United States Court of Appeals
for the
Federal Circuit

KLAMATH IRRIGATION DISTRICT, TULEKAKE IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MIDLAND DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, PINE GROVE IRRIGATION DISTRICT, WESTSIDE IMPROVEMENT DISTRICT NO. 4, SHASTA VIEW IRRIGATION DISTRICT, VAN BRIMMER DITCH CO., FRED A. ROBINSON, ALBERT J. ROBINSON, 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, DANIEL W. BYRNE and BYRNE BROTHERS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee,

and

PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATION,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 01-CV-591, 01-CV-5910 through 01-CV-59125, Judge Francis M. Allegra

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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REPLY BRIEF OF THE PLAINTIFFS-APPELLANTS

I. THE TAKING CLAIM

The trial court dismissed the Irrigators' taking claim on the ground that no Irrigator had a cognizable property interest under the

Fifth Amendment. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 506 (2005) ("At issue in the pending cross-motions for partial summary judgment is whether plaintiffs' various interests in the use of the Klamath River Basin water constitute cognizable property interests for purposes of the Takings Clause."); *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677, 678 (2007) ("Previously, this court held that plaintiffs' interests in the use of Klamath Basin water did not constitute cognizable property interests for purposes of the Takings claim, and, therefore, that plaintiffs were not entitled to compensation under the Fifth Amendment."). In so doing, the trial court rejected as cognizable property rights the Irrigators' claims that (1) each landowner in the Klamath Project acquired a water right as an appurtenance to his land; (2) Appellant Van Brimmer Ditch Company still owns a water right which antedates the Klamath Project; and, (3) Appellants Klamath Drainage District and Klamath Hills Irrigation District own vested water rights granted by the State of Oregon.

The trial court held instead that the United States holds all of the Klamath Project water rights, and that the Irrigators therefore

could own none.[1] *Klamath*, 67 Fed. Cl. at 526 ("[T]he court concludes that, pursuant to relevant Oregon law, in 1905, the United States obtained rights to the unappropriated water of the Klamath Basin and associated tributaries."); *id.* at 540 ("[T]his ruling may disappoint a number of individuals who have long invested effort and expense in developing their lands based upon the expectation that the waters of the Klamath Basin would continue to flow, uninterrupted, for irrigation. But, those expectations, no matter how understandable, do not give those landowners any more property rights as against the United States, . . . than they actually obtained and possess.").

The trial court's dismissal was reversible error because the Irrigators do, in fact, own water rights, which are also cognizable property rights. *See, e.g., Sherred v. City of Baker*, 63 Or. 28, 39, 125 P. 826, 830 (1912) ("According to the modern accepted doctrine, it is the use of water, and not the water itself, in which one acquires property

[1] In so doing, the trial court apparently abandoned the order of the previous trial judge that this case would not decide who, as between the United States and the Irrigators, holds title to the water rights. *See* Gov. Br. 16 ("On November 13, 2003, the CFC barred [Klamath Appellants] from making any claims based on rights, titles, or interests that are or may be subject to determination in the Adjudication.").

in general."); *In Re Willow Creek*, 144 P. 505, 514 (Or. 1914) ("The right to the use of water is a valuable property right guaranteed to every citizen.").

A. Under Oregon Law, the 1905 Klamath Project Irrigation Water Rights Are Appurtenant to the Land and Are Thus a Cognizable Property Right Owned by Appellant Landowners

In Oregon, the owner of the land also owns the water right, which passes as an appurtenance to the land just like the buildings and fences, unless specifically reserved in the deed. The "water appropriated for irrigation is as much a part of the improvements as his buildings and fences, and the transfer of the possessory right to the land carries with it the water so appropriated unless expressly reserved." *Low v. Schaffer*, 33 P. 678, 679 (Or. 1893); *Linfoot v. Dep't of Revenue*, 1971 WL 655, *4 (Or. Tax 1971) ("In its technical sense, in the case of land, the word 'appurtenance' refers to an incorporeal right (e.g., water rights) . . . existing at the time of conveyance of the property, which (although not described in the conveyance) would logically be deemed to pass with the land because the appurtenance is necessary to the use and enjoyment of the property conveyed.").

Oregon water law provides without exception that all water rights in the state must be appurtenant to the land irrigated, and that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water. OR. REV. STAT. § 540.510 (2005) provides: "[A]ll water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made[.]" The Oregon Supreme Court has applied this rule without exception. *See, e.g., Dill v. Killip*, 147 P.2d 896, 898 (Or. 1944) ("'A water-right is incidental or appurtenant to land when by right used with the land for its benefit.'" (quoting 1 WIEL ON WATER RIGHTS IN THE WESTERN STATES 587, § 550 (3rd ed.))); *In Re Water Rights of Deschutes River and Tributaries*, 286 P. 563, 574 (Or. 1930) ("Water for irrigation purposes is appurtenant to the land for which it is appropriated and applied."). Similarly, Oregon law also provides that "[b]eneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." OR. REV. STAT. § 540.610 (2005).

Nor does the 1905 Oregon statute, Or. Gen. Laws, 1905, Ch. 228, p. 401, create any exemption from these requirements of

appurtenancy and beneficial use as the government contends. Section 1 of the statute, titled "Appropriation of Water," provides the method by which "[a]ny person, association, or corporation" may appropriate water for reclamation of arid lands, while Section 2, entitled "Appropriation of Water by United States," prescribes the process by which Reclamation may do so. Or. Gen. Laws, 1905, Ch. 228, §§ 1, 2, p. 401-02. Neither Section 1 nor Section 2 of the 1905 statute even mentions—let alone provides an exemption from—the appurtenancy requirement of OR. REV. STAT. Section 540.510, nor does either section suggest that beneficial use is not the basis, measure, and limit of the water so appropriated. Section 5 also provides that the Court Decree which finally determines the rights shall declare "the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant[.]" Or. Gen. Laws, 1905, Ch. 228, § 5, p. 403.

Moreover, even if the 1905 statute had allowed Reclamation to claim a water right that was not subject to the requirements of appurtenancy and beneficial use, Reclamation failed to do so. Reclamation's right to the use of Klamath Basin water is limited to

Reclamation Act (beneficial) uses appurtenant to the lands owned by Appellant landowners because that is all Reclamation claimed in its 1905 notices of appropriation and, under the 1905 statute, Reclamation's water right is limited to the description in those notices. *See* Joint Appendix ("J.A.") 004185, J.A. 004187. Section 2 of the 1905 statute required that Reclamation "shall file in the office of the State Engineer a written notice that the United States intends to utilize certain specified waters" and that only "the waters described in such notice . . . shall be deemed to have been appropriated by the United States[.]" Or. Gen. Laws, 1905, Ch. 228, § 2, p. 401-02. Reclamation's notices, filed with the Oregon State Engineer, stated that "the United States intends to use the above described waters in the operation of works for the utilization of water in the State of Oregon under the provisions of . . . the Reclamation Act," J.A. 004187, and that "[t]he Water is to be used for irrigation, domestic, power, mechanical and other beneficial uses in and upon lands situated in Klamath Oregon and Modoc California counties [the Klamath Project lands owned by Appellant landowners.]" J.A. 004185. By specifying a limited number of beneficial uses authorized

by the Reclamation Act (domestic, irrigation, power, mechanical) and a limited place of use (on the lands of the Klamath Project), Reclamation thus appropriated only a limited water right appurtenant to Klamath Project lands, which is owned by the Irrigators as an appurtenance.[2]

The Oregon Attorney General has also concluded that the United States acquired only the right to the water identified in its 1905 notice filed with the State Engineer, and not all of the water of the Klamath Basin as the government contends:

> The notice and map filed pursuant to [the 1905 Act], mark the limit of the proposed enterprise and determine the amount of water required for such project.
>
> * * *
>
> I am therefore of the opinion that although the notice states all the waters of the specified area, it is only binding to the extent that such waters may be put to beneficial use . . . .

25 Or. Op. Atty. Gen. 62, 1950 WL 44856, at *6 (Or.A.G.).

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[2] The government's and the Tribes' reliance on *In re Waters of Umatilla River*, 88 Or. 376, 168 P. 922 (1917), and, 88 Or. 390, 172 P. 97 (1918), for the proposition that its Klamath water rights are unlimited is misplaced, for those cases did not deal with the Klamath Basin notices at issue here, but with different notices on a completely different river system.

In short, there is nothing in Oregon law to support the government's contention that the Klamath Basin water rights appropriated in 1905 are uniquely exempted from Oregon's universal rule that all water rights in the state must be appurtenant to the lands irrigated, and that these water rights pass to the landowner as an appurtenance to the land.[3]

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[3] PCFFA's brief in support of affirmance raises extraneous issues regarding alleged subsidies that they claim the Irrigators received. There is, however, no factual record in this case supporting this allegation nor is it an issue in this appeal. The Irrigators further note that they opposed the granting of the PCFFA's motion to intervene in this case on the ground that they possess no right to Klamath Project water and as their brief in support of affirmance demonstrates, could waste the parties' and the court's resources in this case by raising extraneous issues. Read in the most favorable light, PCFFA's brief at most demonstrates that they believe there is a policy argument against the Irrigators' argument that they possess a compensable property right in the Klamath Project water. However, as this Court has previously noted in another context, the Court's obligation is to construe the law as it existed at the time the property rights were created, and not according to current policy objectives:

> The government stresses that the present national policy is in marked contrast to earlier homesteading policy, and that the earlier movement of federal lands into private ownership is now countered by a policy whereby government title serves national interests such as conservation and public recreation. The appellants respond that the nation, and the courts, must respect these landowners' property rights, whatever the shifts in

B. Under the Supremacy Clause, the Reclamation Act also Required that These Klamath Project Water Rights Be Appurtenant to the Irrigators' Land

Even if the Oregon legislature had wished to create a federal reclamation water right that was not appurtenant to the Irrigators' Klamath Project land, it was prohibited from doing so by the preemptive provisions of Section 8 of the Reclamation Act, which requires that, no matter what state law may say, "[T]he right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372 (West 2007). As the Supreme Court held in construing water rights issued by California to Reclamation, federal law controls Reclamation Act water distribution in certain respects—including the requirement of appurtenancy: "Congress did not intend to relinquish total control of

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> public attitudes or national policy. We agree that the judicial obligation is to apply the law, to construe the property interests here at issue in accordance with the law in effect at the time the various arrangements were entered into, in implementation of the parties' intent, guided by the decisions of the Supreme Courts of the United States . . . .

Hash v. United States, 403 F.3d 1308, 1323 (2005).

the actual distribution of the reclamation water to the States. Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use[.]" *California v. United States*, 438 U.S. 645, 688 n.21 (1978).

Section 8 of the Reclamation Act controls in this case, making the 1905 Klamath Project water rights appurtenant to the Irrigators' land, because a state measure is "pre-empted to the extent it actually conflicts with federal law[.]" *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Thus, although Section 8 contains an explicit direction that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such [state] laws...," "[t]he Secretary in executing a particular reclamation project . . . need not comply with state laws conflicting with congressional directives respecting particular reclamation projects[.]" *California v. F.E.R.C.*, 495 U.S. 490, 505 (1990); *see also City of Fresno v. California*, 372 U.S. 627, 630-31 (1963) (explaining that state preferences for domestic water uses cannot override Section 9(c) of the Reclamation Act, which gives preference to irrigation uses); *Arizona v. California*, 373 U.S. 546, 586-87 (1963) (holding provisions of the Boulder Canyon

Project Act delegating discretion to the Secretary of the Interior to apportion project waters from the Colorado River sufficient to override state water allocation laws); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958) (finding the 160-acre limitation in Section 5 of the Reclamation Act limited state-granted reclamation project water rights, despite California's attempt to eliminate it).

Thus, although Oregon law certainly governs the creation and operation of the Klamath Project water rights, it does so only insofar as Oregon law is not inconsistent with the Reclamation Act. *See United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989) (concluding that "[s]tate law regarding the acquisition and distribution of reclamation water applies if it is not inconsistent with congressional directives"); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) ("It generally can be said that state law governs the distribution of water from federal projects unless Congress expresses a different approach."); *Westlands Water Dist. v. United States*, 805 F.Supp. 1503, 1509 (E.D. Cal. 1992) ("[F]ederal reclamation projects must be operated in accordance with state water law, when not inconsistent with congressional directives.").

Fortunately, no issue of pre-emption arises in this case because Oregon imposes precisely the appurtenancy and beneficial use requirements mandated by the Reclamation Act. Indeed, the language of the Oregon statutes, mirroring the language of Section 8, evidences Oregon's conscious intention to conform its water law to the Reclamation Act, as Table 1 demonstrates.

TABLE 1 COMPARISON OF OREGON STATUTES & RECLAMATION ACT	
"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water[.]" OR. REV. STAT. § 540.610 (2005).	"Beneficial use shall be the basis, the measure, and the limit of the right." Reclamation Act, Section 8, 43 U.S.C § 372 (West 2007).
"[A]ll water used in this state for any purpose shall remain appurtenant to the premises upon which it is used[.]" OR. REV. STAT. § 540.510 (2005).	"The right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated[.]" Reclamation Act, Section 8, 43 U.S.C § 372 (West 2007).

The government's contention that the Oregon legislature intended that these provisions *not* apply to the Klamath project lacks any support and, moreover, it is inconsistent with Oregon's conscious replication of Reclamation Act language and requirements.

Nor does the government offer any reason why Oregon, alone among Western states, would choose to create reclamation project water rights that conflicted with the Reclamation Act itself. No other state has done so. *See, e.g., Nevada v. United States*, 463 U.S. 110 (1983) (Nevada); *California v. United States*, 438 U.S. 645 (1978) (California); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (Nebraska and Wyoming); *Ickes v. Fox*, 300 U.S. 82 (1937) (Washington); *United States v. Pioneer Irrigation Dist.*, 157 P.3d 600, 609 (Idaho 2007) (Idaho); *In re Unitah Basin*, 133 P.3d 410, 421 (Utah 2006) (Utah). Indeed, Congress prescribed these appurtenancy and beneficial use requirements in the Reclamation Act precisely to bring about sufficient uniformity in western water law to allow the Secretary of Interior to efficiently administer this massive program of water projects across the arid West: "'This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected.'" *California*, 438 U.S. at 668 (quoting H. R. Rep. No. 794, 57th Cong., 1st Sess., 6 (1902)). In 1996, the Oregon Attorney General issued an opinion concurring in this interpretation:

> The United States Supreme Court specifically rejected a United States' contention that it had the authority to unilaterally reallocate state-law based water rights acquired under the Reclamation Act to endangered fish protection or tribal treaty purposes. In *Nevada v. United States*, [] the United States sought to reallocate water from irrigators within a federal project for the benefit of endangered fish and a tribal fishery. The Court rejected the United States' position:
>
> > We conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Letter from Stephen E. A. Sanders, Oregon Assistant Attorney General to Martha Pagel, Director, Oregon Water Resources Department 6-7 (Mar. 18, 1996) (quoting *Nevada v. United States*, 463 U.S. at 1126).

In short, regardless of what state law says, all water rights for all federal projects constructed under the authority of the Reclamation Act must be limited by the principles of appurtenancy and beneficial use set forth in Section 8 of the Reclamation Act. The

government's contention here that state law supersedes Reclamation Act requirements for project water rights is therefore erroneous:

> As we have noted, the Supreme Court of California first concluded that the provisions of s[ection] 8 of the 1902 Act as to the application of state law were absolute, and controlled all provisions of the Act and other reclamation statutes having to do with the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder. We believe this erroneous . . . .

Ivanhoe Irrigation Dist, 357 U.S. at 291 (internal punctuation and quotation marks omitted).

C. The Irrigators' Ownership of Water Rights Is Confirmed by Their Patent Deeds

Finally, the United States explicitly conveyed to the irrigators by patent deed a water right appurtenant to their land. Such patent deeds typically conveyed "the tract above described, together with the right to the use of water from the Klamath Reclamation Project as an appurtenance to the irrigable lands in said tract[.]" J.A. 001598 ¶ 31; J.A. 004191-92. These patent deeds were effective to convey to Appellant homesteaders the fee title to their land as well as an appurtenant water right. *See Hash v. United States*, 403 F.3d 1308, 1318-19 (2005) (patent deed conveys all of the United States' interest

unless explicitly reserved). This water right is a cognizable property right under the Fifth Amendment, and it was clear error for the trial court to hold otherwise.

The government's contention that the patent deeds "contained only contract rights to water in the Klamath Project, akin to the other contract rights at issue here[,]" makes no sense. Gov. Br. 45. First, a patent deed conveys title to land and appurtenances, *Hash*, 403 F.3d at 1318-19, it does not convey contract rights. Second, the government's contention is flatly contradicted by the Reclamation regulations in effect at the time, which provided that "for lands entered under the Reclamation Act . . . patent in each of such cases carries with it the water right to which the lands patented are entitled." 43 C.F.R. § 230.59 (1993).

Similarly, the government's contention that the property right it conveyed to the irrigators by patent deed is limited by the terms of the Form A ("Application for Permanent Water Right") contract is contrary to the doctrine of merger, under which it is the deed and not the original contract for conveyance which defines the scope of the property right conveyed. *Archambault v. Ogier*, 95 P.3d 257, 261 (Or.

App. 2004) ("Under the doctrine of merger, when a deed is delivered pursuant to the terms of a previous agreement, the deed supersedes the contract as to all its provisions made pursuant to the terms of the latter." (internal citation and quotation marks omitted)).

As this Court recently noted, despite a modern change in governmental land use priorities, the integrity of the patent deed is paramount:

> Throughout its resolution of various disputes, the Court has required that unless a property interest was expressly reserved by the government, whether in the patent grant or by statute or regulation then in effect, the disposition of the land was in fee simple.
>
> * * *
>
> The government stresses that the present national policy is in marked contrast to earlier homesteading policy, and that the earlier movement of federal lands into private ownership is now countered by a policy whereby government title serves national interests such as conservation and public recreation. The appellants respond that the nation, and the courts, must respect these landowners' property rights, whatever the shifts in public attitudes or national policy. We agree that the judicial obligation is to apply the law, to construe the property interests here at issue in accordance with the law in effect at the time the various arrangements were

> entered into, in implementation of the parties' intent, guided by the decisions of the Supreme Courts of the United States and of Idaho.

Hash, 403 F.3d at 1315-16.

As a last ditch effort, the government asserts that "[t]he CFC concluded that 'assuming *arguendo* that the patent deeds and water permits actually reflect perfected interests in water, they give rise to interests that could not have been taken or infringed' by the United States. . . . The CFC assumed the holders of patent deeds have a vested right and held that any such right has a priority date that is junior to the Project's rights." Gov. Br. 44. This was, of course, an "arguendo" rumination of the trial court, after he had already held that all the Irrigators lack any cognizable property right under the Fifth Amendment. *See Klamath*, 67 Fed. Cl. at 506 ("At issue in the pending cross-motions for partial summary judgment is whether plaintiffs' various interests in the use of the Klamath River Basin water constitute cognizable property interests for purposes of the Takings Clause."); *Klamath Irrigation Dist.*, 75 Fed. Cl. at 678 ("Previously, this court held that plaintiffs' interests in the use of Klamath Basin water did not constitute cognizable property interests

for purposes of the Takings claim, and, therefore, that plaintiffs were not entitled to compensation under the Fifth Amendment."). This comment about the seniority of water rights, which the court had held do not exist, was thus dicta rather than a holding, and was therefore not appealable. *See Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 894 (Fed. Cir.) ("We review judgments, however, not passing statements."), *cert. denied*, 469 U.S. 857 (1984). The Irrigators did not, therefore, acquiesce in the trial court's dictum nor waive their right to point out that this "arguendo" commentary is incorrect.[4]

Moreover, the trial court's suggestion that the Irrigators' water rights do not bear the priority date on which they were appropriated (May 17, 1905) is incomprehensible, since what the Irrigators received

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[4] Indeed, on motion by the government, the trial court held in abeyance all issues other than whether the irrigators have a cognizable property right under the Fifth Amendment, and even struck the portion of the irrigators' brief addressing other issues. *See* Order (Mar. 23, 2004) ("[T]he court grants defendant's motion to hold in abeyance the portion of plaintiffs' brief that deals with matters other than the threshold issue of the precise scope and nature of the property rights plaintiffs allege to have been taken by the government"); Order (Aug. 22, 2003) ("[P]laintiffs' motion for partial summary judgment, filed on July 21, 2003, shall be stricken from the record").

from the United States by patent deed was the very same water right (with a priority date of May 17, 1905) appropriated by the United States when it filed its notice with the State Engineer. *See* J.A. 004187, J.A. 004189-90, J.A. 0044191-92, J.A. 004193-94, J.A. 004312-17, J.A. 004320-24, J.A. 004347, J.A. 004377-81, J.A. 004393-94. Indeed, the only Klamath Project water right the United States held was the 1905 water right – which it conveyed to the Irrigators. Under Oregon law, the water right retains its priority date when transferred.[5] *In re Willow Creek*, 144 P. 505, 524 (Or. 1914) (affirming land sold in 1906 held prior appropriation right dating to year 1882); *Campbell v. Walker*, 2 P.2d 912, 915 (Or. 1931) (citing rule that "a squatter upon public lands may, even by parol, transfer his claim and interest, whatever it may be in this respect, to another, and the rights of the subsequent purchaser and of his successors in interest, if asserted under the doctrine of prior appropriation, relate back to the date of

[5] The government's assertion that the Irrigators have waived this argument lacks merit, as the holding of the trial court was that the Irrigators lacked a property right protected by the Fifth Amendment. The trial court's "arguendo" observation on the priority of these rights, a casual aside suggesting that, even if the irrigators had a property right, it had not been taken, was outside the issues before the trial court. *See supra* at footnote 1.

the first appropriation by the person with whom there may be a privity of estate"); *see also City of Stillwater v. Oklahoma Water Resources Bd.*, 524 P.2d 938, 944 (Okla. Civ. App. 1974) ("Later on Regents could and did succeed to the rights of the United States by transfer. . . . Regents acquired by the transfer the priority of the initial appropriation and, as the Department of Agriculture's privy, Regents must be regarded as standing in the very same position[.]" (internal quotation marks omitted)).

D. Van Brimmer, Klamath Drainage District, and Klamath Hills District Improvement Company Had Separate Water Rights Which the Trial Court Ignored

The government erroneously claims that the Irrigators waived its argument regarding Van Brimmer, Klamath Drainage District, and Klamath Hills District Improvement Company. To the contrary, the Irrigators stated in their opening brief that the trial court seems to have simply forgotten about the uncontested water rights of three parties: Van Brimmer, Klamath Drainage District, and Klamath Hills District Improvement Company. *See* Irrigators' Br. 45. Despite the government's contention, the Van Brimmer Ditch Company does

possess a pre-1905 water right, which the United States has never contested. *See* J.A. 004307-09 (1883 Notice of Appropriation filed by Van Brimmer brothers). The contract language on which the government relies relinquishes only Van Brimmer's riparian rights in lower Klamath Lake, not its appropriative rights. Van Brimmer Ditch Company 1909 Contract, at ¶ 1, J.A. 004270 ("[T]he Company hereby waives and renounces to the use and benefit of the United States any and all of its riparian rights, in relation to the waters and shores of Lower Klamath Lake."). The agreement simply transferred Van Brimmer's point of diversion from lower Klamath Lake (which was to be blocked off) to upper Klamath Lake, which became the current reservoir where the water is today stored and diverted. Similarly, two districts, Klamath Drainage District and Klamath Hills District Improvement Company, hold vested water rights certificates, which are also property rights under Oregon Law, and the trial court erred in holding otherwise. *See* J.A. 0043416 (water right certificate dated Sept. 5, 1978) and J.A. 0043414 (water right certificate dated May 30, 1984).

II. The Klamath Basin Compact

The plain language of the Klamath Compact (which the United States ratified) provides the Irrigators a just compensation remedy for the government's impairment (something less than a taking) of their vested irrigation and domestic water rights in the Klamath Project. The United States recognized these vested water rights in Article III of the Klamath Compact: "[t]here are hereby recognized vested rights to the use of waters originating in the Upper Klamath River Basin validly established and subsisting as of the effective date of this compact under the laws of the state in which the use or diversion is made, including rights to the use of waters for domestic and irrigation uses within the Klamath Project." Klamath River Basin Compact, Art III (1957), J.A. 004296. The United States agreed to pay just compensation if it impairs those rights: "[t]he United States shall not, without payment of just compensation, impair any rights to the use of water [for domestic or irrigation purposes] within the Upper Klamath River Basin." Pub. L. No. 85-222, 71 Stat. 497, 507 (Aug. 30, 1957).

Contrary to the government's contention, nothing in Article XIII limits the irrigators' just compensation rights. The provision on which the government relies does not mention the irrigators' just compensation remedy at all, but instead merely limits the United States' exercise of its power to impair a limited class of post-1957 rights: "But the exercise of powers and rights by the United States shall be limited under this paragraph 2 only as against rights to the use of water for use (a) [domestic] or (b) [irrigation] within the Upper Klamath River Basin which are acquired as provided in subdivision B of Article III after the effective date of this compact, but only to the extent that annual depletions in the flow of the Klamath River at Keno resulting from the exercise of such rights to use water for uses (a) [domestic] or (b) [irrigation] do not exceed 340,000 acre feet in any one calendar year." J.A. 004301.

Finally, even if this Compact remedy were limited to post-1957 water rights, both Klamath Drainage District and Klamath Hills District Improvement Company hold such water rights and would be entitled to just compensation for them. See J.A. 0043416 (water right

certificate dated Sept. 5, 1978) and J.A. 0043414 (water right certificate dated May 30, 1984).

III. The Sovereign Act Doctrine

This court has repeatedly rejected the government's argument, resurrected here, that common law impossibility should not be an element of the sovereign act defense and should again do so here.[6] *See City Line Joint Venture v. United States*, --- F.3d ----, 2007 WL 2791704, at * 3 (Fed. Cir. 2007) (rejecting the sovereign acts defense under a *Winstar* analysis because the effect of the statute at issue "was not merely a consequential loss resulting from the lawful exercise of the police power, but rather legislation aimed at the contract rights themselves in order to nullify them" and refusing to allow the government to "avail itself of the impossibility defense to save it from this breach of contract claim") (internal citation and quotation marks omitted)); *Carabetta Enterprises v. United States*, 482

[6] "The CFC correctly concluded that grafting a common law impossibility test on the sovereign acts doctrine would undermine the sovereign act doctrine's purpose to retain government's ability to respond to unanticipated public needs without the specter of liability." Gov. Br. 59.

F.3d 1360 (Fed. Cir. 2007) ("Yet even if the sovereign acts doctrine applies, 'it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach." (quoting *United States v. Winstar*, 518 U.S. 839, 904 (1996))).

Moreover, because it found that the government need not prove impossibility, the trial court failed to address the myriad number of factual issues relating to impossibility, which precluded summary judgment on the sovereign act defense. For example, the contractors pointed the trial court to no fewer than eleven alternatives that Reclamation could lawfully have taken rather than to cut off all water deliveries; by adopting one of these other alternatives, Reclamation could have complied with the ESA while avoiding the 2001 breach of contract. *See* Pls.' Opp. 9-10, J.A. 003986-87. At the trial court, the government did not even dispute the irrigators' and water districts' point that Reclamation could have delivered Klamath Project water to the irrigators in 2001, both legally and physically (as Upper Klamath Lake was virtually full all summer). *See* Def. Reply 10, J.A. 4102 ("[T]hese attacks on the basis

of the agencies' actions in 2001 have no relevance to the application of the sovereign acts doctrine or the unmistakability doctrine. Accordingly, it is not necessary at this time to reach or address these issues."). Nor did the government dispute the irrigators' and water districts' point, supported by the blue ribbon National Research Council's scientific reports, commissioned by Defendant itself,[7] that such water deliveries would not have jeopardized the endangered fish. *See* National Research Council, *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin* at 23 (2002). Instead, the government chose to rely solely on its argument that it need not prove impossibility at all to establish its sovereign act defense.

Another issue of fact which precluded summary judgment on impossibility, but which was ignored by the trial court and the

[7] The NRC Report was the result of the Department of the Interior and Department of Commerce's request "for the National Research Council to form the Committee on Endangered and Threatened Fishes in the Klamath River Basin, whose charge is to conduct an external review of the scientific basis for the biological opinions that resulted in changes of water management for year 2001." National Research Council, *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin* at xvi (2002).

government, was whether the injunction that led to the 2001 biological opinion, resulted from Reclamation's cavalier disregard of its management responsibilities for nearly a decade. The contractors relied on the doctrine that "an order or decree which interferes with the performance of the contract is not an excuse . . . if it was caused by defendant's own negligence or breach of duty to others, and means of avoiding such interference with performance are reasonably available." 17B C.J.S. Contracts § 527 (2006); *see also Precision Pine & Timber, Inc. v. United States*, 50 Fed. Cl. 35 (2001) (holding that where the Forest Service was responsible for the unreasonable delays in completing the ESA consultation, through series of substantive and procedural blunders, the agency was not shielded from breach of contract liability under the sovereign acts doctrine).

The contractors demonstrated that, as of March 2000, Reclamation was intentionally operating in violation of the Endangered Species Act, precipitating the suit that led to the preliminary injunction requiring the 2001 consultation, and that the injunction was the culmination of nearly a decade of mismanagement

by Reclamation, including outright refusal to prepare an operating plan for the Klamath Project despite strong urging by the court to do so as early as 1994. *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 138 F.Supp.2d 1228, 1242-46 (N.D. Cal. 2001) (detailing the Bureau's actions before concluding that "[d]espite the weight which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is clear that the Bureau of Reclamation failed to comply with these requirements before implementing its 2000 Operations Plan for the Klamath Project.")

Nor did that injunction prohibit water deliveries in 2001, as the government implies. Rather, the injunction merely required Reclamation to consult with Fish and Wildlife and NMFS, a procedure set out in Section 7 of the Endangered Species Act. *Id.* at 1250 ("Plaintiffs' request for injunctive relief hereby is GRANTED, and the Bureau of Reclamations hereby is enjoined from sending irrigation deliveries from Klamath Project whenever Klamath River flows at Iron Gate Dam drop below the minimum flows recommended in the Hardy Phase I report, until such time as the Bureau completes a concrete plan to guide operations in the new

water year, and consultation concerning that plan is completed, either by (1) formal consultation to a "no jeopardy" finding by the NMFS, or (2) the Bureau's final determination, with the written concurrence of the NMFS, that the proposed plan is unlikely to adversely affect the threatened coho salmon."). That consultation was completed on April 6, 2001, with the issuance of the biological opinions, and the injunction was lifted on May 3, 2001. *See* Order Granting Request to Lift Injunction (May 3, 2001), *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, No. 4:00-cv-01955-SBA (N.D. Ca. 2000).

Finally, the government points to nothing in the Endangered Species Act that prohibited it from delivering water to the contractors in 2001. The Act required Reclamation to complete a Section 7 consultation (which it did as of April 6, 2001), and Section 9 prohibited Reclamation to "take" an endangered species; but, as the National Research Council report demonstrates, there is no evidence that delivering water to the contractors in 2001 would have harmed the endangered fish:

> Extensive field data on the fish and environmental conditions in Upper Klamath Lake do not provide scientific support for the underlying premise of the RPA that higher lake levels will help maintain or lead to the recovery of [the shortnose and Lost River suckers] . . . [Moreover,] [t]he committee does not find scientific support for the proposed minimum flows as a means of enhancing the maintenance and recovery of the coho population.

National Research Council, *Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin* at 26-27 (2002).

In short, the trial court's impermissible truncation of the sovereign act inquiry, limiting its analysis to whether Reclamation's nonperformance was motivated by something other than the desire to breach these water contracts, fell far short of the showing required to establish the sovereign act defense as announced by this Court.

CONCLUSION

For all of these reasons, the Irrigators ask that this Court reverse the two decisions of the trial court at issue in this appeal.

Respectfully submitted,

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Dated: November 13, 2007

CERTIFICATE OF SERVICE

United States Court of Appeals
for the Federal Circuit
No. 07-5115

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KLAMATH IRRIGATION et al.,
Plaintiffs-Appellants,
v.
UNITED STATES,
Defendant-Appellee,
and
PACIFIC COAST FEDERATION OF
FISHERMAN'S ASSOCIATION
Defendant-Appellee.
---)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by MARZULLA & MARZULLA, Attorneys for Plaintiffs-Appellants.

On the **13th Day of November 2007**, I served the within **Reply Brief for Plaintiffs-Appellants** upon:

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via Electronic mail and First Class Mail, by causing 2 true copies of each, enclosed in a properly addressed wrapper, to be deposited in an official depository of the U.S.P.S..

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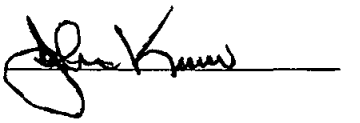
November 13, 2007



CERTIFICATE OF COMPLIANCE WITH FEDERAL CIRCUIT RULE 32(a)(7)

Counsel for Plaintiffs-Appellants states that this reply brief complies with the type-volume limitations of Federal Circuit Rule 32(a)(7)(B). The brief contains 6,494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

In addition, counsel for Plaintiffs-Appellants states that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared with a proportionally spaced typeface using Microsoft Word 2003, in 14 pt. font, Book Antiqua typeface.

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