MEMORANDUM AMICUS CURIAE OF NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF THE UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Natural Resources Defense Council ("NRDC") respectfully submits this memorandum amicus curiae in support of the United States' opposition to plaintiffs' motion for partial summary judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This memorandum seeks to assist the Court in evaluating the several fundamental questions of western water and takings law raised by plaintiffs' motion for partial summary judgment. In a nutshell, plaintiffs contend it is clear they are the owners of all of the Klamath project water they require for irrigation purposes and it is unnecessary for the Court to stay this case in order to permit the ongoing Klamath basin adjudication to resolve the water ownership issue. NRDC agrees that a stay is not warranted to permit resolution of the ownership issue, but for a completely different reason: NRDC believes it is clear the irrigators lack a vested property right to deliveries of specific quantities of water from the Klamath project. NRDC takes no position on whether or not the Court should grant the motion for a stay on other grounds.

In their motion for summary judgment, plaintiffs make several sweeping arguments about how property rights, including rights to the use of water, should be defined for the purpose of the Takings Clause. NRDC submits that plaintiffs' description of the applicable law, both in general and as it applies to the Klamath project, is mistaken in several respects. As NRDC explains below, (1) "property" within the meaning of the Takings Clause of the Fifth Amendment is not defined by the Constitution, but instead is defined by federal or state law which is independent of the Fifth Amendment; (2) the Reclamation Act of 1902 provides that title to appropriative water rights in Bureau of Reclamation projects should be determined under state law; and (3) under applicable Oregon law (and California law, to the extent relevant), the United States holds the appropriative water rights in the Klamath project; the plaintiffs' project water rights, if any, are based on, and defined by, their contracts with the Bureau.

This memorandum also addresses why, once it is recognized that the irrigators' water

rights are rooted in contract, the plaintiffs' takings claims will certainly fail. Specifically, (1) the irrigators' contracts with the Bureau bar them from claiming property rights in Klamath project water; (2) any contract-based claims the irrigators might have must be pursued as a breach of contract claim, rather than under the Takings Clause; and (3) even if the plaintiffs could overcome these two threshold hurdles, their takings claims, in particular the per se physical occupation theory, fail as a matter of law.

Finally, NRDC explains why, even if plaintiffs could claim a property right in Klamath project water independent from their alleged contract rights, the terms of the irrigators' contracts with the Bureau still bar plaintiffs' claims. The terms of the contracts unambiguously absolve the United States of liability on account of water shortages due to "drought" or any "other cause," and the water restriction imposed in this case was plainly the combined result of drought and another cause, i.e., the mandates of the Endangered Species Act. The irrigators are bound by the terms of their contract with the United States, regardless of the nature of their alleged "rights" to water.[1]

NRDC submits that at least brief consideration of the ultimate merits of the case is appropriate and potentially useful at this stage to assist the Court in resolving the stay motion. Resolution of the stay motion (especially the issue of the potential overlap between tribal water claims and irrigators' water claims) might require extended proceedings, possibly including a mini-trial. On the other hand, several of the merits issues could be expeditiously resolved based on summary judgment, if the court were to request briefing on these issues. Thus, the public interest in efficient administration of justice might be better served by addressing the merits of the claims at an early stage instead of staying this action. An examination of the merits of the case is warranted to permit consideration of this possible course of action.

It bears emphasis that this litigation represents the third lawsuit by Klamath irrigators attempting to demonstrate that application of the Endangered Species Act in the Klamath basin violated their asserted rights in Klamath project water. In Klamath Water Users Protective Association v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 2000), the court, addressing what NRDC

[1] This memorandum does not address plaintiffs' contract claims, but many of the reasons the takings claims should fail also explain why the contract claims should fail.

believes to be the central issue in this case, ruled that ESA requirements "override the water rights of the irrigators" under their contracts with the Bureau. Second, in Kandra v. United States, 145 F. Supp.2d 1192 (D.Or. 2002), the court again rejected the claim that the ESA requirements violated the irrigators' water rights, concluding once more that "plaintiffs' contract rights to irrigation water are subservient to ESA... requirements." Id. at 1201. In NRDC's view, this lawsuit raises the same basic issue as these two earlier lawsuits, and it, too, should ultimately be rejected on the same basis.[2]

ARGUMENT

I. "PROPERTY" FOR THE PURPOSE OF THE FIFTH AMENDMENT TAKINGS CLAUSE IS DEFINED BY LAW INDEPENDENT OF THE FIFTH AMENDMENT.

Plaintiffs assert that "[t]he determination of whether a right is 'property' within the meaning of the Fifth Amendment is an issue of federal, not state law." Plaintiffs' Memorandum, at 18. It is unclear from their Memorandum whether, in referring to "federal law," plaintiffs are referring solely to federal constitutional law (the Takings Clause, apparently), see Plaintiffs' Memorandum at 18-19, or to federal statutory law (the Reclamation Act), see Plaintiffs' Memorandum, at 19-20, or perhaps to a combination of both. In any case, plaintiffs' position is mistaken. In this section we address why property rights are not defined by the Constitution itself, but instead are defined by federal or state law which is independent of the Constitution. In the next section we explain why the independent source for defining the relevant property interest in this case is state law.

The first contention can be disposed of quickly. As the Federal Circuit has very recently explained: "The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment" Maritrans Inc. v. U.S., 342 F.3d 1344 (Fed.Cir., 2003), citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). "Instead,

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[2] Indeed, so far as NRDC is aware, every other litigation in the country brought by irrigators served by Bureau of Reclamation projects seeking financial recovery for economic injuries allegedly incurred as a result of the mandates of the Endangered Species Act has failed.

'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." Id., quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

The Supreme Court's decision in Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998), specifically dealt with the issue of what law governs the question of who owns the property in a takings case. The claim in that case was that Texas had effected a taking by requiring that the earnings on client funds in lawyer trust accounts be used to support legal services for the poor. The issue before the Supreme Court was whether or not these earnings represented the property of the client. Following the established Supreme Court precedent cited above, the Court resolved this issue, not by reference to the Takings Clause, but by referring to Texas law. See id. at. 164-66.

Based on Phillips, the issue of whether the United States or the irrigators "own" Klamath project water must be decided based on law which is independent of the Fifth Amendment. As discussed below, Oregon (and perhaps California) law define the nature and scope of the interests at stake in this case.

This is not to say, as a general proposition, that there is no constitutional dimension to the definition of private property interests for the purpose of the Takings Clause. In Lucas v. South Carolina Coastal Council, for example, the Court said that state-law definitions of the scope of private property rights must be based on an "objectively reasonable application of relevant precedents." 505 U.S. at 1032 n.18. Thus, the federal Takings Clause might be violated if a state adopted an entirely novel, unprincipled interpretation of state property law in order to defeat an otherwise viable taking claim. However, this exception to the general rule has no bearing on this case. As discussed below, the relevant state law rule in this case has a long and consistent history.

II. SECTION 8 OF THE FEDERAL RECLAMATION ACT PROVIDES THAT STATE LAW DEFINES THE CHARACTER AND SCOPE OF THE APPROPRIATIVE WATER RIGHTS IN BUREAU WATER PROJECTS.

The plaintiffs also are incorrect insofar as they contend that the issue of water ownership

should be decided as a matter of federal law because the Reclamation Act itself defines who is the owner of water at Bureau projects. Far from prescribing a federal rule for the resolution of this issue, the Reclamation Act, instead, states that the issue should be resolved under state law.

Section 8 of the federal Reclamation Act states, in relevant part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

43 U.S.C. §383 (emphases added). The language of this section demonstrates that Congress intended for title to appropriative water rights at Bureau projects to be determined in accord with state law.

This reading of the act was confirmed by the Supreme Court's decision in California v. United States, 438 U.S. 645 (1978). The Court disavowed dicta in a series of its earlier decisions, starting with Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958), suggesting that state authorities could be prevented "from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." Id. at 674. The Supreme Court declared that, absent a direct conflict with a supervening federal legislative mandate, section 8 of the Reclamation Act provides that state law controls the ownership and management of water at Bureau projects.

With respect to water ownership specifically, the Court said: "From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control" and that "the Secretary [of the Interior] would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." Id. at 665. The Court stressed that state law control over appropriation of water was more than a technicality, rejecting the argument that "§ 8 merely require[s] the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." Id. at 675. The Court dismissed the contrary

argument as an attempt to "trivialize the broad language and purpose of §8." Id.

In this case, plaintiffs do not – and cannot – point to any project-specific congressional directive that would override state water law.[3] Rather, notwithstanding the language of section 8 and the decision in California v. United States, plaintiffs contend that the issue of the ownership of appropriative water rights associated with Bureau projects should be decided based on a uniform federal rule derived from the Reclamation Act itself. According to plaintiffs, this supposed rule dictates that the irrigators, rather than the United States, must be regarded as the "owner" of project water. For the reasons explained below, this argument is wrong and should be rejected.

Plaintiffs rely, first, on certain other language in section 8 indicating that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C §372. Plaintiffs suggest that, because the right to use water is "appurtenant" to the land, then the owners of land served by a project are necessarily owners of the water delivered by the Bureau. The language does not support this reading. First, since the quoted language addresses "water acquired under the provisions of this Act," this provision plainly does not itself create water rights. Rights in Bureau project water are created by contracts negotiated pursuant to other provisions of the Reclamation Act, and the extent of those rights are defined by those contracts. In any event, this language reflects, at most, that, in authorizing a water project, Congress intended that specific lands (as opposed to any other irrigated lands) should generally be served with the irrigation water supplied by the project. The language cannot be stretched to support the further point that the owners of the lands served by a project are the owners of the rights in water serving these lands vis-a-vis the United States. As discussed above, California v. United States explicitly said that questions relating to ownership of water rights are to be determined under state law.

Plaintiffs also cite a series of decisions, starting with Ickes v. Fox, 300 U.S. 82 (1937), for

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[3] The authorizing statute for the Klamath project simply directs the Secretary of the Interior to construct the Klamath project "under the terms of the national reclamation act." Act of February 9, 1905, c. 567, 33 Stat. 714.

the proposition that the Supreme Court has embraced, as a matter of federal law, a uniform rule that irrigators are the owners of project waters. Admittedly, several of these decisions contain dicta that is arguably in tension with the subsequent decision in California v. United States. As discussed, however, that decision represented an important shift in the Supreme Court's interpretation of the Reclamation Act, strengthening the primacy of state law with respect to the management of Bureau project water. To the extent some earlier Supreme Court pronouncements are in tension with the Court's later decision, the later ruling obviously controls. See generally Roderick Walston, "Federal-State Water Relations in California: From Conflict to Cooperation," 19 Pac. L. J. 1299 (1988) (by "reaffirm[ing] the original relationship that Congress had in mind in enacting the basic reclamation law in 1902," California v. United States "has ushered in a new era of cooperation in federal-state water relations").

Furthermore, as NRDC explains below, a careful analysis of these decisions shows that they do not recognize federal law as determinative on the question of water ownership. The Court in these cases concluded that the irrigators were the owners of the water at issue primarily by applying the law of the state in which the controversies arose. Thus, these decisions, insofar as they defer to state law, are in accord with section 8 and California v. United States. Rather than supporting the conclusion that the Reclamation Act establishes an invariable federal-law rule that irrigators are the owners of Bureau project water, these decisions confirm that the ownership issue is governed by state law.

Ickes v. Fox, 300 U.S. 82 (1937), involved the question of whether the Bureau could impose a surcharge on irrigators served by one Bureau project in order to help finance the development of a second project. The issue before the Court was whether the United States was an "indispensable party" to the suit brought by irrigators challenging the surcharge. The Court ruled that the United States was not an indispensable party, based on its determination that the irrigators, not the United States, "owned" the project water. The Court reached this result at least in part based on its conclusion that, "by the contract with the government, it was the land owners who were 'to initiate rights in the use of water,'" id. at 94, apparently meaning that the irrigators themselves, not U.S. government officials, took the steps necessary under Washington law to acquire the water rights. As we explain below, this case is very different from Ickes, both on the

law and the facts.

In Nebraska v. Wyoming, 325 U.S. 589 (1945), an equitable apportionment case within the Supreme Court's original jurisdiction, the Court determined that individual irrigators, not the United States, were the owners of the water rights. But, again, this outcome depended, not on a blanket federal rule, but on state water law which defined the irrigators as the holders of the water rights. Referring to section 8, the Court said: "We have... a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction. Pursuant to the [Wyoming] procedures, individual landowners have become the appropriators of the water rights, the United States being the storer and carrier." Id. at 614-15. The Court also explained, '"Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted that proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual land owners." Id. at 613. Again, this case is quite different.

The final decision upon which plaintiffs rely, Nevada v. United States, 463 U.S. 110 (1983), dealt with the issue of whether the United States could unilaterally decide to reallocate the water from long-established irrigators to a new user. The decision confirms that the issue of water ownership must be determined, not by federal law, but by state law. The Court said, "[a]s in Ickes v. Fox and Nebraska v. Wyoming, the law of [the] relevant State" decides the water ownership issue. 463 U.S. at 126. In Nevada v. United States, the Court concluded that state law granted ownership in the water to the irrigators. Again, this is a different case.

The fallaciousness of the argument that a federal rule prescribes that irrigators always hold the appropriative water rights at Bureau projects is confirmed by the established understanding in California (the state with the largest Bureau water projects), that the issue of the ownership of appropriative water rights is governed by California, not federal, law. For example, in a brief recently filed in a pending case before the U.S. Court of Appeals for the Ninth Circuit, the United States affirmed that, applying California water law, the United States is the owner of project water at the Bureau's Central Valley project:

The plaintiffs' claims under California state water law fail because the United States,

> and not the Area I plaintiffs [the irrigators], holds the permitted rights to the water. The United States acquired these rights by developing the Central Valley Project, which puts the water to beneficial use. Central Valley Project water is therefore not available for appropriation by end users of the water. The end users of federal reclamation water law have only a contractual right to water, not a state property right.

Brief for the Federal Appellees, Orff v. United States, No. 00-16922 (9th Cir., September 13, 2002) (emphases added). The position of the United States in the Orff litigation is supported by numerous federal and state court decisions. See, e.g., Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457, 461 (9th Cir. 1994); County of San Joaquin v. State Water Resources Control Board, 54 Cal. App.4th 1144, 1157 n.12 (3d App. Dist. 1997); United States v. State Water Resources Control Board, 182 Cal. App.3d 82, 145 (1st App.Dist. 1986). If the United States holds the appropriative right to Bureau project water under California law, then plainly there cannot be an invariable federal rule that the United States can never own project water. The issue is to be resolved, on a state-by-state basis, as a matter of state law.

The Court of Federal Claims basically adopted this position in its decision on liability in Tulare Lake v. United States, 49 Fed. Cl. 313 (2001). As the Court is well aware, the issues in that case are somewhat similar to the issues in this case. The Court ruled that, under California law, the project operator (in that case the Department of Water Resources) held the appropriative water right, not the irrigators. The court said that we "acknowledge that plaintiffs [i.e. the irrigators] possess rights not as direct appropriators of water, but as parties to a contract with an entity – DWR – entitled to appropriate." Id. at 318 n.6. This ruling, too, contradicts plaintiffs' theory that water ownership is determined by a one-size-fits-all federal rule invariably assigning the ownership interest in project water to the irrigators served by the project.

III. UNDER OREGON (AND CALIFORNIA) LAW, THE OWNER OF KLAMATH PROJECT WATER IS THE UNITED STATES, NOT THE IRRIGATORS.

Under Oregon water law, which as a result of section 8 of the Reclamation Act governs this issue, the United States, not the irrigators, is the owner of Klamath project water. Furthermore, to the extent California law may apply to certain Klamath project water used in

California, California law also supports the conclusion that the United States is the owner of Klamath project water.

The claim of the United States to Klamath project water is based on the act of the Oregon legislature of February 22, 1905, which 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 date 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.

In re. Waters of Umatilla River, 168 P. 922, 925 (Or. 1917) (quoting the full text of the act) (emphases added).

A few months after the enactment of this state legislation, on May 19, 1905, the United States filed a notice of intention to appropriate Klamath River water. The notice states in substantive part:

> Notice is hereby given that the United States intends to utilize certain specified waters, to wit:
>
> All of the waters of 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 of 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. 389, known as the Reclamation Act)
>
> This notice is given under the provisions of section two (2) of an act passed by the legislature of the state of Oregon, filed in the office of the Secretary of State, February 22, 1905, and constituting chapter 288, of the General Laws of Oregon, 1905, as compiled by the Secretary of State.

Opinions of the Oregon Attorney General, No. 1583, 25 Op.Atty.Gen. 62 (November 10, 1950) (quoting in full the notice of intention filed by the United States).

The unmistakable meaning of the 1905 legislation is that, when the United States constructed a Bureau project in the state of Oregon, and so long as it complied with the formalities of the statute, the United States would become the holder of the appropriative water right in the project under Oregon law. The Bureau's 1905 notice for the Klamath project was filed in conformity with the Oregon legislation and, so far as we are aware, there is no dispute that the United States took all necessary steps under the legislation to acquire vested rights in the water.

The view that the United States holds the appropriative water rights in the Klamath project is supported by numerous relevant authorities. For example, in In re Waters of the Umatilla River, 168 P. 922, 925 (Or. 1917), involving a Bureau project on the Umatilla River, the Oregon Supreme Court said that the United States' compliance with the 1905 legislation "vested the United States with title to all the then unappropriated water in the Umatilla River." If compliance with the 1905 legislation was sufficient to grant the United States vested title to Umatilla water, then compliance with the 1905 legislation also was sufficient to grant the United States vested title to Klamath water.

This understanding is also confirmed by several opinions published by the Oregon Attorney General's office. In Oregon Attorney General Opinion No. 1583, 25 Op.Atty.Gen. 62

(November 10, 1950), the Attorney General addressed whether the federal government, by filing its 1905 claim, had acquired all of the available waters in the Klamath or only the amount necessary to carry out the planned project. The Attorney General adopted the latter interpretation. The key point for present purposes is that the Attorney General, in addressing this specific issue, took it as given that the federal government (and no one else) was the owner of the water appropriated for the Bureau project. See also Memorandum from Walter Perry and Meg Reeves, Assistant Attorney Generals, to Richard Bailey Adjudicator, August 16, 1999) (available at http://www.wrd.state.or.us/programs/klamath/index.shtml) (concluding "that the United States is entitled to the amount of water that is necessary to develop the project described by the United States when it filed its 1905 notice and plan, and that was subsequently developed within a reasonable period of time, with a priority date of May 19, 1905").

The several federal court decisions arising from implementation of the ESA in the Klamath basin have been litigated based on the understanding that the United States is the holder of the appropriative water rights in the Klamath project. See, e.g., Klamath Water Users Protective Association 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."); Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F. Supp.2d 1228 (N.D. Cal. 2001) (same).

As indicated above, the language of the 1905 Oregon legislation makes clear that, once the United States acquired appropriative water rights to the Klamath project, the United States was authorized to transfer ownership of the water by assignment, so long as the assignment was (1) in writing, (2) signed by a duly authorized official, and (3) filed with the State Engineer. So far as NRDC has been able to determine, no assignment conforming to the requirements of the 1905 act has ever been made with respect to the Klamath project. Thus, the United States was, and remains, the owner of Klamath project water.

The conclusion that the United States is the owner of Klamath water is not only supported by the law, but it is supported by basic fairness. While the irrigators make much of their payments to the United States, the benefits conferred on the irrigators by the Klamath project

have come at a very heavy cost to U.S. taxpayers. See Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 283 (1958) (because the costs "allocated to irrigation facilities will be reimbursed at no cost,.... the irrigators will... be chargeable with but small fraction of the total cost of the project"). Given the significant subsidy of the Klamath project by the national government, it is entirely appropriate for the United States to retain ownership of project water. See also Israel v. Morton, 549 F.2d 128, 132 (9th Cir. 1977) ("Project water... would not exist but for the fact that it has been developed by the United States.")

In the foregoing, we have assumed that Oregon law supplies the rule of decision on the issue of water ownership. However, California law also may apply in this case. Because all or most of the water for the Klamath project is apparently initially diverted in Oregon, California and Oregon water officials apparently have assumed that Oregon law should control water appropriation in the Klamath basin. But the Klamath River Compact, P.L. 85-222 (approved August 30, 1957) states in part: "There are hereby recognized vested rights to the use of waters originating in the Upper Klamath basin validly established and subsisting as of the effective date of this compact under the laws of the state in which the use or diversion is made, including rights to the use of waters for domestic and irrigation uses within the Klamath project." (Emphasis added.) Because much of the Klamath project water is used in California, the Klamath Compact appears to indicate that the law of appropriation of California may apply to at least some Klamath project water.

Fortunately, it is unnecessary for the Court to resolve this thorny choice of law issue. As described above in our discussion of whether water rights in Bureau projects are determined under federal or state law, see pp. 8-9, supra, the rule under California law is that the owner of the project water is the United States, not the irrigators. Thus, on the issue of ownership of Klamath project water, the laws of California and of Oregon yield the same result in this case.

Given that the United States (and not the irrigators) is the owner of Klamath project water, whatever rights the irrigators can assert to Klamath project waters must rest on their contracts with the United States. As the United States affirmed before the Ninth Circuit in the pending Orff litigation, once it is recognized that United States holds the appropriative water right at Bureau projects, it is clear that "[t]he end users of federal reclamation water [i.e., the

irrigators] have only a contractual right to water, not a state property right." Brief for the Federal Appellees, Orff v, United States, No. 00-16922 (9th Cir., filed September 13, 2002) (emphasis added). This also has been the consistent understanding in the Klamath River ESA litigation. See Klamath Water Users Protective Association v. Patterson, 15 F.Supp.2d 990, 995 (D. Or. 1998), aff'd, 204 F.3d 1206, 1209 (9th Cir. 2000) (distinguishing between "the rights held by the United States in the project," and the rights held by the irrigators by virtue of "their individual repayment contracts"). See also Tulare Lake v. United States, 49 Fed. Cl. 313, 318 & n. 6 (2001) (distinguishing between the appropriative claim of the Department of Water Resources and the irrigators' contract-based rights based on their contracts with the Department).[4]

IV. PLAINTIFFS' TAKINGS CLAIMS SHOULD ULTIMATELY FAIL ON THE MERITS.

Contrary to plaintiffs' repeated suggestion that it has a strong position in the merits of its claims, see Plaintiffs' Memorandum at 3 n.3, these taking claims should ultimately be rejected on the merits. As discussed in the introduction, the weakness of plaintiffs' claims on the merits is pertinent in considering whether to grant, or even to proceed with consideration of, the United States' motion for a stay.

A. The Contracts Between the Irrigators and the Bureau Do not Create a Right to the Delivery of Any Specific Quantity of Water.

1. The Contracts Expressly Contradict Plaintiffs' Claim of Rights.

By their express terms, the contracts between the Bureau and the irrigators bar the irrigators from claiming a "property" right to water deliveries from the Bureau. For this reason

[4] As plaintiffs point out, the United States has acknowledged that plaintiffs "who receive irrigation water from the Klamath Project have a beneficial interest in the Klamath project water." Plaintiffs' Memorandum, at 2. NRDC understands this statement to simply reflect that the irrigators have interests in Klamath project water pursuant to their contracts, subject to all of the limitations expressed in the contracts.

alone, all or most of the takings claims in this case must be rejected.[5]

The key provision in the Klamath Project contracts reads as follows:

> "On account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs, and while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States ... for any damage, direct or indirect, arising therefrom.

On its face, this language means that, insofar as the plaintiffs base their takings claims on rights allegedly conferred by their contracts with the Bureau, they are barred from recovering compensation under the Taking Clause. The Bureau is immune from liability for water shortages "[o]n account of drought or other causes," and this case clearly falls within the broad scope of this provision. The Bureau's restrictions on deliveries in 2001 were the combined result of drought conditions and "other causes," i.e., the mandates of the Endangered Species Act.

As Professor Brian Gray has succinctly summarized the point: "The Klamath Project water contracts... expressly absolve the United States of liability for all types of water shortages - hydrologic, regulatory, or hybrid - that may occur within the system. As such, the contractors and beneficiaries have no 'property' right to receive project water in violation of the directives of the Endangered Species Act or other laws that govern project operations. The United States therefore has not breached its contract obligations, nor has it taken property without just compensation." "The Property Right in Water," 9 Hastings W.-Nw J. Envtl. L., Policy & Thought 1, 26 (2002).

Apart from the compelling logic of this argument, the precise issue of whether the Klamath contracts create an enforceable right to a specific quantity of water has already been litigated – and resolved – with respect to some of the very same plaintiffs who are pursuing this litigation. See Klamath Water Users Association v. Patterson, 15 F.Supp.2d 990 (D. Or. 1998), aff'd, 204 F.3d 1206 (9th Cir. 2000). The resolution of this issue in the earlier litigation should preclude relitigation of the issue in this case, at least as to these plaintiffs, under the doctrine of

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[5] Federal law governs the interpretation of these contracts. See O'Neill v. United States, 50 F.3d 677, 682 (9th Cir), cert. denied, 516 U.S. 1028 (1995) ("Federal law governs the interpretation of contracts entered into pursuant to federal law where the government is a party.")

res judicata. See Stearn v. Department of the Navy, 280 F.3d 1376,1380 (Fed. Cir. 2002) ("Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action.").

In the Patterson case, the irrigators challenged requirements imposed by the Bureau under the ESA on the operations of Link Dam, which is managed by a private firm pursuant to a contract with the Bureau. The irrigators claimed standing on the theory that they were third party beneficiaries under a contract between the Bureau and the dam operator. To resolve the issue, the court examined the irrigators' direct contracts with the Bureau, treating these contractual relationships as "relevant evidence" for interpreting the meaning of the Bureau's contract with the operator of Link Dam and for deciding whether the plaintiffs could claim third-party beneficiary status. 15 F.Supp.2d at 996. The court concluded, based on the shortage provision in the irrigators' contracts with the Bureau, that the irrigators lacked an enforceable right under the contracts to the delivery of water without regard to the threat to endangered species. Based in part on this conclusion, the court determined that the plaintiffs also were not third party beneficiaries under the Link Dam contract. The court reasoned that it would be anomalous to grant irrigators the right to challenge ESA requirements as beneficiaries of a contract to which they were not a party if they lacked the right to challenge ESA requirements directly under contracts with the Bureau to which they were parties. See Id.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the trial court judgment. While the Ninth Circuit did not discuss the irrigators' contracts with the Bureau in the same detail as the trial court, the Ninth Circuit specifically affirmed the trial court's ruling that ESA requirements "override the water rights of the irrigators." See 204 F.3d at 1213. The Patterson case plainly represents an adjudication of the rights of the irrigators under their contracts with the Bureau and there is no just reason these plaintiffs should be permitted to relitigate this issue in this Court.

In addition, the conclusion that the irrigators' contracts with the Bureau preclude a finding that the irrigators have vested rights to project water has been affirmed in the subsequent Klamath basin litigations. In Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F.Supp.2d 1228 (N.D.Cal. 2001), the court ruled that the Bureau's

year 2000 operating plan violated the ESA and issued an injunction restricting project water deliveries to irrigators. The court rejected the argument advanced by the irrigator-intervenors (again, many of the same parties in this case) that the curtailed deliveries violated the irrigators' rights to project water. The court, again relying on the shortage provision in the contracts, said the requirements of the ESA "override the water rights of the irrigators." Id. at 1250 n. 20, quoting Patterson. Also, in Kandra v. United States, 145 F. Supp.2d 1192 (D. Or. 2002), the district court rejected a preliminary injunction motion filed by the irrigators based on the year 2001 Klamath plan, ruling that the plaintiffs failed to demonstrate a likelihood of success on the merits. The court rejected the plaintiffs' claim of breach of contract-based water rights, again on the ground that the "plaintiffs' contract rights to irrigation water are subservient to ESA ... requirements." Id. at 1201.

These rulings in the Klamath cases are entirely consistent with other precedent addressing this issue. In particular, in O'Neill v. United States, 50 F3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995), the Ninth Circuit ruled that, in view of a contract clause absolving the United States of liability in the event of water shortages due to "any other causes," the United States was not liable for Bureau reductions in water deliveries to land owners and water users in the Westland Water District. Just as in this case, the reductions in deliveries in O'Neill resulted from the agency's "mandatory compliance" with the Endangered Species Act. See Brian Gray, "The Property Right in Water, " supra (explaining in detail the significance of the decision in O'Neill for the resolution this litigation). See also Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) (because federal government had reserved the right to modify the program creating the alleged contract right, California's alleged contract right "did not rise the level of 'property'").[6]

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[6] This case is the exact opposite of a Winstar-type case. See United States v. Winstar Corp., 518 U.S. 839 (1996). That decision stands for the proposition that the government may be held financially liable for breach of contract as a result of legislative action which abrogates a contract containing an express promise by the United States to grant particular regulatory treatment, as a result of which the United States assumed the risk of loss in the event of a change in legal policy. These contracts, by contrast, expressly absolve the United States from liability due to changes in legal policy.

2. The Unmistakability Doctrine Governs This Case.

Even if the repayment contracts were completely silent about the potential liability of the United States based on water shortages, the plaintiffs still would not have a viable takings claim. Under the unmistakability doctrine, contracts, including contracts between a private party and the sovereign, are not immune from subsequently enacted legislation. As the Supreme Court has explained "Sovereign power... governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982). Given that the Klamath repayment contracts contain no unmistakable surrender of Congress' legislative power (indeed they contain an express reservation of power), they cannot be construed as creating an immunity from future legislative changes. As a result, plaintiffs can claim no "property" right based on their contracts to avoid compliance with the ESA.

This precise point has been upheld in another case involving enforcement of the ESA against a Klamath River contractor. As discussed above, in Klamath Water Users Protective Association v. Patterson, the irrigators challenged the decision of the Bureau to require that Link Dam be managed in accordance with the ESA. The Ninth Circuit rejected the claim in part based on the unmistakability doctrine.

> "It is well settled that contractual arrangements can be altered by subsequent Congressional legislation.... Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity. Therefore, when an agency, such as Reclamation, decides to take action, the ESA generally applies to the contract."

204 F.3d. at 1213. See also O'Neill v. United States, supra (ruling that, even if the contracts had not contained clauses absolving the United States of liability in the event of shortages, irrigators' contract rights in the Westlands project were "not immune from subsequently enacted statutes").[7]

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[7] Because the contracts and the unmistakability doctrine so plainly bar plaintiffs from claiming any right to the delivery of a specific quantity of project water, the Court may have no need to reach the issue of whether plaintiffs' alleged property rights in project water are limited by background principles of state property and/or nuisance law. In Tulare Lake v. United States, 49 Fed.Cl. 313, 321 (2001), the Court of Federal Claims acknowledged the importance of the

B. The Irrigators' Only Remedy for a Violation of Their Alleged Contract Rights Would Lie in a Suit for Breach of Contract, Not a Takings Claim.

For the reasons set forth above, the plaintiffs have no enforceable contract rights to delivery of specific quantities of water. Therefore, they cannot assert a viable taking claim based on the alleged taking of any contract rights. However, if the plaintiffs had enforceable contract rights, they would be required to vindicate those rights through a breach of contract suit, rather than as claims under the Takings Clause. For this second, independent reason, plaintiffs' takings claims should fail.

In general, "the concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract." Sun Oil Co. v. United States, 572 F.2d 786, 818 (Ct.Cls. 1978). If "alleged damage is due to and measured in reference to plaintiffs' performance of a contract, and is exclusively money damages," plaintiffs' claim that the wrong originated in a constitutional violation "does not strip the case of its contractual nature." A&S Council Oil Co. v. Lader, 56 F.3d 234 (D.C. Cir. 1995). In other words, the remedy for alleged infringement of rights rooted in contract lie in contract, not under the Fifth Amendment, because it is the contract which governs the parties' rights and obligations.

California public trust and reasonable use doctrines as limitations on private water rights. But the Court concluded these background principles could not defeat the takings claims in that case because the California Water Resources Control Board had previously determined that these doctrines did not support further restrictions on irrigation deliveries. This reasoning (whether or not correct) has no bearing on this case, because no state agency (or state court) has determined how these doctrines limit private water rights in the Klamath basin. Thus, in NRDC's view, in the event it is necessary to reach the issue, the Court should reject the takings claims in this case, to the extent California law applies, based on the California public trust and reasonable use doctrines. To the extent Oregon law applies, Oregon law also supports the conclusion that these claims are barred under background principles of state law. The invasion of "a right common to the members of the public generally" has been defined as a public nuisance under Oregon law. See Smejkal v. Empire Lite-Rock, 547 P.2d 1363 (Or. 1976). Actions destroying the public's fishery resources certainly invade rights common to the public. See Columbia River Fishermens' Protective Union v. City of St. Helen's, 87 P.2d 195 (Or.1939) (enjoining as a public nuisance private actions which injured fish owned by the State as trustee for the public and interfered with "the common right of the citizens of the state to fish").

Recently, in Castle v. United States, 301 F.3d 1328 (Fed. Cir. 2002), the Federal Circuit ruled that plaintiffs were not entitled to pursue both contract and takings claims based on the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act. The mere assertion that a contract-based right has been violated is not sufficient to support a taking claim, the Court declared, because "the plaintiffs retained the full range of remedies associated with any contractual right they possessed." Id. at 1342.

In this case, because the plaintiffs' rights to Klamath project water, if any, are based on their contracts, they are not entitled to seek recovery under both a contract and a takings theory. Of course, in NRDC's view, the plaintiffs' direct contract claims should ultimately fail as well based on the contract language absolving the United States of liability for damages arising from water shortages. However, the fact that the plaintiffs may lack a winning contract claim does not alter the fact that they cannot proceed with a duplicative taking claim. There can be no taking here because the plaintiffs retain the full range of remedies for any contract right they actually possess.

C. The Contract Language Bars the Plaintiffs From Claiming a Violation of Property Rights Even If They Could Otherwise Claim a Property Right in Klamath Project Water Under Either Federal or State Law.

For the reasons discussed in sections II and III, the issue of ownership of Klamath project is governed by state law which, in the circumstances of this case, dictates that the United States, not the irrigators, is the owner of Klamath project water. Accordingly, the project irrigators are limited to asserting rights under their contracts with the Bureau. These contracts, as explained above, would not support a taking claim against the United States and, in any event, bar financial recovery from the United States on any basis. However, if these contentions were wrong, and the plaintiffs could claim a property interest in Klamath project water independent of their contracts with the Bureau – either under federal or state law – they still would be barred from claiming an infringement of any protected property interest in the circumstances of this case.

The reason is that the Klamath project contracts expressly absolve the United States of liability for shortages in deliveries by the Bureau from the project. The shortage at issue in this case arose from the Bureau's operation of the project, and the provision absolving the United

States applies, but its terms, in the circumstances of this case. This language must be given effect, and the irrigators should be held to the terms of their bargain, regardless of whether they possess only contract rights or can claim, in addition, some independent property interest in the water under either federal or state law.

Two decisions are particularly instructive on this point. In Barcellos & Wolfson, Inc v. United States, 849 F.Supp. 717 (E.D. Cal. 1993), aff'd sub.nom. O'Neill v. United States, 50 F.3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995), irrigators contended, just as the plaintiffs are contending in this case, that they possessed rights to water under the Reclamation Act. Like the plaintiffs in this case, they specifically relied on the language in section 8 stating that the right to use water "shall be appurtenant to the land served," and again like the plaintiffs in this case, cited Ickes v. Fox and its progeny to support their position. Without specifically passing on the validity of these arguments, the court ruled that the contract language absolving the United States of liability for water shortages trumped any right the irrigators might otherwise have possessed under the Reclamation Act: "Ickes does not stand for the proposition that these property rights require the government to continue to deliver water in contravention of the water delivery contract, which defines the extent of the water right... [The] argument that [section 8] unilaterally abrogates the shortage provision of the present contract is meritless." Id. at 731-32.

Likewise, in Fremont-Madison Irrigation District v. U.S. Department of the Interior, 763 F.2d 1084 (9th Cir. 1985), employing precisely the same reasoning, the Ninth Circuit ruled that, where a contract between irrigators and the United States absolved the United States of liability in the event of a shortage, the Bureau could not be held to have violated plaintiffs' water rights under Idaho law by failing to deliver water. The court said, "In light of [the shortage] clause, it is unclear just how the rights and interests claimed by the appellant would be protected by law. Absent such protection, they cannot rise to the level of 'property" under the law of Idaho." Id. at 1088. See Water and Water Rights (R.Beck, ed.) §41.05(a) at 411 n.214 (1991) (stating that "[t[he United States, of course , is compelled by Ickes only to fulfill its contracts," citing Fremont-Madison Irrigation District).

D. Plaintiffs' Per Se Takings Theory Should Fail

Finally, even if plaintiffs had a protected right to water deliveries which they could seek to vindicate through a takings claim, this takings suit should fail because there is no merit to plaintiffs' argument that this case involves a physical occupation supporting a finding of a per se taking.

1. General Considerations Weigh Against a *Per Se* Claim.

Plaintiffs' per se takings claim rests on an extreme, even radical, legal theory. Under this theory, once a claimant identifies a protected property interest in water, every restriction on the diversion or delivery of water, no matter how modest in scope or short in duration, could be challenged as a taking. That outcome would be inconsistent with the quest for balance which is at the heart of the Supreme Court's takings jurisprudence. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). It also would fly in the face of the Supreme Court's recent mandate to avoid the use of per se rules. See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 n.23 (2002) ("The temptation to adopt what amount to per se rules ... must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances").

In addition, the notion that water rights should be evaluated under an automatic, per se test is inconsistent with the fact that, "[u]nlike real property rights, ... water rights are limited and uncertain." United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 104 (1986). In the first place, all water in the states of California and Oregon belongs to the public. See ORS 537. 110; Cal Water Code §102. Thus, the only type of right which a project operator or a water user can acquire is a right to "use" the water. See Tulare Lake, 49 Fed. Cl. at 319. In addition, maintenance of rights in water traditionally has depended on their continued exercise; thus, in contrast with rights in land, rights in water can be completely lost through non-use over a period of time. See Wimer v. Simmons, 39 P. 6,10 (1895). Moreover, all rights in water have always been subject to the condition that the water be put to beneficial use. See Id. Lastly, as a matter of basic hydrology, all water rights are subject to the condition that Nature might not make the water available.

In view of the limited and contingent nature of rights in water, it would be surprising indeed if private property rights in water had greater protection under the Takings Clause than any other kinds of property rights. But that is exactly what plaintiffs are claiming by advancing a per se takings theory in this case. Property rights in water, at a minimum, should have no greater protection that rights in other types of property. See generally Joseph Sax, "The Constitution, Property Rights, and the Future of Water Law,"61 U.Colo.L.Rev. 257, 260 (1990) (stating that claimed private property rights in water "have no higher or protected status than any other sort of property").

2. Regulation of a Usufructuary Right in Water Is Not a Physical Occupation.

For several reasons, the theory that a restriction on the exercise of a water right represents a physical occupation supporting a finding of a per se taking must be rejected. First, this theory is illogical and incoherent in light of the limited nature of private rights in water. As discussed, a water right is only a right to the "use" of a certain quantity of water during a certain period of time. A water right holder does not hold a property right in the corpus of the water itself, and therefore cannot exercise any type of dominion over any identifiable pool or area of water. Because a water right is simply a right to the use of a certain quantity of water, it makes no sense to speak of government physically occupying a water right by restricting the exercise of the right. In this respect, rights in water are different from rights in land, where the concept of physical occupation does logically apply. See generally Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

Second, under the Supreme Court's general standards for distinguishing between regulatory restrictions and physical occupations, ESA restrictions on the exercise of water rights represent regulatory restrictions rather than physical occupations. In Tahoe-Sierra, the Supreme Court emphasized that the physical occupation category must be tightly cabined to avoid "transform[ing] government regulation into a luxury few governments could afford." 535 U.S. at 1479. Accordingly, the Court said, the physical occupation category must be reserved for "relatively rare" cases in which the physical occupation can be "easily identified." The Court also stressed that regulatory takings and physical occupations must be kept analytically distinct. It is "inappropriate to treat cases involving physical occupations as controlling precedents for the

evaluation of a claim that there has been a 'regulatory taking,' and vice versa." Id.

The Court described the distinction between physical occupations and regulatory restrictions by way of illustration. Thus, the Court said compensation is due under a physical occupation theory "when a leasehold is taken and the government occupies it for its own purposes." Id. at 1478-79. (citing e.g., United States v. General Motors Corp., 323 U.S. 373 (1945)). "Similarly," the Court said, "when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U.S. 256 (1946)," physical-occupation theory applies. Id. at 1479. On the other hand, regulatory takings analysis applies, the Court said, to "a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, Block v. Hirsh, 256 U.S. 135 (1921); that bans certain private uses of a portion of an owner's property, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987); or that forbids the private use of certain airspace, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)." Id.

Under these standards and based on these examples, ESA restrictions on the exercise of water rights do not qualify as physical occupations. Certainly these types of restrictions are not "easily identified" as physical occupations. Indeed, as discussed, it is logically incoherent to view restrictions on the exercise of water rights as a physical invasion because a water right includes no interest capable of being invaded or occupied in a physical sense. In terms of the type of restraint they impose, the ESA restrictions in this case are akin to the land use regulations in Keystone or the air space restrictions in Penn Central. On the other hand, they are unlike the actual physical invasions of real property in Loretto and Causby.

The significance of the distinction between regulation and physical occupation, for the purpose of this litigation, lies in the fact that characterizing the government action as one or the other determines whether or not the claim must be evaluated using the parcel as a whole rule. As the Supreme Court explained in Tahoe -Sierra, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire

parcel or merely a part thereof." 535 U.S. at 322 (emphasis added). By contrast, "in the analysis of regulatory takings claims.... we must focus on the 'parcel as a whole.'" Id. at 327 (emphasis added).

In this case, the question of whether the claims involve a regulation or a physical occupation, and hence whether the parcel as a whole rule applies or not, is potentially decisive. The takings claims are based on reductions in deliveries in a single year, the year 2001. If the alleged takings were treated as physical occupations, the evaluation of the effect of the alleged takings would properly focus on the impact during that single year. Under this approach, the government's action could potentially be viewed as eliminating all economically viable use of the alleged property interests. But if the claims are treated as being regulatory takings claims, then the analysis must consider the plaintiffs' ability to use the water in other years. See Tahoe-Sierra, 535 U.S. at 332 (stating that the relevant parcel must be defined, not only in geographic terms, but in the temporal dimension as well). Under that approach, the effect of the government action on the value and/or use of the alleged property interests is plainly very modest.

The Supreme Court's rejection of the per se regulatory takings claim in Tahoe-Sierra compels rejection of claimant's per se takings claims in this case. The Supreme Court refused to apply a per se rule to a regulation that prohibited use of the property for a period of 32 months, rejecting the argument that the claim should be evaluated by focusing solely on that period without considering that the owners could still use their properties after the restriction was lifted. Likewise, the takings claims in this case cannot properly be evaluated by focusing on the single year in which water deliveries were curtailed, disregarding the plaintiffs' ability to use water in other years. See also Maritrans Inc. v. U.S., 342 F.3d 1344 (Fed.Cir., 2003) (applying the parcel rule in the temporal dimension).

3. Tulare Lake Was Wrongly Decided on This Point.

Plaintiffs apparently intend to rely heavily on the Court of Federal Claims decision in Tulare Lake v. United States, 49 Fed. Cl. 313 (2001), to support their claims. In that case, irrigators challenged restrictions on water deliveries imposed under the ESA. The restrictions reportedly were relatively modest in their effects. See Melinda Harm Benson, "The Tulare Case:

Water Rights, the Endangered Species Act, and the Fifth Amendment," 32 Envtl. L. 551, 560 ("[t]he restrictions resulted in an overall reduction in water availability of approximately 0.11%and 2.92%" for the two irrigation district plaintiffs). Nonetheless, applying the per se physical- occupation theory, the court found a taking.

This ruling in Tulare Lake was mistaken and the Court should not follow it. The basic reasoning of the Court in Tulare Lake was that the ESA restrictions accomplished "a complete extinction of all value" of plaintiffs' water rights, and for that reason "amount[ed] to a physical occupation" of the property. Id. at 320. Unfortunately, the Court in Tulare Lake did not have the benefit of the guidance provided by the Supreme Court's subsequent decision in Tahoe-Sierra. Under the standards articulated in Tahoe-Sierra, the per se rule for physical occupations does not apply in that case. Indeed, Tahoe-Sierra directly contradicts the reasoning in Tulare Lake.

The Court erred in Tulare Lake, first, by concluding that because the regulation ostensibly "deprived [plaintiffs] of the entire value of their contract right," 49 Fed.Cl. at 318, it effected a physical occupation of the plaintiffs' asserted water rights. Contrary to the court's reasoning, a regulatory restriction that destroys all economically viable use is not the same thing as a physical occupation of private property. For example, Lucas v. South Carolina Coastal Council involved a regulation that had been found to make the property valueless. But the Supreme Court did not conclude from this finding that the claim in Lucas involved a physical occupation. To the contrary, the Lucas Court said there are "two discrete categories" of government action for the purpose of the Takings Clause, 505 U.S. at 1025 (emphasis added), physical occupations and regulatory use restrictions. The Court treated the "total taking" claim in Lucas as being a regulatory taking claim, not a physical occupation claim.

The Court in Tulare Lake believed that its per se physical-occupation theory was bolstered by the decision in United States v. Causby, 328 U.S. 256 (1946), but that belief was mistaken. Causby addressed a taking claim based on the government's frequent operation of low- flying aircraft through plaintiffs' privately owned airspace. Causby clearly is a physical occupation case, not a regulatory takings case. See Tahoe-Sierra, 535 U.S. at 322 (placing Causby on the physical-occupation side of the divide between regulatory restrictions and physical

occupations). Because Causby involved an actual physical occupation, it does not support the theory that a regulation eliminating all economically viable use can be equated with a physical occupation.

The Court in Tulare Lake also relied on improper circular reasoning in concluding that the ESA restrictions rendered the plaintiffs' water rights valueless. The Court implicitly recognized that under the parcel as a whole rule it could not have found the property valueless, "because the economic loss asserted here - a fraction of the master contract's overall value – was de minimis." 49 Fed.Cl. at 318-19. However, the Court declined to apply the parcel rule; the Court's conclusion that the regulation destroyed all value obviously was based on the premise that the relevant portion for the purpose of takings analysis was the specific water plaintiffs had been barred from exploiting.

The problem with this analysis is that, as explained in Tahoe-Sierra, the parcel rule can be disregarded only if the case involves a physical occupation. The Court in Tulare Lake characterized the regulation as a physical occupation, but its only basis for doing so was that the regulation ostensibly rendered the property valueless. However, as discussed above, that conclusion rested on an implicit assumption that the parcel rule did not apply, an assumption that would have been appropriate only if the case actually involved a physical invasion. In other words, the Court thought that the case involved a physical occupation because it assumed the case involved a physical occupation. This reasoning is perfectly, and fatally, circular.

Instead of simply assuming the answer to its question, the Court in Tulare Lake should have addressed directly, at the outset of its analysis, whether the case involved a regulatory restriction or a physical occupation. As the Supreme Court said in Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993), "To the extent any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." If the Court in Tulare Lake had followed the proper approach, and in particular if it had had the benefit of the guidance provided in Tahoe-Sierra, it would have recognized that the case involved a regulatory restriction, not a physical occupation. Based on that conclusion it would been required to apply the parcel as a whole rule. Because, under the parcel rule, the economic impact

of the ESA regulations on plaintiffs was "de minimis," the basis for the Tulare Lake Court's finding of a taking would have evaporated.

Finally, the Court in Tulare Lake also erred in relying on the Supreme Court decisions in International Paper Co v. United States, 282 U.S. 399 (1931), and other similar cases, such as Dugan v. Rank, 372 U.S. 609 (1963), United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), and Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), to support the per se physical occupation theory. See 49 Fed. Cl. at 319. These cases are all distinguishable because they do not involve regulatory restrictions on the exercise of property rights. Rather, they involve the acquisition of water rights in connection with government water projects, or the direct expropriation of rights in water by government. Thus, each of these cases "present [a] classi[c] taking in which the government appropriates property for its own use...., instead [of an] interference with property rights aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good." Tahoe-Sierra, 535 U.S. at 324-25.[8]

[8] It would be premature on the present, undeveloped record. to attempt to apply the alternative Penn Central analysis to these claims. However, a Penn Central claim would clearly face significant hurdles. One significant factor would be the fact that the Klamath project, like all Bureau projects, has been heavily subsidized by U.S. taxpayers. As a result of these subsidies, plaintiffs would stand in very different position than plaintiffs alleging a taking of real property purchased in an arm's length, market transaction. Those who have been the beneficiaries of generous government givings are in a poor position to complain about alleged government takings. See Wickard v. Filburn, 317 U.S. 111, 130 (1942) ("It is hardly lack of due process for the Government to regulate that which it subsidizes.")

CONCLUSION

For the foregoing reasons, the Court should ultimately conclude in this case that (1) "property" within the meaning of the Takings Clause of the Fifth Amendment is defined by some law (federal or state) which is independent of the Constitution; (2) the Reclamation Act of 1902 provides that title to appropriative rights in Bureau project waters should be determined under state law; and (3) under applicable Oregon and California law, the United States owns the appropriative water rights in the Klamath project, (4) because the irrigators do not "own" the project water, their rights in project water are defined, and limited, by the terms of their contracts; (5) even if the plaintiffs hold some type of property rights in Klamath project water, under either federal or state law, they are still bound by the terms of their contracts; and (6) in any event, per se takings theory does not apply to restrictions on the exercise of water rights.

Respectfully submitted,

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