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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5115

KLAMATH IRRIGATION DISTRICT, TULELAKE 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. ROBISON, ALBERT J. ROBISON, 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,

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

OCT 24 2007

JAN HORBALY
CLERK

v.

UNITED STATES,

Defendant-Appellee,

and

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

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.

CORRECTED BRIEF OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTEREST

Counsel for the defendant-appellee, Pacific Coast Federation of Fishermen's Associations, certifies the following:

1. The full name of every party or *amicus* represented by me is: Pacific Coast Federation of Fishermen's Associations (defendant-appellee). I also represent Institute for Fisheries Resources, The Wilderness Society, Klamath Forest Alliance, Oregon Wild, WaterWatch of Oregon, Northcoast Environmental Center, and Sierra Club as *amicus*.

2. The name of the real party in interest represented by me is: Pacific Coast Federation of Fishermen's Associations.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are: None.

4. ☐ There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are: Todd D. True, Earthjustice, and Robert B. Wiygul (Mr. Wiygul will not be appearing in this court).

Dated this 11th day of December, 2007.

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Federal Circuit Rules, counsel for defendant-intervenor appellee Pacific Coast Federation of Fishermen's Associations ("PCFFA")[1] states that there have been no prior appeals to this Court or any other court from the final judgment in this case, No. 01-591 L. However, there are pending cases that will be directly affected by this Court's decision in this appeal. In particular, two appeals pending before this Court, Stockton East Water District v. United States, No. 2007-5142, and Casitas Municipal Water District v. United States, No. 2007-5153, also involve claims that restrictions on water deliveries that were compelled by compliance with the Endangered Species Act constituted takings of appellants' water rights and breaches of contract. Another case pending in the Court of Claims, John Anderson Farms v. United States, No. 07-194C, also presents these issues and has been stayed pending the outcome of this appeal.

[1] Counsel for PCFFA also represents a number of *amici* in this case: WaterWatch of Oregon, The Wilderness Society, Klamath Forest Alliance, Oregon Wild (formerly Oregon Natural Resources Council), Northcoast Environmental Center, Institute for Fisheries Resources, and Sierra Club. In order to avoid duplicative briefing, these *amici* adopt PCFFA's brief as their *amicus* brief. They also seek leave pursuant to Federal Rule of Appellate Procedure 29 to participate as *amici* in this appeal for the reasons set forth in their memorandum in support of their Motion to Intervene as Defendants filed in the court below. J.A. 000283-328.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

PCFFA concurs in the description of the third issue before the Court identified in Appellants' brief. PCFFA disagrees, however, with the Appellants' characterization of the first and second issues. Appellants' description of the issues presents contested issues as matters of fact. Appellants' second issue is also better characterized as a subset of the first issue. Those issues are more properly described as a single item, as follows:

1. Was the trial court correct in holding that the Plaintiffs-Appellants do not have constitutionally-protected property rights in water from the Klamath Project?

STATEMENT OF THE CASE

As directed by Local Rule 28(b), PCFFA limits this Statement to specific areas of disagreement with Appellants' statement of the case. In particular, Appellants' Statement is erroneous in the following respects:

- In concluding that the United States was the owner of the Klamath Project water rights under a 1905 Oregon statute, the Court of Claims did not "reject[] an unbroken line of Supreme Court precedent," Irrigators' Brief at 4, but instead properly applied the Supreme Court's conclusion that, under the Reclamation Act, "state water law

would control in the appropriation and later distribution of the water." California v. United States, 438 U.S. 645, 664 (1978).

- The Court of Claims correctly concluded the sovereign acts doctrine is an independent defense and not a mere prelude to the application of the common law impracticability doctrine. The plurality opinion in United States v. Winstar Corp., 518 U.S. 839 (1996), does not represent binding authority, as recognized by this Court in Yankee Atomic Electric Co. v. United States, 112 F.3d 1569 (Fed. Cir. 1997).
- The Bureau's decision to allow more water to remain in the Klamath River during the drought conditions in 2001 was compelled by the Endangered Species Act's requirement that federal actions must avoid jeopardy to listed species and that federal agencies act based on the best available science, a result confirmed by an unbroken string of decisions in the courts of the Ninth Circuit.
- Finally, the Irrigators have never repaid the real costs of the construction, operation, and maintenance of the Klamath Project, but have instead been the beneficiaries of massive government subsidies.

STATEMENT OF FACTS

To avoid duplication of the statement of facts provided by the federal

appellees, PCFFA addresses only two issues in this statement of facts.[2] First, PCFFA explains that the Irrigators have received significant government subsidies throughout the operation of the Klamath Project and that they continue to receive subsidies to this day. Second, PCFFA outlines the history of the litigation in the Ninth Circuit over what the Endangered Species Act requires in the context of the Klamath Project. In that litigation, the courts have unequivocally held that the Bureau of Reclamation ("BOR" or "the Bureau") must leave enough water in Upper Klamath Lake and the Klamath River to avoid jeopardy to threatened and endangered fish.

I. THE IRRIGATORS ARE THE BENEFICIARIES OF SIGNIFICANT GOVERNMENT SUBSIDIES

An important frame for the Irrigators' appeal is the claim that they "have paid the costs of constructing, operating and maintaining the Klamath Project for nearly a century," Irrigators' Brief at 8, and that the decision below unfairly robs them of this long-standing investment, id.; see also id. at 12-14 (Irrigators "have long since repaid their portion of the allocated cost of constructing the Klamath Project facilities").

This frame is not accurate. As documented in studies by the Government Accountability Office and acknowledged by the Court below, the federal

[2] PCFFA otherwise relies on the federal appellees' Statement of Facts.

government has not sought to recoup all of its costs for the Klamath Project and, indeed, Bureau of Reclamation water customers have received – and continue to receive – substantial economic subsidies from the government. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 508 (2005) (citing GAO, Rep. No. GAO/RCED-96-109, Bureau of Reclamation: Information on Allocation and Repayment of Costs of Constructing Water Projects (1996) [hereinafter "1996 GAO Report"]) (available at: http://www.gao.gov/archive/1996/rc96109.pdf); GAO Rep. No. PAD-81-07, Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs (1981) (available at: http://archive.gao.gov/f0102/114588.pdf)). PCFFA focuses here on two kinds of subsidies that the Irrigators have received: project construction cost subsidies and electrical power subsidies.

A. The Irrigators Received Construction Cost Subsidies

The Irrigators assert that they "have long since repaid their portion" of the cost of constructing the Klamath Project. Irrigators' Brief at 14. Their contracts with the Bureau, however, allowed them to repay these construction costs over a period of decades *without interest*. As any home mortgage holder knows, by far the largest cost in repaying a major capital investment over a long period of time is interest. Contrary to the Irrigators' claim, they have not, in fact, repaid the government for the real cost of constructing the Klamath Project. Rather, they have repaid a small fraction of those costs, what they characterize as "their

portion."

According to the GAO, the federal government spent $53 million to build the Klamath Project. See 1996 GAO Report, Appendix IV. The beneficiaries of the Project were allocated responsibility for repaying some of these costs. The terms of the repayment contracts varied, with the repayment period ranging from 15 years[3] to 40 years.[4] All of the contracts provided, however, that the districts would repay their share of the costs *without interest.* The repayment schedules provided, in effect, interest-free loans to the districts, costing the public a substantial portion of the time value of the money involved. As analyzed by Richard W. Wahl in a declaration submitted to the court below, the districts' "no interest" subsidy ranged from 1.92% to 48.54% of the total construction costs allocated to each district. J.A. 003696-003700.

Some of the districts' repayment terms were also modified in other ways that effectively increased their subsidies. First, the government has at times provided the irrigators with moratoria even on the limited repayment obligations they have. See Bureau of Reclamation, U.S. Department of the Interior, Repayment of

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[3] See, e.g., Pine Grove Irrigation District contract, art. 7 (J.A. 004537-38); Enterprise Irrigation District contract, art. 7 (J.A. 004533); Malin Irrigation District contract, ¶ 15 (J.A. 004525-26).

[4] See, e.g., Tulelake Irrigation District contract, ¶ 3(b) (J.A. 004450); Shasta View Irrigation District 1972 contract, ¶ 10(b) (J.A. 004595).

Reclamation Projects, at 199 (1972). J.A. 003791. Second, the government has elected not to enforce certain delinquency payments. See, e.g., Klamath Drainage District 1943 contract, ¶ 12 (J.A. 004425). Third, the government provided direct subsidies to Project users, including (1) $431,000 in "irrigation assistance," "payments made with revenues from power or a project's other sources ... because the amounts allocated to irrigators have been determined to exceed their ability to pay," 1996 GAO Report at 58, 64; (2) $915,000 in "charge-offs," legislatively provided debt forgiveness, id. at 59, 66; and (3) $2.4 million in other discounted government loans, id. at 36, 59.

The history of the Klamath Project, its costs, and their limited repayment by the Irrigators reveal that the Irrigators are not hapless victims of government overreaching but the very fortunate beneficiaries of considerable government largess over a long period of time.

B. Appellants Have Received, and Continue to Receive, Subsidized Electrical Power.

Indeed, the government's generosity to the Irrigators continues to this day: they have also received – and continue to receive – significant electrical power rate subsidies. In 1917, BOR and the California-Oregon Power Company (the predecessor of PacifiCorp) entered into a 50-year contract that, among other things, required the utility to supply electricity to Klamath Project water users at low, fixed rates. See In re PACIFICORP, A.05-11-022, I.06-03-002, (Decision 06-04-

034) (Cal. P.U.C. Apr. 13, 2006), at 3 (available at: http://www.cpuc.ca.gov/word_pdf/FINAL_DECISION/63020.pdf) [hereinafter "Cal. PUC Decision 06-04-034"]. Following the Federal Energy Regulatory Commission's decision to issue a license for the Link River Dam in 1954, BOR and PacifiCorp extended this agreement until 2006. Id. at 4. As electricity rates have increased in the region, Klamath Project irrigators have paid an increasingly small proportion of prevailing market rates. In 2006, the Irrigators were paying essentially the same rate for power that they had paid 90 years earlier; that rate was less than *one-tenth* the rates paid by other PacifiCorp customers. See id. at 4-5 (comparing Klamath Irrigators' rate of $0.006 per kilowatt-hour to PacifiCorp Irrigation Schedule PA-20 tariff rate of $0.07928 / kWh); see also In re Pacific Power & Light, UE 170 (Order No. 06-172) (Or. P.U.C. Apr. 12, 2006), at 2, 6 (available at: http://apps.puc.state.or.us/orders/2006ords/06-172.pdf) [hereinafter "Or. PUC Order No. 06-172"]. Now that the 1956 Contract has expired, these rates no longer apply, but the Irrigators are still paying less than other PacifiCorp customers and were paying much less in 2001 while the 1956 Contract was still in effect. In California, pursuant to a "transition plan," their rates are gradually being increased until they will pay full applicable tariff rates in April 2010. See id., App. A at 2; see also In re PACIFICORP, A.05-11-022, I.06-03-002, (Decision 06-12-011) (Cal. P.U.C. Dec. 14, 2006) (available at:

http://www.cpuc.ca.gov/word_pdf/FINAL_DECISION/63020.pdf). The estimated value of this "transition period" subsidy alone is $7.4 million, the cost of which will be borne by other PacifiCorp customers. Cal. PUC Decision 06-04-034 at 18. In Oregon, Klamath Basin irrigators have been granted a seven-year transition to full tariff rates. See Or. PUC Order No. 06-172 at 24. This transition period represents a subsidy of approximately $1.7 million. Id. at 25. The value to the Irrigators of *decades* of remarkably cheap power has not been calculated.

The simple fact is that the Irrigators have received extraordinary economic benefits from the government through the construction and operation of the Klamath Project, benefits for which they have not paid.

II. THE ENDANGERED SPECIES ACT AND THE BEST AVAILABLE SCIENCE COMPELLED THE FEDERAL GOVERNMENT TO LEAVE WATER IN THE KLAMATH RIVER IN 2001

The Irrigators seek to complement the inaccurate claim that they have paid dearly and fully for "constructing, operating and maintaining the Klamath Project for nearly a century," Irrigators' Brief at 8, with the equally misleading argument that "nothing in the [Endangered Species] Act made it impossible for Respondent to supply water to Appellants in accordance with the terms of their contracts," id. at 52. Like the claim that they have paid fully for the Klamath Project, this argument too depends on a selective presentation of the facts, including a description of a report prepared by the National Academies of Science that is both

inaccurate and incomplete. See id. at 6-7, 52. Moreover, they ignore altogether the extensive litigation that has occurred in the Ninth Circuit over precisely what the ESA required in 2001 and still requires today in the context of the Klamath Project – litigation in which many of the Irrigators have fully participated.

A. The ESA and Klamath Project Operations

The ESA requires that, before taking any action, a federal agency must determine whether any threatened or endangered species might be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If it concludes that such species might be present and, in a biological assessment, determines that the proposed action is likely to adversely affect the species, then the agency must engage in formal consultation with either the Fish and Wildlife Service ("FWS") (for terrestrial and freshwater species) or the National Marine Fisheries Service ("NMFS") (for marine and anadromous species). Id.; id. at (a)(2). In the formal consultation, FWS or NMFS must prepare a biological opinion, or BiOp, which identifies the effects that the proposed action will have on the listed species and its critical habitat. Id. at (b)(3)(A). If the Service concludes that the action might cause jeopardy to a listed species or adversely modify its critical habitat, then it must propose "reasonable and prudent alternatives," if any exist, to the proposed action that would avoid jeopardy or adverse modification. Id. The agencies are required to use "the best scientific and commercial data available" when

completing this consultation. Id. at (a)(2).

FWS listed two species of fish that inhabit Upper Klamath Lake and its tributaries, the Lost River and shortnose suckers, as endangered in 1998. 53 Fed. Reg. 27,130, 27,131-32 (July 18, 1988). NMFS listed Southern Oregon / Northern California Coast ("SONCC") coho salmon as a threatened species under the ESA in 1997. 62 Fed. Reg. 24,588, 24,592 (May 6, 1997).[5] SONCC coho spawn in several streams and rivers in southern Oregon and northern California, including the Klamath River and its tributaries. NMFS completed its first BiOp addressing the effects of BOR's operation of the Klamath Project on SONCC coho in 1999. Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation, 138 F. Supp. 2d 1228, 1233 (N.D. Cal. 2001) ("PCFFA I"). The BiOp concluded that the 1999 Annual Operations Plan for the Project would adversely affect SONCC coho, but that it was not likely to jeopardize the continued existence of the species. Id.

In the meantime, the Department of the Interior commissioned Dr. Thomas Hardy of Utah State University to review the status of anadromous fish, including

[5] This listing was reaffirmed in 2005. See Endangered and Threatened Species: Final Listing Determination of 16 ESUs of West Coast Salmon, and Final 4(d) Protective Regulations for Threatened Salmonid ESUs, 70 Fed. Reg. 37,160, 37,193 (June 28, 2005). A federal district court recently upheld the listing. Alsea Valley Alliance v. Lautenbacher, No. 06-6093-HO, 2007 WL 2344927, at *1 (D. Or. Aug. 14, 2007).

SONCC coho, in the Klamath. Id. at 1232. Dr. Hardy released his Phase I report on August 5, 1999. Id. This report included interim recommendations on the flow levels necessary to avoid harm to SONCC coho and other species in the Klamath. Id. at 1232-33.

B. ESA Litigation Over Klamath Project Operations

The Bureau did not consult with NMFS before implementing its 2000 Annual Operations Plan for the Klamath Project, a failure that in early 2001 a district court found to be a violation of the ESA. PCFFA I, 138 F. Supp. 2d at 1247. Consequently, the court enjoined the Bureau from delivering irrigation water to the Klamath Project when Klamath River flows dropped below the minimum flows recommended in the Hardy Phase I report until it completed ESA consultation. Id. at 1251. In imposing this injunction, the court specifically concluded that the Hardy Phase I report was "the best science currently available." Id. at 1250.

The Bureau promptly consulted with FWS and NMFS on its 2001 Annual Operations Plan. Kandra v. United States, 145 F. Supp. 2d 1192, 1198-99 (D. Or. 2001). In this consultation, both FWS and NMFS concluded that operation of the Project as proposed by the Bureau would jeopardize the continued existence of the listed fish in upper Klamath Lake as well as the SONCC coho. Id. at 1198. In draft BiOps, these agencies recommended minimum water levels for Upper

Klamath Lake and minimum flows for the Klamath River below Iron Gate Dam. Id. The Bureau informed the agencies that the forecasted water supplies for 2001 were inadequate to meet these requirements. Id. In other words, even without water diversions for irrigation, the water flows and levels would be less than the agencies concluded the listed fish required. FWS and NMFS subsequently compromised with BOR and released final BiOps with lower flows and lake water levels, concluding that while these RPAs would still harm the listed fish, they would avoid jeopardy to these species. Id. The Bureau then released its final operations plan, which, in order to comply with the ESA, adopted the flow requirements of the reasonable and prudent alternatives in the BiOps under the extremely dry conditions that prevailed in 2001. This decision resulted in the Bureau delivering significantly less water to its customers, including the Irrigators.

Within days, several irrigators, including appellants Klamath Irrigation District and Tulelake Irrigation District, challenged the Bureau's decision to implement the RPAs in the FWS and NMFS BiOps in court. The court denied the plaintiffs' motion for a preliminary injunction in that case, holding, among other things, that they were unlikely to prevail on their ESA claim. Id. at 1210. The plaintiffs had argued – as they apparently attempt to do again here – that the flow recommendations in the BiOps were not based on the best available scientific evidence. Id. at 1208. The court rejected this argument, finding that plaintiffs had

not shown "that NMFS or FWS failed to consider relevant, available, scientific data" and that "plaintiffs simply disagree[d] with the scientific conclusions reached by FWS and NMFS." Id. at 1210. The Irrigators subsequently filed the case in the Court of Claims that is the subject of the present appeal.

Later in 2001, the Department of the Interior asked the National Research Council ("NRC") to "independently review the scientific and technical validity of the government's biological opinions" that were at issue in PCFFA I and Kandra. Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation, 426 F.3d 1082, 1087 (9th Cir. 2005). The NRC Report was not released until 2002 and was not (indeed, could not have been) before the Bureau when it adopted the 2001 Annual Operations Plan in response to the jeopardy biological opinions. The Report did not find scientific support for the flow recommendations in NMFS' salmon BiOp, although the NRC later clarified that it "did not conclude that NMFS must be wrong in its recommendations on main-stem flows."[6] Id. The NRC committee also did not consider the findings of a second

[6] The NRC's subsequent 2004 Report also disagreed with the agency's 2001 conclusions, though it noted that:

> The listing agencies have been criticized for using pseudoscientific reasoning ("junk science") in justifying their requirements for the protection of species in the upper Klamath basin. The committee disagrees with this criticism. The ESA allows the agencies to use a wide array of information sources in protecting listed species. The agencies can be expected, when information is scarce, to extend their

report from Dr. Hardy, the Hardy Phase II report, even though it was available to the Committee in draft form, which determined that "flows lower than approximately 1000 cubic feet per second (cfs) during the later summer would likely expose the SONCC coho to dangerously high water temperatures, thereby increasing the risk of harm to the species." Id. at 1088. The BOR's Annual Operations Plan for 2001, based on the 2001 BiOps' reasonable and prudent alternatives, had required late summer flows of at least 1000 cfs, which is consistent with the Hardy Phase II recommendations.

The Bureau subsequently completed a 2002-2012 Operations Plan for the Klamath Project and engaged in ESA consultation regarding its effects. NMFS prepared yet another BiOp addressing the effects of the new plan on SONCC coho. NMFS again concluded that the plan would cause jeopardy to the coho. In reaching this conclusion, NMFS expressly considered the NRC Report, but did not adopt the NRC's conclusions. Instead, "NMFS attributed the conclusions of the NRC Report to 'lack of information on distribution and abundance of coho ... and the lack of studies focused on coho and factors limiting its population in the

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> recommendations beyond rigorously tested hypotheses and into professional judgment as a means of minimizing risk to species.

National Academies of Science, Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery 9 (2004).

Klamath River Basin.'" Id. at 1087-88. NMFS adopted instead the conclusions of the Hardy Phase II report regarding the effect of summer flows of less than 1000 cfs on coho salmon. Id. at 1089. Nevertheless, NMFS established an RPA that would not require providing such flows until 2010 and even then would hold BOR responsible for only 57 percent of the flows. Id. at 1088-89. The Ninth Circuit rejected this approach as arbitrary and capricious and upheld an injunction requiring the BOR to provide the minimum flows identified by NMFS in the BiOp. Id. at 1095; Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation, 226 Fed. Appx. 715, 716 (9th Cir. 2007).

In summary, the federal agencies considered all of the available scientific evidence when issuing both the 2001 and 2002-2012 BiOps. Furthermore, every court that has reviewed the BiOps and operation plans for the Klamath Project has concluded that the minimum flow requirements established in 2001 were scientifically justified and, indeed, required by the ESA.

SUMMARY OF THE ARGUMENT

The trial court correctly found that the United States owns the appropriative water rights for the Klamath Project. As explained in more detail in the United States' brief, the United States acquired these rights under a 1905 Oregon statute. The Reclamation Act defers to state law governing the acquisition and ownership of water rights, so long as state law is not inconsistent with federal law. Here,

Oregon's statute does not contradict any congressional directive and thus its assignment of water ownership controls. For this reason, the decisions on which the Irrigators rely – all of which interpret the laws of states other than Oregon – do not govern the outcome of this case.

Furthermore, even if the United States did not acquire the water rights under the 1905 statute, it would still have been the owner of the rights under contemporary Oregon common law. Under Nevada Ditch Co. v. Bennett, 45 P. 472 (Or. 1896), and its progeny, an appropriator can be the owner of appropriative water rights even if someone else puts the water to beneficial use. The United States, like the irrigation company in In re Waters of Walla Walla River, 16 P.2d 939 (Or. 1932), appropriated the water and developed the project and only later, by contract, agreed to provide the Irrigators with water. Under these circumstances, the United States would have been considered the owner of the Klamath Project's appropriative water rights even under Oregon common law.

Nor do any of the Irrigators' other alleged sources of property rights help them. First, the patent deeds that the United States granted to certain of the Irrigators conveyed no more than contract rights to water because these were the only rights available to be transferred to individual irrigators at the time the deeds were issued. Second, any cause of action created by the Klamath Basin Compact is unavailing to the Irrigators because they did not have any pre-existing property

rights to enforce through that cause of action. Nor did the Compact create any new property rights for the Irrigators. Third, the Irrigators' passing references to a pre-1905 claim and permits from the 1970s and 1980s are insufficient to properly raise these issues on appeal and they have therefore waived these arguments. In any event, the claim is not properly before this Court because it is being adjudicated in Oregon state proceedings in the Klamath Basin Adjudication and the permits are not vested rights (and are junior to the United States' and Indian water rights).

Furthermore, even if the Irrigators had property rights in Klamath Project water, those rights would be limited by background principles of state and federal law. In this case, the relevant principles include the public trust doctrine, Oregon and California's ownership of wildlife within their borders, and the senior water rights of Indian Tribes. The Irrigators' rights therefore could not have included the right to divert water from the Klamath River and Upper Klamath Lake even when water levels were so low as to jeopardize the continued existence of the suckers and coho.

The Irrigators' takings claims also fail because there is no legal support for their theory that the regulation of water diversions from a Reclamation project is a per se "physical" taking of property and because the government's extensive subsidies to the Irrigators leave it free to subject their access to water to appropriate regulations without facing liability for a taking.

Finally, the Irrigators' attempts to challenge the scientific underpinnings of the Bureau's decision ignore the legal requirements of the ESA.

ARGUMENT

I. THE IRRIGATORS DO NOT OWN ANY WATER RIGHTS THAT HAVE BEEN TAKEN BY THE BUREAU'S ACTIONS

A. The United States Owns the Water Rights Associated With the Klamath Project

The United States, not the Irrigators, is the owner of the appropriative water rights associated with the Klamath Project. This conclusion follows unavoidably from the following facts:

- The Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified, as amended, at 43 U.S.C. §§ 371 et seq.), was not intended to overrule or change state water law, so long as the state laws were consistent with congressional directives. On the contrary, the United States Supreme Court has held that "the Act clearly provided that state water law would control in the appropriation and later distribution of the water." California v. United States, 438 U.S. 645, 664 (1978).
- The Oregon Act of 1905, Or. Gen. Laws, 1905, Ch. 228, § 2, p. 401, as authoritatively interpreted by the Oregon Supreme Court in In re

Waters of the Umatilla River, 168 P. 922 (Or. 1917), vests the ownership of these water rights in the United States.[7]

[7] This Court should deny the Irrigators' request to certify a question to the Oregon Supreme Court regarding the interpretation of the 1905 statute. See Irrigators' Brief at 2 n.2. First, the factual predicate of this argument—that the Oregon Supreme Court has not interpreted the 1905 statute—is incorrect. That court has in fact already construed the statute in Umatilla River, 168 P. at 925, and concluded that the United States is the owner of the Klamath Project water rights. Second, even if the Oregon Supreme Court had not addressed this question, certification would still be inappropriate because the Court of Claims has already resolved the question. While federal courts have broad discretion to certify questions to state supreme courts where permitted by state law, see Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974); Or. Rev. Stat. § 28.200, it is well settled in at least six of the federal circuits that, absent extraordinary circumstances, appellate courts should deny a certification request brought by a party subject to an adverse ruling by the district court, see, e.g., Harvey E. Yates Co. v. Powell, 98 F.3d 1222, 1229 n.6 (10th Cir. 1996); Nieves v. University of Puerto Rico, 7 F.3d 270, 278 n.15 (1st Cir. 1993); National Cycle, Inc. v. Savoy Reinsurance Co., 938 F.2d 61, 64 (7th Cir. 1991); Perkins v. Clark Equipment Co., 823 F.2d 207, 209-10 (8th Cir. 1987); Smith v. FCX, Inc., 744 F.2d 1378, 1379 (4th Cir. 1984); In re McLinn, 744 F.2d 677, 681 (9th Cir. 1984); see also Charles A. Wright, et al., 17A Federal Practice & Procedure § 4248 ("[T]he failure of a party to suggest certification until a late stage in the proceeding considerably weakens his insistence on certification."). This rule promotes judicial efficiency and fairness, preventing a party from "tak[ing] two bites at the cherry by applying to the state court after failing to persuade the federal court." Cantwell v. University of Massachusetts, 551 F.2d 879, 880 (1st Cir. 1977).

Finally, certification of a question to the Oregon Supreme Court is particularly inappropriate here because the Irrigators already had an opportunity to have the Oregon courts resolve their right to Klamath water before proceeding with this litigation. See Fisher v. Bar Harbor Baking & Trust Co., 857 F.2d 4, 8 (1st Cir. 1988) (disfavoring certifying questions when plaintiff in diversity suit had choice of either litigating issue in state or federal court); Wright et al., supra ("[T]he court should be slow to honor a request for certification from a party who chose to invoke federal jurisdiction."). At the outset of this case, the United States sought a stay pending the resolution of a state water rights adjudication for the Klamath. The Irrigators, however, preferred to proceed without the benefit of the state court

- As a result, the cases on which the Irrigators rely – Ickes v. Fox, 300 U.S. 82 (1937), and its progeny – are all distinguishable. Those cases dealt with water rights in other states that did not have laws analogous to Oregon's 1905 statute.

In order to avoid duplicative briefing, however, PCFFA will not elaborate on these points but instead joins in the United States' brief on appeal as to these issues.[8]

B. Even Under Oregon Common Law, the United States Holds the Water Rights

As the United States has established in its brief and as summarized above, the Act of 1905 supplanted Oregon's common law of appropriation and under that statute the United States owns the water rights associated with the Klamath Project. Even if the Court were to disagree that this statute changed the common law (and it should not), the outcome would be the same. Under pre-1909 Oregon common law, the United States would still have been the owner of the water rights.

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ruling. Having chosen to force the Court of Claims to resolve their right to Klamath water, the Irrigators should not now be allowed to engage in an eleventh hour attempt to resuscitate their case by asking the Oregon Supreme Court to resolve an issue that has already been settled, further delaying this seven-year-old litigation.

[8] PCFFA also believes the legal arguments involving the sovereign acts and unmistakability doctrines are adequately addressed by the briefs filed by the United States and *amicus curiae* Natural Resources Defense Council, and PCFFA adopts the legal arguments in those briefs.

Before Oregon adopted its Water Code in 1909, the appropriation of water rights in that state was governed by common law. Under Oregon common law, an appropriator could acquire a water right even if someone other than the appropriator put the water to beneficial use. A valid common-law appropriation consisted of three elements: (1) the intent to appropriate water for a beneficial use; (2) a diversion of water from its natural channel; and (3) the application of water within a reasonable time to a beneficial use. In re Water Rights of Deschutes River and Tributaries, 286 P. 563, 567 (Or. 1930). One issue that arose in the elaboration of this common law framework by the courts was whether one must make an appropriation with the intent to use the water oneself, or whether it is sufficient to have the intent that others will use the water. The Oregon Supreme Court unequivocally concluded that "an appropriation may be made for the future use of another; and for the future use upon lands which the appropriator does not then own, or which he does not contemplate owning, and which he never does own." Id. at 574; see also Nevada Ditch Co. v. Bennett, 45 P. 472, 482 (Or. 1896) ("We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user."). The United States could acquire a

valid water right under Oregon common law by appropriating the waters of the Klamath River with the intention that individual farmers would eventually put the water to beneficial use.

The United States would also have been the owner of these water rights. The Oregon cases show that whether the final ownership of the water right rests in the appropriator or the irrigator depends on the specific relationship between the parties. Thus, in In re Waters of the Walla Walla River, 16 P.2d 939 (Or. 1932), the Oregon Supreme Court held that "a corporation organized for profit for the purpose of supplying water to all persons whose lands lie within reach of its ditch, for general rental ... becomes the owner of the use of the water appropriated, and the irrigator becomes its agent to apply the water supplied to a beneficial use," id. at 941; see also Nevada Ditch Co., 45 P. at 482 ("[I]t would seem that he who designed the scheme and made the diversion was the principal, rather than the user, who applies the result of the former's labor to his beneficial purpose.").[9] By contrast, "a mutual corporation organized for the purpose of carrying the water

[9] The background for this conclusion was the Water Law of 1891, 1891 Or. Laws at 52, codified at Or. Rev. Stat. § 541.010(1). This statute made the rental, sale, or distribution of water to landowners adjacent to or within reach of a company's ditch or canal a franchise subject to rate regulation. See id. The Oregon Supreme Court interpreted this statute to mean that "[w]hen a public corporation complies with all of the provisions of this statute, it, and not the owner of the land supplied, acquires the right to the use of the water." In re Waters of the Walla Walla River, 16 P.2d at 941.

appropriated by its mutual stockholders ... is simply the agent of the appropriator to carry his water to where he makes the beneficial use." In re Waters of the Walla Walla River, 16 P.2d at 941. More generally, the Court suggested that the final ownership of the water right was the subject of agreement between the appropriator and the user. Nevada Ditch Co., 45 P. at 482 ("As to who, in general, would own the appropriation when completed, it is not necessary for us to say at this time. We are of the opinion, however, that it is the subject of contract between the person who initiates the appropriation and the user.").

The Bureau's development and operation of the Klamath Project paralleled that of a public utility company: it appropriated the water, developed the project and, as the Irrigators are fond of pointing out, required anyone receiving water that the government had developed to pay the Bureau for its investment and service as calculated by the government. The Bureau and the project came first, then the Irrigators. By contrast, a mutual company organized by the water users follows development of the water and facilitates its delivery. Some of the individual plaintiff irrigation districts may more nearly resemble such a mutual company but the Bureau does not. Moreover, as the court below held, and the Irrigators do not contest, the contracts between the United States and the Irrigators do not transfer the United States' water rights to the Irrigators. See Klamath Irrigation District, 67 Fed. Cl. at 535-36, 539. Therefore, under the common law applicable at the time

the Bureau appropriated Klamath River waters and began constructing the Klamath Project, the United States, as the appropriator of the water, would have been the owner of the water rights associated with the Project.[10]

C. The United States Did Not Take Any Alleged Property Rights of the Irrigators' Based on Patent Deeds, the Klamath Basin Compact, Pre-1905 Claims, or Post-1953 Permits

Besides their main argument that the Klamath Project water rights originally vested in them, rather than the United States, the Irrigators make a variety of subsidiary claims. None of them has any merit.

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[10] The Irrigators rely, in part, on recent decisions by the Idaho and Utah Supreme Courts. See Irrigators' Brief at 21-22, 28-30 (citing United States v. Pioneer Irrigation District, 157 P.3d 600 (Idaho 2007) and In re Unitah Basin, 133 P.3d 410 (Utah 2006)). This reliance is misplaced. First, as both of these decisions recognize, the ownership of reclamation project waters is primarily a matter of state, not federal, law. Pioneer Irrigation District, 157 P.3d at 604, 608; Unitah Basin, 133 P.3d at 415. Therefore, these decisions, based on Idaho and Utah law, have no relevance to the controlling questions in this case regarding the interpretation of Oregon's 1905 statute and the Oregon common law of appropriation. In addition, the Idaho Supreme Court's decision is particularly unpersuasive. The court rejected several of its own precedents that held that "the project owner holds the water rights where an entity appropriates water for storage or irrigation project[s]." 157 P.3d at 608. Its only reason for doing so was that "none of these cases deals with the BOR or the Reclamation Act" – an explanation directly contradicted by the court's statement, earlier on the same page, that "Idaho law determines ownership, and the Reclamation Act does not independently define ownership rights." Id. at 608. Given the inconsistency of this reasoning, the Idaho Supreme Court's decision should not be accorded any persuasive value even if it were relevant (which it is not).

1. The Patent Deeds Did Not Create Property Rights in Water and Even If They Did, These Junior Rights Were Not Infringed by the Bureau's Actions

The Irrigators argue that the United States conveyed its water rights to the Irrigators by patent deeds. Irrigators' Brief at 43-45. This argument is unavailing for at least two reasons. First, the Irrigators do not even attempt to rebut the Court of Claims' conclusion that any such rights would be junior to those of the United States and therefore could not have been infringed by the Bureau's actions. Klamath Irrigation District, 67 Fed. Cl. at 539. They have therefore waived this issue and should not prevail for that reason alone.

In addition, however, their argument fundamentally misconstrues the nature of the relationship between individual homesteaders and the United States. The Irrigators are correct that the typical patent conveyed "the tract above described, together with the right to the use of the water from the Klamath Reclamation Project as an appurtenance to the irrigable lands in said tract." Irrigators' Brief at 43-44; J.A. 001598. They are incorrect, however, in concluding that these patents conveyed anything more than a contractual right to water.

The homesteaders' rights to water derived from their filing of a Form A "Application for a Permanent Water Right." These Form A contracts set forth the rights and obligations of the United States and the homesteader. J.A. 004200-02. The homesteader's beneficial use set a cap on the quantity of water to be delivered

to the homesteader. In addition, however, the contracts left it to the project manager to determine the actual amount of water to be delivered and limited the liability of the United States for water shortages, whether from drought or other causes. J.A. 004200 ("On account of drought, inaccuracy in distribution, or other cause, there may occur at times a shortage in the water supply, and while the United States will use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States, its officers, agents, or employees, for any damage, direct or indirect, arising therefrom."). Moreover, these contracts provide for the ongoing payment obligations of the homesteaders and state that the contractual right to water delivery is terminated if the land is transferred to nonagricultural uses. J.A. 004200-01. These conditions are inconsistent with a vested property right.

The "rights to the use of water" referenced in the patent deeds were these Form A contract rights. See Klamath Irrigation District, 67 Fed. Cl. at 512 (noting that to obtain a patent deed, homesteaders had to file a Form A and an affidavit stating that they had put the water to beneficial use). At the time the patent deeds were issued, contract rights were the only "rights" to use water available to be transferred. Bureau regulations originally contemplated issuing water rights certificates to individual irrigators, but this approach had been supplanted by the

practice of contracting with irrigation districts.[11] See id. at 508 (observing that after 1926, "the United States contracted exclusively with irrigation districts"). Thus, the Form A contracts were eventually replaced by contracts between the United States and the districts. Under these contracts, the districts assumed the United States' obligations to deliver water and collected payments due to the United States from individual landowners. Given that, as discussed by the United States in its brief, the irrigation districts themselves had only contractual rights to water deliveries, the individual irrigators could not receive any greater rights.

2. The Klamath Basin Compact Did Not Create New Water Rights

The Irrigators also argue that the Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (Aug. 30, 1957), provides them with a cause of action against the United States for the impairment of their water rights. Article XIII of this Compact, which was primarily designed to divide Klamath River water between Oregon and California, provides that "[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." 71 Stat. at 507.

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[11] It is these regulations, formally rescinded in 1994, that the Irrigators cite in their brief. See Irrigators' Brief at 44-45; Proposed Rescission of 43 C.F.R. Part 230, 58 Fed. Reg. 65,692 (Dec. 16, 1993) (noting that the Bureau's "relationships are with organizations rather than individuals, and homesteading is no longer a primary consideration for Reclamation projects"); see also 59 Fed. Reg. 18,491 (Apr. 19, 1994) (final rule rescinding 43 C.F.R. Part 230).

The Irrigators claim that this provision provided them with a "right to just compensation." Irrigators' Brief at 49.

Even if the Compact created a cause of action, this fact is useless to the Irrigators because they did not have any property rights to enforce through it. Article XIII of the Compact requires only that the United States pay compensation when it impairs water rights; it does not itself create any water rights. Indeed, other portions of the Compact expressly preserve existing federal rights. Thus, Article XI provides that "[n]othing in this compact shall be deemed ... [t]o impair or affect any rights, power or jurisdiction in the United States, its agencies or those acting by or under its authority, in, over and to the waters of the Klamath River Basin ... except ... as specified in Article XIII." 71 Stat. at 505. The Irrigators make much of the Article XIII exception at the end of this Article, see Irrigators' Brief at 48-49, but do not identify anything in Article XIII that turns over to the Irrigators the water rights owned by the United States. The exception is thus irrelevant to the question of who owns Klamath Project water rights. Moreover, Article III of the Compact affirmed and recognized the water rights as they existed under state law at the time of the Compact. 71 Stat. at 498 ("There 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."). As established above and by the United States in its brief, the "vested rights" to the Klamath Project water "as of the effective date of this compact" were held by the United States. Nothing in the Compact changed this fact. Cf. United States v. Adair, 723 F.2d 1394, 1419 (9th Cir. 1983) (holding that "Congress did not intend to make the terms of the Compact control the government's acquisition of Indian irrigation rights").[12]

3. *The Irrigators' Cursory Assertion of a Water Right Claim and Permits Should Be Rejected*

The Irrigators also assert that certain of them hold water rights either through a pre-1905 claim by the Van Brimmer Ditch Company ("VBDC") or through permits issued in the 1970s and 1980s. Irrigators' Br. at 45. As an initial matter, the Irrigators' one-sentence reference to these alleged water rights is insufficient to properly raise the issue on appeal. An appellant's opening brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App.

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[12] Moreover, the application of the provision that the Irrigators quote from paragraph B.2 of Article XIII is expressly limited to "rights to the use of water for use (a) or (b) within the Upper Klamath River Basin which are acquired as provided in subdivision B of Article III *after the effective date of this compact*." 71 Stat. at 507 (emphasis added). This section therefore applies only to rights acquired *after* the effective date of the compact (1957) and not to the "vested rights" recognized in subdivision A of Article III.

P. 28(a)(9)(A). A single-sentence reference to an issue does not satisfy this standard. Rothe Development Corp. v. Department of Defense, 413 F.3d 1327, 1339 (Fed. Cir. 2005). Furthermore, "merely stating disagreement with the trial court does not amount to a developed argument." Monsanto Co. v. Scruggs, 459 F.3d 1328, 1341 (Fed. Cir. 2006). The Irrigators have thus waived these arguments.

Moreover, the Irrigators' contentions are without merit. First, the water rights permits of the Klamath Drainage District ("KID") (J.A. 004365-68) and Klamath Hills District Improvement Company ("KHDIC") (J.A. 004372-81) are not vested water rights. On the contrary, under Oregon law "[t]he permit itself does not represent a perfected and vested water right." Teel Irrigation Dist. v. Oregon Water Resources Dept., 919 P.2d 1172, 1174 (Or. 1996). Instead, only a certificate – issued after the applicant has proven that it has applied water to a beneficial use – "represents a vested, perfected water right." Id. at 1175. Second, even if the Court were to assume that KID and KHDIC had vested rights, these rights – with priority dates of April 25, 1997, and October 10, 1983 – are junior to those of the United States and the Tribes. In years when there is a water shortage, all senior rights must be satisfied before the holders of these junior rights may use any water. Therefore, as the Court of Claims correctly concluded, KID and KHDIC's interests "could not have been taken or infringed by the failure of the

Bureau to deliver water in 2001." Klamath Irrigation Dist., 67 Fed. Cl. at 539.

As for the VBDC appropriative water right, the Irrigators' property-right claim is not properly before this Court.[13] In the court below, the Irrigators explicitly renounced any intention to pursue relief based on alleged water rights that were subject to the Klamath Basin Adjudication. See Memorandum Supporting Plaintiffs' Revised Motion for Partial Summary Judgment at 10 (Aug. 29, 2003) (J.A. 001676). VBDC has claimed an appropriative water right in the Adjudication, see In re Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean, Lead Case No. 003, Interim Order 24-25 (Jan. 12, 2006) (ruling on Van Brimmer Ditch Company appropriative right), and the Irrigators were therefore barred from asserting the claim in the Court of Claims. See Order of Nov. 13, 2003, at 2 (J.A. 002030). Accordingly, Judge Allegra did not rule on this argument and it is not before this Court on appeal.

[13] To the extent the Irrigators are alleging a contract-based claim with respect to the VBDC, PCFFA joins the briefs of the United States and of *amicus curiae* NRDC regarding such contract claims.

II. EVEN IF THE IRRIGATORS HAVE ANY WATER RIGHTS, THE BUREAU'S ACTIONS DID NOT CONSTITUTE A TAKING

A. Plaintiffs' Alleged Rights, Whether Based on Property or Contract Theories, Are Limited by Background Principles of State and Federal Law

Even assuming that the Irrigators had any property rights in water from the Klamath Project, those rights – as well as their contracts rights – are limited by background principles of Oregon, California, and federal law.[14] Under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a claim that a government regulation has effected a taking of property is subject to the defense that the regulated limitation on the use of property "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," id. at 1029. In this case, the relevant principles include the public trust doctrine, the state's ownership of wildlife within its borders, and the water rights of Indian Tribes.

Property rights in Oregon are limited by the state's public trust obligations. The protection of fish threatened by the excessive use of water is a component of the public trust. Oregon Shores Conservation Coal. v. Oregon Fish & Wildlife Comm'n, 662 P.2d 356, 364 (Or. Ct. App. 1983) (holding that the State is a

[14] The Irrigators have not addressed this argument and the court below did not rule upon it. PCFFA raises it here to demonstrate that, even if the Court finds that the Irrigators possess a property right in water from the Klamath Project, this finding alone is insufficient for them to prevail on their takings claim.

"trustee for the people, bear[ing] the responsibility of preserving and protecting the right of the public to the use of the waters for [navigation, fishing, and recreation] purposes"). Regulatory measures that enforce the public trust cannot, by definition, take private property rights because the public trust is a pre-existing limitation on those rights. See Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 986 (9th Cir. 2002) (holding that a city's denial of a developer's application to develop shoreline property did not effectuate a taking because "Washington's public trust doctrine ran with the title to the tideland properties and alone precluded the shoreline residential development"); see generally Michael C. Blumm & Lucus Ritchie, Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses, 29 Harv. Envtl. L. Rev. 321, 341-344 (2005). As the California Supreme Court has held with respect to that state's public trust, the existence of appropriative water rights does not bar the state from reallocating water to protect fish habitat. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 729 (Cal. 1983); see also El Dorado Irrigation Dist. v. State Water Res. Control Bd., 48 Cal. Rptr. 3d 468, 490 (Cal. Ct. App. 2006) ("Thus, like the rule against unreasonable use, when the public trust doctrine clashes with the rule of priority, the rule of priority must yield.").

The Irrigators' alleged rights are also limited by the principle of public ownership of wildlife. In Oregon, "ownership [of wild animals], so far as a right

of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common." Fields v. Wilson, 207 P.2d 153, 156 (Or. 1949) (quoting Monroe v. Withycombe, 165 P. 227, 229 (Or. 1917)); see also Anthony v. Veatch, 220 P.2d 493, 504 (Or. 1950) ("The fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity.") (quoting State v. Tice, 125 P. 168, 169 (Wash. 1912)). Any private activity that violates the public's rights by harming such wildlife, including fish, can be restrained by the state. People v. Truckee Lumber, 48 P. 374, 374-75 (Cal. 1897) (holding that a mill that polluted the Truckee River and thereby killed the fish in the river was a public nuisance); see also Fields, 207 P.2d at 156-57 (holding that "nothing is taken from the individual, and his constitutional rights are not infringed" when he is denied the privilege of killing or harming wildlife). Therefore, any water rights that the Irrigators may have acquired under state law, which they claim as the source of their rights, also are limited by this background principle of Oregon law.

To the extent that some of the Irrigators claim water rights under California law,[15] that state's laws incorporate similar principles that limit the scope of private

[15] While PCFFA understands that most of the Irrigators claim water rights under Oregon law, Tulelake Irrigation District's contract states that it is made pursuant to the laws of California. See Tulelake Irrigation District Contract, art. 33(a) (J.A. 004479).

property rights. For example, California recognizes the public trust doctrine, Nat'l Audubon Soc'y, 658 P.2d at 712; State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 294 n.54 (Cal. Ct. App. 2006) ("[T]he rights of an appropriator are always subject to the public trust doctrine."); United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 201 (Cal. Ct. App. 1986) (holding that "the [State Water Resources Control] Board unquestionably possessed the legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife"), the public ownership of wildlife, see Truckee Lumber, 48 P. at 374-75; see also People v. Murrison, 124 Cal. Rptr. 2d 68, 76 (Cal. Ct. App. 2002) ("The state owns the fish in its streams in trust for the public."), and the reasonable use doctrine, which provides that a water user can never acquire a vested right to use water in an excessive or unreasonable manner, see Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 897-98 (Cal. 1967) (holding that deprivation of water did not take a compensable property interest because plaintiffs' use of water for their sand and gravel business was excessive and unreasonable). A right to use water in California does not include the right to violate these background principles of California law. See Nat'l Audubon Soc'y, 658 P.2d at 720 (holding that the public trust constrains the extraction of water that would destroy public trust uses of water); People v. Glenn-Colusa Irrigation Dist., 15 P.2d 549, 551-53 (Cal. Dist. Ct. App. 1932) (enjoining unscreened diversions of

water from the Sacramento River that had killed salmon and other fish). In short, under California law, the Irrigators cannot possess a vested right to use water in a way that interferes with public trust resources (including fish), the state's ownership interest in the fish in the Klamath River basin, or that would be an unreasonable use because of its impact on reasonable instream uses, including fisheries protection.

Finally, as explained in more detail in the *amicus* brief of the Klamath Tribes, the Irrigators' rights are subordinate to the Tribes' reserved water rights. The Tribes' water rights have "a priority date of time immemorial." United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983). These rights therefore "take precedence over any alleged rights of the Irrigators." Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 1999). "[T]he United States, as a trustee for the Tribes, has a responsibility to protect their rights." Id. at 1213. Indeed, the Ninth Circuit has previously held that the Bureau has the authority to operate the Link River Dam to satisfy Tribal water rights, whatever the impact on the Irrigators' alleged junior rights. Id. at 1214. The restrictions that the Bureau imposed here protected the Tribes' reserved water rights and therefore could not have violated the rights of any junior water rights holder. See Adair, 723 F.3d at 1413 (stating that the purpose of the Klamath Tribes' reserved water rights was "to support its hunting and fishing rights"); see also id. at 1414

(quantifying the Tribes' water rights as "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members").

Appellants' contract rights are also limited by these background principles. The United States could not convey to appellants any rights that were greater than those the United States itself possessed. See Klamath, 67 Fed. Cl. at 535; see also State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d at 294 n.54 ("An appropriator cannot give away more rights than he or she has."). Unless Congress has provided otherwise – and, so far as is relevant here, it has not – the water rights that the United States has acquired in the Klamath River basin are subject to the same inherent limitations as state appropriative water rights. See California v. United States, 438 U.S. 645, 665, 674-75 (1978). Therefore, any rights that the Irrigators have derived from their contracts with the United States are also subject to the background principles identified above.

B. There Is No Basis for the Irrigators' Physical-Taking Theory

Even if the Court concludes that the Irrigators have a property right in the use of water from the Klamath Project, a conclusion it should not reach for the reasons discussed above and in the Bureau's brief, the Irrigators have not made – and cannot make – any showing that such property has been taken.

The Irrigators' claims have from the beginning of this case been premised on

a "physical takings" theory, under which the Bureau's reduction in their 2001 water deliveries to the Irrigators constituted a *per se* taking of their property rights. It appears that this remains their theory. See, e.g., Irrigators' Brief at 8 (asserting that Bureau's "decision to impound" Irrigators' water was unlawful); id. at 18 (alleging that "Reclamation physically impounded Appellants[']s water" and that the agency "physically barred the release of the water to plaintiffs"). The Irrigators' counsel had previously prevailed on just this theory in another case before the Court of Claims, Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001). However, that decision was widely criticized. For example, the California Court of Appeal recently concluded that a regulatory action that restricted a company's ability to pump water from an aquifer was not a physical taking. See Allegretti & Co. v. County of Imperial, 42 Cal.Rptr.3d 122, 130-32 (Cal. Ct. App. 2006), review denied, 2006 Cal. LEXIS 9142 (Cal. July 26, 2006), cert. denied, 127 S. Ct. 960, 166 L.Ed.2d 706 (2007). The state court also concluded that it was not a regulatory taking under the Penn Central factors. Id. at 132-37. The plaintiffs in that case had relied on Tulare to support their argument, but the court explicitly rejected Tulare's reasoning and holding.[16]

[16] For academic criticism of Tulare, see, for example, Cari 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, 212-23 (2003); Melinda Harm Benson, The Tulare Case: Water Rights,

More recently – and more significantly – even the judge who issued the Tulare decision has repudiated its conclusion. See Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007). In Casitas, BOR restricted water diversions from the Ventura River in southern California to protect ESA-listed steelhead trout. Id. at 102. Judge Wiese held that this action was not a physical taking of any property right belonging to the plaintiff, and that the plaintiff's claim must instead be judged under the multi-factor balancing test set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1979). Casitas, 76 Fed. Cl. at 106. The Court specifically concluded that its holding in Tulare was no longer defensible in light of the U.S. Supreme Court's decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), in which the Court explained that there is a sharp distinction between physical occupations or invasions of private property and regulatory restrictions on the use of private property and that the per se rule governing the first type of actions should be confined to narrow circumstances. In Casitas, Judge Wiese recognized that, in light of Tahoe-Sierra, a regulatory restriction on the use of water cannot be viewed as falling into the narrow category of actions that qualify as physical occupations or invasions subject to a *per se* rule. 76 Fed. Cl. at 106.

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the Endangered Species Act, and the Fifth Amendment, 32 Envtl. L. 551 (2002).

In short, the legal legs on which the Irrigators have rested their property takings claim have been cut out from under them and they have never offered an alternative argument. Their "physical taking" theory has only ever been adopted by one judge, who has himself more recently rejected it.

C. The Extensive Government Subsidies Provided to the Irrigators Foreclose Any Takings Claim

As outlined above, see supra at 4-9, the Irrigators have been, and continue to be, the recipients of substantial government subsidies. This fact alone undermines their claim that BOR's actions amount to a taking of their property rights. As the U.S. Supreme Court observed in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958), "[i]t is hardly a lack of due process for the government to regulate that which it subsidizes," id. at 296 (quoting Wickard v. Filburn, 317 U.S. 111, 131 (1942)). In that case, the Court rejected a variety of constitutional challenges to BOR's enforcement of the statutory requirement that water from the Central Valley Project not be sold for use on parcels of land larger than 160 acres held by a single owner. The Court affirmed the "power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges." Id. at 295. It noted that Central Valley irrigators were not required to repay the full costs of the project and that they repaid even their portion of the costs "without interest charge. In short, the project is a subsidy, the cost of which will never be recovered in full." Id. The "no interest" subsidy that the Irrigators

have received here is indistinguishable from the "no interest" subsidy involved in the Central Valley Project. Therefore, the same analysis should apply here, whether to the Irrigators' property takings claims or to their contract claims: the government is free to regulate that which it subsidizes.

III. THE IRRIGATORS MAY NOT RELITIGATE HERE THE SCIENTIFIC BASIS FOR THE BUREAU'S DECISIONS

The Court should not countenance the Irrigators' attempt to bring a collateral attack on the validity of the 2001 Biological Opinions and the actions taken pursuant to them, whether in the guise of a taking claim or a contract claim. As described above, see supra at 9-16, the BOR acted as required by the ESA and the best available scientific evidence in 2001. Moreover, the appropriate avenue to challenge the scientific basis for this action would have been an Administrative Procedure Act ("APA") case, not this taking and contract action.

The BOR's decision to implement the reasonable and prudent alternatives identified in the 2001 Biological Opinions was consistent with the ESA. The ESA requires federal agencies to "use the best scientific and commercial data available" in carrying out their consultation obligations under the statute. 16 U.S.C. § 1536(a)(2). This requirement means that agencies must use the best information available at the time they make their decisions; the subsequent availability of data arguably inconsistent with these decisions does not invalidate them. See Bldg. Indus. Ass'n of S. California v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001)

("[T]he Service must utilize the 'best scientific ... data *available*,' not the best scientific data *possible*.") (emphasis in original). Here, the NRC Reports were not issued until 2002 and 2004, after BOR had completed its implementation of the reasonable and prudent alternatives in the 2001 Biological Opinions. Therefore, any alleged inconsistency between the NRC's conclusions and the BOR's 2001 decision is irrelevant. In any event, a district court has already upheld the scientific basis of the 2001 decision, see Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001), and subsequent Ninth Circuit decisions have upheld flow requirements virtually identical to those that BOR imposed in 2001 even in light of the NRC Reports. Pacific Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation, 426 F.3d 1082, 1087 (9th Cir. 2005); see supra at 14-16.

The Irrigators' attempt to challenge the scientific underpinnings of the 2001 Biological Opinions should have been brought in an appropriate district court under the APA. See Bennett v. Spear, 520 U.S. 154, 174-75 (1997). Indeed, some of the Irrigators in this action did challenge the 2001 Biological Opinion under the APA in Kandra, 145 F. Supp. 2d 1192, but after the court denied their motion for a preliminary injunction, they decided to voluntarily dismiss the case. They have filed no other challenge to the validity of the Biological Opinion and, as the Court below properly concluded, cannot now attempt to do so through the back door in this case. See Klamath Irrigation Dist., 75 Fed. Cl. 677, 687-88 (2007).

CONCLUSION

For the foregoing reasons, the decision of the Court of Claims should be affirmed.

Respectfully submitted this 11th day of December, 2007.

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I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On December 11, 2007, I served a true and correct copy of the following documents on the parties listed below:

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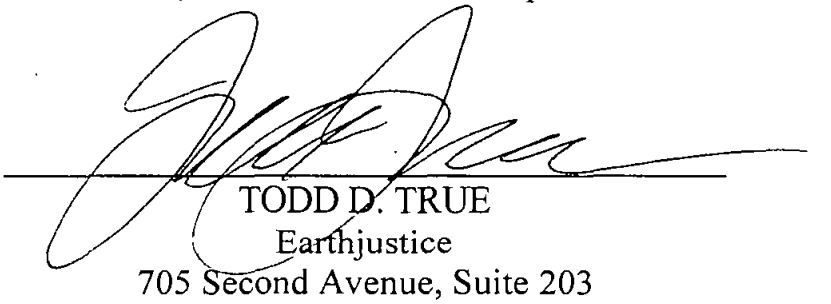

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