

IN THE SUPREME COURT OF THE STATE OF OREGON

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,)

Federal Circuit Court of
Appeals No. 2007-5115

Supreme Court No.
S056275

Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA and PACIFIC)
COAST FEDERATION OF FISHERMEN'S)
ASSOCIATIONS,)

Defendant-Appellees,

and

INSTITUTE FOR FISHERIES RESOURCES, THE)
WILDERNESS SOCIETY, KLAMATH FOREST)
ALLIANCE, OREGON WILD, WATERWATCH OF)
OREGON, NORTHCOAST ENVIRONMENTAL)
CENTER, SIERRA CLUB, NATURAL RESOURCES)
DEFENSE COUNSEL, and OREGON WATER)
RESOURCES DEPARTMENT,)

MEMORANDUM OF
LAW OF PACIFIC COAST
FEDERATION OF
FISHERMENS
ASSOCIATIONS AND
AMICI CURIAE RE
CERTIFICATION OF
QUESTIONS FROM THE
FEDERAL CIRCUIT

Amici Curiae.

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PCFFA and allied *amici curiae*¹ in the Court of Appeals for the Federal Circuit (collectively “PCFFA”) respectfully urge the Court to decline to accept certification of the state law questions posed by the Federal Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

PCFFA joins with the Oregon Department of Water Resources (“Oregon”) in urging the Court to decline this request for certification. Oregon has described the standards the Court employs in deciding whether to accept certification. Oregon Mem. at 2-3. Under these standards, PCFFA submits that the Court should decline this certification request for three separate and independent reasons. First, one of the basic statutory prerequisites for certification, that the Court’s resolution of the certified issues “may be determinative of the cause . . . pending in the certifying court,” is not met in this case because plaintiffs are barred from asserting any state-law based claims of water ownership in this takings case that are being addressed in the ongoing Klamath River Basin Adjudication. Second, even if the Court had the authority to accept the certified questions, it should exercise its discretion to decline this request based on the “procedural posture” of the issues, in particular the fact that the same issues are being addressed in the Adjudication and will soon come before this Court in the ordinary course of appellate review based on a full record. Third, the

¹ The *amici curiae* parties joining in this brief that have been granted leave to participate in this case include the Natural Resources Defense Council, Institute for Fisheries Resources, The Wilderness Society, Klamath Forest Alliance, Oregon Wild, WaterWatch of Oregon, Northcoast Environmental Center, and the Sierra Club. The State of Oregon also filed a brief *amicus curiae* in this case in the U.S. Court of Federal Claims.

Court should decline to accept the certification because, contrary to the assertion of the Federal Circuit, there already is controlling precedent issued by this Court on the issues proposed to be certified.²

DESCRIPTION OF PERTINENT PROCEDURAL HISTORY IN THE FEDERAL COURTS

To assist the Court in addressing this request by the Federal Circuit to certify issues of Oregon law to this Court, PCFFA describes in some detail the nature of this litigation and the procedural history leading to the certification request. Given the complex history of the litigation, this statement of background facts is perforce somewhat extended.³

This case arose from temporary restrictions imposed on plaintiffs' use of Klamath River water for irrigation purposes during the severe drought of 2001. These restrictions were designed to avoid jeopardy to the continued existence of several endangered fish that inhabit the Klamath River Basin. Plaintiffs have alleged that these restrictions constituted a taking of their asserted property interests in the use of Klamath Project water, a breach of their contracts with the U.S. Bureau of

² PCFFA takes no position on Oregon's alternative suggestion that the Court reformulate the questions, except to note that the complexities of Oregon's proposed edits to the questions, which the Federal Circuit has already edited once, confirm that resolution of these issues should be left to this Court's ordinary appellate review of the Adjudication based on a complete record.

³ Over the course of this litigation, the case was assigned to three judges of the U.S. Court of Federal Claims: Judge Diane Sypolt, Judge Edward Damich, and Judge Francis Allegra. In addition, Judge Nancy Firestone signed at least one order in this case. For convenience, PCFFA will refer to "the Court" in discussing the orders and opinions issued over the course of these protracted proceedings.

Reclamation for the delivery of water from the Klamath Project, and a violation of the Klamath River Basin Compact, Pub L. 85-222.

A prominent concern since the commencement of this litigation has been whether this regulatory takings lawsuit might overlap with, and potentially address issues already being litigated in, the Klamath River Basin Adjudication. See, e.g., Answer to Complaint for Just Compensation and Damages, at 11 (dated December 10, 2001); Joint Preliminary Status Report, at 6 (dated February 4, 2002). The Adjudication, commenced in 1990, well before this case was filed, has recently produced a Proposed Order resolving, at the administrative level, the major issues in the proceeding. See In re the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean, Lead Case No. 003, Proposed Order 18-25 (November 14, 2006). In light of these concerns about potential overlap, the United States filed a motion requesting that the claims court stay this case pending resolution of the Adjudication. See Defendant's Motion to Stay this Action Pending Completion of the Klamath Basin Adjudication and Motion for Partial Dismissal (dated May 10, 2002). The United States argued that plaintiffs' "claimed ownership of 'water rights'" represented a "matter of state law," that plaintiffs' claimed ownership "is currently the subject of an ongoing general stream adjudication," and "it is appropriate for this Court to defer to the previously initiated Adjudication and its established process for resolving the state law issues that also are presented in this case." Id. at 2. Plaintiffs opposed the motion for a stay, contending that "the validity of plaintiffs' water rights" is not "jeopardized by the existence of the Klamath Basin

Adjudication.” Opposition (and Request for Hearing) of Plaintiffs to Defendant’s Motion to Stay this Action Pending Completion of the Klamath Basin Adjudication and Motion for Partial Dismissal 4 (dated June 10, 2002).

The State of Oregon filed a brief *amicus curiae* commenting on the motion for a stay. See Brief of *Amicus Curiae* State of Oregon Regarding Defendant’s Motion for Stay and Plaintiffs Opposition Thereto (dated July 30, 2002). The State took no position on whether the claims court should grant the motion, but nonetheless disputed plaintiffs’ position that the Adjudication would not affect plaintiffs’ claim of rights to the use of Klamath Project water. As the State explained,

“The Adjudication will determine and quantify both claims based on asserted pre-1909 use, and claims based on tribal and federal reservations. As relevant here, the United States (through its Bureau of Reclamation and its Fish and Wildlife Service) and the Klamath Project Water Users [representing all or virtually all of the plaintiffs in this takings case] have filed competing or overlapping claims for the use of water within the Klamath Project.”

Id. at 2 (emphases added). In response to plaintiffs’ assertion that the validity of their claimed rights was not being placed “in jeopardy” as a result of the Adjudication, the State observed that this contention “omits a critical point,” namely that a claimant has “[t]he burden of establishing a clam,” and “all claims are subject to contest.” Id. at 3. Because “[p]laintiffs’ claims at issue in this case have been contested in the adjudication,” id., the State explained, plaintiffs have no assurance that their claims of water rights allegedly supporting their takings claims would ultimately survive the Adjudication.

After an extended hiatus, during which plaintiffs filed an Amended Complaint

adding breach of contract claims, see Amended Complaint for Just Compensation and Damages (dated March 24, 2003), the claims court issued an Order setting a status conference to discuss the motion for a stay. The court framed the issues to be addressed at the status conference as follows:

Defendant's arguments [in favor of the motion for a stay] depend on its contention that plaintiffs' water rights, which are the basis for their claims in this court, first must be determined in the KB [Klamath Basin] Adjudication. This contention raises questions of mixed fact and law as to which the court finds that it lacks sufficient factual information, particularly with respect to the current status of the adjudication and the operating plans. In addition, the effect on the stay arguments, if any, of the added breach of contract claims in the recently-filed Amended Complaint must be considered.

Most importantly, the court requires further elucidation on state law and procedures regarding the formation and adjudication of water rights because the existence and/or extent of any overlap between the matters to be decided in the KB Adjudication and plaintiff's precise claims in its various causes of actions before the court is integral to deciding the necessity or advisability of a stay.

Order at 3-4 (dated March 26, 2003) (emphasis added).

At the status conference, ultimately held on May 5, 2003, the Court heard extensive argument from the parties on the advisability of a stay. The parties' basic disagreement focused on whether the Adjudication would resolve any water rights issues that could affect whether plaintiffs could allege that Endangered Species Act regulatory restrictions took any "property" belonging to them. Plaintiffs argued that the Adjudication was irrelevant to their claim of property ownership for the purpose of the takings case, with counsel for plaintiffs stating, "The adjudication, your Honor, is a wild goose chase. It is not necessary to the resolution of this [takings] case."

Klamath Irr. Dist. v. U.S., Transcript at 7 (May 5, 2003). The United States took the position that plaintiffs' claimed property interests could be affected by the outcome of the Adjudication. As counsel for the United States explained: "Right now, we've got different positions [in the Adjudication]. The United States has come in and in the adjudication [is] saying we hold the right, the certificates ought to be issued in our name. Plaintiffs are coming in and taking the opposite position." Id. at 68.

Furthermore, the United States argued that the Adjudication's resolution of the ownership issues could be dispositive of the takings claims. In the words of counsel for the United States: "[I]t would be our position that if in the adjudication, the water rights certificates are issued in the name[] of the United States, that that resolves the takings claim." Id. at 78.

After nearly two hours of argument, the claims court proposed a resolution: a stay would be unnecessary if plaintiffs were willing to stipulate to their position that the Adjudication was irrelevant to the takings case by proceeding to litigate their takings claims on the assumption that the Adjudication would resolve all disputed water rights issues in favor of the United States.

THE COURT: Okay. We're going round and round on this point. But I see a way for Plaintiffs to cut to the chase here. If you're willing to file a motion for summary judgment, assuming that the government does win the adjudication on the takings issue. I mean you're saying it doesn't make a difference for the purpose of the stay. Go for it.

Id. at 86-87. Both parties agreed to this proposal:

MR. MARZULLA: We would be prepared to do that, Your Honor, and would ask the Court to set a [briefing] schedule

MS. TARDIFF: We would be prepared to respond, your Honor.

Id. at 87. Based on this understanding of the future course of the proceedings, the claims court deferred a decision on the motion for a stay.

On May 12, 2003, based on the results of the status conference, the claims court issued an Order describing the limited issue the parties had agreed to brief:

On or before July 7, 2003, plaintiffs shall file a motion for summary judgment on the question of whether their water rights in the Klamath River Valley, allegedly taken by the government in 2001, are property the taking of which is compensable under the Fifth Amendment to the Constitution, notwithstanding any adverse determination, including a retroactive one, regarding the existence, extent or character of such rights by the Hearing Officer Panel in Case No. 003 of the State of Oregon's ongoing Klamath Basin Adjudication.

Id. at 1 (emphasis added.) Plaintiffs responded to this Order by filing a comprehensive motion for summary judgment on their takings claims. See Plaintiffs' Motion for Partial Summary Judgment (dated July 21, 2003). However, contrary to the Court's instructions, plaintiffs did not limit themselves to arguing that they possessed property interests in Klamath Project water that would support their takings claims notwithstanding the disavowal of any claims to such rights that overlapped with the Adjudication. Instead, they also argued the merits of their takings claims, contending that they were entitled to a ruling in their favor based on a per se takings theory.⁴ The United States responded by filing a motion effectively seeking an order

⁴ In support of their per se takings theory, plaintiffs principally relied on the then recent claims court decision in Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001), in which the court ruled that a restriction on water use should be viewed as a per se physical occupation-type taking. But see Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007), appeal pending, U.S. Court

striking plaintiffs' motion for partial summary judgment, arguing that plaintiffs' motion exceeded the permissible scope of the briefs the parties had been instructed to prepare. See Defendant's Motion for an Order Requiring Plaintiffs to Re-File a Motion for Summary Judgment that is in Accord with the Court's Order of May 12, 2003 or, Alternatively, to Hold in Abeyance Those Parts of Plaintiffs' Motion for Summary Judgment that Exceed the Scope of the Court's Order of May 12, 2003 (dated July 25, 2008).

On August 22, 2003, the claims court issued an Order granting the United States' motion, directing that plaintiffs' filing "be stricken from the record." The Court explained its rationale as follows:

As the court . . . explained [at the May 5, 2003, status conference], whether a stay is warranted depends, in part, on whether plaintiffs' claimed property (water) rights in this action might be affected by the outcome of the Adjudication. Plaintiffs' agreement to file the motion occurred after a great deal of discussion of the nature of water rights in the area generally, of those claimed by plaintiffs, and of those to be determined in the Adjudication. Plaintiffs contended that the decisions in the Adjudication would not affect plaintiffs' claims here [in the takings litigation]. The court then proposed that plaintiffs file a motion for partial summary judgment on the sole and specific issue of whether a determination adverse to plaintiffs in the Adjudication would diminish or eliminate any of plaintiffs' property interests at issue in this case. Plaintiffs agreed to do so, without qualification.

The court's May 12, 2003 post-hearing order identified the issue to be briefed as whether plaintiffs' "[allegedly taken] water rights are property the taking of which is compensable under the Fifth Amendment to the Constitution, notwithstanding any adverse

of Appeals for the Federal Circuit, No. 2007-5153 (repudiating the analysis in Tulare Lake on the ground that it is inconsistent with the U.S. Supreme Court's subsequent decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)).

determination . . . by the Hearing Officer Panel in . . . [the] Klamath Basin adjudication.” [Brackets and emphasis in original]

Although plaintiffs’ opposition to defendant’s motion for refiling or abeyance recites the first part of the foregoing statement, it omits reference to the underscored, far more important, component of the assignment, to establish that an adverse decision in the Adjudication would not affect plaintiffs’ alleged property interests here. Moreover, the motion for partial summary judgment contains no serious discussion of the agreed-upon issues, dealing only with the ultimate issue of takings liability, and standing.

Id. at 1-2 . Emphasizing its seriousness about focusing on the question of whether the issues in the takings case might overlap with those in the Adjudication, the Court directed as follows:

On or before September 10, 2003, plaintiffs shall file a motion for partial summary judgment as to their contention that the property rights determination in the Adjudication is irrelevant to plaintiffs’ interests here. Should plaintiffs’ fail to file, or not prevail on, this partial summary judgment motion, the court will stay any decision on their earlier filed motion for summary judgment, filed on July 21, 2003, until the Adjudication is concluded.

Id. at 2 (emphasis added).

In accordance with the Court’s instructions, and faced with the claims court’s threat of a stay order, plaintiffs filed a revised motion designed “to establish their contention that the property rights determination in the [Klamath Basin] Adjudication is irrelevant to plaintiffs’ interests” at issue in this takings lawsuit. Plaintiffs’ Revised Motion for Partial Summary Judgment at 1 (dated August 29, 2003). Essentially, plaintiffs argued that the Adjudication was irrelevant to their takings claims because plaintiffs’ claim of ownership rested on the federal Reclamation Act of 1902 rather than Oregon law. The United States filed an opposition and cross-motion, arguing

that plaintiffs held no ownership interest in the water and the plaintiffs' interest in the water was limited to their rights to receive water pursuant to their contracts with the Bureau of Reclamation. See Defendant's Cross Motion for Partial Summary Judgment and Opposition to Plaintiffs' Motion for Partial Summary Judgment (dated October 3, 2003).

In an Order issued on November 13, 2003, the claims court granted plaintiffs' motion for partial summary judgment and denied defendant's motion for a stay, based on its determination that no property interest plaintiffs were alleging was taken was being addressed in the Adjudication:

[P]laintiffs' motion for partial summary judgment that their water interests are not property interests at issue in the Adjudication is granted and defendant's motion for a stay pending the outcome of the Adjudication is denied. Based on plaintiffs' assertion that no rights or interests in this case are affected by the Adjudication . . . , plaintiffs are barred from making any claims or seeking any relief in this case based on rights, titles, or interests that are or may be subject to determination in the Adjudication.

Id. at 2 (emphasis added). At no time did plaintiffs object to this order. The Court directed the parties to brief, based on this understanding of the scope of this case, the nature and scope of the alleged property interests remaining in the case.

Another set of cross-motions followed, prompting another objection from the United States, and an additional clarification from the claims court. On January 16, 2004, plaintiffs filed a motion for summary judgment, again seeking not only a determination regarding their claimed property interests but also a ruling in their favor on the merits of their takings claims. See Plaintiffs' Cross-Motion for Partial

Summary Judgment (dated January 16, 2004). In response, the United States filed a motion seeking clarification of the Court's November 13 Order, requesting that the Court "hold in abeyance" the portion of plaintiffs' motion that exceeded the scope of that Order. See Defendant's Motion for Clarification on the Scope of the Current Summary Judgment Briefing and Motion to Hold in Abeyance Those Parts of Plaintiffs' Motion for Partial Summary Judgment that Exceed the Scope of the Court's Order of November 13, 2003 (dated January 30, 2004.) The United States observed that the Court's November 13 Order "accepted plaintiffs' representation 'that their water interests are not property interests at issue in the Adjudication,'" and included a ruling that "'plaintiffs are barred from making any claims or seeking any relief in this case based on rights, titles or interests that are or may be subject to determination in the [Klamath Basin] Adjudication.'" Id. at 1, quoting the November 13 Order. The United States explained that, in accord with this understanding of the scope of the proceedings, it had filed a motion seeking a determination that plaintiffs' claimed property interests for the purpose of the takings litigation represented a null set, that is, they could claim no protected property interests in the context of the takings case that were not also being addressed in the Adjudication. The United States argued that the plaintiffs had filed a motion not only addressing the threshold property issue but also the ultimate liability issue. Following a status conference, the claims court issued an Order granting the United States' motion and placing "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, at 1 (filed March 23, 2004).

On August 31, 2005, the U.S. Court of Federal Claims issued a comprehensive opinion on the threshold question of whether plaintiffs could point to protected property interests to support their takings claims, notwithstanding the self-imposed limitations on their claimed water rights. See Klamath Irrigation District v. United States (Klamath I), 67 Fed. Cl. 504 (2005). The opinion (written by the third judge assigned to hear the case) recited in detail the prior proceedings, including the fact that on November 13, 2003, the Court had “granted plaintiff’s motion for partial summary judgment, concluding that plaintiffs’ claim ‘assert[ed] no property interest determinable in the Adjudication.’” Id. at 514, quoting the November 13 Order. The Court further explained, “[t]his action was then permitted to proceed with the understanding that ‘plaintiffs are barred from making any claims . . . based on rights, titles, or interests that are or may be subject to determination in the Adjudication.’” Id. The Court then examined what possible grounds plaintiffs might assert for claiming an ownership interest in Klamath Project water that might allow them to proceed with their takings claims. First, the Court rejected what it characterized as plaintiffs’ “banner assertion,” that is, that they could claim property rights in Klamath Project water under section 8 of the federal Reclamation Act of 1902. The Court then examined whether, in the alternative, plaintiffs could claim state law-based property rights in the water, and concluded that they could not. Based on these conclusions, and without reaching the question of whether plaintiffs could establish a “taking” of any asserted water rights, the Court concluded that the United States was entitled to

summary judgment on plaintiffs' takings claims. In the same opinion, the Court rejected plaintiffs' claims based on the Klamath River Basin Compact, ruling that "nothing in the Compact enhances the rights of any of the plaintiffs here as against the United States." Id. at 540.

Thereafter, the parties filed cross-motions for summary judgment on plaintiffs' contract claims. In a second comprehensive opinion, the claims court granted summary judgment to the United States, ruling the claims were barred by the sovereign acts doctrine. See Klamath Irrigation District v. United States (Klamath II), 75 Fed Cl. 677 (2007). The Court subsequently entered final judgment in favor of the United States, leading to the currently pending appeal to the U.S. Court of Appeals for the Federal Circuit.

Plaintiffs first proposed to certify state law issues to this Court in the form of a suggestion in footnotes in their opening brief filed in the Federal Circuit. See Brief of Plaintiffs-Appellants at 2 n.2, at 37 n.4 (filed July 16, 2007). The United States responded with a footnote in its opposition brief that the certification proposal should be rejected because, among other things, plaintiffs "are bound by the CFC's November 13, 2003 order not to assert claims to property rights in water that emanate from Oregon appropriation law and are thus determinable in the Klamath Basin Adjudication," and "Oregon law is clear" on the subject of water ownership in the circumstances of this case. Brief of Appellee the United States at 27 n.9. Defendant-Intervenor PCFFA likewise included a footnote in its brief opposing certification, also observing that plaintiffs had opposed a stay in favor of the Adjudication and should be

held to their choice to litigate the ownership issue in federal court, and that the Court's decision In re Waters of Umatilla River, 168 P. 922 (Or. 1917), represents an authoritative precedent interpreting Or. Gen. Laws, 1905, Chap. 228, § 2.⁵

Following oral argument, during which there was discussion of the option of requesting certification to the Oregon courts,⁶ the Federal Circuit sent a letter to the parties stating that “the court has decided to certify four questions of law to the Oregon Supreme Court,” and requesting the parties to supply the Court with a Joint Statement of Facts for transmission to the Oregon Supreme Court. See Letter to Parties from Jan Horbaly, Clerk, dated March 11, 2008. The United States filed a motion for reconsideration, emphasizing that plaintiffs “sought and obtained a grant of summary judgment on their contention that the property interests they claim in this case are not determinable in the Klamath Basin Adjudication.” Motion Reconsideration of Certification or, in the Alternative, for Modification of Questions Identified for Certification at 1-2 (dated April 1, 2008). PCFFA filed a “response”

⁵ The 1905 statute and its relevance to this case are discussed below.

⁶ In addition, following oral argument, the Federal Circuit requested that plaintiffs supply a copy of a brief filed by Oregon Department of Water Resources presenting “exceptions” to a “Proposed Order” issued in the Adjudication on November 14, 2006, and plaintiffs complied with this request. The Proposed Order, in accord with the decision of the claims court in this case, ruled that the United States, rather than the water users, is the owner of Klamath Project waters based on this Court's Umatilla decision. See In re the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean, Lead Case No. 003, Proposed Order 18-25 (November 14, 2006). The Department's Exceptions, without directly addressing the Umatilla decision, argue that the United States should not be viewed as the holder of water rights under the 1905 statute. See Oregon Water Resources Department's Exceptions to Proposed Order 4-9 (dated March 30, 2007).

supporting the United States' motion. Defendant-Appellee PCFFA's Response to United States' Motion for Reconsideration of Certification or, in the Alternative, for Modification of Questions Identified for Certification (dated April 7, 2008). On April 17, 2008, the State of Oregon filed a four-page motion seeking leave to respond to the United States' motion, stating: "The State of Oregon has a strong interest in ensuring that any questions certified to the Oregon Supreme Court are appropriate given the interrelation between this proceeding and the Klamath Basin water rights adjudication." Motion for Leave to File Response to United States' Motion for Reconsideration 2 (dated April 17, 2008). The State further observed that the claims court's judgment in this case "was predicated on the CFC's determination that Plaintiffs were barred from making claims based on rights, titles or interests that are or may be subject to determination in the Adjudication." But, the State continued, contrary to this predicate, "[t]he Court's questions . . . [do] invoke rights, titles, and interests that are subject to determination in the Adjudication, and that should only be decided by Oregon state courts at the appropriate stage in the Adjudication." Id.

On April 24, 2008, the Federal Circuit sent a second letter to the parties denying the motion for reconsideration, but reformulating the questions proposed to be certified into three questions, and again requesting that the parties submit a joint Statement of Facts for transmission to this Court. Letter to Parties from Jan Horbaly, Clerk (dated April 24, 2008). The Court's letter reflected no awareness of Oregon's then pending motion seeking leave to respond the United States' motion. Six days after the letter was apparently mailed, on April 30, 2008, the Court issued an Order

denying the Oregon's motion, noting simply that "[o]n April 24, 2008, the court had denied the [United States] government's motion for reconsideration."

On May 27, 2008, the parties submitted two versions of the Statement of Facts requested by the Court, one supported by the United States and PCFFA and one supported by plaintiffs. The version supported by the United States and PCFFA includes one paragraph not included in the version supported by plaintiffs, which reads as follows:

In the instant litigation, the United States moved in May 2002 to stay proceedings on plaintiffs' claims for just compensation under the Fifth Amendment pending completion of the Klamath Basin Adjudication on grounds that plaintiffs' claims that they hold property rights in Klamath Project water are being addressed in the Adjudication. See [Klamath I, 67 Fed. Cl. at 514.] On August 29, 2003, plaintiffs filed a motion for partial summary judgment that the water rights determinations to be made in the Klamath Basin Adjudication are irrelevant to the property rights they claim in the Klamath Project water in the instant litigation. See id. On November 13, 2003, the Court of Federal Claims issued an order declaring that "plaintiffs motion for partial summary judgment that their water interests are not property interests at issue in the Adjudication is granted" and holding that "plaintiffs are barred from making any claims or seeking any relief in this case based on right, titles, or interest that are or may be subject to determination in the Adjudication." Id. JA (2030).

The parties joint cover letter further states: "KID [Klamath Irrigation District] and the other Appellants believe this procedural order [apparently referring to the claims court's November 13, 2003 Order granting plaintiffs' motion for summary judgment], issued by the first trial court judge, was superseded by the decision of the second trial court judge in Klamath I, who ruled that the United States owns all post-1905 water rights in the Klamath basin (the precise issue pending in the adjudication)."

Finally, on July 16, 2008, the U.S. Court of Appeals for the Federal Circuit issued its “Certification Order.” See Klamath Irrigation Dist. v. United States, --- F.3d ---, 2008 WL 2751212 (Fed. Cir., July 16, 2008). The Court’s explanation for its decision to certify the proposed questions consists of the following:

The answer to the takings question depends upon complex issues of Oregon property law, including the interpretation of Oregon General Laws, Chapter 228, § 2 (1905). This court discerns an absence of controlling precedent in the decisions of the Oregon Supreme Court and the intermediate appellate courts of Oregon on the pertinent issues of Oregon property law. At the same time, this court believes that the Oregon Supreme Court would be in a better position than would this court to issue a pronouncement on the proper interpretation of the law at issue. The State of Oregon has a procedure pursuant to which this court may certify unsettled questions of state law to the Oregon Supreme Court. See Or. Rev. Stat. §§ 28.200–28.255 (2007).

Id. at 2. The Order recites three questions for consideration by this Court:

1. Assuming that Klamath Basin water for the Klamath Reclamation Project “may be deemed to have been appropriated by the United States” pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
2. In light of the statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable property interest in the water right acquired by the United States?
3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?

Id. The Certification Order acknowledges that the parties disagreed about what to include in the Joint Statement of Facts, but apparently (the Court’s Order does not expressly indicate) the Federal Circuit forwarded both versions to this Court. The Federal Circuit also noted, “[t]his court does not believe that the inability of the parties to agree on paragraph 23 bears upon the ability of the Oregon Supreme Court to address the three certified questions.” Id. Finally, the Federal Circuit “acknowledge[d] that the Oregon Supreme Court . . . is not bound to answer the questions as certified. See W. Helicopters Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633-34 (Or. 1991).” Id. at 2.⁷

Judge Arthur J. Gajarsa dissented from the Court’s request for certification. Judge Gajarsa reasoned that in this particular case certification is improper because the claims court, at the behest of plaintiffs, issued an order barring plaintiffs from claiming a taking of any alleged state-law property interests the validity and scope of which are being addressed in the Adjudication, and therefore this Court’s resolution of the certified questions of state water law would be irrelevant to the resolution of this case. Judge Gajarsa also observed that the claims court’s November 13 Order

⁷ Separate and apart from the issue raised by the certified questions of whether the United States or the water users are the “owners” of Klamath Project water, there is the distinct question in this case, even if plaintiffs were the “owners” of the water, whether their rights would be limited by “background principles” of state law, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), including the public trust doctrine, the doctrine of public ownership of wildlife, and/or the reasonable use doctrine. See Brief of Defendant-Intervenor-Appellee, 33-38, Klamath Irrigation District v. United States, No. 2002-5115 (dated October 25, 2007). PCFFA does not understand this request for certification to encompass this distinct set of issues.

represents “law of the case” for the purpose of this proceeding and therefore remains binding on the parties.

ARGUMENT

ORS 28.200 provides: “The Supreme Court may answer questions of law certified to it by . . . [designated courts], when requested by the certifying court if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court and the intermediate appellate courts of this state.” The Court has established a two-step process for deciding whether or not to answer questions certified by another court. Western Helicopter Services, Inc. v. Rogerson Aircraft Corp., 311 Or. 361, 811 P.2d 627, 630 (1991). First, the Court must determine whether each of five prerequisites for accepting certification enumerated in ORS 28.200 is satisfied. Id. Second, assuming the statutory prerequisites are satisfied, the Court will consider additional discretionary factors in deciding whether to accept certification. Id. at 631. Ultimately the question whether to grant a request for certification is left to the Court’s sound discretion. See State v. Shaw, 113 P.3d 898, 916 (Or. 2005) (observing that the legislature’s use of the word “may” indicates that decision is left to “court’s sound discretion”); Western Helicopter, 811 P.2d at 630.

The Court should respectfully decline the request by the Federal Circuit to certify questions of Oregon law to this Court for three separate and independent reasons, which we address in turn below.

I. THE CERTIFIED QUESTIONS CANNOT DETERMINE THE CAUSE.

To avoid embroiling the Court in issuing pointless advisory opinions, ORS 28.200 provides that the Court may grant a certification request only if the certified question “may be determinative of the cause then pending in the certifying court.” Given the unique procedural history of this case, the Court’s answer to the certified question could not affect the outcome of this case.

The certified questions, though broken down into three individual questions, raise a single central issue: whether there is some basis in Oregon law for plaintiffs to assert an ownership interest in Klamath Project water that will support a taking claim based on restrictions on their ability to exploit this water. More specifically, as the Federal Circuit’s Certification Order makes clear, the certified questions relate to the proper interpretation of Or. Gen. Laws, 1905, Chap. 228, § 2, and whether plaintiffs can claim an ownership interest in Klamath project water under that law.

This issue is irrelevant to the outcome of this cause because, as discussed above, in response to plaintiffs’ own motion, the Court entered an Order on November 13, 2003, stating that “plaintiffs are barred from making any claims or seeking any relief in this case based on rights, titles, or interests that are or may be subject to determination in the Adjudication.” The issue of the proper interpretation of the 1905 statute, and whether plaintiffs can claim ownership rights under that law, are plainly being determined in the Adjudication. Indeed, the Proposed Order recently issued in the Adjudication includes a lengthy discussion of the 1905 statute and the prior decisions of this Court interpreting the statute. See In re the

Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean, Lead Case No. 003, Proposed Order 18-25 (November 14, 2006). In addition, the Proposed Order specifically addresses – and resolves – the question whether the United States or the water users should be regarded as the owners of Klamath Project water. Accordingly, there is no question that this issue is being determined in the Adjudication and that plaintiffs are barred, pursuant to the November 13 Order, from litigating their takings claims based on the same ownership theory in this case. As a result, regardless of how this Court resolves the certified questions, it would not be determinative of the cause pending in the Federal Circuit.⁸

Plaintiffs apparently intend to dispute this conclusion based on the theory that the claims court’s November 13 Order “was superseded by the decision of the second trial court judge in Klamath I, who ruled that the United States owns all post-1905 water rights in the Klamath basin (the precise issue pending in the adjudication).” See Joint Cover Letter from the Parties Transmitting Joint Statement of Facts 1 (dated May 27, 2008). This argument is baseless and should be rejected. An examination of the decision in Klamath I shows that the judge who authored this decision was fully

⁸ Furthermore, as Oregon correctly emphasizes in its brief opposing the certification, whatever state law basis plaintiffs might conceivably seek to advance in support of their takings claims, any such legal theory is necessarily being addressed in the Adjudication. See Memorandum of Law of the Oregon Water Resources Department, at 9. As the Department observes, ORS 539.210 provides: “Any claimant who fails to appear . . . and submit proof . . . shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream.” (Emphasis added). In other words, any and all *possible* state law theories that might support a claim of ownership to Klamath Project water will be addressed and resolved by the Adjudication.

aware of the November 13 Order and understood that it meant plaintiffs were barred from claiming any ownership interests in the taking suit that were being determined in the Adjudication. There is no indication that the judge intended to revisit or revise, much less reverse, the November 13 Order. While a trial court judge has some discretion to overrule a decision by another judge previously assigned to the case for good cause, see generally Wright Miller & Cooper, Federal Practice & Procedure § 4478.1 (2008), there is no indication in this case that the new judge intended to disturb the November 13 Order. To the contrary, he expressly acknowledged the existence of the November 13 Order and reiterated its operative language – “plaintiffs are barred from making any claims . . . based on rights, titles, or interests that are or may be subject to determination in the Adjudication.” Klamath I, 67 Fed Cl. at 514.⁹

It was entirely logical, given the complexities of this case and plaintiffs’ persistent arguments, for the claims court, after entering the November 13 Order, to also proceed to address the merits of plaintiffs’ claims to protected interests in the Klamath Project water in Klamath I. Even after entry of the November 13 Order, plaintiffs continued to assert that they possessed property interests that could support

⁹ In its Certification Order the Federal Circuit stated: “The third paragraph of the May 27 letter states the nature of the difference between the parties with respect to paragraph 23. This court does not believe that the inability of the parties to agree on paragraph 23 bears upon the ability of the Oregon Supreme Court to address the three certified questions.” 2008 WL 2751212 *1. It is unclear what the Federal Circuit intended to mean by this statement, but there is no indication that the Court recognized or intended to address the prerequisites of Oregon law that must be satisfied before this Court can accept a request for certification. In any event, it is unquestionably the responsibility of this Court to determine whether Oregon’s statutory prerequisites for accepting certified questions have been met.

their takings claims, although the basis for this argument was very obscure. See, e.g., November 13 Order at 2 n.2 (observing that plaintiffs have claimed “vested beneficial interests” but have “appl[ied] the term inconsistently throughout their brief”). The claims court thus determined that, apart from the effect of the plaintiffs’ concession, one way of disposing of any possible remaining claims of water interests in the case was to analyze the merits of plaintiffs’ theories under federal and/or state law. The upshot is a final judgment supported, so to speak, by a belt as well as suspenders: The claims court barred plaintiffs from asserting any claims being determined in the Adjudication and, to whatever extent that ruling did not dispose of the takings claims, the claims court also concluded that plaintiffs had no legal basis for asserting such claims. See Brief of Appellee United States 16, Klamath Irrigation District v. United States (dated October 25, 2007) (arguing that plaintiffs lack an ownership interest in Klamath Project water as a matter of law, but also asserting that “the CRC granted the Irrigators’ motion and barred them from making any claims based on rights, titles, or interests that may be subject to determination in the Adjudication.”).

Because any answer to the certified questions would not affect the outcome of the appeal in the Federal Circuit, the Court should deny the request for certification pursuant to ORS 28.200.

II. THE THREAT OF DISRUPTION TO THE ONGOING ADJUDICATION.

Assuming for the sake of argument that the certification request meets the relevant statutory criteria (which it does not), the Court should nonetheless exercise its discretion to deny the request. The Court has said that the “procedural posture” of

an issue is a relevant factor in deciding whether, as a matter of discretion, the Court should grant a certification request. See Western Helicopter, 811 P.2d at 633. Here, the procedural posture of the issue weighs strongly against granting the request because the very same issue that the Federal Circuit seeks to certify is being addressed in the ongoing Adjudication and will be presented to this Court in the ordinary course of appellate review of that proceeding.

In general, this Court has expressed a strong preference for resolving legal issues through the ordinary appellate process, stating that, “This Court best fulfills its obligation to interpret the laws of this state after a trial court and the Court of Appeals have had an opportunity to consider and refine the factual and legal issues.” Strunk v. Public Employees Retirement Board, 108 P.3d 1058, 1066-67 (Or. 2005). The Court has specifically affirmed the relevance of this consideration in the context of the certification process. See Western Helicopter, 811 P.2d at 633 (“Our experience with cases on direct appeal or in which we are exercising our original jurisdiction has taught us that the issues and arguments in both kinds of cases often are not as well defined or as focused as are the issues and arguments in cases in which discretionary review is sought after the case has filtered through the lens of a Court of Appeals decision.”).

Here, there are numerous advantages to this Court addressing the water ownership issue on ordinary appellate review and numerous disadvantages of doing so through a certification process. Administrative Law Judge Maurice L. Russell II recently filed a Proposed Order in the Adjudication and that ruling is currently being

reviewed by the Director of the Oregon Water Resources Department. Or. Rev. Stat. §§ 539.005 et seq. Once the Director makes his determination, it will be submitted to the appropriate Oregon circuit court which, after hearing objections and defenses, will issue a judgment affirming or modifying the determination. Or. Rev. Stat. § 539.130 & 539.150. That judgment will then be subject to appeal through the Oregon court system to this Court. Or. Rev. Stat. § 539.150(4). The Adjudication decree, once final, “shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream.” ORS 539.200.

This Court will be able to resolve the issue of water ownership far more confidently and effectively if the issue comes to the Court on appeal from the Adjudication. The Adjudication record includes voluminous testimony and other evidence regarding the competing claims of the United States, the plaintiffs, and other claimants. The Administrative Law Judge, the Director and the lower courts have already addressed, or will soon be addressing, the same legal issues presented by this certification request, including the proper interpretation of the 1905 statute. All of these materials and prior sifting of the issues will undoubtedly assist the Court in resolving this legal issue. In particular, all of this information will educate the Court about potential ramifications, legal as well as practical, of different interpretations of the 1905 law for those parties and interests that will be affected by the Adjudication but who may not be included as parties in this regulatory takings case.

On the other hand, addressing the ownership issue on certification would require the Court to examine the issue through the relatively narrow lens of a

regulatory taking claim based on a relatively thin, and largely irrelevant, evidentiary record. Moreover, for this Court to address the ownership issue at this time threatens to disrupt the entire Adjudication. Resolution of the legal claims of one set of claimants, outside the context of the Adjudication, could have unforeseeable adverse legal consequences for other claimants.

Finally, and most importantly, significant questions have already been raised about whether the Klamath Basin adjudication is sufficiently “comprehensive” to satisfy the McCarran Amendment and produce a determination that will bind the United States. See United States v. State of Oregon, 44 F.3d 758, 768 (9th Cir. 1994) (“Congress was concerned that the United States not be subjected to piecemeal, private water rights litigation.”) Granting the certification in this case, and addressing the ownership rights of the United States in isolation from the claims of other parties, could undermine the comprehensiveness of the Klamath Adjudication to the point of destroying its capacity to legally determine the rights of the United States. Id. The upshot would be to waste the millions of dollars and many thousands of hours of work that have been invested in the Adjudication to date.

Decisions from other jurisdictions, involving facts very similar to the facts of this case, are instructive on the value of allowing the Adjudication to proceed in its ordinary course. In Rufino v. United States, 506 N.E. 2d 910 (1987), the New York Court of Appeals (the state’s highest court) declined to accept certified questions from a federal District Court about the types of injuries that are compensable under New York tort law. The New York court observed that the “very questions now tendered

for our review were only recently answered” by the state’s trial courts and were the subject of an ongoing appeal, id. at 911, and that, if the Court were to accept the certification, it “would necessarily affect the ordinary State procedure now in actual progress for the resolution of these issues.” Id. The Court concluded, “[i]n the circumstances, it is unquestionably preferable in the resolution of significant State law issues to secure the benefit afforded by our normal process – the considered deliberation and writing of our intermediate appellate court in a pending litigation.” Id.

The U.S. Court of Appeals for the Fifth Circuit applied similar reasoning in Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee, 283 F.3d 650 (5th Cir. 2002), in deciding against certifying a state law issue to the Texas Supreme Court. The court observed that other parties were “currently litigating” the very same issue in two state court proceedings. The Court concluded: “We believe that the Supreme Court of Texas would be better suited to answer this question with the benefit of records generated in state court by several [parties] than it would be by receiving a certified question from one [party] with a relatively limited record on appeal.” Id. at 656-57. See generally Wright, Miller, Cooper & Amar, Federal Practice & Procedure § 4248 n.48 (2008) (“Certification would not be appropriate where the same legal issues were already making their way through the state court system in other cases which presented better developed records on which state courts could render decisions.”). Cf. Mansolillo v. Employee Retirement Bd. of City of Providence, 668 A.2d 313 (R.I., 1995) (refusing to accept certified questions when the

certification “was [largely] motivated . . . by the desire of the parties to obtain speedy resolution of their pending Superior Court case without the necessity of a trial”).

It bears emphasis that there is nothing unusual about leaving resolution of the state-law water ownership issue in this takings suit to the federal courts. In modern takings doctrine, a regulatory taking claim must be analyzed in two steps, with the first question being whether the claimant can point to a protected “property” interest. See Phillips v. Washington Legal Foundation, 524 U.S. 156, 164 (1998). See also Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993) (rejecting regulatory takings claims under the state and federal constitutions based on beachfront development restrictions because background principles of Oregon property law barred plaintiff from claiming protected property rights to develop the property). “The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment.” Conti v. United States, 291 F.3d 1334, 1340 (2002), citing Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Instead, property rights are defined by “resort to ‘existing rules or understandings that stem from an independent source such as state law.’” Lucas, 505 U.S. at 1030, quoting Roth, 408 U.S. at 577.

Assuming a claimant can demonstrate that she possesses a protected property interest, the second question in a regulatory takings case is whether the regulation is so burdensome that it amounts to a “taking,” an issue which presents a pure question of federal constitutional law. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

As a consequence of this two-step analysis, federal courts are routinely required to address state law property issues in order to decide takings cases presented to them. See, e.g., Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (regulatory taking claim defeated by limitations on title imposed by Washington public trust in tidelands); Rith Energy, Inc v. United States, 44 Fed Cl. 108 (1999), aff'd, 247 F.3d 1355 (Fed. Cir. 2001) (regulatory taking claim rejected because proposed mining activity would have constituted an illegal nuisance under Tennessee law). Thus, the Federal Circuit has both the authority and the competence to decide whether the water interests at stake belong to plaintiffs or instead belong to the United States, to the extent it even needs to address the issue at all in view of the November 13 Order barring plaintiffs from asserting ownership rights being determined in the Adjudication.¹⁰

III. THERE IS CONTROLLING PRECEDENT ON THE ISSUE.

Finally, the Court should exercise its discretion to reject the certification

¹⁰ PCFFA respectfully disagrees with Oregon's suggestion that the federal courts handling this case may at some stage be required to consider abstaining in favor of the Adjudication under the Pullman abstention doctrine. See Memorandum of Law of the Oregon Water Resources Department, at 5. The Pullman doctrine, which calls for federal court abstention when state court construction of a statute might avoid the need to evaluate the constitutionality of the statute, has no relevance in this quite different context. The U.S. Court of Federal Claims has repeatedly ruled that it has no obligation to abstain from resolving federal takings claims in favor of state water adjudications. See Klamath I, 67 Fed. Cl. at 514 n.11 ("It bears noting at this juncture that there is no per se rule requiring this court to abstain in favor of a state water rights adjudication."); Hage v. United States, 35 Fed.Cl. 147 (1996) (ruling that ongoing river basin adjudication in Nevada did not preclude prosecution of Nevada rancher's taking claim based on water rights at issue in the adjudication).

request because the Court already has issued controlling precedent on the question of whether the United States, rather than the ultimate water users, holds the right to use of Klamath Project water under Oregon law.

This Court has held that, in deciding whether to accept a certified question, it must make its own “independent assessment” about whether or not there is controlling state precedent. See Western Helicopter, 811 P.2d at 631.¹¹ The controlling precedent may be supplied either in the form of a decision by this Court or by the Court of Appeals. Id. When the controlling precedent is a decision of this Court, as in this case, the essentially unvarying rule is to deny the request for certification. See id. (“Although we always shall be willing to reconsider settled precedent of this court if circumstances warrant, we ordinarily shall not reconsider such precedent in a certified case.”)

The Court should deny the request for certification because this Court has issued a decision that represents controlling precedent on point. As discussed, the basic legal question presented by the certification request is whether the 1905 statute made the United States owner of Klamath Project water. The controlling legal precedent answering that question in the affirmative is In re Waters of Umatilla River, 168 P. 922, 925 (1917); In re Waters of Umatilla River, 172 P. 97 (1918) (opinion on

¹¹ Significantly, the U.S. Court of Appeal for the Federal Circuit, in its Certification Order, apart from stating that it “discerns an absence of controlling precedent in the decisions of the Oregon Supreme Court and the intermediate appellate courts on the pertinent issues of Oregon property law,” 2008 WL 2751212 *1, never actually analyzed the pertinent authorities nor sought to explain why they are not controlling.

rehearing).

By way of background, the Oregon statute of February 22, 1905, reads, in relevant part, as follows:

Whenever the proper officers of the United States, authorized by law to construct works for the utilization of water within this State, shall file in the office of the State Engineer a written notice that the United States intends to utilize certain specified waters, the waters described in such notice and unappropriated at the time of the filing thereof shall not be subject to further appropriation under the laws of this state, but shall be deemed to have been appropriated by the United States; provided, that within a period of three years from the date of filing such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State Engineer for his information; and provided further, that within four years from the date of such notice the United States shall authorize the construction of such proposed work. No adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this State except as for such amount of said waters described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized, which release shall also be filed in the office of the State Engineer.

Or. Gen. Laws, 1905, Chap. 228, § 2. It is undisputed that Congress, in accordance with the terms of the Act of 1905, authorized the development of the Klamath Irrigation Project. Act of February 9, 1905, ch. 567, 33 Stat. 714. Subsequently, on May 17, 1905, the United States filed a notice of intention to appropriate Klamath River water, stating:

Notice is hereby given that the United States intends to utilize certain specified waters, as follows, to-wit: All of the waters of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath River and Lost River, and all of the lakes, streams and rivers supplying water thereto or receiving water therefrom, including the following and all their tributaries ... [listing tributaries].

It is the intention of the United States to completely utilize all the waters of the Klamath Basin in Oregon, and to this end this notice includes all lakes, springs, streams, marshes and all other available waters lying or flowing therein.

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 act of Congress approved June 17, 1902 (32 Stat, 388), known as the Reclamation Act.

Klamath I, 67 Fed. Cl. at 524. Because the United States filed the necessary claim under the 1905 Act, and met the other prerequisites laid out in the legislation,¹² the United States has consistently maintained, with the support of PCFFA and the *amici*, that Klamath Project water should “be deemed to have been appropriated by the United States,” rather than by water users utilizing these waters pursuant to contracts with the United States.

The position of the United States is supported, indeed dictated, by the Court’s holding in Umatilla. The case involved competing claims by the United States and other parties to water in the Umatilla Basin. The Court held that a notice filed by the United States pursuant to the 1905 Act “vest[s] the United States with title to all the then unappropriated water.” In re Waters of Umatilla River, 168 P. at 925. The Court addressed the nature of the United States’ property interest in the water most extensively in its second opinion, issued in response to a motion for reconsideration,

¹² The U.S. Court of Federal Claims observed, “It should be noted that the United States met the other two requirements imposed by the 1905 Oregon law. Thus, on May 6, 1908, the Bureau filed plans and specifications for the Klamath Irrigation Project with the State Engineer. And, on May 8, 1909, the Bureau filed proof of authorization to construct the necessary works. On May 17, 1909, the Bureau filed supplemental plans with the State Engineer.” Klamath I, 67 Fed. Cl. at 524 n. 31.

stating:

By the statute quoted in the previous opinion the Legislature withdrew from further appropriation the waters of such streams as the United States should elect to utilize in the manner therein pointed out. The United States has accepted the grant and conformed to the terms thereof. The Legislature could not displace water rights which had vested prior to the acceptance by the United States of the provisions of the statute, but the plain precept of the law vests the United States with title to all waters not theretofore appropriated. The claim of the government ... must be sustained, regardless of the diligence of the government in matters not specified in the statute, and regardless of the amount of water required to irrigate the lands served by the government ditches.

In re Waters of Umatilla River, 172 P. at 100.

The issue of water ownership, and the significance of the Umatilla decision, was addressed exhaustively – and in our view correctly – by the United States Court of Federal Claims in this case. The claims court stated:

Every indication is that the May 1905 notice triggered the provisions of the 1905 Oregon legislation, thereby vesting in the United States, as of that time, the appropriative water rights associated with the Klamath project that were unappropriated as of the date of the filing. This conclusion is confirmed by In re Waters of Umatilla River, 168 P. 922, 925 (1917), in which the Oregon Supreme Court held that, under the 1905 legislation, a similar notice by the United States “vested the United States with title to all the then unappropriated water of the Umatilla River.”

Klamath I, 67 Fed. Cl. at 524. As the quoted language indicates, the claims court believed that its ruling in favor of the United States was dictated by controlling Oregon precedent.

Not surprisingly given the clarity of the holding in Umatilla, there has been little subsequent disagreement about the proper interpretation of 1905 Act. While no other decision has directly addressed the issue, “a number of . . . opinions [have]

proceeded from the uncontested assumption that the United States, in 1905, appropriated all unappropriated water rights in the Basin.” Klamath I, 67 Fed. Cl. at 524 n.32, citing, inter alia, Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1209 (9th Cir. 2000) (“In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.”). In addition, a series of Oregon Attorney General Opinions (with one exception) confirm this reading of the 1905 Act. Id. at 525-26.

Most recently, on January 12, 2006, Judge Russell, who presided over the administrative phase of Klamath Basin adjudication, issued a comprehensive Proposed Order upholding the claim of the United States to ownership of Klamath Project water. In a clear and well-reasoned opinion, he embraced the reasoning of the claims court, relying on the Umatilla decision. Referring to the 1905 Act, the judge stated:

It is scarcely possible to conceive more unambiguous language. The law authorized the United States to file with the State Engineer a notice of intent to appropriate previously unappropriated waters, and declared, subject to the subsequent filing of certain items with the State Engineer, that once that notice was filed, no further appropriation of the water described in the notice would be permitted, and the United States would be deemed to have appropriated the water described. It also required as a precondition to any claim adverse to at least part of the United States’ appropriation that the United States formally release the claim in writing.

In re the Determination of the Relative Rights of the Waters of the Klamath River, a

(November 14, 2006).

Before the Federal Circuit, plaintiffs presented various arguments against the established reading of the Oregon Act of 1905. None are convincing on the merits and, more to the point, none refutes the fact that, however one believes the 1905 Act should or might be interpreted, this Court has already issued a decision addressing the issue, which remains the controlling precedent unless and until the Court revisits the issue.¹³

It bears emphasis that this Court need not, in the context of reviewing this certification request, definitively resolve the proper interpretation of the 1905 Act or decide whether the claims court's interpretation was necessarily the correct one. Nor would a decision to deny certification imply that the Court believes the issue is unimportant or that the Umatilla precedent should not be reexamined in the eventual appeal from the final determination in the Klamath Basin adjudication. Instead, the narrow issue presented by this request to certify state law issues is whether, at present,

¹³ For example, plaintiffs have asserted that acquisition of actual ownership depended upon putting the water to beneficial use and that the Klamath water users (not the United States) are the ones who actually have put the water to beneficial use. On that basis they have contended that the water users, not the United States, should be treated as the owners of the water. But this is the precise argument that was raised and rejected in Umatilla; as noted above, the Court stated, "The claim of the government [to the water] ... must be sustained, regardless of the diligence of the government in matters not specified in the statute, and regardless of the amount of water required to irrigate the lands served by the government ditches. In re Waters of Umatilla River, 172 P. at 100 (emphasis added.). The fact that the Department of Water Resources has filed a brief in the Adjudication adopting this position, see note 5 supra, does not alter the fact that Umatilla remains controlling precedent.

the issue is controlled by a governing precedent of this Court. See Western Helicopter, 811 P.2d at 631-32. The Court need go no further to decide to decline this certification request on this third, independent ground.

CONCLUSION

For the foregoing reasons, PCFFA and *amici curiae* urge the Court to respectfully decline to accept certification of the questions posed by the Federal Circuit.

Respectfully submitted this 25th day of July, 2008.

STEPHANIE M. PARENT (OSB #92590)
Attorney at Law
4685 S.W. Flower Place
Portland, OR 97221
(503) 320-3235
parentlaw@gmail.com

*Attorney for Defendant-Intervenor-Appellee
PCFFA and Amici Curiae Institute for
Fisheries Resources, The Wilderness
Society, Klamath Forest Alliance, Oregon
Wild, WaterWatch of Oregon, Northcoast
Environmental Center, Sierra Club, and
Natural Resources Defense Council*

Of Counsel:

TODD D. TRUE

Earthjustice

705 Second Avenue, Suite 203

Seattle, WA 98104

(206) 343-7340

(206) 343-1526 [FAX]

ttrue@earthjustice.org

Attorney for Defendant-Intervenor-Appellee

PCFFA and Amici Curiae Institute for

Fisheries Resources, The Wilderness Society,

Klamath Forest Alliance, Oregon Wild,

WaterWatch of Oregon, Northcoast Environmental

Center, and Sierra Club

JOHN D. ECHEVERRIA

Georgetown Environmental Law & Policy Institute

Georgetown University Law Center

600 New Jersey Avenue, N.W.

Washington, D.C. 20001-2075

(202) 662-9863

(202) 662-9005 [FAX]

echeverj@law.georgetown.edu

Attorney for Amicus Curiae Natural Resources

Defense Council

KATHERINE S. POOLE

Natural Resources Defense Council

111 Sutter Street, 20th Floor

San Francisco, CA 94104

(415) 777-0220

(415) 875-6161 [FAX]

kpoole@nrdc.org

Attorney for Amicus Curiae Natural Resources

Defense Council

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Memorandum of Law of PCFFA and *Amici Curiae* Re Certification of Questions From the Federal Circuit to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on July 25, 2008.

I further certify that I directed the Memorandum of Law of PCFFA and *Amici Curiae* Re Certification of Questions From the Federal Circuit to be served upon the following individuals:

Roger J. Marzulla
Nancie G. Marzulla
Marzulla & Marzulla
1350 Connecticut Avenue, N.W., Suite 410
Washington, D.C. 20036
(202) 822-6760
(202) 822-6774 [FAX]
Attorneys for Plaintiff-Appellants

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail

Kristine Tardiff
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
55 Pleasant Street, Suite 352
Concord, NH 03301
(603) 225-1562 ext. 283
(603) 225-1577 [FAX]
Attorneys for Defendant-Appellees

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail

Katherine J. Barton
Kathryn E. Kovacs
Appellate Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail

Street Address:

601 D Street, N.W.
PHB Mail Room 2121
Washington, D.C. 20004
(202) 353-7712
(202) 353-1873 [FAX]
Attorney for Defendant-Appellees

Stephen M. Macfarlane
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
501 I Street, Suite 9-700
Sacramento, CA 95814-2322
(916) 930-2204
(916) 930-2210 [FAX]
Attorney for Defendant-Appellees

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail

Denise G. Fjordbeck
Attorney-in-Charge
Civil/Administrative Appeals
Department of Justice
Oregon Water Resources Department
1162 Court Street N.E.
Salem, OR 97301-4096
(503) 378-5648
(503) 378-3465 [FAX]
*Attorney for Amicus/State Agency Oregon
Water Resources Department*

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail

I, Stephanie M. Parent, declare under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of July, 2008, at Portland, Oregon.

Stephanie M. Parent