No. 07-5115

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KLAMATH IRRIGATION DISTRICT, et al.
Plaintiffs- Appellants
v.

UNITED STATES
Defendant-Appellee,

and

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS,
Defendant-Intervenor-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

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BRIEF OF AMICUS CURIAE NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF THE UNITED STATES

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October 31, 2007

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Klamath Irrigation District, et al. v. United States.

No. 07-5115

Certificate of Interest

Counsel for Natural Resources Defense Council certifies the following:

1. The full name of every party or amicus represented by me is:
   Natural Resources Defense Council.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
   None

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. 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 court:
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MISCELLANEOUS

Natural Resources Defense Council ("NRDC") respectfully submits this brief amicus curiae in support of the United States urging the Court to affirm the judgment below.

INTERESTS OF AMICUS

NRDC is a not-for-profit conservation organization with more than 400,000 members nationwide and more than 90,000 members in Oregon and California. NRDC members use and enjoy natural resources affected by the Klamath project. Through its scientific, litigation, and other programs, NRDC has been active in efforts to promote sustainable agriculture, to encourage water conservation, and to protect endangered species. NRDC has participated, either as a party or as an amicus curiae, in many cases involving alleged private property and/or contract rights in water supplied by Bureau of Reclamation ("Bureau") projects. The U.S. Court of Federal Claims granted NRDC leave to participate as amicus curiae in the proceedings below.

STATEMENT OF FACTS

NRDC adopts the statement of the facts of the United States, as supplemented by the Pacific Coast Federation of Fishermen's Associations et al. ("PCFFA").

INTRODUCTION AND SUMMARY OF ARGUMENT

NRDC, in order to assist the Court in resolving this case and avoid duplication, focuses in detail in this brief on the water users' challenge to the claims court's application of the sovereign acts doctrine.

Judge Allegra properly ruled that the sovereign acts doctrine (with its companion, the unmistakability doctrine) represents a freestanding defense to a breach of contract claim based on a sovereign act. The claims court correctly rejected the theory that the sovereign acts doctrine is merely the prelude to application of the traditional common law impracticability defense.

Judge Allegra correctly rejected the water users' argument that the government, to sustain a sovereign acts defense, must demonstrate that the sovereign could have taken no other path that would have avoided impairment of the contract. He also properly rejected the argument that a

plaintiff can defeat a sovereign acts defense by challenging the legal validity of the governmental action.

Finally, on the facts of this case, Judge Allegra correctly ruled that these contract claims were barred by the sovereign acts doctrine. The enactment and application of the Endangered Species Act represent a sovereign act that compelled the Bureau to reduce water deliveries. The contracts contained no "unmistakable" commitment by the United States to accept liability if a sovereign act obstructed contract performance.[1]

ARGUMENT

I THE SOVEREIGN ACTS DOCTRINE IS NOT A "PRELUDE" TO APPLICATION OF THE TRADITIONAL IMPRACTICABILITY DEFENSE.

The water users contend that Judge Allegra erred in ruling that the sovereign acts doctrine is an independent defense barring a breach of contract suit against the United States. See Klamath Irr. Dist. v. United States, 75 Fed. Cl. 677 (2007). According to the water users, demonstrating that a sovereign act obstructed contract performance should merely be the "prelude," or the first step, in a more complicated legal analysis that also

[1] Although it might provide an independent basis for rejecting these contract claims, the United States did not specifically assert that the claims were barred under the "reserved powers" doctrine, "which holds that some sovereign powers cannot be ceded even if the contractual intent to do so is patently clear." Klamath, 75 Fed Cl. at 695 n.28.

includes most of the elements of the traditional common law impracticability defense. The Court should reject the water users' argument.

Under the sovereign acts doctrine, the government as contractor cannot be held liable "for an obstruction to the performance of . . . [a] contract resulting from its public and general acts as a sovereign." Horowitz v. United States, 267 U.S. 458 (1925). Application of the doctrine requires a case-specific inquiry to determine whether a legislative or executive branch action was designed to serve a public purpose or was instead "designed to target prior governmental contracts." Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1575 (Fed. Cir. 1997); see also City Line Joint Venture v. United States, 2007 WL 2791704 *3 (Fed. Cir. Sept. 27, 2007) (sovereign acts doctrine does not apply to legislation that "directly and intentionally abrogated" contractual commitments). The scope of the governmental action often provides useful insight into whether the government acted for the purpose of abrogating specific contracts rather than to serve the public. Yankee Atomic, 112 F.3d at 1575.

Assuming an action represents a sovereign act, see Centex Corp. v. United States, 395 F.3d 1283, 1306-07 (Fed. Cir. 2005), the government may nonetheless be held liable under the unmistakability doctrine if the government has surrendered the right to exercise sovereign power "in terms

which admit of no other reasonable interpretation." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982); see also Centex, 395 F.3d at 1306-07 ("[T]the unmistakability doctrine provides that, absent a clear statement to the contrary, a contract entered into by a private party with the government will not be interpreted to exempt the private party from the operation of a subsequent sovereign act by the government.").

On the other hand, the traditional impracticability defense requires a showing that (1) a supervening event made performance "impracticable," (2) the non-occurrence of the event was a "basic assumption" on which the contract was based; (3) the occurrence of the event was not the breaching party's "fault," and (4) the breaching party did not "assume the risk" of the occurrence. Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (citing Restatement (Second) of Contracts § 261).

The Court should reject the water users' argument that analysis under the sovereign acts doctrine (and its companion, the unmistakability doctrine) should be treated as a prelude to analysis under the traditional common law doctrine of impracticability. That position is refuted by (1) relevant precedent, (2) the distinctive origins and functions of the sovereign acts doctrine, and (3) the doctrinal confusion that would result if the doctrines were conjoined.

Relevant Precedent. Longstanding precedent confirms that the sovereign acts doctrine represents a freestanding defense in a breach of contract action against the United States. In Horowitz, the seminal sovereign acts case, the Supreme Court stated, "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." 267 U.S. at 461 (quoting Jones v. United States, 1 Ct. Cl. 383, 384 (1865)). This language "plainly enunciate[s] an independent defense." Klamath, 75 Fed. Cl. at 692. The traditional common law impracticability doctrine "is neither mentioned nor even obliquely referenced in the one page opinion in Horowitz." Id. Horowitz in turn relied on several earlier claims court decisions - including Deming v. United States, 1 Ct. Cl. 190 (1865), Wilson v. United States, 11 Ct. Cl. 513 (1875), and Jones v. United States, supra - none of which contains any suggestion that the sovereign acts doctrine is a prelude to a traditional impracticability analysis.

The plurality opinion in United States v. Winstar Corp., 518 U.S. 839 (1996), contains language supporting the water users' position, but that opinion is clearly not dispositive of the issue. A Supreme Court opinion that fails to command a majority of the justices is not a binding precedent, either

in the Supreme Court itself, Texas v. Brown, 460 U.S. 730, 737 (1983), or in other courts. Hertz v. Woodman, 218 U.S. 205, 213-14 (1910). Moreover, the plurality opinion cannot be pieced together with any of the concurring opinions to form a majority position on this issue. See Klamath, 75 Fed. Cl. at 91-92 & n.21; see also Winstar, 518 U.S. at 931 (Rehnquist, C.J., joined by Ginsburg, J., dissenting) (rejecting the plurality position on sovereign acts, stating that "neither Horowitz nor the Court of Claims cases upon which [the plurality] relies confine themselves to so narrow a rule").

Indeed, this Court as well as the commentators have recognized that the concurring and dissenting opinions in Winstar are more authoritative on some issues than the plurality opinion. For example, in Yankee Atomic this Court rejected the position of the plurality that the unmistakability doctrine does not apply to contracts that are simply risk-shifting agreements. Instead, the Court adopted the view of the "five [concurring and dissenting] justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts." 112 F.3d at 1579. See also Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrine in the Wake of Winstar: An Interim Report*, 51 Ala. L. Rev. 1177, 1186 (2000) (observing that there is "a plausible basis for arguing that the precedential effect of Winstar is to reject, rather than to accept, Justice Souter's cramped

reading of the unmistakability doctrine"). Thus, there is no reason to treat the plurality position on the "prelude" issue as authoritative, much less binding, in this case.

The plurality in Winstar deduced the novel idea that the sovereign acts doctrine is a prelude to a traditional impracticability analysis from the language in Horowitz that suggests that the sovereign acts doctrine serves to place the government on a par with a private party: "In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants." Horowitz, 267 U.S. at 461 (quoting Jones, 1 Ct.Cl. at 384). The Winstar plurality reasoned that since a private party can raise an impracticability defense in a breach of contract suit, the effect of placing the government on a par with a private party must be to require the government to assert an impracticability defense. See 518 U.S. at 904. But this interpretation of Horowitz is mistaken. Read in historical context, the Court's language is better understood to mean that, generally speaking, neither the government nor a private party should be held liable when a sovereign act obstructs contract performance.

This Court embraced this interpretation in Yankee Atomic, describing the scope of the sovereign acts doctrine as follows:

> From its earliest days . . . application of the sovereign act[s] doctrine has proceeded from the recognition that in governing the country, the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts. Were those contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party for the governing action. Given the large number of contracts the Government enters, its contracts will sometimes be affected by those same governing acts. The policy underlying the sovereign act[s] doctrine is that in those circumstances, the Government in its contracting role, like its private counterpart, should not incur liability for its act done in the governing role.

112 F.3d at 1574 n.3 (emphases in original) (quoting O'Neill v. United States, 231 Ct. Cl. 823, 826 (1982)). The underscored language shows that the Court understood that the effect of equating a government contractor with a private party should be to excuse both types of parties from contract liability for sovereign acts. See also Klamath, 75 Fed. Cl. at 694 n.27.

In addition, the decisions of this Court preceding and following Winstar support the conclusion that the sovereign acts doctrine is not a prelude to application of the common law impracticability defense. As Judge Allegra explained, "A long and unbroken line of cases from the old Court of Claims and the Federal Circuit . . . applied the sovereign acts defense without any mention or hint of the impossibility defense." See Klamath, 75 Fed.Cl. at 693 n.24 (collecting cases). As he also pointed out,

the first major decision by this Court applying the sovereign acts doctrine post-Winstar "indisputably did so without conducting any impossibility analysis whatsoever." Id. at 693 (citing Yankee Atomic, 112 F.3d at 1577).

The water users rely on the recent decision in Carabetta Enters., Inc. v. United States, 482 F.3d 1360 (Fed Cir. 2007), to support their theory that the sovereign acts doctrine is merely a prelude to application of a separate impracticability analysis. In that case the Court assumed that a congressional appropriations rider obstructing contract performance represented a sovereign act. Nonetheless, relying on the Restatement (Second) of Contracts § 270, the Court concluded that the government should still be liable for breach because the agency could have rendered "substantial" performance and failed to do so. This decision will not support the weight the water users attempt to place on it. The conclusion that a viable sovereign acts defense does not excuse the government from failing to render substantial performance does not resolve whether the government must satisfy all of the various elements of the traditional impracticability defense in order to raise the sovereign acts defense in the first place. There is no logical conflict between the conclusion that the sovereign acts doctrine represents a freestanding defense and the ruling in Carabetta.

The water users also cite a passing reference to "impossibility" in Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000), but that decision contains no suggestion that the courts should engage in a traditional impracticability analysis separate and apart from the sovereign acts defense. Furthermore, the Court stated that the possible application of the sovereign acts doctrine was not at issue in the case, making its comments dictum. See id. at 620. Thus, Mobil offers no support for the idea that a sovereign act is simply a prelude to a separate common law impracticability analysis.

Finally, the water users invoke Seabord Lumber Co. v. United States, 308 F.3d 1283 (Fed. Cir. 2002), but that decision is completely beside the point. Seabord involved an effort by a private party to raise an impracticability defense to a countersuit by the government, not an effort by the government to invoke the sovereign acts defense. Thus, the decision provides no guidance on the interaction between the sovereign acts defense and impracticability doctrine in the context of a suit against the United States.

First Principles. The theory that a sovereign act is merely a set up for traditional common law impracticability analysis is inconsistent with the distinctive purposes and functions of the sovereign acts doctrine. In a

general sense, both the sovereign acts doctrine and the doctrine of impracticability seek to balance the public and private interests served by enforceable contracts with a recognition that, in some circumstances, "justice requires departure from the general rule that a promisor bears the risk of increased difficulty of performance." Farnsworth, CONTRACTS 624 (4th Ed. 2004). Historically, the doctrine of impracticability was explained in terms of individual morality, see, e.g., James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 Am. J. Comp. L. 513 (2004), while in the modern era the doctrine has more frequently been characterized as an economically efficient risk allocation rule. See, e.g., Robert Cooter & Thomas Ulen, LAW AND ECONOMICS 277-81 (1988).

The sovereign acts doctrine, which is related to the traditional impracticability doctrine, is partly rooted in these same considerations. But it also reflects the special "responsibilities of government, rather than private, actors." Klamath, 75 Fed. Cl. at 694. Under our democratic system, the government has unique authorities and responsibilities, unlike those possessed by a private party, to protect and advance the general public welfare. In addition, a breach of contract suit against the government based on a sovereign act raises issues of legislative supremacy and separation of

powers not implicated by private-private contract litigation. Accordingly, suits for breach of contract against the government, unlike contract suits against a private party, raise unique concerns about the scope of the judicial role. The sovereign acts doctrine is designed to adapt traditional impracticability doctrine in order "to shield exercises of the lawmaking function that involve sovereign powers." Cuyahoga Metropolitan Housing Authority v. United States, 57 Fed. Cl. 751, 774 n.31 (2003).

The sovereign acts doctrine would be eviscerated if a sovereign act were simply a prelude to application of the common law impracticability doctrine. The protections for legislative or executive branch action created by the sovereign acts doctrine would be rendered meaningless if government defendants also had to overcome the same hurdles as private parties under the traditional impracticability analysis. See Klamath, 75 Fed. Cl. at 694 (quoting Gerard Wimberly & Kristin Amerling, *The Sovereign Acts Doctrine After Winstar*, 6 Fed. Cir. B. J. 127, 130 (1996)) ("Grafting the sovereign acts doctrine onto a common law impossibility defense . . . [would] largely deprive[] the former of its raison d'etre - enabling 'the government to serve the public and respond to crises without fear of liability for the incidental effects its actions may have on its wide range of contracts.'").

Doctrinal Logic. Finally, the water users' position should be rejected because the only coherent doctrinal answer is that the sovereign acts doctrine cannot function as a prelude to the traditional impracticability defense.

Attempting to combine the sovereign acts doctrine and the traditional impracticability defense would produce a redundant and internally inconsistent legal standard. The sovereign acts doctrine is, in effect, a particularized version of impracticability doctrine that applies in breach of contract suits against the government based on sovereign acts. See Klamath, 75 Fed. Cl. at 694 n.27 ("[T]he sovereign acts defense focuses only on a particular form of impossibility - that prompted by sovereign acts."). The sovereign acts doctrine, together with the unmistakability doctrine, form a "'double helix' of contract interpretation applicable only to sovereign entities." Id. at 694. The sovereign acts and unmistakability doctrines, considered together, combine those elements of traditional impracticability analysis that are relevant in the context of sovereign acts with distinctive features that reflect government's unique authority and responsibility to safeguard the public welfare. Accordingly, once the government has established that a contract claim is barred under the sovereign acts and unmistakability doctrines, a separate analysis under traditional impracticability analysis would be redundant of the sovereign

acts/unmistakability analysis and also undercut the distinctive elements of those separate defenses.

A review of the different elements of traditional impracticability analysis confirms that this doctrine cannot be grafted onto sovereign acts/unmistakability analysis. First, impracticability doctrine bars a breaching party from raising an impracticability defense if the supervening event was his or her "fault." Therefore, if the sovereign acts and impracticability doctrines were combined, a literal application of impracticability analysis would bar government from ever claiming that a sovereign act rendered performance impracticable. The courts have avoided this result by invoking the language from Horowitz indicating that the United States, when sued as a contractor, cannot be held responsible for the actions of the government as sovereign. See Winstar, 518 U.S. at 895 ("the 'public and general' acts of the sovereign are not attributable to the Government as contractor so as to bar the Government's right to discharge"). In other words, the courts have recognized that the "fault" element of impracticability analysis is inconsistent with the sovereign acts doctrine, and therefore disregard this element of impracticability analysis whenever a sovereign acts defense is raised.

Second, the traditional element of impracticability analysis focusing on the assumptions of the contracting parties would fit awkwardly, at best, with the sovereign acts doctrine. As discussed, to succeed on an impracticability defense, a party must show that the "non-occurrence" of the supervening event was a "basic assumption" underlying the contract. However, one of the fundamental rationales for the sovereign acts doctrine is that sovereign power is so essential to the functioning of government that every party who contracts with the government should understand that the government may engage in some action that could potentially impair the contract. See Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 958, 959 (Fed. Cir. 1993) (describing "[t]he sovereign act defense [as] an inherent element of every contract to which the government is a party"). The principle that every government contract is subject to potentially being overridden by a sovereign act is inconsistent with the notion, implicit in the argument that traditional impracticability analysis applies, that the government must make an affirmative showing that the parties assumed the government would not take any supervening action. See Klamath, 75 Fed. Cl. at 692 (observing that the "common law defense brings with it additional requirements regarding what the parties' basic assumptions were in drafting

the contract, requirements that have not been historically associated with the sovereign acts doctrine").

Further, requiring the government to show that the non-occurrence of a sovereign act was a basic assumption would also be inconsistent with the general presumption in contract law that no supervening law will obstruct performance of a contract. The Restatement (Second) of Contract § 264, states "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." See also, e g., Louisville & Nashville RR Co. v. Mottley, 219 U.S. 467, 485 (1911) (the authorities "are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced."); Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57, 69 (2000) (Scalia, J., concurring) ("Supervening law is always grounds for the dissolution of a contractual obligation."). Because government would at least be entitled to the benefit of the same rules as private parties, if traditional impracticability analysis applied, the government would also be entitled to the benefit of this presumption. Assuming the government could invoke such a presumption,

then this factor, too, would have no meaningful role in the analysis if the sovereign acts and impracticability doctrines were joined, because a sovereign act would satisfy this element of impracticability analysis in every case.

Finally, the third element of the common law impracticability defense does not mesh with the sovereign acts defense. Under the common law rule, a party is not relieved of contract liability if "the language [of the contract] or the circumstances indicate the contrary." See Restatement (Second) of Contracts § 261. To defeat an impracticability defense on this basis it need only be shown, "by appropriate language," that the parties have "agree[d] to perform in spite of impracticability that would otherwise justify . . . nonperformance." See id., Comment c. By contrast, as discussed, in a suit for breach of contract based on a sovereign act, the government may be held liable only if a claimant can meet the more demanding standard of the unmistakability doctrine--that is, by showing that the contract, in unmistakable terms, precludes the government from avoiding liability. These different standards cannot logically both apply in a breach of contract suit against the government. See Klamath, 75 Fed. Cl. at 694 (observing that "[g]rafting the sovereign acts doctrine onto a common law impossibility defense . . . raises serious interaction questions involving the common law

impossibility defense and the unmistakability doctrine"); see also id. at 695 (stating that these two approaches "cannot peacefully coexist"). This provides yet another reason to conclude that the sovereign acts doctrine should be regarded as a freestanding defense, and not a mere prelude to application of the traditional common law impracticability defense.

II. THE SOVEREIGN ACTS DOCTRINE DOES NOT AUTHORIZE JUDICIAL SECOND-GUESSING OF GOVERNMENT POLICY DECISIONS.

Recognizing that the sovereign acts doctrine represents a freestanding defense applicable to public sovereign acts, there is still the question of how the defense should be applied in this context. Under Horowitz, the general rule is that the government as contractor cannot be held liable in contract for obstruction of contract performance "resulting from its public and general acts as a sovereign." 267 U.S. at 461. This language suggests that the defense calls for straightforward examination of whether or not a sovereign act actually caused impairment of a contract. See Klamath, 75 Fed.Cl. at 688 (observing that "the decisions have approached cautiously questions regarding what 'caused' a sovereign act to occur").

The water users in the course of this litigation have primarily argued for two narrowing constructions of the sovereign acts doctrine. Neither of these arguments has any merit and the Court should reject them.

A. The Sovereign Acts Defense Does Not Require an Open-Ended Analysis of Possible Alternative Sovereign Acts.

Before the U.S. Court of Federal Claims, the water users' primary argument for why the sovereign acts doctrine did not bar these claims was that Congress and/or the Bureau might have adopted nearly a dozen different strategies in the years preceding the 2001 drought that might have avoided a shortfall in water deliveries. See Third Declaration of David A. Solem, attached to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment as to Contract Claims (filed April 20, 2006). The alternatives they pointed to included establishment of a water conservation program, creation of a water bank, and construction of fish screens and fish passage facilities. Id. The water users have apparently abandoned this argument on appeal because they have not specifically raised it in their opening brief. In any event, this kind of open-ended analysis of alternatives has no place in sovereign acts analysis.

First, this approach is inconsistent with the basic rationale for the sovereign acts doctrine, which is that the role of the government as contractor cannot be "fused" with the role of the government as sovereign. Given this understanding of why the government as contractor cannot be held liable for a sovereign act, it would be nonsensical to suggest that, even though the government cannot be held liable for a sovereign act, it should

nonetheless be held liable unless it can show that there was no alternative action it might have haven taken that would avoided impairing the contract. If two roles of the government cannot be "fused" for the purpose of deciding whether a sovereign act obstructs contract performance, they also cannot be fused for the purpose of deciding whether some other action by the sovereign might have avoided contract impairment.

Second, in practice, the water users' expansive theory would render the sovereign acts doctrine essentially meaningless. The U.S. government, with its vast financial and other resources, virtually always has the ability, at least with 20-20 hindsight, to pay certain interest groups or launch some new program, in a manner that would obviate impairment of a specific contract. As Judge Allegra observed:

> "If plaintiffs are correct, an agency riveted upon the public good, and unmotivated whatsoever by any desire to relieve itself of any contractual obligations, would still be subject to liability unless it could show that, over an extended period of time, perhaps spanning multiple Administrations, it could have chosen no path that would have avoided the sovereign act that violated the contract."

75 Fed.Cl. at 689. It is literally unthinkable that the sovereign acts defense could depend on such "captious considerations." Id.

Indeed, requiring the courts to engage in this kind of broad-ranging investigation into government's policy options would defeat the very purpose of the sovereign acts doctrine. As discussed, the doctrine rests on

the principle that "the Government-as-sovereign must remain free to exercise its powers." Yankee Atomic, 112 F.3d at 1575. The government could not exercise its sovereign powers if every sovereign act were subject to judicial second-guessing to evaluate whether the sovereign might have selected some alternate course.

The proper approach to this issue is illustrated by the recent decision of the U.S. Court of Federal Claims in Casitas Municipal Water. Dist. v. United States, 72 Fed. Cl. 746 (2006), appeal pending, No. 07-5153. In that case, which also involved reductions in water deliveries to address threats to endangered species, the claims court ruled that the sovereign acts doctrine barred a water district's claim of breach of contract. The water district argued that the United States was barred from invoking the sovereign acts doctrine because, in lieu of reducing water diversions to promote successful fish migration, the government could have adopted the alternative of "trapping and trucking" the fish upstream. The Court rejected the argument, concluding that the fact that officials had to make a discretionary choice about how to implement the Endangered Species Act ("ESA") "does not alter the sovereign character" of the course they selected. Id. at 755.

By contrast, the U.S. Court of Federal Claims erred in Stockton East Water Dist. v. United States, 75 Fed. Cl. 321 (2007), appeal pending, No.

07-5142, by rejecting the sovereign acts defense in similar circumstances. Several water districts claimed the United States breached water supply contracts as a result of the enactment and implementation of the Central Valley Project Improvement Act. The Bureau reduced water deliveries to claimants from the New Melones Dam, one of the elements of the Central Valley Project, in order to achieve the Act's habitat protection goals. Without disputing that the Bureau's water allocation represented a sovereign act, the Court rejected the sovereign acts defense on the ground that the government "could have taken the water from other . . . contractors" who relied on other dams in the Central Valley Project. 75 Fed. Cl. at 373. The Court reached this conclusion despite the Bureau's resource management justifications for modifying the operations of New Melones Dam and the lack of evidence that the Bureau focused on the New Melones Dam for the purpose of abrogating contractual commitments.

In denying a motion for reconsideration, the Court rejected Judge Allegra's conclusion that the sovereign acts doctrine represents a freestanding contract defense, lamenting that this position "does not leave the court with a means to dampen the exuberance of sovereign acts." Stockton East Water Dist. v. United States, 76 Fed. Cl. 497, 512 (2007). But one person's "exuberance" is to another the appropriate expression of the

political will through our democratic system. The very purpose of the sovereign acts doctrine is to recognize that our elected officials have the primary responsibility for determining what governmental actions are necessary to serve the public interest. The approach of the Court in Stockton East would place the courts in the improper role of reviewing the wisdom of government decision-making.

B. The Sovereign Acts Doctrine Does Not Authorize Judicial Inquiry Into the Legal Validity of Sovereign Acts.

In their appeal to this Court the water users attack the trial court's reliance on the sovereign acts defense primarily by arguing that the government's implementation of the ESA in the Klamath Basin was scientifically flawed. The sole basis for this argument is a National Research Council ("NRC") report, published in 2004, which supposedly shows that reduced water deliveries from the project were not necessary to protect the fish. According to the water users, the ESA did not make contract performance impracticable because if the Bureau had not relied on its faulty analysis it would not have reduced water deliveries.

The water users' argument should be rejected because a breach of contract action against the government is not the proper vehicle for challenging the validity or legitimacy of the government action. As a matter of general contract law, the issue of whether a supervening law or order

obstructs contract performance does not turn on the validity of the law or order. See Restatement (Second) of Contract § 264, Comment b ("It is not necessary that the regulation or order be valid."). A comment to the Restatement explains that, "The requirement is like that of Uniform Commercial Code § 2-615, under which compliance in good faith is sufficient regardless of the validity of the regulation or order." Id. See also, e.g., MG Refining & Marketing, Inc. v. Knight Enterprises, Inc., 25 F.Supp. 2d 175, 191 (S.D.N.Y. 1998) ("Even an invalid order can then serve as the grounds for a successful impossibility defense, so long as the party believes it to be valid in good faith.").

Furthermore, the water users' theory that they are entitled to challenge the scientific validity of the Bureau's administrative decision-making improperly seeks to inject into breach of contract suits before the U.S. Court of Federal Claims issues that should be litigated under the Administrative Procedure Act ("APA") in federal District Court. In an action under the APA, a federal District Court conducts highly deferential review of agency action based on a well-defined agency record. If the same issues could be litigated in the claims court in a contract case, the issues could be tried on an essentially de novo basis based on an unlimited evidentiary record, severely undermining Congress' carefully constructed scheme for judicial review of

federal agency action. Judge Allegra properly "reject[ed] the notion that this contract case should be a vehicle for challenging the provenance and ultimate validity of every action taken by the Bureau and other Federal agencies leading up to and including and the application of the ESA here." Klamath, 75 Fed. Cl. at 687.

The water users' mistaken theory that a breach of contract claim can encompass a challenge to the validity of the underlying administrative action is comparable to the mistaken theory that a claim for compensation under the Takings Clause can encompass a challenge to the validity of the government action. In Lingle v. Chevron USA, 544 U.S. 528 (2005), the Supreme Court repudiated the theory that a regulation results in a taking if it fails to "substantially advance" a legitimate government interest, emphasizing that the Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.'" Id. (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)). Likewise, in a contract case, if a party wishes to challenge the validity of the underlying agency action, she should seek an injunction in federal District Court. On the other hand, a contract suit against the United States filed in the claims court assumes that the underlying government

action is valid, while asserting that the government is nonetheless liable in damages for breach of contract as a result of the action.

III. THE CLAIMS COURT PROPERLY DETERMINED THAT THE SOVEREIGN ACTS DOCTRINE BARRED THESE CLAIMS.

In light of the foregoing, Judge Allegra plainly reached the correct result in concluding that the ESA represented a sovereign act that barred the water users' contract claims. So far as we are aware, his ruling is consistent with the conclusions of every other court that has addressed the issue of whether the ESA represents a sovereign act barring a suit for breach of contract. See, e.g., Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999); O'Neill v. United States, 50 F.3d 677, 687 (9th Cir. 1995).

The ESA obviously qualifies as a public and general act for the purpose of the sovereign acts doctrine. The ESA was adopted to preserve species that "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," 16 U.S.C. § 1531(a) (3), and has been described by the Supreme Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1995). "Conversely, nothing in the statute or its legislative history remotely suggests even the slightest intent to relieve the United States of any

responsibilities under pre-existing contracts, particularly, water delivery contracts, and, especially, the contracts at issue." Klamath, 75 Fed. Cl. at 685.

Furthermore, the legal requirements of the ESA plainly obstructed water deliveries under the contracts. Apart from the legal force and effect of the ESA itself, the various court injunctions enforcing the ESA effectively required the Bureau to reduce water deliveries. See Kandra v. United States, 145 F. Supp.2d 1192, 1207 (2001); Pacific Coast Fed. of Fishermen's Assocs. v. U.S. Bureau of Reclamation, 138 F.Supp. 2d 1228 (N.D. Cal. 2001); cf. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 72-73 (2001) (holding that the Forest Service's compliance with ESA duties rendered contract performance impracticable where an Arizona district court had "specifically directed the Forest Service . . . to comply with the ESA by suspending all timber harvesting activities . . . during consultations").

The conclusion that the claims are barred by the sovereign acts doctrine does not depend on whether the Court focuses on the ESA itself or the application of the ESA in this case. As Judge Allegra explained, the result is the same under either approach because "the statute left the agency

with little alternative but to deny water." Klamath, 75 Fed.Cl. at 690. [2] But even if the Bureau had been required to exercise discretion in deciding how to apply the ESA in this case, the sovereign acts doctrine would still apply, for sovereign acts can be either "legislative or executive." Horowitz, 267 U.S. at 461. See Klamath, 75 Fed. Cl. at 691 (quoting Casitas Municipal Water Dist. v. United States, 72 Fed. Cl. 746, 754 (2006), in turn quoting Winstar)) (""[t]he targeting of a particular contract is not itself an action that would foreclose reliance on the sovereign acts doctrine," provided "'the action's impact upon public contracts is . . . merely incidental to the accomplishment of a broader governmental objective.'"). Focusing solely on the application of the ESA in this case, the Bureau still plainly applied the Act for purpose of protecting nationally significant wildlife, not for the purpose of impairing specific contracts.

For the reasons discussed above, challenges to the validity of agency action are irrelevant to the issue of whether a breach of contract claim is barred by the sovereign acts doctrine, in this or any other case. But there are

[2] It is noteworthy that in Stockton East Irrig. Dist. v. United States, 76 Fed. Cl. 497, 508 (2007), the claimants, represented by the same counsel who represents the claimants in this case, argued that the Klamath case was "distinguishable factually" because in Klamath the ESA left the Bureau no alternative but to reduce water deliveries, whereas in Stockton East the relevant legislation granted the Bureau more discretion. See Plaintiff's Reply Brief on Motion for Reconsideration (filed in Stockton East, Case No. 04-541L, April 6, 2007).

additional reasons, specific to this case, why the Court should reject the water users' challenge to the scientific validity of the Bureau's decisions in their attempt to overcome the sovereign acts defense.

First, the water users place altogether too much weight on the National Research Council report, for that report hardly demonstrates that the Bureau's application of the ESA in 2001 lacked a valid scientific basis. As explained in the brief of PCFFA, the NRC Committee did not take the position that NMFS had necessarily erred in 2001, the Committee did not consider at least one crucial study (the Hardy Phase II Report) in conducting its review, and NMFS itself subsequently declined to embrace the conclusions of the NRC review based on the Hardy Phase II Report and other evidence.

Second, even if the NRC report may offer new analysis that casts doubt on the soundness of the Bureau's scientific judgment in 2001, that does not undermine the validity of the decision at the time it was made. The ESA does not require perfect decision-making, let alone a crystal ball, neither of which is possible in the real world. Instead, the ESA requires that management decisions affecting endangered species be made based on the "best scientific and commercial data available." 16 U.S.C. § 1536 (a) (2). The water users do not suggest that the Bureau failed to make an appropriate

decision based on the information available in 2001. Certainly the post-hoc analysis of the NRC, by itself, does not demonstrate that the Bureau failed in 2001 to act on the basis of the "best available" information.

Third, claimants are barred from challenging the validity of the Bureau's decisions implementing the ESA because all or most of the plaintiffs in this case previously litigated these issues in federal District Court, see Kandra, 145 F.Supp.2d at 1198-99, and are barred from attempting to relitigate the issues in this case. As Judge Allegra stated, "most of the plaintiffs before the court are, in one fashion or another, bound by the prior judicial rejection of their claims and are prohibited from relitigating whether the Bureau was bound by the ESA to reduce water deliveries in 2001." 75 Fed. Cl. at 687.

Finally, the water users cannot avoid the effect of the sovereign acts doctrine by invoking the doctrine of unmistakability, for the contracts contain no unmistakable commitment by the United States to accept liability in the event a sovereign act barred performance. Indeed, the water users "readily admit[ted]" that "there are no unmistakable terms in any of the contracts precluding the government from exercising its sovereign powers." Id. at 695. This concession is fully justified because none of the contracts contains language committing to particular regulatory treatment, cf. Winstar,

518 U.S. at 904-05, and none contains any language, much less clear and unmistakable language, allocating the risk of future policy changes to the government. The water users face a particularly high hurdle in seeking to establish an unmistakability defense in this case in light of the massive subsidies they have received. See Brief of PCFFA. When a party has paid fair consideration, it may be reasonable, depending on the circumstances, for the party to expect to receive the benefit of the bargain. See Winstar, 518 U.S. at 863. By contrast, when a contract largely represents an act of public munificence, as in this case, the parties should reasonably anticipate that new public needs may incidentally impact contract performance.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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October 31, 2007