In September of 2002, a large run of fall chinook salmon returned to spawn in the lower Klamath River.<sup>45</sup> Under normal circumstances, such healthy numbers of returning salmon would be a cause for celebration; that fall, it was viewed as a calamity. Precipitated by several factors discussed below, a disease outbreak caused a fish kill of unprecedented size, which, according to FWS estimates, resulted in a total mortality of at least

33,000 fish, the vast majority of which were chinook.<sup>46</sup> Both the numbers of fish killed and the causes of the die-offs were hotly contested. Although scientists and others agreed that infections were the direct cause of the deaths, they disagreed as to the role of low flows, high water temperatures, poor water quality, and a period of warm, dry weather.<sup>47</sup> The Bureau eventually released a small pulse of water, but unfortunately for the salmon it was too little, too late.<sup>48</sup> Sadly, history repeated itself during July 2005, when another serious fish kill occurred in the upper basin. High temperatures and poor water conditions, including an algae bloom, reportedly caused the death of 100,000 fish on the Upper Klamath River between Klamath Falls and the Keno Dam.<sup>49</sup> Although most of the fish affected were tui chubs and fathead minnows, Bureau scientists estimated that several thousand endangered suckers perished.<sup>50</sup> For species at the brink of extinction, such mass die-offs add an extra element of uncertainty to their future.

### III. The Legal Foundations

*Tulare Lake* and *Klamath Irrigation District* both involved the interplay between water law, the takings doctrine, and the ESA—all complex and controversial legal subjects. Although a comprehensive examination of these areas of law is beyond the scope of this Article, this part will discuss aspects that are pertinent to understanding these cases.

#### A. *Water Rights in the Klamath Basin*

Since the Secretary of the Interior authorized the construction of the Klamath Project in 1905, the Bureau has been the dominant force in shaping water use in the basin.<sup>51</sup> The project currently provides water for more than 1,300 farms, irrigating a total of 240,000 acres, including national wildlife refuges and a small amount of nonagricultural lands.<sup>52</sup>

40. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 71. Chinook populations are relatively abundant and still support commercial, sport, and tribal fisheries. *Id.* at 263.

41. The PCFFA predicted that the salmon industry would suffer losses of at least \$100 million in 2005. Glen Spain & Zeke Grader, *Can't Fish Salmon? Federal Klamath Water Policies Are to Blame*, FISHERMEN'S NEWS (2005), <http://www.pcffa.org/fn-apr05.htm>.

42. *See, e.g.*, Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (challenging the Bureau's 2000 Operations Plan for the Klamath Project for failure to formally consult with the National Marine Fisheries Service (NMFS)).

43. Curtis Cude, *Oregon Water Quality Index Report for Klamath Basin: Water Years 1986-1995*, <http://www.deq.state.or.us/lab/wqm/wqi/klamath/klamath3.htm> (last visited June 30, 2006).

44. *Id.* California and Oregon have joined in a cooperative effort to develop total maximum daily load (TMDL) standards for temperature, nutrients, and other substances in the water bodies of the basin. *See* OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, FACT SHEET: STATUS OF LOST RIVER AND KLAMATH RIVER TMDLS (2004), available at <http://www.deq.state.or.us/wq/wqfact/lostrivklamathrivtmdlstatusfactsheet.pdf>.

45. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 279. The run size was estimated at 132,000 fish. *Id.*

46. *Id.* at 278.

47. Fishermen and Native Americans blamed the George W. Bush Administration and the Bureau for causing the die-offs, arguing that their policy of favoring irrigators over other interests created a drought in the Lower Klamath that prevented the salmon from migrating; the Bureau denied that withholding water from the river caused the event, and emphasized the role of the weather and natural factors. Timothy Egan, *As Thousands of Salmon Die, Fight for River Erupts Again*, N.Y. TIMES, Sep. 28, 2002 at A1.

48. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 283. *See* Dean E. Murphy, *U.S. Sees No Tie to Water Plan in Deaths of Fish in California*, N.Y. TIMES, Oct. 3, 2002, at A25 (quoting Glen Spain of the PCFFA as stating, "[t]he main reason that the fish kill started to decline before the slug of water got to the lower river is because the majority of the fish had been dead by then," and noting that the DOI described the situation as a battle for water between salmon and sucker fish in Upper Klamath Lake).

49. John Driscoll, *Fish Die-Off on Upper Klamath*, EUREKA TIMES-STANDARD, July 25, 2005, <http://www.klamathforestalliance.org/Newsarticles/newsarticle20050725.html>.

50. Dylan Darling, *Heat Blamed for Klamath Fish Kill*, KLAMATH FALLS HERALD & NEWS, July 21, 2005, <http://www.klamathforestalliance.org/Newsarticles/newsarticle20050725.html>.

51. *See* ERIC A. STENE, THE KLAMATH PROJECT (SEVENTH DRAFT) (Bureau of Reclamation 1994), available at <http://www.usbr.gov/dataweb/html/klamath.html> (providing the history of the Klamath Project).

52. U.S. Bureau of Reclamation, *Project Data*, <http://www.usbr.gov/dataweb/html/mpklapjdata.html> (last visited June 28, 2006) (using 1992 data).

Ownership of reclamation project water is usually shared by four entities: the federal government; the state; the irrigation district; and the ultimate user.<sup>53</sup> Unlike naturally flowing water, for which use rights are obtained under state law, rights to project water must be obtained from the federal government and are subject to more federal limitations and oversight because the United States developed it in the first place.<sup>54</sup> In most cases, irrigators have acquired their water rights by contract with the local irrigation, storage, or improvement district, which has obtained its right to the delivery of water for specific purposes under a contract with the Bureau.<sup>55</sup> Individuals and irrigation districts in the Klamath Basin receive water under more than 250 contracts, which have perpetual duration and obligate the Bureau to provide an unspecified amount of available water for beneficial use on identified lands.<sup>56</sup>

Irrigation districts and individuals who are entitled to receive project water are also subject to state water laws. In their capacity as sovereign and as trustee of natural resources for the public, states have developed systems for allocating rights to use water. Western water law is founded on the doctrine of prior appropriation, embodied by the phrase “first in time, first in right.” However, California and Oregon have dual systems that recognize both appropriative and riparian rights.<sup>57</sup> The states determine what property rights in water exist and to what degree these rights will be recognized.<sup>58</sup> In 1975, the Oregon Water Resources Department initiated a mass water rights adjudication for the Klamath Basin to identify and quantify all potential water rights.<sup>59</sup> Thirty years later, the adjudication is unresolved, and the status quo remains in effect.

The federal government can circumscribe water rights in two key manners: by invoking the doctrine of reserved rights and by exercising its own regulatory water rights. The most notable application of the reserved rights doctrine occurred in the context of Native American tribes, where the courts have long recognized that in ceding their vast lands to the federal government, the tribes retained their water rights so that they could make productive use of reservation lands.<sup>60</sup> Further, in *United States v. Adair*,<sup>61</sup> the U.S. Court of Appeals for the Ninth Circuit held that the Klamath tribe’s right to hunt and fish on former reservation lands allowed it to “prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies.”<sup>62</sup> The reserved water rights doctrine also applies to federal lands. Land set aside by the federal government for a certain purpose incorporates a res-

ervation of sufficient water rights necessary to achieve that purpose.<sup>63</sup> For example, this doctrine would provide the government with authority to keep water in-stream on federal lands, where uses such as fishing, recreation, and wildlife protection exist. In contrast, the federal government’s regulatory water rights issue from environmental statutes, such as the Clean Water Act<sup>64</sup> and the ESA, and they can also give the government authority to require that water be left in-river in order to achieve the goals of these statutes.<sup>65</sup> As discussed below, the ESA prevails over water rights when the Bureau is forced to choose between them.

### B. The ESA

The ESA was passed in 1973 due to growing public sentiment that Americans had a duty to prevent species, particularly wildlife, from vanishing before our eyes. The declared purposes of the statute included providing “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.”<sup>66</sup> The federal agencies charged with implementing the ESA are the FWS, within the DOI, and the National Marine Fisheries Service (NMFS), now called NOAA Fisheries, which is in the U.S. Department of Commerce. The FWS implements the Act with respect to terrestrial species; NOAA Fisheries is responsible for aquatic species and anadromous fish.

Under ESA §7(a)(2), all federal agencies must ensure that any actions they undertake, fund, or authorize are not likely to result in jeopardy to a listed species or in adverse modification of critical habitat (designated pursuant to §4). If listed species are in the area, the agency must prepare a biological assessment; if it determines that an adverse effect is likely, the agency must undergo formal consultation with the applicable service.<sup>67</sup> The service will then conduct a study and prepare a biological opinion (BiOp), which can result in either a finding of jeopardy or adverse modification, or a finding that no such jeopardy or adverse modification will result.<sup>68</sup> If the service finds that the proposed action will result in jeopardy or adverse modification, it must suggest reasonable and prudent alternatives (RPAs) that will avoid this consequence.<sup>69</sup>

The Bureau is subject to this mandate and must consult on its activities such as renewing contracts with irrigation districts, determining the amount of water it will deliver under those contracts, and its general operation of the Klamath Project.<sup>70</sup> In addition, under *O’Neill v. United States*,<sup>71</sup> when the Bureau must withhold irrigation water in order to avoid jeopardy to listed species, it is excused

53. Benson, *supra* note 5, at 367.

54. *Id.* at 370.

55. *Id.* at 371.

56. Doremus & Tarlock, *supra* note 2, at 300.

57. See generally 1 WATERS & WATER RIGHTS §§8.01-8.02 (Robert E. Beck ed., Matthew Bender & Co. 1991).

58. *Id.* §4.03.

59. See *United States v. Oregon*, 44 F.3d 758, 25 ELR 20531 (9th Cir. 1994).

60. *Winters v. United States*, 207 U.S. 564 (1908).

61. 723 F.2d 1394 (9th Cir. 1984).

62. *Id.* at 1410-11. Short of quantifying the tribe’s water right, the court described it as “the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members,” as limited by the moderate living standard. *Id.* at 1414-15.

63. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 240 (Southern Ill. Univ. Press 2002).

64. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

65. Doremus & Tarlock, *supra* note 2, at 305.

66. 16 U.S.C. §1531(b).

67. *Id.* §1536(c)(1).

68. *Id.* §1536(a)(3)(A).

69. *Id.*

70. Doremus & Tarlock, *supra* note 2, at 309.

71. 50 F.3d 677, 25 ELR 20873 (9th Cir. 1995).

from its contract obligations to water districts.<sup>72</sup> Further, the agency may use its authority to impose measures for the conservation of listed species above and beyond the Act's minimum requirements.<sup>73</sup>

### C. Takings Claims: When the ESA and Water Rights Conflict

The Fifth Amendment of the Constitution provides “nor shall private property be taken for public use, without just compensation.”<sup>74</sup> This language is referred to as the Takings Clause. For the purposes of this Article, the critical distinction is between the two categories of takings in the U.S. Supreme Court's jurisprudence: “possessory” or “physical” taking, which occurs when the government takes possession of or physically occupies property; and “regulatory” taking, which occurs when government regulations so limit the use of private property as to render it economically useless.<sup>75</sup> For physical takings, there is a per se rule that a taking exists whenever government action is in the nature of a “permanent physical occupation of property . . . without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”<sup>76</sup> In contrast, in most regulatory takings cases the court will apply a balancing test, known as the *Penn Central* test, in which it will consider: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation interfered with the plaintiff's investment-backed expectations; and (3) the character of the government action, for example, whether it is a physical invasion or a program meant to serve the public.<sup>77</sup> However, the Supreme Court has carved out an exception: it will apply a categorical rule that “where regulation denies all economically beneficial or productive use of land,” there has been a taking unless “the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with,” meaning that if background principles of nuisance and property law would have prohibited the use, a regulation that likewise prohibits that use does not give rise to a takings claim.<sup>78</sup>

Takings challenges to regulations imposed pursuant to the ESA have been few and far between, perhaps due to the strength of the ESA and the low probability of success under the regulatory takings test. As seen in *Tulare Lake and Klamath Irrigation District*, takings challenges may be a new weapon in the arsenal of water rights holders who wish to maintain their position of power.

## IV. Tulare Lake

Events mirroring those to come in the Klamath Basin took place in California in the early 1990s, when the Bureau withheld irrigation water to protect two endangered fish species in the Sacramento River—the winter-run chinook salmon and the delta smelt. Perhaps unsurprisingly, the events prompted a lawsuit: *Tulare Lake Basin Water Storage District v. United States*.<sup>79</sup> The populations of chinook and delta smelt had been suffering due to a prolonged drought, exacerbated by continued withdrawals of water by the Bureau for the Central Valley Project (CVP) and by California's Department of Water Resources (DWR) for the State Water Project (SWP).<sup>80</sup> In February of 1992, the NMFS issued a BiOp concluding that the proposed operation of these irrigation projects was likely to jeopardize the winter-run chinook.<sup>81</sup> In compliance with the RPA set forth in the BiOp, the Bureau pumped less water out of the Sacramento-San Joaquin Delta that year, making less water available for the SWP and CVP.<sup>82</sup> Pursuant to the RPAs included in subsequent BiOps, including one that made a jeopardy finding for the endangered delta smelt, the Bureau imposed restrictions on the SWP and CVP in 1993 and 1994 as well.<sup>83</sup>

Subsequent to these events, a group of California water districts whose water deliveries had been cut back sued the federal government in the Court of Federal Claims.<sup>84</sup> The districts alleged they were entitled to compensation under the Takings Clause because their contract rights to receive water from the CVP and SWP were taken due to the application of the ESA. They sought approximately \$66 million compensation for the losses they suffered from 1992 to 1994.

On April 30, 2001, Judge John Weise handed down his opinion granting the plaintiffs' motion for summary judgment. The court framed the issue as “not whether the federal government has the authority to protect the winter-run chinook salmon and delta smelt under the ESA, but whether it may impose the costs of their protection solely on plaintiffs.”<sup>85</sup> The articulation of the issue in those terms was a not so subtle indication of the court's predilection toward the irrigators' position.

The court summarily rejected the government's three main defenses—one based on contract and two on takings principles. First, the government argued that under *Omnia Commercial Co. v. United States*<sup>86</sup> the restriction of water deliveries merely frustrated the parties' expectations under the contract; it did not appropriate the plaintiffs' water rights so as to constitute a taking.<sup>87</sup> The court distinguished *Omnia*

72. *Id.* at 689; see also *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (holding that “the Bureau's responsibilities include taking control of the [Link River] Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators”).

73. *Carson-Truckee Water Conservation Dist. v. Clark*, 741 F.2d 257, 14 ELR 20797 (9th Cir. 1984).

74. U.S. CONST. amend. V.

75. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 498 (Aspen Law & Bus. 2001).

76. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

77. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 8 ELR 20528 (1978).

78. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1027, 22 ELR 21104 (1992).

79. 49 Fed. Cl. 313, 31 ELR 20648 (2001).

80. Cori S. Parobek, *Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 207-08 (2003).

81. 49 Fed. Cl. at 315.

82. *Id.*

83. *Id.* at 316.

84. The Court of Federal Claims has exclusive jurisdiction over claims for damages greater than \$10,000 founded on theories of express or implied contract with the federal government pursuant to the Tucker Act. See 28 U.S.C. §1491 (2001).

85. 49 Fed. Cl. at 316.

86. 261 U.S. 502 (1923).

87. 49 Fed. Cl. at 316-17.

on the basis that the contract right involved there, the right to purchase steel at a particular price, was distinct from the property that was the subject of the contract (steel), whereas the water districts had an ownership right in the subject of their contracts, which the court described as “an identifiable interest in a stipulated volume of water.”<sup>88</sup> The court stated plainly that it regarded the “plaintiffs’ contract rights in the water’s use as superior to all competing interests.”<sup>89</sup> However, the court failed to recognize that the plaintiffs’ consumptive right could not fairly be compared to the government’s interest and legal responsibility for keeping sufficient water in-stream to ensure survival of endangered fish.

Second, the government maintained that because the plaintiffs could prove neither the existence of reasonable, investment-backed expectations nor a significant decrease in the economic value of their water rights, the restrictions worked no regulatory taking.<sup>90</sup> The court rejected this argument, concluding that the restriction of plaintiffs’ water rights amounted to a *physical* taking.<sup>91</sup> Accepting the water districts’ argument that the denial of their right to use water eliminated the entire value of that right and made the government the beneficiary of water rights at the plaintiffs’ expense, the court opined that the government’s exclusive possession of the water use rights amounted to a physical occupation of the plaintiffs’ property.<sup>92</sup> This conclusion made short work of the court’s takings analysis because a physical occupation is a *per se* taking that requires no further analysis or balancing of interests.<sup>93</sup>

The court’s opinion in *Tulare Lake* reflects its confusion about both takings law and the fundamental nature of water rights. First, the cases cited by the court for support of its physical taking determination all involved an actual physical taking, where the government had physically entered the plaintiff’s property or had taken the plaintiff’s water for its own use.<sup>94</sup> Second, the court seemed to conflate ownership of water with the right to use water, resulting in its adoption of the districts’ view of their water rights as more secure than they actually were and facilitating the comparison between the “physical taking” involved in this case and genuine physical invasions.

The *Tulare Lake* court addressed the question whether plaintiffs in fact owned property that could be taken *after* it had already concluded the property was taken and compensation was owed. The government argued that under the terms of the water supply contracts between DWR and the plaintiffs, it could not be held liable for failing to provide water because plaintiffs’ entitlement to receive water was

contingent on water being made available to DWR.<sup>95</sup> Since that condition did not occur, the government averred, the contract right was not enforceable.<sup>96</sup> The court read the “hold harmless” provisions in the plaintiffs’ contracts with DWR narrowly as insulating DWR from liability, but providing no defense to the federal government.<sup>97</sup> The court also declined to accept the government’s argument that background principles of law limit the scope of the property right in water so that an interference with this interest is not compensable. While recognizing the existence of the public trust doctrine and California’s requirement that water be put to reasonable and beneficial use, the court concluded that these principles could not be given effect without impairing the plaintiffs’ contract rights, unless the state water board or the courts formally changed the allocation scheme.<sup>98</sup> Interestingly, this view appears to conflict with Judge Weise’s prior stated view about the role of background principles in the takings analysis.<sup>99</sup>

The parties in *Tulare Lake* ultimately reached a settlement, with the federal government agreeing to pay the water users \$16.7 million as compensation.<sup>100</sup> Farmers and property rights advocates viewed this as a victory, while environmentalists saw it as a potential setback to ESA enforcement. However, no one doubted that it would open the door for future takings claims.

## V. The Klamath Irrigators’ Suit

In 2001, a severe drought, scientific realizations, and flaring tempers combined to make the Klamath Basin a legal battleground. Much like a real war, it was hard to tell the victors from the vanquished.

### A. A Fishy Situation for the Bureau

In the context of the Klamath Basin’s water wars, the most significant ESA-listed species are the coho salmon and the shortnose and Lost River suckers. Both species of suckers, which inhabit lakes and rivers in the upper basin, typically have lifecycles similar to salmon—their eggs hatch in rivers and streams, the larvae make their way down to lakes where they grow and mature, and adults return upstream to their natal rivers and streams to spawn—though they differ from salmon in that they spawn multiple times in their 30-year life cycle.<sup>101</sup> A severe decrease in the abundance of these

88. *Id.* at 317-18.

89. *Id.* at 318.

90. *Id.* at 317.

91. *Id.* at 319.

92. *Id.*

93. See *supra* note 76 and accompanying text.

94. *Id.* at 319 (citing *United States v. Causby*, 328 U.S. 256 (1946), where frequent flights over landowner’s property constituted a taking; *International Paper Co. v. United States*, 282 U.S. 399 (1931), where the government diverted water from the plaintiff’s mill in order to produce hydropower; and *Dugan v. Rank*, 37 U.S. 609, 625 (1963), where the Bureau impounded water behind a dam upstream from the riparian plaintiffs, cited for the proposition that “seizure of water rights need not necessarily be a physical invasion of land”); see also Parobek, *supra* note 80, at 213.

95. The “hold harmless” provisions stated that neither the state nor its agents could be held liable for “any damage, direct or indirect, arising from shortages in the amount of water to be made available for delivery . . . caused by drought, operation of area of origin statutes, or any other cause beyond its control.” *Tulare Lake*, 49 Fed. Cl. at 320.

96. *Id.*

97. *Id.* at 321. It is possible that if the provision exempting the government from liability for damages resulting from restrictions on water rights was written more broadly, the defendant would not have been held liable. Parobek, *supra* note 80, at 216-17.

98. 49 Fed. Cl. at 322.

99. See Michael C. Blumm & Lucus Ritchie, *Lucas’ Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 329-30 (2005).

100. Mike Tauger, *U.S. Water Pact Makes Big Waves*, CONTRA COSTA TIMES, Jan. 18, 2005, at A-1, available at <http://www.klamathbasin.crisis.org/esa/esa%20lawsuits/esaluspactulare011805.htm>.

101. NATIONAL RESEARCH COUNCIL, *supra* note 13, at 191. The shortnose sucker is up to 21 inches long, and the Lost River sucker can be 26 to 40 inches long. *Id.*

fish was apparent by the 1980s, a decade that saw a major fish kill (1986), the closure of the snag fishery (1987), and the FWS' listing of these species as endangered (1988).<sup>102</sup> Coho salmon can be found in the lower basin, wherever there is suitable habitat that is not blocked by dams or irrigation structures.<sup>103</sup> Unlike the long-lived suckers, coho live for only three years, with most adults returning from their ocean feeding grounds in the fall to spawn in their natal rivers and streams and then die.<sup>104</sup> Numbers of coho salmon plunged during the second half of the last century, resulting in NMFS listing the species as threatened in 1997.<sup>105</sup>

These ESA listings imposed a duty on the Bureau to incorporate the Act's goal of protecting imperiled species into its operation of the Klamath Project. Thus far, the Bureau has failed to strike a balance that is acceptable to both fish and farmers.

This problem became exceedingly apparent in 2001. Spurred by forecasts of a dry year, the Bureau prepared biological assessments on the impact of the Klamath Project's operation on the endangered suckers and the threatened coho in conjunction with developing its yearly operational plan. The biological assessment for coho, issued on January 22, 2001, determined that the project's operation was likely to adversely affect the southern Oregon/northern California coho and result in adverse modification of its critical habitat.<sup>106</sup> The study cited low flows below Iron Gate Dam, high water temperatures, and poor water quality as the major contributing causes.<sup>107</sup> Likewise, the Bureau's biological assessment of Lost River and shortnose suckers, released on February 13, 2001, concluded that the project's operation was likely to adversely affect these species, mainly due to loss of habitat and degradation of water quality resulting from the Bureau's regulation of reservoir levels, genetic isolation and vulnerability because of reduced connectivity between water bodies, and entrainment and loss of fish through diversions.<sup>108</sup> As a result of these determinations, the FWS and NMFS were required to prepare BiOps.

In April 2001, the regrettable fate of the basin for the coming year was sealed. The FWS and NMFS released final BiOps that concluded that the proposed operation of the Klamath Project would jeopardize the continued existence of the suckers and coho.<sup>109</sup> The RPA in the NMFS' BiOp rec-

ommended higher flows in the Klamath River and set forth a schedule for water releases at Iron Gate Dam.<sup>110</sup> Similarly, the RPA in the FWS' BiOp required the Bureau to maintain minimum lake elevations throughout the upper basin. The FWS set the minimum level for Upper Klamath Lake at 4,140 feet, with slightly higher levels during spawning and rearing times.<sup>111</sup> On April 6, the Bureau released its 2001 Annual Operations Plan, which was intended to guide its operation of the project through March 31, 2002.<sup>112</sup> The Operations Plan adopted the minimum flows and water levels set forth in the services' RPAs. Noting its contractual obligation to provide water for irrigation, the Bureau stated: "Due to the requirements of the [BiOps] and the ESA and the current drought conditions, only limited deliveries of Project water will be made for irrigation."<sup>113</sup>

Indeed, the Bureau all but completely halted its deliveries of irrigation water in 2001. When the drought turned out to be worse than expected, the Bureau had only enough water to satisfy its primary objective of conserving listed species. The irrigation interests swiftly filed suit in federal court, seeking to enjoin the Bureau from implementing its 2001 Operations Plan, but the court squarely rejected their various claims, adding:

In essence, plaintiffs request that this court stand in the place of Reclamation as the operator of the Project and reallocate Project water in a manner that is inconsistent with governing law. . . . The law requires the protection of suckers and salmon as endangered and threatened species and as tribal trust resources, even if plaintiffs disagree with the manner in which the fish are protected or believe that they inequitably bear the burden of such protection.<sup>114</sup>

Although the headgates at Upper Klamath Lake remained closed through most of the growing season, farmers in some areas obtained water from Clear Lake and Gerber Lake, by pumping groundwater, and by unlawfully breaking open the headgates and releasing water, as described in Part II.<sup>115</sup> Perhaps in an attempt to pacify the indignant irrigators, the Secretary of the Interior announced on July 24, 2001, that due to

(CHASMISTES BREVIROSTRIS), THREATENED BALD EAGLE (HALIAEETUS LEUCOCEPHALUS) AND PROPOSED CRITICAL HABITAT FOR THE LOST RIVER/SHORTNOSE SUCKERS (2001) [hereinafter FWS 2001 BiOp], available at [http://www.usbr.gov/mp/kbao/esa/34\\_final\\_sucker\\_bo\\_4\\_06\\_01.pdf](http://www.usbr.gov/mp/kbao/esa/34_final_sucker_bo_4_06_01.pdf); NMFS, BIOLOGICAL OPINION: ONGOING KLAMATH PROJECT OPERATIONS (2001) [hereinafter NMFS 2001 BiOp], available at [http://www.usbr.gov/mp/kbao/esa/38\\_cohobo\\_4\\_6-01.pdf](http://www.usbr.gov/mp/kbao/esa/38_cohobo_4_6-01.pdf).

102. *Id.* at 203.

103. *Id.* at 253-54.

104. *Id.* at 255.

105. *Id.* at 263. The NMFS listed the Southern Oregon-Northern California Coast evolutionary significant unit, which includes Klamath Basin coho. *Id.* The NMFS identified the portion of the main stem Klamath River within the upper basin as critical habitat two years later. Doremus & Tarlock, *supra* note 2, at 294.

106. U.S. BUREAU OF RECLAMATION, BIOLOGICAL ASSESSMENT OF THE KLAMATH PROJECT'S CONTINUING OPERATIONS ON SOUTHERN OREGON/NORTHERN CALIFORNIA ESU COHO SALMON AND CRITICAL HABITAT FOR SOUTHERN OREGON/NORTHERN CALIFORNIA ESU COHO SALMON (2001), available at [http://www.usbr.gov/mp/kbao/esa/Final\\_Ba\\_012201\\_Sutton.pdf](http://www.usbr.gov/mp/kbao/esa/Final_Ba_012201_Sutton.pdf).

107. *Id.* at 45.

108. U.S. BUREAU OF RECLAMATION, BIOLOGICAL ASSESSMENT OF THE KLAMATH PROJECT'S CONTINUING OPERATIONS ON THE ENDANGERED LOST RIVER SUCKER AND SHORTNOSE SUCKER 89 (2001), available at [http://www.usbr.gov/mp/kbao/esa/4-1-01\\_30\\_Final\\_Sucker\\_BA.pdf](http://www.usbr.gov/mp/kbao/esa/4-1-01_30_Final_Sucker_BA.pdf).

109. FWS, BIOLOGICAL/CONFERENCE OPINION REGARDING THE EFFECTS OF OPERATION OF THE BUREAU OF RECLAMATION'S KLAMATH PROJECT ON THE ENDANGERED LOST RIVER SUCKER (DELTIESTES LUXATUS), ENDANGERED SHORTNOSE SUCKER

110. NMFS 2001 BiOp, *supra* note 109, at 31-32. The schedule provided for releases of 1,700 cubic feet per second (cfs) from April through June, with a spike of 2,100 cfs from June 1 to 15 (to ensure smolt survival), then 1,000 cfs from July through September.

111. FWS 2001 BiOp, *supra* note 109, at 143-44. The RPA also set minimum levels for Clear Lake, Gerber Reservoir, and the Tule Lake Sump. *Id.* at 151-53. The FWS included a number of other measures in the RPA, such as a water quality study to inform adaptive management, installation of fish passage screens at A-Canal and Link River Dam, and habitat restoration. *Id.* at 148-51.

112. U.S. BUREAU OF RECLAMATION, KLAMATH PROJECT 2001 ANNUAL OPERATIONS PLAN (2001), available at [http://www.usbr.gov/mp/kbao/news/Final2001OperationPlan4\\_6\\_2001.pdf](http://www.usbr.gov/mp/kbao/news/Final2001OperationPlan4_6_2001.pdf).

113. *Id.* at 2.

114. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1211 (D. Or. 2001).

115. Doremus & Tarlock, *supra* note 2, at 320-22; see also Klamath Basin Coalition, *The Truth About Klamath Water Project Deliveries in 2001*, <http://www.onrc.org/programs/klamath/2001truths.html> (last visited June 28, 2006) (arguing that the Project received 68% of its normal deliveries that year).

unexpected rainfall, the Bureau could legally release a small amount of water to prevent the basin from going the way of the Dustbowl.<sup>116</sup> Estimates of the financial losses incurred by farmers ranged from \$20 million to \$200 million.

### B. The Plaintiffs and Their Claims

Encouraged by the success of the plaintiffs in *Tulare Lake*, a group of 13 landowners and 14 water, irrigation, and drainage districts in the Klamath Basin brought suit against the federal government in the Court of Federal Claims.<sup>117</sup> The plaintiffs sought a total of \$1 billion compensation under the Takings Clause and in damages for breach of contract for the restriction of their water deliveries in 2001.<sup>118</sup> They also claimed they were entitled to compensation under the Klamath Basin Compact, an agreement between California and Oregon ratified by Congress in 1957.

Judge Francis Allegra began his opinion with a thorough discussion of federal reclamation laws, the history and legal grounding of the Klamath Project, and the nature of the specific water rights held by plaintiffs. Since federal law required water users to organize into districts in order to contract with the Bureau, the plaintiff districts, with one exception, entered into water delivery contracts with the Bureau.<sup>119</sup> These contracts included significant limitations. Eight included provisions holding the federal government harmless for any direct or indirect damage resulting from a shortage in the quantity of water available due to drought “or other causes.”<sup>120</sup> Four included provisions stating that the government is not liable for failure to supply water due to drought, two of which specified the drought must be unusual.<sup>121</sup> One contract did not include a shortage provision.<sup>122</sup> Most of these district level contracts with the Bureau expressly extinguished the water rights of individuals, but some did not, and, therefore, individual water users in some districts might have retained their own water rights.<sup>123</sup> The other purported sources of water rights were patent deeds granting homesteaders riparian rights, state-issued permits, and treaty rights.<sup>124</sup>

116. Douglas Jehl, *U.S. to Resume Farms' Access to Irrigation*, N.Y. TIMES, July 25, 2001, at A12. Approximately 70,000 acre-feet of water was released over a period of one month. Doremus & Tarlock, *supra* note 2, at 322.

117. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 507 (2005). The court allowed the PCFFA to intervene as a defendant based on the finding that its interest in harvesting fish would be affected by the outcome of this suit, and the government would not adequately protect it. *Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328 (2005).

118. Marzulla & Marzulla of Washington, D.C., the attorneys for the *Klamath* plaintiffs, also represented the *Tulare Lake* plaintiffs.

119. 67 Fed. Cl. at 511. Without drawing any conclusions with respect to the Klamath Project, the court noted the failure of reclamation projects to achieve financial solvency as intended by Congress. *Id.* at 507. In contrast to the court in *Tulare Lake*, the court in this case was willing to recognize the potential shortcomings of the water policy framework.

120. *Id.* at 511.

121. *Id.*

122. *Id.*

123. *Id.* at 511-12; see Benson, *supra* note 5, at 384-85 (stating that “an irrigator who uses project water is subject to controls and conditions imposed by both the district and the Bureau, unlike an individual irrigator who holds water rights in his own name . . .”).

124. 67 Fed. Cl. at 512. Given the complex and uncertain nature of plaintiffs’ water rights, the court separated the issues involved in the pres-

Whereas the *Tulare Lake* court saved the question whether the plaintiffs owned compensable property until the end of its opinion, the *Klamath* court addressed this threshold question at the outset. Judge Allegra emphasized that the irrigators’ interest in water could only be considered a property right if defined as such by a source of law outside the Fifth Amendment.<sup>125</sup> The court considered three sources of law capable of elevating plaintiffs’ interest in the use of water to the status of a property right: (1) federal reclamation law; (2) state law; and (3) contract law.

### C. Interests in Project Water

First, the court addressed the plaintiffs’ argument that their water rights issued directly from the Reclamation Act of 1902 rather than state law. The court examined the language and history of the Act and determined that Congress did not intend it to supersede state appropriation laws.<sup>126</sup> The court also pointed to case law, chiefly *California v. United States*,<sup>127</sup> in which the Supreme Court held that the Reclamation Act established state control over defining property rights in project water, citing the fact that the Secretary of the Interior had to obtain water rights for the project in conformance with state law and that the distribution of project waters to landowners was governed by state law.<sup>128</sup>

Next, the *Klamath* court addressed the plaintiffs’ claim that they had property rights in project waters under state law. The government argued that it had obtained controlling rights to project water in May 1905, under an Oregon statute passed in anticipation of the project’s approval by the Bureau, which provided that after federal officials filed notice of intent to appropriate waters for the project, such waters were no longer subject to appropriation by the state.<sup>129</sup> Considering these events, the court concluded, “Every indication is that the May 1905 notice triggered the provisions of the 1905 Oregon legislation, thereby vesting in the United States, as of that time, the appropriative water rights associated with the Klamath project that were unappropriated as of the date of the filing.”<sup>130</sup> The court rejected the plaintiffs’ argument, based on a 1950 opinion of Oregon’s Attorney General, that the United States only acquired unappropriated waters that were “reasonably necessary” to the project to the extent that they were put to “beneficial use,” deeming that once those rights had vested in the federal government they could not be appropriated under state law without being released by the government first.<sup>131</sup>

ent case from those involved in the adjudication, allowing the case to continue with the condition that plaintiffs were barred from making claims or seeking relief based on rights, titles or interests at issue in the adjudication. *Id.* at 514.

125. *Id.* at 515.

126. *Id.* at 516-18.

127. 438 U.S. 645, 8 ELR 20593 (1978).

128. 67 Fed. Cl. at 518-19 (citing *California v. United States*, 438 U.S. at 665, 667).

129. *Id.* at 523 (citing Or. Gen. Laws, 1905, ch. 228, §2, pp. 401-02). Similar legislation was enacted in California. *Id.* at n.30. On May 17, 1905, a few months after Congress authorized the Klamath Project, the United States filed a notice of its intention to appropriate all of the waters of the Klamath Basin for use as authorized under the Reclamation Act. *Id.* at 523-24.

130. *Id.* at 524.

131. *Id.* at 525.

The *Klamath* court then took up the question whether any rights to Klamath Basin water acquired before 1905 were extant. The court agreed with the government's assertion that it had purchased all of the pre-project water rights obtained under state law and incorporated them into the project.<sup>132</sup> More difficult was the assertion of seven individual irrigators, who claimed that they or their predecessors had exchanged state water rights for perpetual rights to receive project water, which they regarded as a beneficial interest.<sup>133</sup> The court recognized that such potential interests were the product of contracts entered into between the United States and water users after 1905.<sup>134</sup>

The post-1905 transactions took various forms. Only one water user—the Van Brimmer Ditch Company—had records of its agreement with the United States.<sup>135</sup> Judge Allegra surmised that in most cases the irrigation district entered into a contract with the United States on behalf of its members, under which the district would receive an amount of water tied to the acreage of irrigable land in exchange for payments intended to cover the cost of the project.<sup>136</sup> The individual members then submitted “Form-B” applications to the DOI in order to receive their apportioned share of project water.<sup>137</sup> Similarly, homesteaders who purchased or leased reclaimed lands received water rights by filing a “Form-A” application with the DOI.<sup>138</sup> These, too, were permanent water rights, and the quantity of water was tied to the beneficial use concept. Notably, the “Form-A” application included a broad water shortage clause absolving the government from liability and gave the project manager discretion in determining the individual's proportionate share in times of shortage.<sup>139</sup> The court concluded that most of these individual contracts were eventually replaced by contracts between water districts and the United States or the Bureau, all of which contained broad water shortage clauses.<sup>140</sup>

#### D. Choosing the Right Remedy

Judge Allegra sorted the plaintiffs' purported interests in Klamath Project water into two groups: interests based on contracts and interests based on patent deeds and state permits.<sup>141</sup> This discussion was a major point of departure from the approach taken by the *Tulare Lake* court. The *Klamath* court, relying on Federal Circuit precedent, determined that the plaintiffs' viable contract claims against the federal government controlled over their potential takings claims.<sup>142</sup> The court stated that “both of the rationales favoring the use of contractual remedies over takings remedies apply here—that is, the United States may be viewed as acting in its proprietary capacity in entering into the water contracts

in question, and it appears that the affected plaintiffs retain the full range of remedies with which to vindicate their contract rights.”<sup>143</sup>

But before plaintiffs could assert contract claims against the United States, they had to establish privity of contract. Thus the court inquired whether the individual plaintiffs could be third-party beneficiaries under the water districts' contracts. Looking to the language of the relevant contracts, the court found that “each express[ed] the intent of the relevant district and the United States to benefit the irrigators directly by having the district assume the primary responsibility for providing water within the district in exchange for collecting amounts owed by the irrigator in payment for their water.”<sup>144</sup> Bolstering this conclusion was Federal Circuit case law in which the courts, presented with similar facts, by and large determined that irrigators were third-party beneficiaries with enforceable rights.<sup>145</sup> Having concluded that the individual irrigators were third-party beneficiaries of the district contracts, Judge Allegra held that their claims against the United States “sound in contract, not in takings.”<sup>146</sup>

#### E. Assessing the Plaintiffs' Claims

After determining that the plaintiffs' claims stemmed from their status as third-party beneficiaries, the *Klamath* court considered the viability of these contract claims. The court made it clear that the plaintiffs' rights to project water were limited by the contracts themselves.<sup>147</sup> “Simply put,” the court explained, “plaintiffs could not obtain an interest from the districts better than what the districts themselves possessed or once possessed—‘*nemo dat qui non habet*,’ the venerable maxim provides, ‘one who does not have cannot give.’”<sup>148</sup>

Although the issue of whether the Bureau actually breached the contracts had been stayed and, thus, was not before the court, Judge Allegra made some “observations” about the contract rights involved. The court noted that the water shortage clauses included in the district contracts limit the plaintiffs' rights, citing *O'Neill*<sup>149</sup> for the proposition that the Bureau does not incur liability for failing to deliver water under its contracts when it does so in order to comply with the ESA or other laws.<sup>150</sup> Also, the court suggested that under the “sovereign acts doctrine” the government might be shielded from liability because the actions giving rise to breach of contract claims— withholding water to comply with the ESA—were arguably “merely incidental to the accomplishment of a broader governmental objective.”<sup>151</sup> Thus, in the court's view, the plaintiffs' contract claims did not have a high likelihood of success.

132. *Id.* at 526.

133. *Id.* at 526-27.

134. *Id.* at 527.

135. *Id.* at 527-28. The Van Brimmer Ditch Company exchanged its riparian rights and waived all claims for damages in exchange for a perpetual right to receive a specified quantity of water.

136. *Id.* at 528.

137. *Id.*

138. *Id.* at 529.

139. *Id.*

140. *Id.* at 529-30.

141. *Id.* at 530-31.

142. *Id.* at 531-32.

143. *Id.* at 532.

144. *Id.* at 533.

145. *Id.* at 533-34.

146. *Id.* at 534.

147. See Benson, *supra* note 5, at 395 (“Although contract rights may be property rights, water users' expectations do not rise to the level of property rights unless those expectations are protected in the contract itself.”).

148. 67 Fed. Cl. at 535.

149. *O'Neill v. United States*, 50 F.3d 677, 25 ELR 20873 (9th Cir. 1995).

150. 67 Fed. Cl. at 536.

151. *Id.* at 536-37 (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996)).

As for the plaintiffs claiming water rights from patent deeds and state water permits, they would be considered junior users under Oregon's appropriation scheme because their priority dates were after 1905, and therefore subservient to the United States and the tribes.<sup>152</sup> Finally, the court held that the Klamath Basin Compact did not make the plaintiffs' water rights any stronger.<sup>153</sup>

#### F. Dealing With Tulare Lake

Since the Court of Federal Claims also had decided *Tulare Lake*, which the plaintiffs relied upon, the court was compelled to address it. Judge Allegra opined, "with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others, and, distinguishable, at all events."<sup>154</sup>

The *Klamath* court criticized the *Tulare Lake* court's opinion on two bases. First, Judge Allegra found fault with the *Tulare Lake* court's treatment of water rights as absolute, rather than considering the contract limitations and common-law doctrines that place limits on property ownership.<sup>155</sup> This mistake, the court reasoned, resulted in "award[ing] just compensation for the taking of interests that may well not exist under state law."<sup>156</sup> Second, the *Klamath* court expressed disapproval of the *Tulare Lake* court's failure to analyze the plaintiffs' claims as breach of contract claims rather than takings claims.<sup>157</sup> Curiously, the *Klamath* court did not emphasize the most glaring error committed by the *Tulare Lake* court—its analysis of the takings issue as one involving physical, rather than regulatory, taking. The court limited its critique on this subject to a footnote.<sup>158</sup>

## VI. Conclusions and Predictions

The *Klamath* decision is a significant development in water law because it resolutely acknowledges the legal restraints and limitations placed on rights in reclamation project wa-

ter. It presents a compelling counterargument to the distorted view that water rights are super-property warranting special constitutional protection.<sup>159</sup> By applying a straightforward contract analysis to the *Klamath* plaintiffs' water rights, the court demonstrated that they are subject to the same legal doctrines as other forms of property—a right obtained by contract is not more solid simply because it concerns the use of water.

This case also makes vivid the flexibility of water law to adapt to new realities. Water is a public resource and comes with strings attached. When the government steps in to regulate the use of water, it is not taking something from its owner, but asserting a right and duty it has always possessed. As the "new West" continues to develop, the government must retain the ability to set resource policy that comports with the needs and values of its citizens. Most Americans recognize the value of rescuing endangered species and would not want to jeopardize their survival in order to protect the economic interests of a few.

The decision affirms the Bureau's ability to provide water for important nonagricultural uses without fear of subjecting the government to takings suits. Hopefully, this will encourage the Bureau—and other agencies with the discretion and political will—to fully commit to carrying out the goals of the ESA. The *Klamath* decision adds to the small but growing body of law demonstrating the Bureau's power to act against the interests of its constituents—even when those interests have been the status quo for generations.<sup>160</sup>

It seems likely that a reviewing court would uphold the *Klamath* decision.<sup>161</sup> In stark contrast to the *Tulare Lake* court, the *Klamath* court thoroughly examined the precise rights at issue before determining whether and what type of remedy was appropriate. In addition, the language of the "hold harmless" provisions in the district contracts involved in the *Klamath* case was stronger than those involved in *Tulare Lake*, offering the government added protection against liability and allowing the Federal Circuit to distinguish the cases. Furthermore, by analyzing the claim as a breach of contract rather than under the takings doctrine, the court took a tempered approach consistent with case law from the Federal Circuit. Finally, the *Klamath* decision is based on sensible public policy. It only makes sense that if the government is required by law—a law that is equally applicable to private parties—to regulate the use of resources, it should not have to pay in order to fulfill a duty shared by all.

152. *Id.* at 539.

153. *Id.* at 539-40.

154. *Id.* at 538.

155. *Id.* Many scholars espouse this view. See Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 281 (1990) ("For most of our history, largely because of the illusion of abundance we created, we have operated as if the private element of the property system was the whole of it, and the public elements could be relegated to a back corner.").

156. 67 Fed. Cl. at 538.

157. *Id.*

158. See *id.* at 538 n.59. In *Allegretti & Co. v. County of Imperial*, the California Court of Appeal relied on the *Klamath* case in holding that the county's restriction of the plaintiff landowner's right to pump groundwater under a conditional use permit did not constitute a physical taking of the plaintiff's water rights. 42 Cal. Rptr. 3d 122, 131-32, 36 ELR 20085 (Cal. Ct. App. 2006). The *Allegretti* court followed the *Klamath* court's reasoning and criticism of *Tulare Lake* on the bases described above. *Id.*

159. See Sax, *supra* note 155, at 261.

160. See Benson, *supra* note 5, at 408-09 (explaining that "the Bureau has generally sought to satisfy irrigators and other project beneficiaries . . . even when that meant ignoring clear requirements of federal law").

161. The court denied the plaintiffs' motion for interlocutory appeal on December 20, 2005. *Klamath Irrigation District v. United States*, No. 01-591 L (Fed. Cl. Dec. 20, 2005).