No. _____

In the Supreme Court of the United States

LONNY E. BALEY, ET AL.,

Petitioners,

v.

UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI
APPENDIX – VOLUME 2

TIMOTHY S. BISHOP, ESQ.
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
tbishop@mayerbrown.com

PAUL S. SIMMONS, ESQ.
Counsel of Record
RICHARD S. DEITCHMAN, ESQ.
Somach Simmons & Dunn
500 Capital Mall, Suite 1000
Sacramento, CA 95814
(916) 449-7979
psimmons@somachlaw.com
rdeitchman@somachlaw.com

Counsel for Petitioners

APPENDIX TABLE OF CONTENTS

Page

VOLUME 2

United States Court of Appeals
for the Federal Circuit

2007-5115

Decided: February 17, 2011

KLAMATH IRRIGATION DISTRICT, TULELAKE IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MIDLAND DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, PINE GROVE IRRIGATION DISTRICT, WESTSIDE IMPROVEMENT DISTRICT NO. 4, SHASTA VIEW IRRIGATION DISTRICT, VAN BRIMMER DITCH CO., FRED A. ROBISON, ALBERT J. ROBISON, LONNY E. BALEY, MARK R. TROTMAN, BALEY TROTMAN FARMS, JAMES L. MOORE, CHERYL L. MOORE, DANIEL G. CHIN, DELORIS D. CHIN, WONG POTATOES, INC., MICHAEL J. BYRNE, DANIEL W. BYRNE, AND BYRNE BROTHERS,
Plaintiffs-Appellants,

v.

UNITED STATES and PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
Defendants-Appellees.

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

ROGER J. MARZULLA, Marzulla Law, of Washington, DC, argued for plaintiffs-appellants. With him on the brief was NANCIE G. MARZULLA. Of counsel was GREGORY T. JAEGER.

KATHERINE J. BARTON, Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued for all defendants-appellees. With her on the brief for defendant-appellee United States were RONALD J. TENPAS, Acting Assistant Attorney General, and KATHRYN E. KOVACS, Attorney, of Washington, DC, KRISTINE S. TARDIFF, Attorney, of Concord, New Hampshire, and STEPHEN M. MACFARLANE, Attorney, of Sacramento, California.

TODD D. TRUE, Earthjustice, of Seattle, Washington, for defendant-appellee Pacific Coast Federation of Fishermen's Associations. Of counsel was SHAUN A. GOHO.

WALTER R. ECHO-HAWK, Native American Rights Fund, of Boulder, Colorado, for amicus curiae Klamath Tribes. With him on the brief was THOMAS P. SCHLOSSER, Morisset, Schlosser, Jozwiak & McGaw, of Seattle, Washington, for amicus curiae Hoopa Valley Indian Tribe.

JOHN ECHEVERRIA, Georgetown Environmental Law & Policy Institute, of Washington, DC, for amicus curiae Natural Resources Defense Council. With him on the brief were HAMILTON CANDEE and KATHERINE S. POOLE, Natural Resources Defense Council, of San Francisco, California.

Before BRYSON, SCHALL, and GAJARSA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL.
Opinion concurring-in-part and concurring in the judgment filed by *Circuit Judge* GAJARSA.

SCHALL, *Circuit Judge*.

Plaintiffs-Appellants ("plaintiffs") are fourteen water, drainage, and irrigation districts and thirteen agricultural landowners in Oregon and California.[1] Plaintiffs appeal the final judgment of the United States Court of Federal Claims that, based on two separate summary judgment decisions, dismissed their Fifth Amendment takings claims, their claims under the Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957) (the "Klamath Basin Compact" or

[1] We sometimes refer to the plaintiff water, drainage, and irrigation districts as the "districts."

the "Compact"), and their breach of contract claims. *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005) ("*Takings Decision*"); *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677 (2007) ("*Contract Decision*").

On July 16, 2008, we certified three questions relating to the takings and Compact claims to the Oregon Supreme Court. *See Klamath Irrigation Dist. v. United States*, 532 F.3d 1376 (Fed. Cir. 2008) ("*Certification Order*"). The certification was pursuant to a procedure whereby unsettled questions of state law may be certified to the Oregon Supreme Court. *See* Or. Rev. Stat. §§ 28.200-28.255 (2010). Pending action by the Oregon court, we withheld decision on all of plaintiffs' claims. The Oregon Supreme Court accepted the case for certification, *Klamath Irrigation Dist. v. United States*, 202 P.3d 159 (Or. 2009), and on March 11, 2010, the court rendered its decision, answering our certified questions. *See Klamath Irrigation Dist. v. United States*, 348 Or. 15, 227 P.3d 1145 (Or. 2010) (en banc) ("*Certification Decision*").

We now vacate the judgment of the Court of Federal Claims and remand the case to the court for further proceedings. On remand, the court is to (1) consider the takings and Compact claims in light of the *Certification Decision;* (2) determine whether, as far as the breach of contract claims are concerned, the government can establish that, for purposes of its defense based on the sovereign acts doctrine, contract performance was impossible; and (3) decide the breach of contract claims as appropriate.

BACKGROUND

I.

Plaintiffs are users of water in the Klamath River Basin. Located in southern Oregon and northern California, the Klamath River Basin is the drainage basin of the Klamath River, the Lost River, and the Link River, as well as various other rivers. Water flow from Upper Klamath Lake in Oregon into the lower Klamath River is controlled by the Link River Dam. Upper Klamath Lake has a shallow depth and limited water capacity that fluctuates with wet and dry periods; thus, downstream flow to lower portions of the Klamath River and ultimately the Klamath River Basin is affected by droughts. *See Takings Decision*, 67 Fed. Cl. at 509-10.

The Klamath Irrigation Project (the "Klamath Project" or the "Project") is an irrigation project that benefits primarily southern Oregon and portions of northern California, including the Klamath River Basin. The Project has its origins in the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified, as amended, at 43 U.S.C. § 371 *et seq.*) (the "Reclamation Act"). The Reclamation Act directed the Secretary of the Interior to reclaim arid lands in certain western states through irrigation projects. In 1905, Congress authorized the development of the Klamath Project. *See* Act of February 9, 1905, ch. 567, 33 Stat. 714. Shortly thereafter, the Oregon legislature passed its own reclamation legislation. Among other things, that legislation created a procedure to assist the United States in appropriating

water for the irrigation works contemplated by the Reclamation Act. *See* Or. Gen. Laws, 1905, ch. 228, § 2 (the "1905 Act") (repealed 1953); *see also* Or. Gen. Laws, 1905, ch. 5, §§ 1-2 (authorizing the United States to both raise and lower the lakes associated with the Klamath River Basin and also to use the beds of those lakes for water storage in connection with irrigation projects).

The Klamath Project is managed and operated by the Secretary of the Interior, through the United States Bureau of Reclamation (the "Bureau"). The Project provides water to about 240,000 acres of irrigable crop lands. It also provides water to several national wildlife refuges in the Klamath River Basin, including the Lower Klamath and Tule Lake National Wildlife Refuges. Over the years, the Bureau has entered into various types of contracts with water districts and individual water users who wish to receive deliveries of Project water for irrigation purposes. In one way or another, each of the plaintiffs receives delivery of water from the Klamath Project for irrigation purposes.

II.

In light of its dual purposes of serving agricultural uses and providing for the needs of wildlife, the Klamath Project is subject to the requirements of the Endangered Species Act. *See* Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified, as amended, at 16 U.S.C. § 1531 *et seq.*) (the "ESA"). In a 1999 Ninth Circuit decision, the interests of Project water users were declared

subservient to the ESA, the result being that, as necessary, the Bureau has a duty to control the operation of the Link River Dam in order to satisfy the requirements of the ESA. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (noting that the ESA was enacted to "halt and reverse the trend toward species extinction, *whatever the cost.*") (emphasis added) (internal citations omitted), amended by 203 F.3d 1175 (9th Cir. 2000).

Pursuant to the ESA, the Bureau has an obligation not to engage in any action that is likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such a species. *See* 16 U.S.C. § 1536(a)(1). As a result, the Bureau is required to perform biological assessments to determine the impact of the diversion of Klamath Project water for irrigation purposes upon endangered and threatened species and to adjust water delivery to minimize the impact upon the habitat of such species. *See* 16 U.S.C. § 1536(a)(2), (c)(1).

Shortly after the Ninth Circuit's ruling in *Patterson*, several environmental organizations filed suit against the Bureau in federal court for alleged failure to comply with the ESA in preparing Klamath Project operating plans. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1238 (N.D. Cal. 2001). During the pendency of that case, in the spring of 2001, severe drought conditions caused the Bureau to reevaluate its planned water deliveries for the year 2001. Several federal

agencies indicated that water levels in the Klamath River Basin had become so low as to threaten the survival of certain endangered species, including the coho salmon, the shortnose suckerfish, and the Lost River suckerfish. *See Takings Decision*, 67 Fed. Cl. at 512-13. In due course, the Bureau forwarded biological assessments of the Project's proposed operations to the two agencies authorized to issue final biological opinions for those species; the National Marine Fisheries Service (for coho salmon) and the Fish and Wildlife Service (for suckerfish). The two agencies performed their analyses and ultimately issued final biological opinions concluding that the Project's proposed operations for 2001 threatened the continued existence of the species in question. *Id.* at 513. As statutorily required, both opinions presented alternatives to address the threat to the three species. These alternatives included reducing the water available for irrigation from Upper Klamath Lake during 2001 when flows were below certain levels. *Id.* (citing 16 U.S.C. § 1536(b)(3)(A)). In addition, at this time, the Bureau was subject to a preliminary injunction order issued by the U.S. District Court for the Northern District of California in the *Pacific Coast* case. The order barred the delivery of Klamath Project water for irrigation purposes when water flow was below certain minimum levels, until the Bureau complied with ESA consultation requirements. *See Pac. Coast Fed'n of Fishermen's Ass'ns*, 138 F. Supp. 2d at 1251.

On April 6, 2001, the Bureau issued a revised operating plan for the Klamath Project that terminated

delivery of irrigation water for the year 2001. *Takings Decision*, 67 Fed. Cl. at 513. As a result, the Bureau ceased water deliveries from Upper Klamath Lake from April through July of 2001, when it was able to release some water to its users, including plaintiffs. *See Takings Decision*, 67 Fed. Cl. at 513 n.10.

Following the Bureau's cessation of irrigation water deliveries in April 2001, various Project users, including several of the plaintiffs in this case, filed a breach of contract suit against the United States in the U.S. District Court for the District of Oregon. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1196 (D. Or. 2001). The suit was dismissed in October 2001 after the court denied the users' motion for a preliminary injunction against the halting of water deliveries. *Id.* at 1211.

III.

A

On October 11, 2001, plaintiffs brought this action in the Court of Federal Claims. In their Second Amended Complaint, which was filed on January 31, 2005 ("Complaint"), plaintiffs assert three claims against the United States.[2] First, they allege that,

[2] Several organizations, including defendant-appellee Pacific Coast Federation of Fishermen's Associations ("PCFFA"), moved for leave to intervene in the suit as a matter of right, based on asserted interests relating to the allocation and ownership of Klamath Project water. The court ruled that only PCFFA was entitled to intervene. *See Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328, 331, 336 (2005).

when the Bureau halted the delivery of water in 2001, it took their water rights for public use without just compensation, in violation of the Fifth Amendment to the Constitution. Complaint, ¶¶ 32-33. Second, they allege that the Bureau's action impaired their water rights without just compensation, in violation of the Klamath Basin Compact. *Id.* at ¶¶ 38-39. The Compact, which was entered into between Oregon and California for the division of Klamath Project water, received the consent of Congress. 71 Stat. at 497. It states that "the United States shall not, without payment of just compensation, impair any rights to the use of water for [domestic or irrigation purposes] within the Upper Klamath River Basin." *Id.* at 507. Lastly, plaintiffs allege that, when the Bureau halted the delivery of water, its action breached water service contracts with the plaintiff districts. Complaint, ¶ 47. Among other things, the individual plaintiffs in the case claim rights as third-party beneficiaries of the contracts between the Bureau and the districts. *Id.* at ¶ 46.

Several plaintiffs also asserted equitable or beneficial property interests in the use of Klamath Project water through claims based on patent deeds and claims based on state water permits.[3] Five landowner

[3] The United States issued patent deeds to individual water users who filed an "Application for Permanent Water Right-Form A" and an affidavit "attesting to the fact that [the user] had put Klamath Project water to beneficial use." Once an applicant met these requirements, he or she was issued a patent deed conveying land "together with the right to the use of water from the Klamath Reclamation Project as an appurtenance" to the land. *Takings*

plaintiffs—Fred A. Robison, Albert Robison, Mark Trotman, Lonny Baley, and Baley Trotman Farms—claim they were granted title to their land in "patent deeds" and that once they filed applications for the beneficial use of Klamath Project water, the deeds conveyed their land to them together with the right to the use of water from the Klamath Reclamation Project as an appurtenance to the land. *See Takings Decision*, 67 Fed. Cl. at 512. Two plaintiffs, the Klamath Drainage District and the Klamath Hills District Improvement Company, assert property interests based on water permits issued by the State of Oregon. They claim that the permits demonstrate ownership of a "vested and determined" state law water right. *Id.*

Under Oregon's Water Rights Act of 1909, Or. Rev. Stat. §§ 539.005-240 (the "Water Rights Act"), once all competing water rights claims are filed and entered into state records, they are made subject to a final determination of rights through a statutory adjudication process. *See* Or. Rev. Stat. §§ 539.240(8), 539.010-240. Pertinent to this case, the Water Rights Act authorizes the adjudication of federal and state law water rights vesting prior to passage of the 1905 Act. *Id.* In 1976, the Klamath Basin Adjudication (the "Adjudication") was initiated to determine water rights in the Klamath Basin. On November 13, 2003, the Court of Federal Claims ruled that plaintiffs were barred from asserting claims based on rights, titles, or interests that

---

Decision, 67 Fed. Cl. at 512. In addition, the State of Oregon issued water rights permits to certain districts after the state repealed the 1905 Act in 1953. *Id.*

could be subject to determination in the Adjudication, which remains pending. *See Takings Decision*, 67 Fed. Cl. at 514 (citing the court's November 13, 2003 summary judgment order).

B

The Fifth Amendment to the United States Constitution proscribes the taking of private property "for public use, without just compensation." U.S. Const. amend. V, cl. 4. When evaluating whether governmental action constitutes a taking, a court employs a two-part test. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether the government's action amounted to a compensable taking of that property interest. *See*, *e.g.*, *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1364 (Fed. Cir. 2009); *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004); *see also Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212-13 (Fed. Cir. 2005).

In due course, the parties filed cross-motions for summary judgment on the threshold question of whether plaintiffs have property interests in Klamath Project water rights cognizable under the Fifth Amendment. In the *Takings Decision*, the Court of Federal Claims granted the government's motion for summary judgment and held that plaintiffs had failed to

assert cognizable property interests in Klamath Project water for purposes of their taking claims, their Compact claims, or other asserted property rights. *See Takings Decision*, 67 Fed. Cl. at 540.

In determining whether a party has asserted a cognizable property interest for Fifth Amendment purposes, a court must look to "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, [that] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Air Pegasus*, 424 F.3d at 1213 (internal quotations and citations omitted). In the *Takings Decision*, the Court of Federal Claims rejected plaintiffs' argument that the Reclamation Act created property interests for plaintiffs owning land appurtenant to Klamath Project waters, holding that the statute and its legislative history clearly intended for state law to govern plaintiffs' asserted usufruct property rights, i.e., the right to the use of the water that had been appropriated by the federal government. 67 Fed. Cl. at 516-519. The court also rejected plaintiffs' contention that Supreme Court cases recognizing usufructuary rights in water sources created by Section 8 of the Reclamation Act established property rights in Klamath Project water under federal law.[4] The court noted that each of the

---

[4] Section 8 of the Reclamation Act states that:

> [N]othing 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

cases cited by plaintiffs applied the law of the relevant state or states providing for such rights. *Id.* at 519-523, *discussing Ickes v. Fox*, 300 U.S. 82, 94 n.3 (1937) (relying on contracts and a Washington statute); *Nebraska v. Wyoming*, 325 U.S. 589, 612-15 (1945) (applying Nebraska and Wyoming law); *Nevada v. United States*, 463 U.S. 110, 122, 126 (1983) (applying Nevada law). The court ruled that Oregon law, therefore, was the governing law for determining the existence of property rights in Klamath Project water. *Id.* at 523.

The Court of Federal Claims next considered whether Oregon law established any property rights for the plaintiffs, as users of Klamath Project water, as against the United States. Focusing on the 1905 Act, the court noted that the statute expressly provided the procedure by which the United States could appropriate the waters deemed necessary for the Klamath Project. Once the United States had complied with all of the statutory requirements for acquiring water rights, the court reasoned, the 1905 Act vested the United States with title to all the waters unappropriated as of

---

acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the water thereof: Provided, *That the right to 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.*

32 Stat. 388, 390 (codified at 43 U.S.C. §§ 372, 383) (emphasis added).

the date of filing, and those waters could not be subject to further appropriation or adverse claims except as permitted by the United States. *See id.* at 523-25 (citing *In re Waters of the Umatilla River*, 88 Or. 376, 168 P. 922, 925 (Or. 1917) (under the 1905 legislation, the filing of notice by the United States, upon compliance with the various procedural strictures of the statute, "vested the United States with title to all the then unappropriated water of the Umatilla River.")). The court acknowledged the Oregon legislation could not displace any water rights which had vested prior to the acceptance by the United States of the provisions of the statute, but found no evidence of such pre-1905 rights still existing. Thus, because the United States had perfected its property rights by complying with necessary procedural requirements, the court concluded that "pursuant to relevant Oregon law, in 1905, the United States obtained rights to the unappropriated water of the Klamath Basin and associated tributaries." *Id.* at 526.

The court recognized, however, that this conclusion did not answer the question whether any of the individual plaintiffs held water rights that predated the government's 1905 notice appropriating water for the Klamath Project—specifically, water rights that were already appropriated as of the date of the government's notice of appropriation. It also recognized that it did not answer the question whether any of the individual plaintiffs held water rights that post-dated the 1905 notice that were obtained from the United States. *Id.*

Addressing first water rights that predated the government's 1905 appropriation notice, the Court of Federal Claims noted that plaintiffs did not seriously dispute that these water rights had been acquired by the government and integrated into the Klamath Project. *Id.* The court also noted, however, the contention that alleged pre-1905 rights of at least seven plaintiffs[5] had been exchanged for a perpetual right to receive water from the Project. In the court's view, the record revealed that these alleged exchanges had arisen from a series of post-1905 contracts with the United States, under which the government made various commitments regarding Project water. *Id.* at 527.

The court next considered whether, after 1905, plaintiffs obtained any property rights in Klamath Project water from the United States. The court classified the asserted interests into the following types: rights based on contracts with the United States; rights based on applications for beneficial use and patent deeds granted by the United States to individual users; and rights based on state water permits (involving the Klamath Drainage District and the Klamath Hills District Improvement Company). *Id.* at 530-31. The court first determined that any rights obtained by contract with the United States, including rights of individual users as third-party beneficiaries of district contracts, were subject to contract, rather than takings, remedies. *Id.* at 532-35. In that regard, the court

---

[5] The Van Brimmer Ditch Company, Michael J. Byrne, Daniel W. Byrne, Daniel G. Chin, Deloris D. Chin, Cheryl M. Moore and James L. Moore. *See* 67 Fed. Cl. at 526-27 n.38.

noted that briefing on the contract issue had been stayed and that the ultimate issue of whether the Bureau had breached the district contracts in question remained to be decided. *Id.* at 535.

The court next determined that any rights obtained contractually by patent deeds or state water permits were junior in priority to the rights of the United States in carrying out its Klamath Project duties. *Id.* at 538-39. The court reasoned that the United States could not have taken rights to receive water based on patent deeds and water permits with priority dates after the 1905 appropriation by the United States of water for the Project. This determination rested on the prior appropriation doctrine and the Water Rights Act's recognition of claims of water rights according to the "first in time, first in right" rule.[6] *Id.* at 539 (citing Or. Rev. Stat. §§ 537.120, 537.160, 537.250). Accordingly, the court concluded that any water rights of plaintiffs arising from patent deeds and water permits were subservient to the prior interests of the United States (as well as to those of various Native American tribes). *Id.* Finally, the court determined

---

[6] Under the prior appropriation doctrine, a water rights holder who appropriates water for beneficial use is granted priority for that use in times of shortage over other appropriators who made later use of the water. *See Takings Decision*, 67 Fed. Cl. at 539 (citations omitted). The doctrine prioritizes water rights according to the "first in time, first in right" rule, where claims of rights to the use of water are prioritized so that the senior-most (i.e., oldest) rights holder is entitled to have his or her entitlement fully satisfied before the next rights holder can appropriate water for his or her needs. *Id.*

that the Compact, as a contract between California and Oregon to which the United States consented, did not alter this analysis in any manner so as to impair the rights of the United States "over and to the waters of the Klamath River Basin." *Id.* Having ruled that neither federal nor Oregon state law provided plaintiffs with any property rights as against the United States that were compensable under the Fifth Amendment or the Compact, the court entered judgment in favor of the United States on the takings and Compact claims. *Id.* at 540.

Subsequently, in the *Contract Decision*, the court turned to the unresolved matter of whether the United States' failure to deliver irrigation water in 2001 breached any of plaintiffs' contract rights, asserted directly by the district plaintiffs and indirectly by the landowning plaintiffs as beneficiaries of the district plaintiffs' contracts. The court emphasized that many (though not all) of the contracts had provisions absolving or limiting the United States' liability for Klamath Project water shortages. 75 Fed. Cl. at 681-82. However, the court stated that it did not have to resolve the bounds of the government's exemption from liability on that basis, because the "controlling issue" in the case was whether the sovereign acts doctrine foreclosed government liability as to plaintiffs' breach of contract claims. *Id.* at 682.

The court first noted that the sovereign acts doctrine immunizes the federal government for any and all acts taken in its sovereign capacity, rather than its capacity as a contractor. The court then rejected

plaintiffs' argument that the sovereign acts doctrine did not apply because the Bureau was not compelled "as a sovereign" by the ESA to diminish water deliveries in 2001. *Id.* at 683-85. The court reasoned that because the ESA was a general statute enacted for public benefit, the United States could not be held liable for an obstruction to its performance as a contractor that resulted from its public and general acts of compliance as a sovereign. *Id.* at 683-84 (citing *Horowitz v. United States*, 267 U.S. 458, 461 (1925)).

The court noted that compliance with the ESA was mandatory upon the government and that the Bureau modified the Klamath Project operating plan in 2001 in order to protect the endangered species of fish, not to provide an excuse for decreasing the amount of water provided to plaintiffs in its role as government contractor. *Id.* at 684-85. On this basis, the court deemed the government was immunized from liability for breach of contract based on sovereign acts that impacted its "subservient" performance of the water contracts at issue. *Id.* at 686-87.

In addition, the court rejected plaintiffs' argument that, even if the sovereign acts doctrine did apply, it did not excuse the government's breach of the water supply contracts because the government had failed to show the contract was impossible to perform. The court acknowledged that, in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), four justices deemed impossibility of performance a requirement of a sovereign act defense. The court reasoned, however, that the Court's non-majority opinion was not binding. *See Contract*

Decision, 75 Fed. Cl. at 691. Accordingly, the court concluded that the common law doctrine of impossibility of performance is not a component of the sovereign acts doctrine and that the latter doctrine therefore provided a complete defense to plaintiffs' breach of contract claims. *Id.* at 695.

Based on the *Takings Decision* and the *Contract Decision*, the Court of Federal Claims entered judgment in favor of the United States and dismissed the Complaint. Plaintiffs timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

IV.

Following briefing and oral argument, we concluded that Oregon property law was pertinent to the question of whether plaintiffs possessed property rights in Klamath Project water. We therefore certified three questions to the Oregon Supreme Court. *See Certification Order.* Pending action by the Oregon Supreme Court, we withheld decision on the takings, Compact, and breach of contract claims.

Our first certified question asked whether, assuming that Klamath Project water was deemed appropriated by the United States pursuant to the 1905 Act, the statute precluded irrigation districts from acquiring a beneficial or equitable property interest in the water right acquired by the United States. *Id.* at 1377-78. The second question asked whether, in light of the 1905 Act, landowners who receive and put to beneficial use Klamath Project water have a beneficial or

equitable property interest appurtenant to their land in the water right acquired by the United States, and whether district plaintiffs who receive Project water have a beneficial or equitable property interest in the water right acquired by the United States. *Id.* at 1378. The third question asked, with respect to surface rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights were not within any previously adjudicated area of the Klamath Basin, whether Oregon law recognizes any property interest, whether legal or equitable, in the use of Project water that is not subject to the Adjudication.[7] *Id.*

The Oregon Supreme Court accepted the case for certification, and on March 11, 2010, the court rendered its decision in response to the *Certification Order*. *See Certification Decision*. The *Certification Decision* was filed with this court on March 22, 2010.

The Oregon Supreme Court answered our three questions as follows:

> 1. The 1905 [Act] did not preclude plaintiffs from acquiring an equitable or beneficial property interest in a water right to which the United States holds legal title. Moreover, under the 1905 [A]ct, a formal written release from the United States is not necessary for

[7] Under the Water Rights Act, all water rights "that had vested prior to 1909, but had never been subject to a judicial determination" were "left intact as 'undetermined vested rights.'" *United States v. Oregon*, 44 F.3d 758, 764 (9th Cir. 1994) (quoting Or. Rev. Stat. § 536.007(11)).

plaintiffs to have acquired an equitable or beneficial property interest in the water right that the United States appropriated.

2. Under Oregon law, whether plaintiffs acquired an equitable or beneficial property interest in the water right turns on three factors: whether plaintiffs put the water to beneficial use with the result that it became appurtenant to their land, whether the United States acquired the water right for plaintiffs' use and benefit, and, if it did, whether the contractual agreements between the United States and plaintiffs somehow have altered that relationship. In this case, the first two factors suggest that plaintiffs acquired a beneficial or equitable property interest in the water right to which the United States claims legal title, but we cannot provide a definitive answer to the court's second question because all the agreements between the parties are not before us.

3. To the extent that plaintiffs assert only an equitable or beneficial property interest in the water right to which the United States claims legal title in the [A]djudication, plaintiffs are not "claimants" who must appear in that adjudication or lose the right. As a general rule, equitable or beneficial property interests in a water right to which someone else claims legal title are not subject to determination in a state water rights adjudication.

See Certification Decision, 227 P.3d at 1169.

By letter dated April 5, 2010, we asked the parties to "advise the court as to how they think the court should proceed in this matter in view of the Oregon Supreme Court's decision." *See* Letter from Jan Horbaly, Clerk of the Court, in Case No. 2007-5115, Docket No. 100. The parties have now submitted responsive briefs and presented oral argument on that question.

DISCUSSION

I.

A

Plaintiffs argue that the *Certification Decision* compels reversal of the *Takings Decision*. Plaintiffs contend that, in light of the Oregon Supreme Court's answers to our questions, it is clear that the *Takings Decision* is based on two erroneous rulings: (1) that plaintiffs lacked beneficial or equitable property interests under Oregon law; and (2) that the 1905 Act precluded plaintiffs from acquiring equitable or beneficial property interests in Klamath Project water rights. *See* Appellants' Suppl. Br. at 2. Turning to the Oregon Supreme Court's statement in answering certified question 2 that it lacked all the information (i.e., record of contracts) from which it could determine if plaintiffs had contractually given away any of their water rights, plaintiffs state that "there is absolutely no evidence in the record that the individual water users contractually bargained away or relinquished their vested water rights to the United States—and substantial evidence that they did not, not the least of which is the fact that

none of the named individual Klamath Irrigators has a contract with the Government." *Id.* at 2-3.

Finally, plaintiffs urge that the Oregon Supreme Court's answer to our third certified question compels the conclusion that the beneficial or equitable rights at issue in this case are not involved in the Adjudication. The significance of this point is that plaintiffs who have filed claims in the Adjudication have agreed to proceed in the Court of Federal Claims litigation on the understanding that they are barred by the court's November 13, 2003 order from making any claims or seeking any relief based on rights, titles, or interests that are, or may be, subject to determination in the Adjudication. *See Takings Decision*, 67 Fed. Cl. at 514.

For its part, the United States contends that, in the wake of the *Certification Decision*, we should affirm the *Takings Decision.* The government takes this position based on its assessment of the Oregon Supreme Court's analytical approach to our second certified question. Addressing that question, the court stated:

> As we understand the second question, it asks whether beneficial use alone is sufficient to acquire a beneficial or equitable property interest in a water right to which another person holds legal title. The answer to that question, as we have restated it, is "no." Beneficial use is a necessary but not a sufficient condition to acquire a beneficial or equitable property interest in a water right.

Certification Decision, 227 P.3d at 1160. From there, the court went on to state the two additional factors that must be considered in determining whether plaintiffs acquired a beneficial or equitable property interest in the water rights at issue. Those factors are "whether the United States acquired the water right for plaintiffs' use and benefit, and, if it did, whether the contractual agreements between the United States and plaintiffs somehow have altered that relationship." *Id.* at 1169.

The government argues that, by restating the second question and then answering it in the negative, the Oregon Supreme Court rejected the arguments made by plaintiffs on appeal. *See* United States Appellee's Suppl. Br. at 10-11. Although the government recognizes that the court spelled out the two additional factors under Oregon law that must be considered in determining whether a beneficial or equitable property interest has been acquired, it takes the position that the Oregon Court's three-factor test embodies a new legal theory that has not heretofore been argued by plaintiffs. *Id.* at 11. As we understand it, the government's position is that, up to now, plaintiffs have not argued they possess equitable rights to Klamath Project water based upon the operation of state law (the Oregon Supreme Court's three-factor test), but, rather, that they possess such rights by virtue of a uniform, federally-established rule that is not dependent on or limited by their contracts with the United States. *Id.* at 8, 11. For this reason, the government urges that plaintiffs have "waived any claim to property rights

based on the Oregon court's three-factor analysis." *Id.* at 11. The government states that a remand by this court to the Court of Federal Claims for consideration of the three-factor test would be inappropriate because the test rests on a theory that is "fundamentally different" from the one heretofore advanced by plaintiffs. *Id.* at 14-15.

In the alternative, the government argues that we should remand to the Court of Federal Claims for a determination of whether, under the Oregon Supreme Court's three-factor test, any of the plaintiffs has a compensable property interest in Klamath Project water rights. *Id.* at 17-21. The government states, however, that even if we generally remand the takings and Compact claims, we should nonetheless affirm the judgment with respect to plaintiff Van Brimmer Ditch Company's takings claim, and plaintiffs' takings claims based upon patent deeds and state water permits. *Id.* at 21-22. According to the government, the Van Brimmer Ditch Company's claim is identical to the claim it has presented for determination in the Adjudication and is therefore barred from this case by the Court of Federal Claims' November 13, 2003 order. *Id.* at 21. Turning to claims based on patent deeds and the claims of the Klamath Drainage District and the Klamath Hills District Improvement Company based on state water permits, the government contends that plaintiffs have not challenged the *Takings Decision* with respect to those claims. *Id.* at 22.

B

In our view, the Oregon Supreme Court's answers to our three certified questions compel further proceedings. The court's first answer makes clear that the district plaintiffs are not precluded, under Oregon's 1905 Act, from acquiring a beneficial or equitable property interest in Klamath Project water that was appropriated by the United States under that statute. *See Certification Decision*, 227 P.3d at 1157-60. The Oregon Supreme Court stated: "[W]e find nothing in the text and context of the 1905 [Act] that would preclude plaintiffs from acquiring a beneficial or equitable property interest in the water right appropriated by the United States." *Id.* at 1160.

The Oregon Supreme Court did not answer our second question in yes-or-no terms. Instead, it restated the question and responded "no" to whether beneficial use alone is sufficient to acquire a beneficial or equitable property interest in a water right to which another person holds legal title. The court explained why, under Oregon law, district plaintiffs who receive Klamath Project water and individual plaintiffs who have put to beneficial use Project water appurtenant to their land do not, *on that basis alone*, have a beneficial or equitable property interest in the water. The court stated: "Beneficial use is a necessary but not a sufficient condition to acquire a beneficial or equitable property interest in a water right." *Id.* at 1160.

Explaining its answer, the court began by noting that Oregon law has long recognized the distinction

between equitable title and legal title to property, with the result that one party may hold legal title to a water right while another holds equitable title. *Id.* at 1161 (citing *Fort Vannoy Irrigation Dist. v. Water Res. Comm'n*, 345 Or. 56, 86, 188 P.3d 277, 295 (2008) (irrigation district holds legal title to a water right as trustee while its members hold equitable title as beneficiaries); *In re Waters of Willow Creek*, 119 Or. 155, 195, 199, 236 P. 487, 500 (1925) (corporation held appropriated water right in trust for use and benefit of shareholders who put the water to beneficial use)). The court reasoned that beneficial use alone does not always give the user a property interest in a water right appropriated by another, however. Citing *In re Waters of Walla Walla River*, 141 Or. 492, 497-98, 16 P.2d 939, 941 (1933), it stated that two other factors, in addition to beneficial use, must be considered in determining whether a beneficial or equitable property interest exists: the relationship between the parties as well as any contractual relationships between them. *See Certification Decision*, 227 P.3d at 1162. The court pointed to the United States Supreme Court's consideration of the three factors in *Nevada v. United States*, where the Court stated: "[T]he beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of the relevant State and the contracts entered into by the landowners and the United States make this point very clear." 463 U.S. at 126.

Having found the *Nevada* Court's analysis "both persuasive and consistent with Oregon law," the Oregon Supreme Court adopted the three-factor test in this case. *See Certification Decision*, 227 P.3d at 1163. Applying that test, the court concluded that, as a matter of Oregon law, (1) plaintiffs who have taken Klamath Project water, applied it to their land, and put it to beneficial use have acquired a water right appurtenant to their land, *id.* at 1163; and (2) the relationship between the United States, as appropriator of the Klamath Project water, and plaintiffs as water users is similar to that of a trustee and beneficiary, *id.* at 1164-65. As for the last factor, the contractual relationships between the United States and plaintiffs, the court stated that whether the parties entered into agreements that "clarified, redefined, or even altered" the aforementioned trustee-beneficiary relationship "requires a full consideration of the agreements between plaintiffs and the United States." *Id.* at 1165. Because it did not have the pertinent contracts before it, the court stated that it was not in a position to undertake that analysis. *Id.* at 1165-66.

We do not agree that plaintiffs are barred from proceeding under the three-factor test articulated by the Oregon Supreme Court. We have reviewed plaintiffs' July 16, 2007 brief in this court ("Blue Brief"), the government's October 25, 2007 brief in response ("Red Brief"), and plaintiffs' November 13, 2007 reply brief ("Grey Brief"). Based upon that review, we have no difficulty concluding that plaintiffs have consistently argued that the beneficial/equitable rights to project

water which they claim arose by operation of state law. *See* Blue Brief at 24-43, Red Brief at 32-42, Grey Brief at 5-9.[8] Moreover, in response to our certified question 2, the Oregon Supreme Court has told us what the pertinent law of Oregon is. The case should now proceed under the Oregon Court's three-factor test for determining whether plaintiffs hold beneficial or equitable property interests in Klamath Project water.[9]

Finally, the court's answer to our third question makes clear that plaintiffs may assert, under Oregon law, beneficial or equitable property interests in Klamath Project water to which the United States claims legal title; plaintiffs need not pursue those claims in the Adjudication. *Certification Decision*, 227 P.3d at 1166-68. The Oregon Supreme Court stated: "The answer to the Federal Circuit's third question is 'yes.' A person asserting only a beneficial or equitable property interest in a water right is not a 'claimant' who must

---

[8] The beneficial or equitable water rights at issue in this case are in the nature of usufructuary rights. Such a right is chiefly a right of use, not a right of possession or other right associated with land ownership, and has been acknowledged as a cognizable property interest. *Dugan v. Rank*, 372 U.S. 609, 625-26 (1963); *Washoe County, Nevada v. United States*, 319 F.3d 1320, 1322 (Fed. Cir. 2003) ("Although a water right is property subject to constitutional protection, it is usufructuary in nature, meaning that it is a 'right to use' water in conformance with applicable laws and regulations.")

[9] We do not agree with the government that plaintiffs have not challenged the *Takings Decision* insofar as it relates to claims based on patent deeds and the claims of the Klamath Drainage District and the Klamath Hills District Improvement Company based on state water rights. *See* Blue Brief at 43-45; Grey Brief at 22-23.

appear in the Klamath Basin adjudication and file a claim to determine that interest." *Id.* at 1166. Accordingly, because Oregon law does not preclude plaintiffs from acquiring a beneficial or equitable interest in Project water rights held by the United States, and because plaintiffs' claims thereto need not be determined in the Adjudication, they should be considered in this case.[10]

In sum, we remand plaintiffs' takings and Compact claims for (1) determination, based on the *Certification Decision*, on a case-by-case basis, of any outstanding property interest questions; and (2) determination on the merits, on a case-by-case basis, of all surviving takings and Compact claims. On remand, the Court of Federal Claims should proceed as follows: First, it should determine, for purposes of plaintiffs' takings and Compact claims, whether plaintiffs have asserted cognizable property interests. In making that determination, the court should direct its attention to the third part of the three-part test set forth by the Oregon Supreme Court in response to our certified question 2. That is because it is not disputed that, in this case, the first two parts of the three-part test have been met. Specifically, the parties do not dispute that plaintiffs have put Klamath Project water to beneficial use and that the United States acquired the pertinent water rights for plaintiffs' use and benefit. As far as the third

---

[10] We leave it to the Court of Federal Claims to determine, in the first instance, whether the claim of the Van Brimmer Ditch Company is not properly before the court because it is identical to the claim the company has presented in the Adjudication.

part of the three-part test is concerned, the court should address whether contractual agreements between plaintiffs and the government have clarified, redefined, or altered the foregoing beneficial relationship so as to deprive plaintiffs of cognizable property interests for purposes of their takings and Compact claims. In that regard, as seen, plaintiffs assert that there are no such contracts.[11] On remand, the Court of Federal Claims should give the government the opportunity to demonstrate how plaintiffs' beneficial/equitable rights to the use of Klamath Project water have been clarified, redefined, or altered. In that context, it will be the government's burden to demonstrate with specificity how the beneficial/equitable rights of one or more plaintiffs have been clarified, redefined, or altered.[12] After the government has come forward with its

---

[11] At oral argument on November 18, 2010, the government acknowledged that there are no contracts that serve as a complete surrender of plaintiffs' rights.

[12] It is plaintiffs' burden to establish cognizable property interests for purposes of their takings and Compact claims. *Air Pegasus*, 424 F.3d at 1212-13; *American Pelagic Fishing Co.*, 379 F.3d at 1372. In that regard, with respect to the third part of the Oregon Supreme Court's answer to certified question 2, plaintiffs assert there are no contracts which have clarified, redefined, or altered their property rights. On remand, if the government contends that there are such contracts, it will have the burden of coming forward with appropriate evidence. *See Nat'l Commc'ns Ass'n, Inc. v. AT & T Corp.*, 238 F.3d 124, 129-31 (2d Cir. 2001) ("[A]ll else again being equal, courts should avoid requiring a party to shoulder the more difficult task of proving a negative. 'The general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim.'") (quoting *Auburndale State Bank v. Dairy Farm Leasing Corp.*, 890 F.2d 888, 893 (7th Cir. 1989)).

showing, plaintiffs will have the opportunity to respond. To the extent the Court of Federal Claims determines that one or more plaintiffs have asserted cognizable property interests, it then should determine whether, as far as the takings and Compact claims are concerned, those interests were taken or impaired. That determination will turn on existing takings law.[13]

II.

A

Turning to the breach of contract claims, plaintiffs contend that the Court of Federal Claims erred in not holding impossibility of performance a threshold requirement the government must meet when asserting the sovereign acts defense. Although plaintiffs acknowledge that the Supreme Court's *Winstar* plurality opinion commanded the votes of only four Justices on the impossibility of performance issue, they argue that, in *Carabetta Enterprises, Inc. v. United States*, 482 F.3d 1360 (Fed. Cir. 2007), we relied upon the *Winstar* plurality holding. Plaintiffs argue that the government should not be absolved from liability based on the sovereign acts doctrine for breach of contract without first proving impossibility of performance, which it contends the government failed to do in this case. *See* Appellants' Br. at 49-52.

---

[13] On remand, counsel for plaintiffs should confirm which plaintiffs are asserting takings and Compact claims and which plaintiffs are asserting breach of contract claims.

Responding, the government argues that the Court of Federal Claims correctly held that the sovereign acts doctrine provides a complete defense to plaintiffs' breach of contract claims. In the government's view, the "ESA compelled the Bureau to reduce irrigation deliveries in 2001." *Contract Decision*, 75 Fed. Cl. at 686.

B

The sovereign acts doctrine is designed to balance "the government's need for freedom to legislate with its obligation to honor its contracts." *Winstar*, 518 U.S. at 895-96. Under the doctrine, "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1574 (Fed. Cir. 1997) (quoting *Horowitz v. United States*, 267 U.S. 458, 461 (1925)). The government is not liable for breach of contract whenever it takes any generally applicable action in its sovereign capacity that incidentally frustrates performance of a contract to which it is a party. *Horowitz*, 267 U.S. at 461. Discussing the sovereign acts doctrine in *Winstar*, Justice Souter, joined by Justices Stevens, O'Connor, and Breyer, stated:

> As *Horowitz* makes clear, that defense simply relieves the Government as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act

> rendered performance impossible. But even if the Government stands in the place of a private party with respect to "public and general" sovereign acts, it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach.

518 U.S. at 904.

We have stated that "[a]lthough the portion of the principal [*Winstar*] opinion addressed to the sovereign acts doctrine had the support of only four (and as to some portions, only three) justices, this court has treated that opinion as setting forth the core principles underlying the sovereign acts doctrine." *Conner Bros. Const. Co., Inc. v. Geren*, 550 F.3d 1368, 1374 (Fed. Cir. 2008) (citing *Carabetta*, 482 F.3d at 1365; *Yankee Atomic*, 112 F.3d at 1574-77). Relevant to this case, in *Carabetta*, we stated that even if the sovereign acts defense applies, "it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach." 482 F.3d at 1365 (quoting *Winstar*, 518 U.S. at 904). *See also*, *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (stating that contract performance by the government is excused under the sovereign acts defense when "it is objectively impossible"). We reaffirmed this requirement in *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1287 (Fed. Cir. 2008), stating that "performance by the government is

excused under the sovereign acts defense only when the sovereign act renders the government's performance impossible."

The sovereign acts defense involves the following two-part test:

> [F]irst [we ask] whether the sovereign act is properly attributable to the Government as contractor. That is, is the act simply one designed to relieve the Government of its contract duties, or is it a genuinely public and general act that only incidentally falls upon the contract? If the answer is that the act is a genuine public and general act, the second part of the test asks whether that act would otherwise release the Government from liability under ordinary principles of contract law. This second question turns on what is known in contract law as the impossibility (sometimes impracticability) defense.

Stockton East Water Dist. v. United States, 583 F.3d 1344, 1366 (Fed. Cir. 2009) (internal quotations and citations omitted).

Turning to the first question, we agree with the Court of Federal Claims that, in this case, the Bureau's halting of water deliveries in response to the biological assessments of the National Marine Fisheries Service and the Fish and Wildlife Service constituted a genuine public and general act that only incidentally fell upon the contracts at issue. We concluded in *Casitas* that "the [agency's biological] opinion and the decision of the [Bureau] to adopt the [biological] opinion are

sovereign acts." 543 F.3d at 1288. In reaching that conclusion, we rejected the argument that narrowly cabined a public and general sovereign act to only the ESA itself, holding instead that both the agency's issuance of a formal biological opinion and the Bureau's decision to adopt that opinion are governmental actions that are "sovereign in character [so that] the sovereign acts doctrine may be invoked." *Id.* at 1287-88. We therefore find no error in the Court of Federal Claims' ruling that the Bureau's withholding of water releases in 2001 was a public and general act.

However, the Court of Federal Claims failed to undertake the second part of the sovereign acts doctrine analysis, which addresses whether the sovereign act would otherwise release the Government from liability under ordinary principles of contract law. *See Stockton*, 583 F.3d at 1366. This implicates the impossibility of performance component of the sovereign acts defense, which the government must establish. *See id.* at 1367 ("the Government would have to demonstrate that the agencies' actions made it impossible for [the Bureau] to deliver to the Districts the full amount of water provided for in the contracts . . . "); *Seaboard Lumber*, 308 F.3d at 1294 ("[T]he doctrine of impossibility does not require a showing of actual or literal impossibility of performance but only a showing of commercial impracticability.").

In sum, the Court of Federal Claims erred in holding that impossibility of performance is not a factor to be taken into account in considering the sovereign acts doctrine. The Bureau's reduction of water deliveries in

order to comply with the requirements of the ESA was a public and general act. However, in order to escape liability from breach of contract in this case based on the sovereign acts doctrine, the government has the burden of establishing that performance of the various contracts at issue was impossible. The case is remanded to the Court of Federal Claims so that the government may have the opportunity to carry that burden.[14] Once the court determines whether the government is entitled to assert the sovereign acts doctrine in this case, it should proceed to resolve, in the appropriate manner, plaintiffs' breach of contract claims.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the Court of Federal Claims which dismissed plaintiffs' takings and Compact claims based upon the *Takings Decision* and which dismissed plaintiffs' breach of contract claims based upon the *Contract*

---

[14] After receiving the views of the parties, the court should determine whether the impossibility of performance question can be decided based upon the existing record or whether additional evidence should be received. Specifically, the court should determine whether additional evidence should be received in order to give the government the opportunity to show that the Bureau lacked alternatives to halting water deliveries in 2001. The court also should determine whether additional evidence should be received in order to give plaintiffs the opportunity to respond to any such showing by the government. Finally, we do not view any party as having waived any arguments it may wish to make on the question of impossibility of performance.

Decision. The case is remanded to the Court of Federal Claims for further proceedings consistent with this opinion. If the court determines that the government is liable for takings or for breach of contract, or both, it will be necessary for it to address the question of damages. Needless to say, we express no views on whatever issues may arise in the setting of a damages determination.

COSTS

No costs.

VACATED and *REMANDED*.

GAJARSA, *Circuit Judge*, concurring-in-part and concurring-in-judgment.

In my judgment, the majority opinion is incomplete in some respects. Thus, although I generally agree with the opinion of the court, I write separately to clarify my reasoning on certain issues before us.

I.

When this matter was last before this court, I dissented from the panel's decision to certify certain questions to the Oregon Supreme Court. *Klamath Irr. Dist. v. United States*, 532 F.3d 1376, 1378-81 (Fed. Cir. 2008) (Gajarsa, J., dissenting). Nevertheless, we now have the guidance of the Oregon Supreme Court, and it is binding upon us. *See Engel v. CBS, Inc.*, 182 F.3d 124,

125-26 (2d Cir. 1999); *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994).

In its certification order, the panel identified three questions for certification to the Oregon Supreme Court:

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

> of Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?

Klamath Irr. Dist. v. United States, 532 F.3d 1376, 1377-78 (Fed. Cir. 2008). The Oregon Supreme Court unequivocally answered "no" to the first certified question, and "yes" to the third. *Klamath Irr. Dist. v. United States*, 227 P.3d 1145, 1157, 1166 (Or. 2010) ("*Certification Decision*").

The Oregon court's answer to the second question, however, was not definitive. It began by making clear that "[b]enefical use is a necessary but not sufficient condition to acquire a beneficial or equitable property interest in a water right." *Certification Decision*, 227 P.3d at 1160. The Oregon court then adopted the three factors considered in *Nevada v. United States*, 463 U.S. 110 (1983), as probative, as a matter of state law, of whether landowners have an equitable or beneficial property interest in a water right to which the United States holds legal title. *Certification Decision*, 227 P.3d at 1163. Discussing the first factor—whether the water right was appurtenant to the land—the Oregon court found that it was. *Id.* And discussing the second factor—the relationship that exists between the federal government and plaintiffs—the Oregon court found that "the United States holds the water right that it appropriated . . . for the use and benefit of the landowners." *Id.* at 1163-64. I have no objection to the majority's decision on these two factors, and I join it.

The third factor adopted by the Oregon Supreme Court is "the contractual agreements between the United States and plaintiffs." *Id.* at 1165. I agree with the majority that, on remand, the trial court should direct its attention to the third factor set forth by the Oregon court. *Majority Op.* at 27. But I disagree with the majority's assumption that an equitable water right has been created by the first two factors, and that the contractual agreements between plaintiffs and the government can only "have clarified, redefined, or altered" that preexisting property interest. *Id.* at 28; *see also Certification Decision*, 227 P.3d at 1165. Instead, I read the *Certification Decision* as making the creation of such an interest dependent upon the content of the agreements between the various plaintiffs and the government. *See Certification Decision*, 227 P.3d at 1165 ("[W]e are in no position to provide a definitive answer whether . . . the various contractual agreements between the United States and plaintiffs *support* or *defeat* plaintiffs' claim that they have an equitable or beneficial property interest. . . ." (emphasis added)). I therefore believe that the Oregon court was neutral on this factor, but noted its dependency on the terms and conditions of the relevant agreements.

Regardless of how the third factor is analyzed, I agree fully with—and want to emphasize—the majority's statement that the existence of any right must be determined on a case-by-case basis. *Majority Op.* at 27; *see also Certification Decision*, 227 P.3d at 1165-66. The effect of each contract, patent, or other document serving as the basis for plaintiffs' claims must be analyzed

in light of its internal content, as well as the law and regulations in effect at the time. *See Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

II.

In addition to the over-arching issue of equitable or beneficial water rights, plaintiffs Van Brimmer Ditch Company ("Van Brimmer"), Klamath Drainage District, and Klamath Hills District Improvement Company assert specific alternative sources of water rights. Appellants 2007 Br. at 45; *see also* Appellants 2007 Reply Br. at 22-23. Because these claims are squarely before us and their disposition depends only upon conclusions of law, I would reach the claims of these three plaintiffs.

A.

Resolution of the claims asserted by plaintiffs Klamath Drainage District and Klamath Hills District Improvement Company is straight-forward. These plaintiffs assert claims based on water right *permits* with priority dates of 1977 and 1983, respectively. J.A. 43414-17. In their briefing, plaintiffs repeatedly characterize the referenced documents as "water rights *certificates*" granting them vested rights. 2007 Reply Br. at 23 (emphasis added). But these documents are identified as "permits" on their face. And the trial court, in addition to noting other defects associated

with these claims[1], explicitly found that the record contains "no evidence that Oregon has issued a [subsequent] water rights *certificate*." *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504, 539 n.62 (2005) (emphasis added). Absent evidence of subsequent water right *certificates*, the permits provide "only an inchoate right that . . . does not constitute a vested water right." *Fort Vannoy Irr. Dist. v. Water Res. Comm'n*, 188 P.3d 277, 290 (Or. 2008) (en banc). I would therefore hold that plaintiffs Klamath Drainage District and Klamath Hills Improvement Company lack any protected property interest based upon the documents in the record.

B.

Turning to the rights of Van Brimmer, plaintiffs argue that Van Brimmer "does possess a pre-1905 water

---

[1] For example, the trial court noted that the Klamath Drainage District permit is for use during a period of time that appears to be outside the period when delivery was suspended in 2001. *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504, 539 n.62 (2005). The trial court also included the Klamath Drainage District and Klamath Hills District Improvement Company permits in a discussion of the availability of damages, *id.* at 539, an issue which I do not believe the parties have adequately considered. Assuming that plaintiffs do have an equitable or beneficial property interest in the waters to which the United States took title in 1905, plaintiffs' interests are likely junior to the aboriginal fishing rights of *amici* Indian tribes. I also think it very likely that the water flow allocations associated with Indian fishing rights may be largely co-extensive with the flow allocations made by the United States in 2001. In any event, plaintiffs' damages, if such damages exist, may not be calculable—or even ascertainable—prior to resolution of the state-level adjudication of Klamath Basin water rights.

right" and that a 1909 contract between Van Brimmer and the United States "relinquishes only Van Brimmer's riparian rights in lower Klamath Lake, not its appropriative rights." 2007 Reply Br. at 22-23. Assuming, arguendo, that Van Brimmer did obtain a water right with a priority date earlier than that of the United States, I disagree with plaintiffs' interpretation of the 1909 agreement.

We have the ability to interpret the language of the agreement, *San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557, 1564 (Fed. Cir. 1997), and we should do so. The 1909 agreement includes a contractual promise by the United States to deliver water, in consideration for which Van Brimmer

> hereby waives and renounces to the use and benefit of the United States any and all of its riparian rights, in relation to the waters and shores of Lower Klamath Lake appurtenant or incident to the lands now being irrigated by [Van Brimmer] . . . and also waives and renounces any and all claims for damages consequent upon or arising from any change of the course or water level of the said Lower Klamath Lake. . . .

J.A. 4270. I interpret this portion of the contract to constitute a quit-claim of Van Brimmer's "riparian rights," a position with which plaintiffs apparently agree. 2007 Reply Br. at 23. The question is what does the contract mean by "riparian rights"?

Prior to February 24, 1909, the State of Oregon applied both the riparian doctrine and the prior

appropriation doctrine to the use of surface waters. *Fort Vannoy Irr. Dist.*, 188 P.3d at 283-84 (citing Wells A. Hutchins, The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification, 36 Or. L. Rev. 193 (1957)); *cf.* Oregon General Laws, Chapter 216 (1909) (adopting prior appropriation doctrine). Given this historical context, I believe that the 1909 contract's quit-claim of "riparian rights" is ambiguous, and I would remand for additional briefing of this specific issue.

III.

In conclusion, my view differs only by a limited degree with that of the majority. I agree that remand is appropriate, but my guidance would differ on certain aspects of the *Certification Decision*. I therefore concur with the majority in part, and I concur in the judgment.

Filed: March 11, 2010

IN THE SUPREME COURT
OF THE STATE OF OREGON

(Federal CC No. 2007-5115; SC S056275)

KLAMATH IRRIGATION DISTRICT, TULELAKE IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MIDLAND DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, PINE GROVE IRRIGATION DISTRICT, WESTSIDE IMPROVEMENT DISTRICT NO. 4, SHASTA VIEW IRRIGATION DISTRICT, VAN BRIMMER DITCH CO., FRED A. ROBISON, ALBERT J. ROBISON, LONNY E. BALEY, MARK R. TROTMAN, BALEY TROTMAN FARMS, JAMES L. MOORE, CHERYL L. MOORE, DANIEL G. CHIN, DELORIS D. CHIN, WONG POTATOES, INC., MICHAEL J. BYRNE, DANIEL W. BYRNE, and BYRNE BROTHERS,

Plaintiffs,

v.

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

Defendants

and

STATE OF OREGON, by and through the Oregon Water Resources Department,

Intervenor.

En banc

On certified questions from the United States Court of Appeals for the Federal Circuit; certification order dated July 16, 2008; certification accepted January 29, 2009; argued and submitted May 13, 2009

Counsel: William M. Ganong, Klamath Falls, argued the cause for plaintiffs Klamath Irrigation District, Tulelake Irrigation District, Klamath Drainage District, Poe Valley Improvement District, Sunnyside Irrigation District, Klamath Basin Improvement District, Klamath Hills District Improvement Co., Midland District Improvement Co., Malin Irrigation District, Enterprise Irrigation District, Pine Grove Irrigation District, Westside Improvement District No. 4, Shasta View Irrigation District, Van Brimmer Ditch Co., Fred A. Robison, Albert J. Robison, Lonny E. Baley, Mark R. Trotman, Baley Trotman Farms, James L. Moore, Cheryl L. Moore, Daniel G. Chin, Deloris D. Chin, Wong Potatoes, Inc., Michael J. Byrne, Daniel W. Byrne, and Byrne Brothers. Michael H. Simon, of Perkins Coie, Portland, filed the briefs for plaintiffs. With him on the briefs were Julia E. Markley, Nicholle Y. Winters, Nancie G. Marzulla, Roger J. Marzulla, and Paul S. Simmons.

David C. Shilton, United States Department of Justice, Environment and Natural Resources Division, Washington, D.C., filed the briefs and argued the cause for defendant United States of America. With him on the briefs were John C. Cruden, Acting Assistant Attorney General, Katherine J. Barton, and Suzanne Bratis, Assistant United States Attorneys.

Todd D. True, Earthjustice, Seattle, Washington, argued the cause and filed the briefs for defendant Pacific Coast Federation of Fishermen's Associations. With him on the briefs was Stephanie M. Parent.

Stephanie L. Striffler, Senior Assistant Attorney General, Salem, argued the cause and filed the briefs for intervenor. With her on the briefs were John R. Kroger, Attorney General, and Jerome Lidz, Solictor General.

Carl Ullman, Klamath Water Project, Chiloquin, filed the brief for amicus curiae Klamath Tribes.

John T. Bagg, Salem, filed the brief for amicus curiae Natural Resources Defense Council. With him on the brief was John D. Escheverria.

Judges: KISTLER, J. Walters, J., concurred and filed an opinion, in which Balmer and Linder, JJ., joined.

Opinion by: KISTLER

The certified questions are answered.

Opinion

En Banc

KISTLER, J.

The United States Court of Appeals for the Federal Circuit certified three questions to this court, which this court accepted. *Klamath Irrigation District v. United States*, 345 Ore. 638, 202 P.3d 159 (2009). All three questions arise out of a dispute over water rights in the Klamath River basin. Essentially, they ask whether, as a matter of state law, the farmers and irrigation districts that use water from a federal reclamation project have an equitable property interest in

a water right to which the United States holds legal title and whether an equitable property interest in a water right is subject to adjudication in the ongoing Klamath Basin water rights adjudication. In answering those questions, we begin by describing the procedural posture in which the questions arise. We then discuss briefly the common law and statutory context that preceded a 1905 state statute on which the parties' arguments turn. Finally, we answer the certified questions.

I

The Federal Bureau of Reclamation (the Bureau) manages the Klamath Project, which stores and supplies water to farmers, irrigation districts, and federal wildlife refuges in the Klamath River basin. The plaintiffs in the underlying federal litigation are farmers and irrigation districts that use water from the Klamath Project for irrigation and other agricultural purposes. As a result of drought conditions in 2001, the Bureau terminated the delivery of water to plaintiffs that year in order to make water available for three species of endangered fish.[1]

Claiming a property right in the water, plaintiffs brought an action in the United States Court of Federal Claims, alleging that the United States had taken their property in violation of the Fifth Amendment and, alternatively, that the United States had breached its contractual obligation to deliver water to them. The United States asked the federal claims court to abstain from deciding plaintiffs' takings claim until an ongoing

[1] The Bureau was able to make some water (approximately 70,000 acre feet) available in July 2001.

state water rights adjudication determined what, if any, property rights plaintiffs had in the water from the Klamath Project. *Cf. Colorado River Water Conservation Dist. v. United States*, 424 US 800, 819-20, 96 S Ct 1236, 47 L Ed 2d 483 (1976) (upholding a federal district court ruling abstaining from deciding federal government and tribal water rights that were at issue in a state water rights adjudication).

In response to that argument, plaintiffs told the federal court that they were not asserting, in federal court, any right to water that the state water rights adjudication would determine. Plaintiffs took the position that the state water rights adjudication would resolve who has the legal title to use the water from the Klamath River basin but that it would not resolve who has an equitable or beneficial property interest in using the water. Plaintiffs accordingly assumed, for the purposes of their federal takings claim, that the United States holds legal title to the water rights, and they elected to proceed in the federal action solely on the theory that they hold an equitable or beneficial interest in the water rights, which the government took when it refused to deliver water to them in 2001. The Court of Federal Claims proceeded on that theory, *see Klamath Irrigation District v. United States*, 67 Fed Cl 504, 513-14 (2005) (describing plaintiffs' position), and so do we in answering the certified questions.[2]

---

[2] We understand that some or all plaintiffs have asserted in the state water rights adjudication that they hold legal title to the water right and are entitled to have a certificated water right issued to them. In answering the certified questions, we accept plaintiffs' claim as they have narrowed it in the federal proceeding; that is, we assume that the United States holds legal title to

Plaintiffs have argued in the federal action that their equitable property interest in the water arose from two sources: Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat 388, and state water law. The Court of Federal Claims held that neither source of law gave plaintiffs an equitable interest in the water from the Klamath Project. The court initially reasoned that federal law did not define the scope of plaintiffs' water rights. 67 Fed Cl at 518-23.[3] Turning to plaintiffs' state law claims, the court held that, the United States appropriated, pursuant to a 1905 Oregon statute, all the then-unappropriated waters of the Klamath Basin and that, under the terms of the 1905 statute, a person could not obtain any property interest in that water without a formal written release from the United States. *Id.* at 526-27.

At two points in its opinion, the Court of Federal Claims summarized and quoted excerpts of various contracts between the United States and plaintiffs concerning the distribution of water. *Id.* at 510-12, 527-30. The court later explained that plaintiffs' contractual agreements with the United States divided into five basic categories:

> "(i) interests based upon an exchange agreement, in which preexisting water rights were

---

the water and that plaintiffs claim only an equitable or beneficial interest in the water. We express no opinion on plaintiffs' claims that they obtained and hold legal title to water from the Klamath Project. We leave that question for the state water rights adjudication.

[3] We do not describe the Court of Federal Claims' reasoning regarding plaintiffs' claims under section 8 of the Reclamation Act. That issue is beyond the scope of the questions that the Federal Circuit has posed.

> exchanged for an interest in the Project water; (ii) interests deriving from district contracts with the United States or the Bureau, claimed by the districts; (iii) interests deriving from the district contracts with the United States, claimed by individual irrigators as alleged third-party beneficiaries; (iv) interests based upon application for the beneficial use of water filed either by homesteaders on reclaimed lands (Form A), or by homesteaders or other landowners whose property does not involve reclaimed lands (Form B), and the patent deeds issued allegedly in response thereto; and (v) interests based upon alleged water rights permits granted by the State Oregon after the repeal of the 1905 Oregon legislation in 1953."

Id. at 530-31. The court concluded that agreements falling into the first three categories resulted in contractual rights to receive water and that a contractual interest is not a property interest that gives rise to a takings claim under the Fifth Amendment.[4] *Id.* at 531-32. Regarding the fourth and fifth categories, the court concluded that, because the patent deeds and the water rights granted by the state had a later priority date than the United States' water right, the United States had not taken those rights when it denied water to plaintiffs. *Id.* at 538-39.

Having reached those conclusions, the Court of Federal Claims granted summary judgment for the United States on plaintiffs' takings claim. *Id.* at 540.

---

[4] It is not completely clear from the Court of Federal Claims' opinion why, in its view, the agreements in the first three categories gave rise only to contractual rights to receive water.

Later, in a separate opinion, that court granted summary judgment for the United States on plaintiffs' contractual claim, reasoning that the sovereign acts doctrine provided a complete defense to that claim. *Klamath Irrigation District v. United States*, 75 Fed Cl 677, 695 (2007). Having disposed of both claims, the court entered judgment in the United States' favor.

Plaintiffs appealed to the United States Court of Appeals for the Federal Circuit. Regarding plaintiffs' takings claim, the Federal Circuit observed that the "answer to [plaintiffs'] takings question depends upon complex issues of Oregon property law, including the interpretation of Oregon General Laws, Chapter 228, § 2 (1905)." *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376, 1377 (Fed Cir 2008). To assist its resolution of plaintiffs' takings claim, the Federal Circuit certified three state law questions to this court:

> "1. Assuming that Klamath Basin water for the Klamath Reclamation Project 'may be deemed to have been appropriated by the United States' pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
>
> "2. In light of the statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States,

> and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable property interest in the water right acquired by the United States?
>
> "3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?"

Id. at 1377-78. As noted, we accepted the certified questions.

II

Before answering those questions, it is helpful to discuss briefly the common-law and statutory context for the Oregon legislature's enactment of the 1905 statute. *See Stevens v. Czerniak*, 336 Ore. 392, 401, 84 P.3d 140 (2004) (explaining that the context for interpreting a statute's text includes " 'the preexisting common law and the statutory framework within which the law was enacted' " (quoting *Denton and Denton*, 326 Ore. 236, 241, 951 P.2d 693 (1998)).[5] We begin with the Oregon

[5] Because no legislative history of the 1905 act remains, we are left with the text and context of that statute to determine the legislature's intent.

common law regarding the appropriation of water rights. We then turn to the statutory background that both preceded the 1905 Oregon statute and informs our understanding of it.

Before 1905, the Oregon courts had adopted the doctrine of prior appropriation of water rights. *See Fort Vannoy Irrigation v. Water Resources Comm.*, 345 Ore. 56, 64-67, 188 P.3d 277 (2008) (describing the history of that doctrine in Oregon). To encourage the beneficial use of water, Oregon courts recognized before 1905 that a person who puts surface water to beneficial use acquires a right to use that water that takes precedence over subsequent users. *See id.* (same). Before the Oregon legislature codified the doctrine of prior appropriation in 1909, this court had held that a person seeking to establish his or her right to use water had to prove three elements:

> "First, an intent to apply it to some beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal, or other structure; and third, an application of it, within a reasonable time, to some useful industry."

Low v. Rizor, 25 Ore. 551, 557, 37 P 82 (1894).

Customarily, the intent to apply water to a beneficial use was manifested by some form of public notice, and the date of the appropriation related back to the date of the notice, as long as the appropriator both began the diversion of the water and put the water to

beneficial use within a reasonable time. *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 84-86, 45 P 472 (1896); *see Re Rights to Waters of Silvies River*, 115 Ore. 27, 101-02, 237 P 322 (1925) (describing pre-1909-code methods of providing notice). Put differently, although appropriation was perfected "'only when the ditches or canals [we]re completed, the water diverted from its natural stream or channel, and actually used for beneficial purposes,'" the priority date for the water right related back to the date of the notice as long as the diversion and beneficial use were accomplished with reasonable diligence. *Nevada Ditch*, 30 Ore. at 90-91 (quoting Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 167 (1894)).

The scope and extent of the appropriation turned on the appropriator's intent, typically manifested in the notice and ultimately limited by the beneficial use to which the water was put. *See id.* at 98-100 (explaining that the extent of the appropriation with a priority date that related back to the notice turned on the use set out in the notice and did not include other or additional uses). The right to use water, once appropriated, is appurtenant to the land and passes with it, even without an express grant of water rights in the deed conveying the land. *Simmons v. Winters*, 21 Ore. 35, 44, 27 P 7 (1891).

Initially, the court's decisions focused only on individuals who diverted water for use on property that they owned, and the cases frequently turned on factual disputes, such as the diligence with which the owner had constructed a ditch to put the water to beneficial

use. The application of those common-law rules raised potentially more difficult legal issues when a person diverted water for use on land that he or she did not yet own and, in a separate situation, when one person diverted water for another's use.

The first situation arose primarily as a result of federal acts, such as the Homestead Act of 1862, ch. 79, 12 Stat 392, that promised a tract of federal land to persons who entered onto public land and reclaimed it. Typically, those acts required an initial application, an entry onto the land, and proof that the settler had completed certain requirements within a period of years. *E.g.*, *id.* § 2. Until the settler completed those requirements, legal title to the land remained in the United States.

This court first considered what state property rights, if any, a settler had in such land in *Kitcherside v. Myers*, 10 Ore. 21 (1881). In that case, the court explained that the disputed land "is public land of the United States, subject to be taken under the acts of congress as homestead, and which the plaintiff has taken the necessary preliminary steps to secure as a homestead." *Id.* at 26. The defendant, however, had occupied part of the plaintiff's tract, and both parties claimed a right to possess the part of the tract that the defendant occupied. *Id.* at 21-22. Recognizing that legal title to the land lay in the United States (the plaintiff had not yet perfected his claim and received a patent from the government), the court held that "[t]he right of possession of the plaintiff for the purpose of homestead is a valuable right which equity will

protect." *Id.* at 26-27. Accordingly, it upheld the trial court's decree giving the plaintiff the right of possession. *Id.* at 27.

Later, the court held that, when a settler had put water to beneficial use on such land, the water right was appurtenant to the land and passed with it even though the settler had not yet received legal title to the land. *Hindman v. Rizor*, 21 Ore. 112, 117-18, 27 P 13 (1891). In *Hindman*, the plaintiff's predecessors in interest entered onto federal land in 1863, diverted water onto the land, and cultivated it, but did not perfect their title to the land until 1882. *Id.* at 115. The question in *Hindman* was whether the plaintiff's predecessors in interest had obtained a water right before 1882 (the date that they perfected their title to the land) that they could pass to the plaintiff.[6]

In answering that question, this court recognized initially that "[a] settler upon public land has a [possessory] right thereto as against every person except the government, and when such settlement is made with the view of obtaining title, such right is a valuable property right, which the courts will protect and enforce." *Id.* at 116-17 (citing *Kitcherside*). The court also recognized that, "[w]hen such a settler appropriates water for the necessary irrigation of the land occupied by him, it becomes as much a part of his improvements

[6] The question arose because, after 1863 but before 1882, another person had put water to beneficial use on land that he owned and claimed that his appropriation was prior to the plaintiff's, whose water rights he contended did not vest until plaintiff's predecessor in interest perfected title to the land in 1882.

as his buildings or fences, and can be sold and transferred with his possessory right in the same way." *Id.* at 117. The court explained that "[t]he water when appropriated and used for irrigation becomes an incident to the land, and the transfer of the possessory rights thereto carries with it the water unless expressly reserved." *Id.* at 118. Accordingly, the court held that the plaintiff's predecessors in interest had obtained a water right before they obtained title to the property in 1882, which could and did pass to the plaintiff.

The Oregon courts also considered, for the first time in *Nevada Ditch*, whether one person could appropriate water for another's use and, if that were possible, what rights the user had in the water. The court explained that, in many instances, individual landowners located at some distance from streams lacked the resources, even when they acted collectively, to construct ditches to divert water to irrigate their lands. *Id.* at 96. It observed that, "[i]n such cases other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water * * * ." *Id.* However, that arrangement raised fundamental questions, the foremost of which was whether one person could appropriate water for another's use. And if that were possible, questions arose concerning the relationship between the appropriator and the user, the priority date of the water right, and whether the appropriator, the user, or both owned the right.

The court answered two of those questions in *Nevada Ditch*. It held initially that one person could

appropriate water for another's use; that is, "the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator." *Id.* at 97. It also held that, under Oregon law, the persons who used water that another person had appropriated had the same priority date (the date of the notice) as long as the later user put the water to beneficial use within a reasonable time and the use came within the scope of the original plan set out in the appropriator's notice. *Id.* at 98-102.[7]

The court noted but did not decide two aspects of the relationship between the appropriator and the persons who put the water to beneficial use. It noted

---

[7] The court's holding in this regard is expressed in its resolution of the parties' claims. Accordingly, we describe the relevant facts and the court's resolution of the parties' claims briefly. On July 12, 1881, the principals of what became the Nevada Ditch Co. posted a notice of their intent to divert 8,000 miners' inches of water from the Malheur River for agricultural and milling purposes. *Nevada Ditch*, 30 Ore. at 64-65. The notice set out generally the route and terminals of the ditch. *Id.* at 65. Other settlers came as late as 1886 and took subdivided interests in the ditch according to the original plan. *Id.* at 69. Meanwhile, other persons appropriated water from the Malheur River after 1881 but before the later settlers came in 1886 and began putting the water to beneficial use. Although those persons claimed a prior right to the water than the later settlers claiming under Nevada Ditch's appropriation, this court held that the priority date for the later settlers' water rights related back to the date of the 1881 notice. *Id.* at 102. This court also held that the priority date for subsequent extensions of the ditch, which went beyond the original plan, did not relate back to the 1881 notice but had a separate priority date. *Id.* at 100.

initially that "it would seem that he who designed the scheme and made the diversion [the appropriator] was the principal, rather than the user, who applies the result of the former's labor to his beneficial purpose." *Id.* at 97-98.[8] Having noted that that "seem[ed]" to be the relationship, the court did not decide whether that was the relationship. Rather, it observed that, "in whatever capacity the parties to the appropriation may be considered," both were necessary to appropriate the water. *Id.* at 98. The court next raised the question of who, as between the appropriator and the user, "would own the appropriation when it is completed." *Id.* The court again found it unnecessary to decide that issue but observed, in *dicta*, that "[w]e are of the opinion * * * that it is the subject of contract between the person who initiates the appropriation and the user." *Id.* at 98. The court went on to note that, in any event, both the appropriator and the user were necessary to perfect and maintain an appropriation. *Id.*

Later Oregon decisions, issued after 1905, have addressed the respective rights of appropriators and users of a water right when one person appropriates water for another's use. For instance, this court has explained that, in "a mutual water company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of the

---

[8] In making that observation, the court distinguished Oregon law from Colorado law, which regarded the person who diverted the water as the agent for the person who put it to beneficial use. *Id.* at 97.

water the quantity to which each is entitled," the corporation held legal title to the water right and acted as the trustee for the users who have a beneficial property interest in the water right. *Eldredge v. Mill Ditch Co.*, 90 Ore. 590, 596, 177 P 939 (1919); *see Smith v. Enterprise Irrigation Dist.*, 160 Ore. 372, 378-79, 85 P.2d 1021 (1939) (an irrigation district held the water right in trust for the district's members even though the statute creating that irrigation district did not so provide). Later, the court explained that, when a private for-profit corporation, acting pursuant to an 1891 Oregon statute, entered into annual rental agreements with the persons using the water, the corporation, not the users, owned the water right *In re Waters of Walla Walla River*, 141 Ore. 492, 498, 16 P.2d 939 (1933).

That was the state of the Oregon common law of appropriation before 1905, with the later gloss placed on it by *Eldredge, Smith*, and *Walla Walla River.* The common law that preexisted the 1905 statute is, however, not the only context for the 1905 statute. Both the state and the federal government passed various statutes before 1905 that inform our understanding of the 1905 Oregon statute. Those statutes share a similar purpose; they were intended, in one way or another, to get water to the arid lands in Oregon (and the west) so that those lands could be settled and reclaimed. However, those acts differ in their details, and that difference potentially has significance in understanding what the Oregon legislature intended in 1905. Accordingly, we briefly summarize the Oregon act of 1891 and

the Oregon act of 1895 before turning to the federal legislation and Oregon's response to it.

In 1891, Oregon passed a law giving private companies a franchise to construct ditches and provide water for irrigation and related purposes to persons whose lands were adjacent to or within reach of the ditches. Ore. Laws 1891, p 52, § 1. For the company's use of the water to come within the terms of the 1891 act, the company had to supply the water to all persons, adjacent to or within reach of the ditches, "without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply." *Id.*

The act required the private company to post a notice and, within 10 days, to file a copy of the notice with the county clerk identifying the point at which the head-gate would be constructed, the general course and size of the ditch, the number of cubic inches of water to be appropriated, and the number of reservoirs, if any. *Id.* §§ 4-5. The act also required the company to begin constructing the ditch within six months and to "prosecute the [construction of the ditch] without intermission [except for certain contingencies] until the same be completed." *Id.* § 9. The act did not expressly make the extent of the appropriation turn on the amount of water put to beneficial use. Rather, it provided that "the actual capacity of [the] ditch or canal or flume, when completed, shall determine the extent of the appropriation" and that, upon compliance with the terms of the act, "the right to the use of the water appropriated shall relate back to the date of posting

said notice." *Id.* Finally, the act provided that the right to use the water, once appropriated, may be "lost by abandonment" if the corporation constructing the ditch "shall fail or neglect to use the same for the period of one year at any time." *Id.* § 22.

This court did not have occasion before 1905 to interpret the rights arising under that act, at least as they bear on the issues in this case. In 1924, this court read the 1891 act in light of the provisions of the 1909 statute setting out Oregon's water code; it suggested that a beneficial use was necessary to perfect an appropriation of water under the 1891 act and, relying on *dicta* from *Eldredge*, that the persons who used the water were the true owners of the water right. *See Re Water Rights of Hood River*, 114 Ore. 112, 134-39, 227 P. 1065 (1924) (quoting *dicta* from *Eldredge* for the proposition that " 'even in cases of public service corporations organized for profit and selling water to the general public, * * * the water and ditch rights really belong to the individual appropriator' ").

In 1933, this court held that the *dicta* in *Eldredge* did not apply to corporations acting pursuant to the 1891 act. *Walla Walla River*, 141 Ore. at 498. The court concluded that, when a public company complies with the provisions of the 1891 act, "it, and not the owner of the land supplied, acquires the right to the use of the water." *Id.* at 497. It explained that " '[t]he water is appurtenant to, but not inseparable from the land,' " *id.* (quoting *In re Waters of Deschutes River*, 134 Ore. 623, 657, 286 P. 563, 294 P. 1049 (1930)), and that, when the water users took their water under annual rental

contracts, "those rental contracts limited their rights to the extent of water and time designated in the contract," *id.* at 499.[9]

In 1895, the Oregon legislature took a different approach. It authorized the formation of irrigation districts that would acquire water rights and hold them in trust for their members. Ore. Laws 1895, p 13; *see Little Walla Walla Irrigation Dist. v. Preston*, 46 Ore. 5, 78 P 982 (1904) (describing the source and terms of the 1895 act). Specifically, the 1895 act authorized persons owning land susceptible to irrigation to petition for the creation of an irrigation district. *Id.* § 1, 2. In addition to providing procedural protections for the members of the district, the act authorized the board of directors of an irrigation district "to acquire, either by purchase or condemnation (or other legal means), all lands and waters and water rights, and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal or canals and works." *Id.* §§ 3, 12. Further, it provided that "[t]he legal title to all property acquired under the provisions of this act shall * * * vest in such irrigation district, and shall be held in trust for and is hereby dedicated and set apart to

---

[9] In *Walla Walla River*, one water company that had organized under the 1891 act appropriated water in 1903, which it supplied to water users pursuant to annual rental contracts. 141 Ore. at 495. Later, those same users began to take water from a second water company. *Id.* at 496. The second company contended that, because the water was appurtenant to the land, the users (and it derivatively) could claim an appropriation date of 1903. As explained above, this court disagreed, holding that the first company, not the users, held the entire water right.

the uses and purposes set forth in this act." *Id.* § 13. The terms of the act thus provided that, although the irrigation district would hold legal title to the water that it appropriated, it would hold that title in trust for its members. *Cf. Fort Vannoy*, 345 Ore. at 85-86 (construing the modern counterpart to the 1895 act).

Oregon was not alone in seeking to bring water to the arid west so that the land could be reclaimed and put to beneficial use. The Supreme Court recounted the federal government's efforts in that regard in *California v. United States*, 438 US 645, 656-63, 98 S Ct 2985, 57 L Ed 2d 1018 (1978). It explained that, after Congress passed the Homestead Act of 1862, 12 Stat 392, to open up the public domain generally, Congress "took its first step toward encouraging the reclamation and settlement of the public desert lands in the West" by passing the Desert Land Act of 1877. *California*, 438 US at 657. That act made 640 acres of arid desert lands available to persons who, after filing a declaration and paying 25 cents an acre, reclaimed the land "by conducting water upon the same." Desert Land Act of 1877, ch. 107, 19 Stat 377.[10]

---

[10] The Desert Land Act is notable primarily because it confirmed that

> "all non-navigable waters then a part of the [federal] public domain became *publici juris*, subject to the plenary control of the designated states * * * the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

California Oregon Power Co. v. Beaver Portland Cement Co., 295 US 142, 163-64, 55 S Ct 725, 79 L Ed 1356 (1935).

The persons who acquired public land pursuant to the Homestead and Desert Land Acts typically "chose those lands which were the nearest or most accessible to the streams," leaving more remote and less accessible lands uncultivated. Clesson S. Kinney, 3 *A Treatise on the Law of Irrigation and Water Rights* § 1314 (2d ed. 1912). Congress sought to promote cultivation of those more remote lands by enacting the Carey Act in 1894. Carey Act, ch 301, § 4, 28 Stat 422. That act authorized the Secretary of the Interior to "donate, grant, and patent to [certain] State[s] * * * such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, [and] occupied." *Id.* The Carey Act left it to the states either to construct themselves or to secure construction, through agreements with private contractors, of the canals and irrigation works necessary to reclaim the more remote tracts of desert land. Kinney, 3 *A Treatise on the Law of Irrigation and Water Rights* § 1323.[11]

Private efforts at creating large-scale reclamation works in the arid West did not prove profitable, and the

---

[11] To take advantage of the Carey Act, Oregon passed a law in 1901 accepting the conditions that Congress had placed on the grant of desert lands to the states. Ore. Laws 1901, p 378, § 1. The Oregon legislature authorized the State Land Board to enter into contracts with private companies to construct ditches, if the companies agreed to meet certain conditions. *Id.* §§ 2-5. The act also provided that "[t]he right to the use of water for irrigation of any tract or subdivision of lands reclaimed under the provisions of this act shall become and perpetually remain appurtenant thereto," subject to annual maintenance charges and "proper and reasonable rules and regulations adopted for the irrigation system under and by which the said land has been reclaimed." *Id.* § 8.

Carey Act did little to advance the reclamation of those lands that Congress had sought to encourage. *See* 2 *Water and Water Rights*, § 41.02 at 41-7 (3d ed 2009). In his message to Congress on December 3, 1901, President Theodore Roosevelt noted that problem. He told Congress that there "remain * * * vast areas of public land which can be made available for homestead settlement, but only by reservoirs and mainline canals, impracticable for private enterprise." Kinney, 3 *A Treatise on the Law of Irrigation and Water Rights* § 1238 at 2239 (quoting President Theodore Roosevelt, Message to Congress (Dec 3, 1901)). The President proposed that the United States build the large-scale irrigation works necessary for the federal government to achieve its object of "dispos[ing] of the land to settlers who will build homes upon it." *Id.*

> Specifically, the President proposed that
>
> "These irrigation works should be built by the Government for actual settlers, and the cost of construction should, so far as possible, be repaid by the land reclaimed. The distribution of the water, the divisions of the streams among irrigators, should be left to the settlers themselves, in conformity with the state laws, and without interference with those laws or with vested rights. The policy of the National Government should be to aid irrigation in the several States and Territories in such a manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation."

Id. Within six months after President Roosevelt's speech to Congress, the Congress passed and the President signed into law the Reclamation Act of 1902. *Id.* at 2238.

The Reclamation Act created a fund derived from the proceeds of the sale of public lands to be used for the construction of "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the [western states and territories]." The Reclamation Act of 1902, ch 1093, 32 Stat 388 § 1. It authorized the Secretary of the Interior, upon determining that an irrigation contract was practicable, to let contracts for the construction of irrigation works and to give public notice of the "lands irrigable under such project, [the] limit of area per entry," and "the charges which shall be made per acre upon the said entries, * * * and the number of annual installments, not exceeding ten, in which such charges shall be paid." *Id.* § 4. The Act provided that the charges shall be determined "with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably." *Id.*

The Act provided that persons entering onto the land

> "shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the

> Government the charges apportioned against such tract as provided [above]."

Id. § 5. The Act also provided for the sale of water rights to privately owned land within the reclamation project and stated that "no such right shall permanently attach [to the privately owned land] until all payments therefore be made." *Id.* Finally, the Act provided that "a failure to make any two [annual] payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act." *Id.*

The Act contemplated that, when the "major portion of the lands irrigated from the waters of any works herein provided for" has been paid, then the "management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby." *Id.* § 6. The Act specified, however, that "title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." *Id.* Finally, the Act reserved state control over water rights with one proviso. *Id.* § 8. Specifically, section 8 of the Act provided:

> "That nothing in this Act shall be construed as affecting or intending 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 * * * : *Provided*, That the 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 limitation of the right."

The United States Supreme Court has explained that, in enacting the Reclamation Act, Congress intended that "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *California*, 438 US at 665. The Court also explained that Congress intended that, "once the waters were released from the Dam [or project], their distribution to individual landowners would again be controlled by state law." *Id.* at 667. The Court observed, however, that

> "Congress did not intend to relinquish total control of the actual distribution of the reclamation water to the States. Congress provided in § 8 itself that the water right must be appurtenant to the land irrigated and governed by beneficial use, and in § 5 Congress forbade the sale of reclamation water to tracts of land of more than 160 acres."

Id. at 668 n 21.[12]

---

[12] Since 1902, Congress has amended the Reclamation Act on numerous occasions. We describe the Reclamation Act as originally enacted because Congress had not amended it substantively before the Oregon legislature enacted the 1905 statute that gives rise to the certified questions.

In response to the Reclamation Act, the 1905 Oregon legislature passed an act that, among other things, created a procedure for the United States to appropriate water for the irrigation works that the Reclamation Act authorized. Ore. Laws 1905, ch 228. Section 2 of the 1905 act provided:

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

Ore. Laws, ch 228, § 2. The state act also authorized the state engineer to gather the necessary data to determine any prior rights to use water from a stream system on which the United States planned to construct irrigation works; it authorized the Oregon Attorney General to file a suit in state court, on the Secretary of the Interior's request, to determine and declare those rights; and it specified that any decree resulting from such a suit shall "declare, as to the water right adjudged to each party * * * the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant." Ore. Laws, ch 228, §§ 3-5.

On February 28, 1905, a representative of the United States posted a notice claiming "all the unappropriated waters of the Klamath River." The notice stated that "[t]he [w]ater is to be used for irrigation, domestic, power, mechanical and other beneficial uses in and upon lands situated in Klamath Oregon and Modoc California counties." On May 17, 1905, the Bureau filed the following notice with the state engineer:

> "Notice is hereby given that the United States intends to utilize * * * [a]ll of the waters of the Klamath Basin in Oregon * * * .
>
> "It is the intention of the United States to completely utilize all the waters of the Klamath Basin in Oregon, and to this end this notice includes all lakes, springs, streams, marshes and all other available waters lying or flowing therein.

> "That the United States intends to use the above described waters in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat, 388), known as the Reclamation Act."

Klamath Irrigation Dist., 67 Fed Cl at 524 (quoting the notice filed with the state engineer).[13] With that background in mind, we turn to the Federal Circuit's questions.

III

A

The Federal Circuit's first question asks:

> "Assuming that Klamath Basin water for the Klamath Reclamation Project 'may be deemed to have been appropriated by the United States' pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?"

In answering that question, we assume that the United States appropriated water rights pursuant to the 1905

[13] The Court of Federal Claims noted that the United States also posted a notice of appropriation for the Lost River system but did not set out the terms of that notice. 67 Fed Cl at 524.

statute[14] and that it acquired and presently holds legal title to use the water for the purposes stated in its notice. The question that the Federal Circuit has asked is: In providing that the United States could appropriate water rights pursuant to the 1905 statute, did the Oregon legislature intend to preclude persons putting the water to beneficial use from acquiring a beneficial or equitable property interest in the water right? The answer to that question is "no."

The first sentence in section 2 of the 1905 statute provides that, if the United States files a notice and meets two other conditions, all the unappropriated waters described in the notice "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." Ore. Laws 1905, ch 228, § 2. The quoted phrase provides two potential grounds for concluding that the legislature intended to preclude plaintiffs from acquiring an equitable right. First, section 2 provides that the water described in the United States' notice is not subject to further appropriation. Plaintiffs,

---

[14] The parties disagree whether the United States appropriated the water rights solely by complying with the three conditions specified in the 1905 statute or whether the water also had to be put to beneficial use to perfect the appropriation. The court's first question, however, asks us to assume that the United States appropriated the water rights. The mechanism by which it accomplished that appropriation may be important to answer whether, as the state contends, both the United States and the landowners own legal title to the water right jointly. That issue, however, is not before us, and we can answer the questions that the Federal Circuit has asked us without resolving it. Accordingly, we leave that issue for another day.

however, are not seeking to appropriate the water right that the United States holds. Rather, they contend in this proceeding only that, because the United States holds the water right in trust for them, they have a derivative interest in that right.

Second, section 2 designates the United States as the "appropriator" of the water right. Potentially, designating the United States as the "appropriator" of a water right could express an intent to preclude others from acquiring an equitable property interest in that right. Because appropriation was a term of art, we look to the way that the Oregon courts and legislature had used that term before 1905 in order to understand the significance of that designation. As noted, this court had held in *Nevada Ditch* that one person may appropriate water for another's use and that a later user who puts the water to beneficial use within a reasonable period of time pursuant to the appropriator's original plan takes the same priority date as the appropriator. As also noted, this court declined to decide in *Nevada Ditch*, as between the appropriator and the user, who owned the water right. It follows from *Nevada Ditch* that, in designating the United States as the appropriator of the water right, the legislature did not necessarily intend to signify that either the United States or the users owned the water rights. Rather, under *Nevada Ditch*, the meaning of that term was open at the time that the 1905 legislature used it. At a minimum, we find nothing in the legislature's use of that term that expresses an intent to preclude landowners and irrigation districts from acquiring a beneficial or equitable

property interest in water rights that the United States has appropriated.

The different ways in which the 1891 and 1895 Oregon statutes describe the relationship between an appropriator and a user reinforce that conclusion. Under the 1895 statute, an irrigation district acquires and holds legal title to a water right but it holds that right in trust for the district's members who put the water to beneficial use. Ore. Laws 1885, p 13. Under the 1891 statute, at least as this court later interpreted it, a for-profit company that enters into annual rental agreements with its users owns the entire water right. *See Walla Walla River*, 141 Ore. at 498. And the 1901 statute implementing the Carey Act provided that "[t]he right to the use of water for irrigation of any tract or subdivision of lands reclaimed under the provisions of this act shall become and perpetually remain appurtenant thereto." Ore. Laws 1901, p 382, § 8. Given the various ways in which an appropriator can hold, share, or relinquish a property interest in the water it appropriates, we cannot say that, merely by providing that the United States may appropriate water rights pursuant to the 1905 act, the Oregon legislature intended to preclude landowners and irrigation districts from obtaining a beneficial or equitable property interest in water that the United States has appropriated.

A final contextual source bears on the issue. The Oregon legislature enacted the 1905 statute in response to Congress' passage of the Reclamation Act. It follows that the Reclamation Act, as originally passed, sheds light on the terms on which the Oregon

legislature understood that the United States would hold the water right that the 1905 act authorized the United States to appropriate.[15] As noted, the Reclamation Act authorized the construction of federal irrigation works "for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands" in the Western states and territories. 32 Stat 388 § 1. Congress wanted to make water available to settlers who entered onto public land, and it provided for the issuance of patents for the land if, within a specified period of time, the settlers entering the land reclaimed "at least one-half of the total irrigable area of his [or her] entry for agricultural purposes" and paid within 10 years a proportionate share of the projected cost of the irrigation works. *Id.* § 5. Congress also provided for sale of water to privately owned land within the scope of the project, provided that the tracts did not exceed 160 acres and that the landowners repaid the proportionate share of the cost of constructing the irrigation works. *Id.*

In passing the Reclamation Act, Congress sought to make water rights available for the benefit of those persons who would use the water to reclaim the land. *See Ickes v. Fox*, 300 US 82, 95, 57 S Ct 412, 81 L Ed 525 (1937) ("Appropriation was made not for the use of the government, but, under the Reclamation Act, for

---

[15] The Federal Circuit's questions ask us to interpret state law. We cannot, however, interpret the meaning of the 1905 Oregon statute without considering the terms and purposes of the Reclamation Act that the Oregon statute was intended to facilitate.

the use of the land owners * * * .”). Reading the 1905 Oregon statute in light of the Reclamation Act that the Oregon legislature sought to facilitate, we conclude that, in authorizing the United States to appropriate water for the construction of irrigation works, the Oregon legislature did not intend to give the United States carte blanche to use the water rights it appropriated in whatever way it chose. Rather, the Oregon legislature authorized the United States to appropriate state water rights pursuant to the 1905 act for the benefit of those persons who the Reclamation Act contemplated would put water to beneficial use. That context is directly at odds with the notion that, in providing for the United States to appropriate water rights, the legislature intended to preclude landowners and irrigation districts from acquiring a beneficial or equitable property interest in the water right.[16]

The United States advances two reasons for reaching a different conclusion. First, it relies on *In re Waters of Umatilla River*, 88 Ore. 376, 168 P. 922, 172 P 97 (1918). In that case, the Western Land and Irrigation

---

[16] Plaintiffs ask us to resolve a related but separate question; they ask us to decide whether the water right that the United States appropriated is limited to the uses specified in the notice that it filed in 1905. The scope of the right that the United States appropriated is separate from the question whether plaintiffs have an equitable property interest in that right (whatever its scope). As we understand the Federal Circuit’s questions, they ask us to address the latter question, not the former. The scope of the water right that the United States appropriated in 1905 is a question for the state water rights adjudication, as well as the question of who holds legal title to that right. We express no opinion on those questions.

Company's predecessor in interest had appropriated water pursuant to the 1891 Oregon statute at three points in time: in 1891, 1903, and 1907. *Id.* at 381-85. The initial question in that case was whether Western's predecessor in interest had abandoned the water that it appropriated in 1891. *Id.* at 381-82. This court held that it had. *Id.* at 382-83. The court then noted that the United States had appropriated water pursuant to the 1905 Oregon act. *Id.* at 384-85. It observed that the United States' compliance with the procedures set out in that statute "vested the United States with title" to the water specified in its notice and that the water rights that the United States held had a priority date of September 6, 1905. *Id.* at 385. It followed, the court held, that Western's 1903 appropriation took priority over the United States' 1905 appropriation, which in turn took priority over Western's 1907 appropriation. *Id.* at 385-86.

The decision in *Umatilla River* does not advance the United States' position that the Oregon legislature intended to preclude landowners and irrigation districts from acquiring a beneficial or equitable property interest in water rights that the United States appropriated. In determining the priority of the United States' water right in *Umatilla River*, the court neither considered nor addressed the relationship between the United States and the landowners who took water under that appropriation. Rather, the question before the court was the relative priority of competing appropriators (Western's predecessor in interest and the United

States). *Umatilla River* has no bearing on our answer to the Federal Circuit's first question.

The United States also relies on the second sentence of section 2 of the 1905 act, which states:

> "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 * * * ."

Ore. Laws 1905, ch 228, § 2. The United States reasons that this sentence "spell[s] out the situations where 'other parties' may obtain rights to waters identified by the United States in its notice." In the United States' view, plaintiffs' present litigation position demonstrates that their interests are adverse to the United States. It follows, the United States concludes, that, without a formal written release, plaintiffs have no claim to any beneficial or equitable property interest in the water that the United States appropriated pursuant to the 1905 statute.

The United States' argument rests on the assumption that, when the Oregon legislature enacted the 1905 statute, it would have understood that the landowners and irrigation districts that took water under the United States' appropriation would have an "adverse claim" to the water. That is not how that phrase was commonly used. As this court used those terms before 1905 in water rights disputes, "adverse claim"

referred to one of two situations. The court used those terms to refer to a claim brought by a person who contended that he or she had a right to use water by adverse possession. *See, e.g.*, *Beers v. Sharpe*, 44 Ore. 386, 394, 75 P 717 (1904); *Mattis v. Hosmer*, 37 Ore. 523, 532, 62 P. 17, 62 P 632 (1900); *Bowman v. Bowman*, 35 Ore. 279, 283, 57 P 546 (1899); *Huston v. Bybee*, 17 Ore. 140, 147-48, 20 P 51 (1888) (all illustrating proposition). The court also used those terms to refer to a claim brought by another appropriator who contended that his or her water right had an earlier priority date. *See, e.g.*, *Brown v. Baker*, 39 Ore. 66, 69, 65 P. 799, 66 P 193 (1901); *Oviatt v. Big Four Mining Co.*, 39 Ore. 118, 126, 65 P 811 (1901); *Carson v. Gentner*, 33 Ore. 512, 518, 52 P. 506 (1898) (illustrating that usage).

Conversely, the court had not described the relationship between an appropriator and those persons who took water under that appropriation as either "adverse" or as a "claim." *See Nevada Ditch*, 30 Ore. at 98. Rather, the court had described the relationship as one of mutual cooperation. *Id.* It held out the possibility that the user was the agent for the appropriator, but found it unnecessary to decide that point because the parties' mutual efforts were necessary to effectuate a perfected appropriation under the common law. *Id.* We need not decide whether the legislature used the phrase "adverse claim" in the 1905 statute to refer to an adverse possession claim or the claim of an adverse appropriator to conclude that the 1905 legislature did not use that phrase as the United States contends – to refer to the United States' relationship with the

persons who took water under its appropriation. In sum, we find nothing in the text and context of the 1905 statute that would preclude plaintiffs from acquiring a beneficial or equitable property interest in the water right appropriated by the United States.

B

The Federal Circuit's second question asks:

> "In light of the [1905] statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable property interest in the water right acquired by the United States?"

As we understand the second question, it asks whether beneficial use alone is sufficient to acquire a beneficial or equitable property interest in a water right to which another person holds legal title. The answer to that question, as we have restated it, is "no." Beneficial use is a necessary but not a sufficient condition to acquire a beneficial or equitable property interest in a water right. In explaining our answer, we first address an assumption that underlies the court's question – whether, under Oregon law, one person can hold a beneficial or equitable property interest in a water right to which another person holds legal title. We then explain why

beneficial use alone is not sufficient. Finally, we explain what, as a matter of Oregon law, is required to establish a beneficial or equitable property interest in a water right.[17]

1

Oregon has recognized since 1862 that one person may hold legal title to property and that another person may hold equitable title to that property. *See Smith v. Ingles*, 2 Ore. 43, 44-45 (1862) (when defendant caused property to be conveyed to his sons for defendant's use and benefit, the sons held legal title to the property and defendant held equitable title). That rule applies equally to water rights. *Eldredge*, 90 Ore. at 594 (recognizing that one person could hold legal title to a water right while another holds equitable title). As this court explained in *Fort Vannoy*, "[t]he existence of [a] trust relationship [between an irrigation district and its members] bifurcates the ownership interest in each certificated water right." 345 Ore. at 86. "The district holds legal title to the water right as trustee, and the members hold equitable title as the beneficiaries." *Id.; see also id.* at 87 (referring to an irrigation district

[17] In answering the Federal Circuit's second question, we address only whether plaintiffs acquired a beneficial or equitable property interest under state law. The question whether that state property interest, if acquired, gives rise to a federal takings claim is a matter of federal law that goes beyond the scope of the court's questions, and we do not address it.

member's "equitable ownership interest" in the water right).[18]

In Oregon, equitable property interests in water rights have not derived solely from formal trust agreements. For instance, this court recognized that beneficial users who transferred appropriated water rights to a corporation and took shares in the corporation in return held an equitable ownership interest in the water right. *Silvies River*, 115 Ore. at 102-03. In reaching that conclusion, the court explained that the corporation was formed "for the purpose of enabling the various owners of land to have a system that would serve all of them"; that is, even though the corporation held legal title to the water right, it held the water right for the use and benefit of its members. *Id.* at 98-99. That was sufficient for the court to conclude that the shareholders held an equitable property interest in the water right.[19] As the court explained, "[a] court of equity

---

[18] In *Fort Vannoy*, a statute provided that the irrigation district held the water right in trust for its members. *See* 345 Ore. at 85 (citing ORS 545.239). The court held, however, that the common law established that, as a consequence of that trust relationship, the district had legal title to the right while the members held equitable title. *See id.* at 86 (looking to common law to determine the effect of the trust relationship).

[19] The specific issue in *Silvies River* was whether the priority date for the corporation's water right related back to a notice of appropriation signed by the shareholders but not the corporation. 115 Ore. at 98-99. The court concluded that, because the corporation held the right for the use and benefit of its members, the signatures of the shareholders were sufficient. *Id.* at 102.

will look beyond the form of the proceeding and if possible consider the substance of the right." *Id.* at 103.

This court has reached the same conclusion without regard to whether the shareholders in a corporation appropriated a water right and transferred that right to the corporation or whether the corporation appropriated the water right and held it for the use and benefit of its shareholders. *See In re Water Rights of Willow Creek*, 119 Ore. 155, 195, 199, 236 P. 487, 237 P 682 (1925) (corporation held appropriated water right in trust for the benefit of its shareholders who put the water to beneficial use); *Eldredge*, 90 Ore. at 596 (explaining that a mutual water company organized for the purpose of transmitting and delivering water appropriated by its shareholders held the water right as a trustee for the use and benefit of its shareholders). That is, even though the shareholders owned the stock and the corporation owned the water right, the court, sitting in equity, "look[ed] beyond" that formal arrangement and, considering its substance, ruled that the persons who put the water to beneficial use held an equitable property interest in the water right.

We draw two conclusions from those cases. First, the premise of the Federal Circuit's question is well-founded. Oregon has recognized and continues to recognize that persons who put water to beneficial use can acquire an equitable or beneficial property interest in a water right to which someone else holds legal title. Second, in determining when such an equitable property interest in a water right exists, this court looks beyond form and focuses on substance. The court has

sought to determine from the structure of a particular relationship and the agreements among the parties to that relationship whether the party that holds legal title to the right does so for the use and benefit of the persons who put the water to beneficial use.

2

With that background in mind, we return to the Federal Circuit's second question: Is beneficial use alone sufficient to create a beneficial or equitable property interest in a water right to which another person holds legal title? We answered that question "no" because this court has held that beneficial use of water does not always give the user a property interest in a water right that another person appropriated. *Walla Walla River*, 141 Ore. at 497-98. It follows that we cannot say, without qualification, that beneficial use alone is sufficient under Oregon law to obtain an equitable property interest in a water right. Two other factors bear on the analysis. As discussed above, in deciding the respective property interests of the appropriator and the user of a water right, this court has looked not only to beneficial use but also to the relationship between the parties, as well as any contractual agreements between them. *See id.* at 497-98 (looking to the nature of the relationship and the contractual agreements); *Silvies River*, 115 Ore. at 98-102 (looking at the nature of the relationship); *Eldredge*, 90 Ore. at 596 (looking to the nature of the relationship); *Nevada Ditch*, 30 Ore. at 98 (holding out the possibility that contractual agreements matter).

The United States Supreme Court considered similar factors in deciding that, even though the United States held legal title to the water right for the Newlands Project (a Reclamation Act project in Nevada), the landowners who had put the water to beneficial use held a beneficial or equitable property interest in the water right. *Nevada v. United States*, 463 US 110, 122-26, 103 S. Ct. 2906, 77 L.Ed.2d 509 and n 9, 463 U.S. 110, 103 S Ct 2906, 77 L Ed 2d 509 (1983). In that case, landowners had settled on land within the Newlands Project and had entered into contractual agreements with the United States for water. *Id.* at 126 n 9. The Court explained that five different forms of contracts had been used since the creation of the Newlands Project. *Id.* "Two of the forms provide[d] for an exchange of a vested water right by the landowner in return for the right to use Project water." *Id.* The other three forms of contracts provided a water right in an amount that may be beneficially applied to a specified tract of land. *Id.* The Court noted that, of the three latter forms, the one most commonly used was an application for a permanent water right for the irrigation of the settler's land. *Id.*

In 1913, the United States filed suit in federal district court, the *Orr Ditch* suit, to adjudicate the water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the Newlands Project. *Id.* at 113. Neither the landowners nor the tribe appeared in that suit. *Id.* at 121. As a result of that suit, the United States acquired title to the water right for both reclamation and reservation use in 1944.

In 1973, the United States sought to reallocate the water decreed to it. *Id.* at 121. More specifically, the United States sought to divert water that it had acquired for reclamation use to another federal use and argued that, because it owned the water right, it was free to do so. *Id.* The Court reached a different conclusion. It explained that, even though the United States held legal title to the water right, it held the water right in trust for the landowners. As the Court explained,

> "Once these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land."

Id. at 126; *see also id.* at 127 (explaining that the United States, in arguing that it could reallocate the water to a different use, had overlooked "the obligations that necessarily devolve upon it from having mere title to water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere").

In determining that the landowners had an equitable or beneficial property interest in the water right to which the United States held legal title, the Court considered three factors: (1) under state law, the water right became appurtenant to the land once it was put

to beneficial use;[20] (2) the United States' relationship with the landowners under the Reclamation Act; and (3) the contracts between the United States and the landowners. *Id.* at 121-26 and n 9. The Court's reasoning in *Nevada* does not bind us in deciding, as a matter of state law, whether one party holds a water right in trust for another. However, we find its analysis both persuasive and consistent with Oregon law. We turn to a consideration of those factors.

3

The first factor is whether the water right was appurtenant to the land. Under Oregon law, the water right became appurtenant to the land once the persons taking the water from the Klamath Project applied it to their land and put it to beneficial use. That is true even if those persons had not yet perfected title to the land. As the court explained in *Hindman*, settlers who entered onto public land (but who had not yet perfected title to the land) acquired "a valuable property right [in the land] which the courts will protect and enforce," and the water they put to beneficial use became appurtenant to the land. 21 Ore. at 116-17. The court was

[20] The Court explained that, under Nevada law, beneficial use was necessary to perfect appropriation and that the right became appurtenant to the land on which it was used. 463 US at 126. As discussed above, the Federal Circuit's questions assume that the United States appropriated the water right, and we need not decide, in answering the court's questions, whether, under Oregon law, beneficial use was necessary to perfect the United States' appropriation of water rights under the 1905 act. *See* note 14 above (reserving that issue).

careful to note in *Hindman* that, until the settlers perfected title to the land, the possessory right in the land that the settler acquired was valid against every person except the government. *Id.* at 117. That reservation, however, merely recognized that, if the United States cancelled the entry because the settler failed to comply with its terms, the settler could lose his or her right to the land and, along with it, the appurtenant water right. This court did not suggest that the settler lacked a valuable property right in the water that the state courts would not recognize and protect.[21]

The second factor requires us to determine the relationship that exists between the federal government and plaintiffs. In the United States' view, it stands in the same relationship to the water users as the private for-profit company did in *Walla Walla River*; that is, the United States contends that it owns the entire water right and that plaintiffs have only a contractual right to receive the water. Plaintiffs and the State of Oregon argue that, although the United States holds title to the water right, it does so for the use and benefit of the landowners who put the water right to beneficial use.

---

[21] *Hindman* discusses publicly held land that a settler reclaims and acquires. Section 5 of the Reclamation Act also addresses privately held land. It provides that "no such right [a right to the use of water] shall permanently attach [to the privately held land] until all payments therefore are made." 32 Stat 389, § 5. Section 5 thus recognizes that, even though water put to beneficial use on privately owned land will become appurtenant to the land, the right does not attach permanently until the landowner pays his or her proportionate share of the cost of constructing the irrigation works.

In their view, the relationship between the United States and plaintiffs is closer to that of the corporation and its shareholders in *Silvies River* or *Eldredge*.

Neither party's analogy is perfect. The United States is not a corporate entity (either a for-profit corporation as in *Walla Walla River* or a mutual water company as in *Eldredge*), and plaintiffs are not its shareholders. However, the Court's decision in *Nevada v. United States* persuades us that the United States holds the water right that it appropriated pursuant to the 1905 Oregon act for the use and benefit of the landowners. In explaining that the United States held the water right it acquired in the *Orr Ditch* suit in trust for the landowners in the Newlands Project, the Court explained that "the primary purpose of the Government in bringing the *Orr Ditch* suit in 1913 [and obtaining title to the water rights in the decree] was to secure water rights for the irrigation of land that would be contained in the Newlands Project, and that [in doing so] the Government was acting under the aegis of the Reclamation Act of 1902." 463 US at 121. In support of that statement, the Court noted that, in filing the *Orr Ditch* suit, the United States had alleged that the "litigation was designed to quiet title to the Government's right to the amount of water necessary to irrigate the lands set aside for the [Newlands] Project," and that the decree entered in that suit gave the United States title to the water " 'for the irrigation of 232,800 acres of land on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the

project and for domestic and other purposes.'" *Id.* at 121 n 8 (quoting decree).

That persuaded the Court that, in obtaining title to the water under the aegis of the Reclamation Act, the United States was not acting for its own benefit but for the benefit of the persons who put the water to beneficial use reclaiming the land. As the Court explained in *Ickes*, 300 US at 95, and reiterated in *Nevada*, 463 US at 123, "[a]ppropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners." The same conclusion applies equally here. In appropriating water pursuant to the 1905 Oregon act, the United States was acting under the aegis of the Reclamation Act, and the notices that it filed in Oregon stated that it was appropriating the water for virtually the same uses that the United States stated that it was acquiring title to the water in *Nevada.* In appropriating water under the 1905 act and pursuant to the Reclamation Act, the United States was not acting as a for-profit company, as in *Walla Walla River*, but was instead appropriating water for the use and benefit of landowners who would put it to beneficial use reclaiming the land.[22]

The United States argues that *Nevada, Ickes*, and a third case, *Nebraska v. Wyoming*, 325 US 589, 65 S Ct

[22] To be sure, Congress required persons taking water from a reclamation project to repay a proportionate share of the costs of constructing the irrigation works. But the same was true in both *Ickes* and *Nevada.* The payments were not intended for the United States to turn a profit but to make the reclamation program self-funding.

1332, 66 S. Ct. 1, 89 L Ed 1815 (1945), are all distinguishable on their facts. We agree that *Ickes* and *Nebraska* are distinguishable, at least as the parties have presented this case to us. In both those cases, the Court concluded that the landowners had acquired title to the water.[23] In this case, by contrast, the parties have assumed that the United States holds the title to the water right. *Nevada*, on the other hand, is far closer to this case. In *Nevada*, the United States held title to the water right as a result of the *Orr Ditch* suit, and we assume that the United States holds title to the right here. But, regardless of whether distinctions could be drawn between *Nevada* and this case, we think that the United States' argument misses the larger point. In that case, as well as in *Ickes* and *Nebraska*, the Court recognized that, in acquiring water rights under the aegis of the Reclamation Act, the United States was not acting for its own benefit, but for the benefit of those persons who Congress intended would put the water to beneficial use reclaiming the land. That consistent recognition of the relationship created by the

---

[23] In *Ickes*, the landowners had entered into contracts with the Secretary of the Interior to acquire water rights from a reclamation project by repaying the proportionate share of the project's cost in ten annual installments. 300 US at 89-90. The Court explained that the landowners "had made all stipulated payments and complied with all obligations by which they were bound to the government, and * * * had acquired a vested right to the perpetual use of the waters as appurtenant to their lands." *Id.* at 94. In *Nebraska*, the landowners applied for and received state water rights certificates as a result of putting the water to beneficial use on their land. 325 US at 613. In both cases, the court concluded that the landowners acquired the water right.

Reclamation Act persuades us that, as a matter of state law, the relationship between the United States and plaintiffs is similar to that of a trustee and beneficiary.

The third factor is the contractual agreements between the United States and plaintiffs. That factor bears on the second. Even though we have concluded that, in appropriating the right to use the waters in the Klamath Basin, the United States did so for the benefit of the landowners, the United States and plaintiffs remained free within statutory and constitutional limits to enter into agreements that clarified, redefined, or even altered that relationship. Whether they did so requires a full consideration of the agreements between plaintiffs and the United States. On that point, it appears that various plaintiffs have entered into different forms of agreement with the United States and that those agreements have been renegotiated, perhaps more than once, since the Klamath Project began.

In attempting to assess the effect of the parties' agreements on the relationship between them, we face a significant difficulty. All the agreements between the United States and plaintiffs in the present litigation do not appear to be before us.[24] The Court of Federal Claims summarized the types of agreements that the parties entered into, and it quoted portions of those

[24] Plaintiffs included four agreements in their excerpts of record and the record discloses other agreements. Not only does it appear from the Court of Federal Claims decision that many other agreements exist, but the parties have not briefed either the history or the significance of those different agreements in any detail.

agreements. However, we hesitate to rely on that summary of the parties' agreements when, in assessing the effect of those agreements on the state law issue that the second certified question presents, we might view other aspects of the agreements or their significance under state law differently. We also note that the Court of Federal Claims' assessment of the significance of the agreements may rest on a misperception of state law. The Court of Federal Claims explained that, under the 1905 Oregon act, plaintiffs could obtain a property interest in the water right that the United States appropriated only if the United States executed a formal written release of that interest, and it concluded that none of those agreements was sufficient to give plaintiffs anything other than a contractual right to receive water. As explained above, however, that understanding of the 1905 Oregon law is not correct.

We are aware that the agreements that the Court of Federal Claims described in its decision are similar to the two forms of agreement that the Court concluded in *Nevada* supported its determination that the United States held title to the water rights in that case in trust for the landowners. However, without all the agreements before us and without briefing on them, we are in no position to provide a definitive answer whether, as a matter of state law, the various contractual agreements between the United States and plaintiffs support or defeat plaintiffs' claim that they have an equitable or beneficial property interest in the water right that the United States appropriated pursuant to the 1905 act.

For instance, we cannot foreclose the possibility that plaintiffs could have bargained away any equitable or legal right to the water in return for a reduced payment schedule or forgiveness of their debt. Conversely, the United States may have granted plaintiffs either patents, water rights, or contractual rights that would be sufficient, as a matter of state law, for plaintiffs to have acquired at a minimum an equitable property interest in the water.[25] In sum, whatever conclusion we might draw on the basis of the first two factors noted above and whatever conclusion the Court of Federal Claims' summary of the various agreements might suggest, we lack a sufficient basis to provide a definitive answer to the court's second question.

---

[25] We also note that some of the agreements that the Court of Federal Claims mentioned, coupled with the fact that the parties have stipulated that plaintiffs have paid all the costs of irrigation works, suggest that plaintiffs may themselves hold a vested water right. *See Ickes*, 300 US at 94 (explaining that the landowners in that case had acquired a vested water right by paying their proportionate share of the irrigation project's construction costs and complying with their other contractual obligations). We express no opinion on that point but mention it only to note that the procedural posture in which this case arises poses additional difficulties in answering the court's second question; that is, it is difficult to discuss in the abstract whether plaintiffs have an equitable interest in the water right in light of facts that suggest that some or all of them may have a greater property interest.

C

The Federal Circuit's third question asks:

> "With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of the Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?"

The answer to the Federal Circuit's third question is "yes." A person asserting only a beneficial or equitable property interest in a water right is not a "claimant" who must appear in the Klamath Basin adjudication and file a claim to determine that interest. Conversely, a person who claims legal title to a water right must file a claim in the adjudication or lose the right.[26]

In answering the court's third question, we begin with the text of ORS 539.210, which governs adjudication of pre-1909 water rights. That statute provides in part:

---

[26] Our answer to the court's question is limited to the facts, as we understand them to exist in the Klamath Basin adjudication – *i.e.*, that the United States has filed a claim for legal title to the water right that it appropriated under the 1905 Oregon statute. We express no opinion on the permissible procedure if the person who appropriated the water right fails to file a claim for that right in the water rights adjudication, and another person claims only an equitable interest in that right.

> "Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant."

The United States argues that "[l]andowners asserting vested property rights in the use of water diverted by the Klamath Project are 'claimants' interested in the 'determination of rights to the use' of the water in the Klamath Basin. Accordingly, any such rights must be claimed in the [a]djudication or be forfeited." Plaintiffs and the State of Oregon argue that, under Oregon law, a state water rights adjudication is a comprehensive proceeding to determine the relative rights of persons who have appropriated water rights and, as a consequence of that determination, issue water rights certificates. They argue that persons holding derivative rights, whether in equity or contract, are not claimants within the meaning of ORS 539.210 and need not file a claim in the water rights adjudication.

Oregon's water code does not define the term "claimant," and both the United States and plaintiffs have proposed plausible interpretations of that term.

The statutory context, however, cuts against the United States' interpretation in two respects. First, what is now ORS 539.210 was first enacted as part of Oregon's 1909 water code, and the current version of ORS 539.210 is virtually identical to that provision as it first was enacted. *Compare* ORS 539.210, *with* Ore. Laws 1909, ch 216, § 34. When the Oregon legislature adopted the 1909 code, it did not define the term "claimant." However, it used that term to refer to a person who had appropriated a water right and could thus claim legal title to the right; for example, it required "claimants" to file a statement setting out facts necessary to establish an appropriation. *See* Ore. Laws 1909, ch 216, § 14. Conversely, it did not require "claimants" to file a statement showing that they had a right to take water under another person's appropriation. Given that context, we conclude tentatively that the term "claimant," as used generally in the 1909 act and as used specifically in the section that became ORS 539.210, does not refer to a person asserting only an equitable or beneficial property interest in a water right that another person appropriated.

A second statutory clue points in the same direction. Under Oregon's water code, a claim for water, if proved, results in the issuance of a certificated water right giving the holder title to the right. *See Fort Vannoy*, 345 Ore. at 84 (describing that process); ORS 539.140 (same). A person claiming an equitable interest in a water right does not receive a certificated right. *See Fort Vannoy*, 345 Ore. at 84-86 (recognizing that a member of an irrigation district had an equitable

interest in a certificated water right issued to the district). By implication, a person holding an equitable interest need not file a claim in a water rights adjudication and is thus not a "claimant" within the meaning of ORS 539.210.

That has long been the rule in Oregon. As this court explained 85 years ago, "[i]f this were a proceeding for determining the relative rights between different appropriators [*i.e.*, a streamwide adjudication], "the court would not consider the controversy between an appropriator and those claiming under him." *Willow Creek*, 119 Ore. at 191. Under Oregon law, controversies between appropriators and those claiming under them are not part of a water rights adjudication to determine the relative rights of different appropriators. The court has, however, recognized one exception, and that exception proves the rule, as the facts in *Willow Creek* illustrate.

In *Willow Creek*, two persons had initiated a water rights adjudication in 1909 to determine the right to use the water in Willow Creek. *Id.* at 163.[27] The Willow Creek Land and Irrigation Company (the irrigation company) had appropriated water from that creek for others' use, and the irrigation company (but not its shareholders who claimed a beneficial property right) appeared in the 1909 adjudication. *Id.* at 163, 181-82.

---

[27] The water rights adjudication in *Willow Creek* arose under Oregon's 1909 water rights code. *See In re Willow Creek*, 74 Ore. 592, 144 P. 505, 146 P. 475 (1915) (considering challenges to the procedure that gave rise to the first decree regarding Willow Creek).

Some of the irrigation company's water rights "had become vested through appropriation and use, while others were at that time inchoate." *Id.* at 163. Recognizing that fact, the first decree entered in 1916 provided that the irrigation company would be allowed until January 1, 1918, "to complete its said irrigation system and apply the impounded waters to beneficial use." *Id.* at 163-64.[28]

In 1920, the state gave notice to all parties interested in the inchoate rights of the irrigation company to appear and determine the extent to which those inchoate rights had been realized. The irrigation company[29] appeared at the supplemental proceeding and argued that the only issue properly before the court

---

[28] The inchoate water rights apparently resulted from the common-law rule, stated in *Nevada Ditch*, that one person can appropriate water for future users with an appropriation date that relates back to the date of the notice, as long as the water is diverted and put to beneficial use within a reasonable time. In *Willow Creek*, the 1909 streamwide adjudication occurred before a reasonable time had passed, with the result that the 1916 decree recognized that the irrigation company held inchoate water rights but that the court could not determine the extent of those rights at that time.

[29] Between the 1909 adjudication and the 1920 supplemental adjudication, the irrigation company transferred the irrigation works and the water rights to a holding company. *Willow Creek*, 119 Ore. at 165. The irrigation company sold land to settlers and gave them a proportionate share of the stock in the holding company. *Id.* at 165. The irrigation company also went into bankruptcy during that period, and another corporation acquired its remaining assets. *Id.* Those corporate changes are not material to our answer to the Federal Circuit's third question, and we have referred solely to the "irrigation company" for ease of reference.

was the extent to which water had been put to beneficial use – *i.e.*, the extent to which the inchoate rights had been realized. Persons who had agreed to purchase land and appurtenant water rights from the irrigation company appeared and claimed that the irrigation company unlawfully had prevented them from putting water to beneficial use on their lands by putting the water to use instead on the company's lands. *Id.* at 182, 191-92. Those persons did not own the water rights directly but held shares in the irrigation company, which claimed legal title to the water right. *Id.* at 165.

In resolving the parties' arguments, this court noted that the only issue before it was the right to water under a single certificate and that the disputes between an appropriator and persons taking under the appropriator "ordinarily would not be considered in a proceeding of this nature" – *i.e.*, in a supplemental proceeding to adjudicate rights among different appropriators. *Id.* at 182. The court reasoned, however, that it could not determine the land on which the water had been put to beneficial use and thus could not issue a water rights certificate to the irrigation company without first resolving the subsidiary dispute between the irrigation company and the persons who took water under it. *Id.* In resolving that subsidiary dispute, the court held that the irrigation company could not use the water it had appropriated to benefit its land to the detriment of the persons who had acquired land and derivative water rights from it. *Id.* at 196-98. The court determined the land to which the water rights attached and held that the irrigation company "is entitled to a

certificate of its water right for the benefit of the land owned by its stockholders." *Id.* at 199.

Willow Creek is telling in at least four respects. First, the court recognized that the irrigation company held the water right for the benefit of the stockholders. Second, the court did not hold that the stockholders' failure to file a claim in the initial adjudication precluded them asserting an equitable interest in the certificated water right that the irrigation company sought. Third, the court recognized that, as a general rule, the only claims that will be adjudicated in a water rights adjudication are the competing claims of different appropriators, not the equitable interests of those persons who take under an appropriator. Finally, it held that that rule is not without exceptions; controversies between an appropriator and the persons who take under that appropriator may be resolved in a general adjudication when necessary to determine the extent of a certificated water right.

Given *Willow Creek* and the other statutory context discussed above, we conclude that the term "claimant" in ORS 539.210 refers to persons claiming legal title to a water right. The term does not include persons asserting only an equitable or beneficial interest in a water right that another person appropriated. It follows that, to the extent that plaintiffs assert only a beneficial or equitable property interest in water rights that the United States appropriated, plaintiffs are not claimants within the meaning of ORS 539.210 who must file claims in the Klamath Basin adjudication or

lose their right to claim a beneficial or equitable property interest in that water right.

It is necessary to add a caveat to our answer. Given the limited record before us, we cannot foreclose the possibility that circumstances comparable to those in *Willow Creek* might arise in the Klamath Basin adjudication that would permit, in that adjudication, the determination of the interests of persons claiming an equitable or beneficial property interest in a water right that another person had appropriated. Subject to that caveat, however, we can say that persons asserting only an equitable or beneficial property interest in a water right that someone else appropriated are not "claimants" within the meaning of ORS 539.210 who must file claims in the Klamath Basin adjudication.

IV

In summary, in answering the Federal Circuit's questions, we have assumed that the United States appropriated the right to use the waters described in its notice and that it presently holds legal title to that water right. We also have assumed that plaintiffs are asserting only an equitable or beneficial property interest in the water right to which the United States holds legal title. Who presently holds legal title to that water right and the scope of that right are questions for the Klamath Basin adjudication, and we express no opinion on those issues. Given those assumptions, we have answered the court's questions as follows:

1. The 1905 Oregon act did not preclude plaintiffs from acquiring an equitable or beneficial property interest in a water right to which the United States holds legal title. Moreover, under the 1905 act, a formal written release from the United States is not necessary for plaintiffs to have acquired an equitable or beneficial property interest in the water right that the United States appropriated.

2. Under Oregon law, whether plaintiffs acquired an equitable or beneficial property interest in the water right turns on three factors: whether plaintiffs put the water to beneficial use with the result that it became appurtenant to their land, whether the United States acquired the water right for plaintiffs' use and benefit, and, if it did, whether the contractual agreements between the United States and plaintiffs somehow have altered that relationship. In this case, the first two factors suggest that plaintiffs acquired a beneficial or equitable property interest in the water right to which the United States claims legal title, but we cannot provide a definitive answer to the court's second question because all the agreements between the parties are not before us.

3. To the extent that plaintiffs assert only an equitable or beneficial property interest in the water right to which the United States claims legal title in the Klamath Basin adjudication, plaintiffs are not "claimants" who must appear in that adjudication or lose the right. As a general rule, equitable or beneficial property interests in a water right to which someone else claims legal title are not subject to determination in a state water rights adjudication.

The certified questions are answered.

Concur by: WALTERS

Concur

WALTERS, J., concurring.

The court answers "no" to the restated second question posed by the Federal Circuit: whether, under Oregon law, beneficial use alone is sufficient to acquire a beneficial or equitable property interest in a water right to which another person holds legal title. ___ Ore. at ___ (slip op at 29).[1] I agree with that answer and with the majority's further statement that, even considering additional factors, we cannot reach a definitive answer to a more pointed question-whether plaintiffs in this case acquired a beneficial or equitable property interest in a water right held by the United States. ___ Ore. at ___ (slip op at 41).

I write to explain the reasons that the latter, more specific, question is an open one that, in my view, cannot be resolved at this time on this record.

First, this case reaches us in a posture in which the following issues are contested in the Klamath Basin adjudication and have not been decided by any

---

[1] We do not expressly consider the interests of irrigation districts that "receive" water from the Klamath Basin Reclamation Project.

court: (1) whether beneficial use is necessary to the United States' appropriation of water rights; (2) whether the United States has appropriated the water rights at issue here; and (3) whether plaintiffs also have appropriated water rights and own them independently or jointly with the United States. ___ Ore. at ___ (slip op at 22 n 14). In answering the questions posed by the Federal Circuit, we are nevertheless asked to assume that the United States has appropriated and acquired sole ownership of the water rights at issue. *See* ___ Ore. at ___ (slip op at 22) ("[W]e assume that the United States appropriated water rights pursuant to the 1905 statute and that it acquired and presently holds legal title to use the water for the purposes stated in its notice") (footnote omitted); *see also* ___ Ore. at ___ (slip op at 47-48) (summarizing assumptions used in answering certified questions). In other words, we are asked to assume that the United States has accomplished whatever measures were necessary to perfect appropriation, without deciding whether beneficial use by landowners was one of those measures and without deciding whether plaintiffs also appropriated and acquired ownership of the rights at issue.

When this court previously has considered the nature of the interests of water users or providers, it has done so on the premise that beneficial use is a necessary prerequisite to perfection of appropriation and in the context of discussing perfected (and sometimes certificated and thereby vested) appropriation. As the majority explains, it has been the law in Oregon since at least 1896 that appropriation is perfected "only when

the ditches and canals are completed, the water diverted from its natural stream or channel, and actually used for beneficial purposes." *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 90, 45 P 472 (1896). Thus, as the court recently stated, in *Fort Vannoy Irrigation v. Water Resources Comm.*, 345 Ore. 56, 88, 188 P.3d 277 (2008), a joint effort between landowners and irrigation companies or districts has been required to "bring the certificated water rights into existence" and beneficial use has been one action required in that joint effort.[2] When we are asked to assume instead, as we understand that we have been instructed to do, that beneficial use may *not* be necessary to perfected appropriation, and that plaintiffs do not hold perfected or certificated interests, our precedent, premised as it is on different assumptions, is of little assistance.

Second, the Federal Circuit Court has not defined what it means by the term "beneficial or equitable property interest." This court's prior consideration of the nature of the interests held by landowners who apply water to beneficial use has not been for the purpose of determining whether those interests are "property" as that term is used in the United States or Oregon Constitutions or whether the government must pay

---

[2] In *Fort Vannoy*, the water rights at issue were not only appropriated, they were also certificated. As the court explained in that case, "the issuance of a water right certificate is the act that vests a certificated water right in a party. *See, e.g.*, ORS 537.250(3) (describing significance of issuance of water right certificate)." *Fort Vannoy*, 345 Ore. at 76.

just compensation if it "takes" those interests.[3] When the court's prior cases use terms such as "equitable title," or liken the relationships between the parties to other equitable relationships, they do so not only on the basis of assumptions that are inapplicable here, but also for the purpose of answering legal questions very different from the one that the Federal Circuit poses. A brief survey of the questions addressed in those cases demonstrates my point.

In *Eldredge v. Mill Ditch Co.*, 90 Ore. 590, 177 P 939 (1919), this court concluded that a quasi-public irrigation company served as the agent of its stockholders when it delivered water for their use. The court held that equity precluded a third-party judgment creditor from forcing a sale of the company's interests to the detriment of the stockholders. *Id.* at 596.

Re Rights to Waters of Silvies River, 115 Ore. 27, 237 P 322 (1925), was a case in which three men posted a notice of appropriation and then formed a corporation to serve as their agent in constructing irrigation ditches and making water available for use. The court held that the priority date for the water right that the corporation acquired related back to the date of the men's original notice of appropriation. *Id.* at 98-103.

---

[3] As we noted in *Doyle v. City of Medford*, 347 Ore. 564, n 4, 227 P.3d 683 (2010), the question whether a state interest amounts to a federally protected property interest (in that case under the Due Process Clause) is a federal question. Although we can describe state interests, the legal conclusion as to whether those interests constitute "vested rights" or "property" is a federal question.

In *In re Waters of Walla Walla River*, 141 Ore. 492, 16 P.2d 939 (1933), this court reached a different conclusion concerning a disputed priority date. The court held that a private irrigation company that had appropriated water in 1903 was the principal and that landowners who were not shareholders in the company, but who put its water to beneficial use pursuant to rental contracts, served as the company's agents. When some of the landowners later formed a new irrigation company, the new water rights acquired did not relate back to the earlier 1903 appropriation because the landowners previously had not obtained "any rights in the use of the water supplied by [the original company] except those given by, and to the extent of, their rental contracts." *Id.* at 498.

In *Fort Vannoy*, the court noted that a statute that required an irrigation district to hold all property it acquired "in trust for * * * the uses and purposes set forth in the Irrigation District Law," gave rise to a trust relationship between the irrigation district and its members, 345 Ore. at 85-86 (emphasis omitted), but the court characterized the relationship between the district and the landowners who put the water to beneficial use as one of principal (district) and agents (landowners). *Id.* at 88-90. To resolve the particular question before it, the court looked to the statutory allocation of rights and responsibilities between the irrigation district, on the one hand, and its members and water users, on the other hand, and concluded that neither the members nor the users were "holder[s] of any water use subject to transfer." Therefore, the court

held, the members did not have the right to change the point of diversion associated with the water right. *Id.* at 86-93.

Although in each of those cases "the water of a public stream [was] eventually applied to a beneficial use, and the general purposes of such appropriations accomplished," *Nevada Ditch*, 30 Ore. at 98, factors other than intended benefit or use determined the answers to the particular legal questions presented. And, for the most part, those cases involved the rights of third parties *vis-a-vis* the irrigation districts. Only *Fort Vannoy* decided the nature of the interests acquired by water users. In that case, it was the statutory allocation of rights and responsibilities, not whether the legislature intended that users benefit by the actions of irrigation districts, that was determinative.

Labels and short-hand descriptions used by the court in particular contexts for particular purposes do not resolve other legal questions, particularly difficult ones. In enacting and proceeding under the Reclamation Act, the United States intended, among other things, to provide some benefit to the lands that it helped to irrigate. Our cases, however, have not decided whether a government's intent to bestow such a benefit alone creates an interest of legal consequence. Without actually resolving the threshold legal issue of whether beneficial use is necessary to perfected appropriation by the United States, without a clear understanding of the federal standard that a "beneficial or equitable property interest" must meet, and without all the facts necessary to determine whether that

standard has been met, we certainly can say that the answer to the Federal Circuit Court's second question is "no," but I emphasize that that is all that we can say.

Balmer and Linder, JJ., join in this opinion.

FILED: January 29, 2009

IN THE SUPREME COURT
OF THE STATE OF OREGON

(Federal CC No. 2007-5115;
SC S056275)

KLAMATH IRRIGATION DISTRICT, TULELAKE IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MIDLAND DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, PINE GROVE IRRIGATION DISTRICT, WESTSIDE IMPROVEMENT DISTRICT NO. 4, SHASTA VIEW IRRIGATION DISTRICT, VAN BRIMMER DITCH CO., FRED A. ROBISON, ALBERT J. ROBISON, LONNY E. BALEY, MARK R. TROTMAN, BALEY TROTMAN FARMS, JAMES L. MOORE, CHERYL L. MOORE, DANIEL G. CHIN, DELORIS D. CHIN, WONG POTATOES, INC., MICHAEL J. BYRNE, DANIEL W. BYRNE, and BYRNE BROTHERS,

Plaintiffs,

v.

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

Defendants,

On certified questions from the United States Court of Appeals for the Federal Circuit; certification order dated July 16, 2008; considered and under advisement on January 6, 2009

Counsel: Michael H. Simon, of Perkins Coie LLP, Portland, filed the response for plaintiffs Klamath Irrigation District, Tulelake Irrigation District, Klamath Drainage District, Poe Valley Improvement District, Sunnyside Irrigation District, Klamath Basin Improvement District, Klamath Hills District Improvement Co., Midland District Improvement Co., Malin Irrigation District, Enterprise Irrigation District, Pine Grove Irrigation District, Westside Improvement District No. 4, Shasta View Irrigation District, Van Brimmer Ditch Co., Fred A. Robison, Albert J. Robison, Lonny E. Baley, Mark R. Trotman, Baley Trotman Farms, James L. Moore, Cheryl L. Moore, Daniel G. Chin, Deloris D. Chin, Wong Potatoes, Inc., Michael J. Byrne, Daniel W. Byrne, and Byrne Brothers to the memoranda of amicus curiae Oregon Water Resources Department, and defendants the United States and Pacific Coast Federation of Fishermen's Associations.

Stephanie M. Parent, Portland, filed the memorandum of law for defendant Pacific Coast Federation of Fishermen's Associations and amici curiae Institute for Fisheries Resources, the Wilderness Society, Klamath Forest Alliance, Oregon Wild, WaterWatch of Oregon, Northcoast Environmental Center, Sierra Club, and Natural Resources Defense Council.

Suzanne Bratis, Assistant U.S. Attorney, filed the response of defendant the United States to the memorandum of law of amicus curiae Oregon Water Resources Department.

Denise G. Fjordbeck, Attorney-in-Charge, Salem, filed the memorandum of law for amicus curiae Oregon Water Resources Department. With her on the

memorandum were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Opinion

The certified questions are accepted.

PER CURIAM

The United States Court of Appeals for the Federal Circuit has certified three state law questions to this court. The parties in the underlying federal litigation and the Oregon Water Resources Department, appearing as an *amicus curiae* in this court, have filed extensive memoranda variously opposing and supporting this court's acceptance of those questions. *See* ORS 28.200 (authorizing Supreme Court to accept certified questions under certain conditions); *Western Helicopter Services v. Rogerson Aircraft*, 311 Ore. 361, 364-71, 811 P.2d 627 (1991) (explaining bases for accepting or declining to accept certified questions). After considering the parties' arguments, we conclude that it is appropriate to accept the certified questions.

Before turning to the parties' arguments, we first put the three questions that the Federal Circuit has asked in context. The Federal Bureau of Reclamation (the Bureau) manages the Klamath Project, which stores and supplies water to farmers, irrigation districts, and federal wildlife refuges in the Klamath River basin.[1] The plaintiffs in the underlying federal litigation are farmers and irrigation districts that use water from the Klamath Project for irrigation and

[1] We take the facts from the parties' statement of agreed facts.

other agricultural purposes. As a result of drought conditions in 2001, the Bureau terminated the delivery of water to plaintiffs in order to make water available for three species of endangered fish.[2]

Claiming a property right in the water, plaintiffs brought an action in the Court of Federal Claims alleging that the United States had unconstitutionally taken their property. Relying on an Oregon statute, the Court of Federal Claims ruled that plaintiffs had no equitable right in the water that they used to irrigate their land. *See Klamath Irrigation District v. United States (Klamath I)*, 67 Fed Cl 504, 526-27 (2005) (holding that, under a 1905 Oregon law, the United States "obtained rights to the unappropriated water of the Klamath Basin"). It followed, the Court of Federal Claims concluded, that plaintiffs' takings claim based on the existence of an equitable interest in the water necessarily failed. *See id.* at 540 (so concluding).[3]

Plaintiffs appealed to the Federal Circuit. As the parties framed the issues in the Federal Circuit, the

---

[2] The Bureau was able to make some water (approximately 70,000 acre feet) available in July 2001.

[3] The Court of Federal Claims concluded that plaintiffs' interests in the water were either contractual or, to the extent that some plaintiffs acquired water rights as a result of patents issued by the United States or permits issued by Oregon, those rights were junior to the rights that the United States and certain tribes held. *Klamath I*, 67 Fed Cl at 531-40. The court granted summary judgment for the United States on plaintiffs' claim that they had a property interest in the water, which the Government took. In a later order, the court focused on plaintiffs' contractual rights to receive water and held that the sovereign acts doctrine was a defense to plaintiffs' breach of contract claim. *Klamath Irrigation District v. United States* (*Klamath II*), 75 Fed Cl 677, 695 (2007).

primary issue arose out of an intersection of federal and state law. We begin by briefly describing the federal statute, which provides the context for the state law issue. Congress passed the Reclamation Act of 1902 to provide for the "construction and maintenance of irrigation works for the reclamation of arid and semiarid lands" in the western states and territories. Reclamation Act of 1902, ch. 1093, § 1, 32 Stat. 388. The Act contemplates that, subject to certain conditions, the Secretary of the Interior will make public lands, irrigated pursuant to the Act, available to settlers and also will make water from the irrigation projects available for privately held land. *Id.* §§ 3-4, 32 Stat. 389. Section 8 of the Act provides that the Act does not affect state laws "relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." *Id.* § 8, 32 Stat. 390. Section 8 then adds the following proviso: "[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." *Id.*

In their briefs to the Federal Circuit, both plaintiffs and the United States explained that section 8 posed a problem for the Secretary in implementing the Act. In most western states, a person may not appropriate water without first putting it to beneficial use. However, the size of many of the federal reclamation projects and the amount of time required to construct those projects prevented the water that those projects

were supposed to deliver from being put to beneficial use for many years. The Secretary thus ran the risk that other users would appropriate the water before the Secretary completed the irrigation projects.

The Oregon legislature responded to that problem in 1905. It enacted a law that provides, in part, that, when an officer of the United States, "authorized by law to construct works for the utilization of water within this State," files with the state engineer "a written notice that the United States intends to utilize certain [unappropriated] waters," those waters "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 certain conditions are met. Or. Laws 1905, ch. 228, § 2. The 1905 Act then added,

> "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 said notice as may be formally released in writing by an officer of the United States thereunto duly authorized."

In 1905, an official with the United States Geological Survey posted a notice claiming "all the unappropriated waters of the Klamath River to be used for irrigation, domestic, power, mechanical, and other beneficial uses" and stating that the waters "hereby appropriated [are] to be stored by means of a dam located across the Klamath River." Later that year, the Bureau of Reclamation filed a notice with the state

engineer stating that "'the United States intends to utilize [a]ll of the waters of the Klamath Basin in Oregon' for purposes of 'the operation of works for the utilization of water under the provisions of the Reclamation Act.'" The Bureau later filed plans for the proposed works and proof of authorization of the Klamath Project.

With that statutory background in mind, we turn to the arguments that plaintiffs and the United States raised in the Federal Circuit.[4] In their opening brief, plaintiffs assumed that the United States acquired rights to water for use in the Klamath Project when it filed notices with the state in 1905 in compliance with state law. Plaintiffs argued, however, that whatever rights the United States acquired in the water from the Klamath River as a result of its compliance with the 1905 state law, the United States did not hold the exclusive right to use the water. Rather, relying on three United States Supreme Court cases, plaintiffs contended that the farmers and irrigators to whom the United States delivered the water obtained, at a minimum, an equitable interest in the water when they put it to beneficial use. *See Nevada v. United States*, 463 US 110, 126, 103 S Ct 2906, 77 L Ed 2d 509 (1983) (explaining that "the beneficial interest in the [water] rights confirmed to the Government resided in the owners of the land within the [reclamation] Project to which these waters became appurtenant upon the

[4] We summarize the parties' arguments only to put the Federal Circuit's questions in context. We express no opinion on the merits of those arguments.

application of Project water to the land"); *Nebraska v. Wyoming*, 325 US 589, 613-14, 65 S Ct 1332, 66 S. Ct. 1, 89 L Ed 1815 (1945) (discussing the United States' and landowners' respective rights to use water from reclamation projects); *Ickes v. Fox*, 300 US 82, 94-96, 57 S Ct 412, 81 L Ed 525 (1937) (same).

Plaintiffs also addressed a state law defense that the United States had asserted (and that the Court of Federal Claims had accepted) to their claimed equitable interest. Plaintiffs noted that the Court of Federal Claims had interpreted the 1905 Oregon statute as barring their claimed interest, but they contended that the federal court had read that statute too broadly. In their view, the 1905 Oregon statute did not preclude persons who received water from a Reclamation Act project from obtaining a property interest in the water.[5]

In its answering brief, the United States argued that state law provided a complete answer to plaintiffs' claimed property right. It emphasized that, under section 8 of the Reclamation Act, state law controls the question of how water for federal irrigation projects will be appropriated and who holds the water right. The United States did not dispute that the three cases on which plaintiffs relied recognized that the landowners who had used water from federal reclamation

[5] Plaintiffs also argued, in their reply brief, that to the extent Oregon law differed, the proviso to section 8 of the Reclamation Act conflicted with that law and controlled. The United States, in its answering brief, anticipated that argument and asserted that the proviso was narrower than plaintiffs contended.

projects had acquired a property interest in it. The United States argued, however, that those cases did not announce a general rule of law applicable to all western states. In the government's view, each of those cases turned on and was limited to the specific facts and state laws at issue in those cases.

The United States then turned to Oregon's 1905 law. It contended that, under that law, it had acquired the right to all unappropriated waters in the Klamath River when it filed its notice of intent with the state engineer and later met the other requirements of that law. The United States further argued that, under the 1905 Oregon law, the United States' formal written release was necessary before plaintiffs could acquire any interest, equitable or otherwise, in the water rights it had acquired. It followed, the United States concluded, that without a written release of the water rights it held, plaintiffs had no equitable interest in the water.

Given that debate, the Federal Circuit certified the following three questions to this court:

> "1. Assuming that Klamath Basin water for the Klamath Reclamation Project 'may be deemed to have been appropriated by the United States' pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
>
> "2. In light of the statute, do the landowners who receive water from the Klamath Basin

> Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable interest in the water right acquired by the United States?
>
> "3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of the Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?"

Klamath Irrigation Dist. v. United States (Klamath III), 532 F.3d 1376, 1377-78 (Fed Cir 2008).

As we understand the first two certified questions, they go to the state law defense that the United States raised in its answering brief. The first question seeks to determine whether, assuming that the United States appropriated water rights for the Klamath Project pursuant to the 1905 Oregon statute, that statute precludes other persons from obtaining a beneficial or equitable interest in those rights. The second question depends on the answer to the first. That is, assuming that the United States appropriated water pursuant to the 1905 statute and assuming that the 1905 statute

is not an absolute bar to obtaining an equitable interest in those water rights, the next question is whether, under Oregon law, beneficial use by the person who receives the water from the Klamath Project is sufficient to give that person a beneficial or equitable interest in the water. The third question addresses a different issue that arises because of an ongoing, separate state adjudication of the rights to the surface water in the Klamath River basin. As we understand that question, it asks whether, under Oregon law, anyone may assert either a legal or an equitable property interest in water from the Klamath Project without first having gone through the pending state water rights adjudication.

All three questions present issues of state law that are both preliminary to and potentially dispositive of plaintiffs' federal takings claim. If, for instance, the United States is correct that the 1905 Act precludes plaintiffs from obtaining an equitable interest in any water right that the United States acquired under that statute, then that could resolve plaintiffs' takings claim, at least as plaintiffs reportedly have litigated that claim in federal court. Similarly, whether beneficial use by the landowners is sufficient to create an equitable interest under state law is also potentially dispositive. Finally, if the equitable interest that plaintiffs assert in the water right may or must be litigated in the pending state water rights adjudication and if, as the United States argues, plaintiffs disclaimed reliance in the federal litigation on any water right that will be determined in the pending state water rights

adjudication, then our answer to the third question also may dispose of plaintiffs' federal takings claim.

At first blush, it appears that the certified questions satisfy the five statutory factors discussed in *Western Helicopter Services;* that is, an appropriate federal court has certified the questions, the questions presented are legal, the questions present issues of Oregon law, the answers to those questions could resolve the federal claim, and the certifying court has concluded that there is no controlling Oregon precedent. *See* ORS 28.200; *Western Helicopter Services*, 311 Ore. at 364-65, 811 P.2d 627 (listing those factors). That conclusion is not without objection, however. The Oregon Water Resources Department (the state) has appeared as an *amicus* in this court and raised objections to accepting the certified questions. The United States and the Pacific Coast Federation of Fishermen's Associations, which intervened as a defendant in the federal action, have filed memoranda in this court agreeing in part with the state. Plaintiffs, for their part, respond that the state and the opposing parties in the federal action are attempting to relitigate issues that the Federal Circuit already has decided against them.

As we understand the state's and the parties' memoranda, they raise essentially three issues. First, the state and others argue that, because of the litigation strategy that plaintiffs adopted in the Court of Federal Claims, the issues raised by the Federal Circuit's three questions are not properly before that court and any answers that we might give to those questions

are irrelevant to the takings claim that plaintiffs are pursuing in federal court. We doubt, however, that the Federal Circuit would have certified the three questions to us if it had not concluded that the state law issues they raise are properly before it. Indeed, Judge Gajarsa dissented from the Federal Circuit's decision to certify those questions for the very reason that the state now advances. *Klamath III*, 532 F.3d at 1378 (Gajarsa, J., dissenting). The majority, however, certified the questions over the dissenting judge's objection.

We are hesitant to second-guess the Federal Circuit majority's apparent conclusion that the state law issues it certified to us are properly before it. Beyond that, we question the premise of the state's argument. The United States has asserted that the 1905 Oregon statute provides a complete defense to plaintiffs' claimed property interest. The Federal Circuit reasonably could conclude that plaintiffs' reported litigation strategy did not preclude either the United States from relying on state law as a defense or the Federal Circuit from addressing that defense. Moreover, the United States has argued that plaintiffs' reported litigation strategy makes the third certified question material, a proposition with which we agree.[6] In short, even if we thought that we had the authority to second-guess the

[6] If, as the United States argues, plaintiffs have disclaimed reliance in the federal action on any property interest that may be adjudicated in the pending state water rights adjudication, then the answer to the third question could provide an alternative basis for resolving plaintiffs' federal action.

Federal Circuit's determination of which issues are and are not properly before it, we see no reason to exercise that authority here.

The state also argues that the parties have not been able to agree on all the facts; it notes that the parties have disagreed regarding one paragraph, paragraph 23, in the statement of facts that the parties submitted. That paragraph addresses plaintiffs' litigation strategy and the resulting limitation that the Court of Federal Claims order places on plaintiffs. In certifying the three questions to us, the Federal Circuit noted the parties' disagreement on that point but expressed its conclusion that their disagreement would not preclude us from accepting certification.

Although the Federal Circuit did not explain the basis for its conclusion, it presumably concluded that plaintiffs' litigation strategy did not bar it from considering the state law issues that the United States had raised as a defense (and on which the Court of Federal Claims had relied) to plaintiffs' federal takings claim. As noted above, we think that the question of which issues are properly before the Federal Circuit is a procedural issue for that court; it is not a disputed fact that would preclude us from accepting the certified questions.

Finally, the state notes that the parties to the federal proceeding, as well as other parties who are not before that court, have invested a substantial amount of time and effort in the pending state water rights adjudication. The state water rights adjudication has

been ongoing since 1975 and, when completed, will provide a comprehensive determination of the right to use the surface water in the Klamath River basin. *See United States v. Oregon*, 44 F.3d 758 (9th Cir 1994) (describing Klamath Basin adjudication). The state draws two conclusions from the existence of the pending state water rights adjudication. First, the state and others suggest that we should not decide the questions that the Federal Circuit has asked us until those questions are presented in the context of the state water rights adjudication. Second, the state notes that, if we decide the questions that the Federal Circuit has asked, the United States may withdraw from participating in the pending state water rights adjudication on the ground that the adjudication is no longer comprehensive. *See id.* at 770 (holding that the Klamath Basin adjudication was the sort of comprehensive proceeding to which Congress had waived the United States' sovereign immunity).[7]

We have no wish to interfere with or unnecessarily anticipate the issues raised in the pending state water

---

[7] In *United States v. Oregon*, the Ninth Circuit rejected the United States' argument that a prior determination of some individual water rights in the Klamath Basin through the permit process meant that the pending Klamath Basin adjudication was not comprehensive within the meaning of the McCarran Amendment. 44 F.3d at 767-68. Given that holding, we do not give great weight to the concern that the United States may withdraw from the pending state water rights adjudication; that is, in light of the Ninth Circuit's holding, it is difficult to see how any issues of state water rights law that we may decide in answering the Federal Circuit's questions would render the state water rights adjudication not comprehensive.

rights adjudication. As we understand the import of the Federal Circuit's certification order, however, the Federal Circuit has determined that those state law questions are material to plaintiffs' federal takings claims. The certification order also implies that, if we do not accept certification, the Federal Circuit will go ahead and decide those state law issues in the course of resolving plaintiffs' federal takings claim. It follows that the issue posed by the certification order is not whether those state law issues should be decided; rather, the issue is which court (this court or the Federal Circuit) should decide them. The state's and others' concerns, as we understand them, go to the federal court's refusal to stay its proceedings pending the completion of the state water rights adjudication. Whatever the merits of that decision, the decision whether to stay the federal proceedings is a matter for the federal courts; it provides no basis for this court to decline to accept the certified questions.

Having considered the parties' arguments, we conclude that it is appropriate to accept the certified questions. Some of the parties have asked us, if we accept the certified questions, either to rephrase them or to answer them in a particular order. The state asks us to rephrase the first and second questions to make clear that we are not deciding whether the United States acquired any interest in the water by complying with the 1905 Oregon law. The United States, for its part, asserts that the first two questions assume that proposition; they do not ask us to decide it. The United States also asks us, if we accept certification, to answer the

third question first because that question would be dispositive.

At this stage of the proceeding, we decline to rephrase the questions or declare the order in which we will decide them. Although the parties have filed extensive memoranda regarding whether we should accept the certified questions, they have not yet filed briefs in this court addressing the merits of the state law issues that the Federal Circuit's questions raise. We are hesitant to limit or rephrase the questions without having had the benefit of the parties' briefing on the merits. We think that the questions are sufficiently open-ended and our procedures sufficiently flexible that we can accommodate the parties' concerns, if they turn out to be justified, in the course of answering the questions on the merits. We also note a proposition that perhaps is so obvious it needs no mention. This court always retains the discretion to decline to provide an answer to a certified question, limit our answer to a question, or rephrase a question if it turns out, after full briefing, that it is appropriate to do so. *See Western Helicopter Services*, 311 Ore. at 366-71 (recognizing court's discretion).

The certified questions are accepted.

United States Court of Appeals
for the Federal Circuit

2007-5115

Decided: July 16, 2008

KLAMATH IRRIGATION DISTRICT, TULELAKE IRRIGATION DISTRICT, KLAMATH DRAINAGE DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MIDLAND DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, PINE GROVE IRRIGATION DISTRICT, WESTSIDE IMPROVEMENT DISTRICT NO. 4, SHASTA VIEW IRRIGATION DISTRICT, VAN BRIMMER DITCH CO., FRED A. ROBISON, ALBERT J. ROBISON, LONNY E. BALEY, MARK R. TROTMAN, BALEY TROTMAN FARMS, JAMES L. MOORE, CHERYL L. MOORE, DANIEL G. CHIN, DELORIS D. CHIN, WONG POTATOES, INC., MICHAEL J. BYRNE, DANIEL W. BYRNE, and BYRNE BROTHERS, *Plaintiffs-Appellants*,

v.

UNITED STATES and PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, *Defendants-Appellees*.

CERTIFICATION ORDER

Counsel: Roger J. Marzulla, Marzulla Law, of Washington, DC, argued for plaintiffs-appellants. With him on the brief was Nancie G. Marzulla. Of counsel was Gregory T. Jaeger.

Katherine J. Barton, Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued for all defendants-appellees. With her on the brief for defendant-appellee United States were Ronald J. Tenpas, Acting Assistant Attorney General, and Kathryn E. Kovacs, Attorney, of Washington, DC, Kristine S. Tardiff, Attorney, of Concord, New Hampshire, and Stephen M. Macfarlane, Attorney, of Sacramento, California.

Todd D. True, Earthjustice, of Seattle, Washington, for defendant-appellee Pacific Coast Federation of Fishermen's Associations. Of counsel was Shaun A. Goho.

Walter R. Echo-Hawk, Native American Rights Fund, of Boulder, Colorado, for amicus curiae Klamath Tribes. With him on the brief was Thomas P. Schlosser, Morisset, Schlosser, Jozwiak & McGaw, of Seattle, Washington, for amicus curiae Hoopa Valley Indian Tribe.

John Echeverria, Georgetown Environmental Law & Policy Institute, of Washington, DC, for amicus curiae Natural Resources Defense Council. With him on the brief were Hamilton Candee and Katherine S. Poole, Natural Resources Defense Council, of San Francisco, California.

Judges: Before SCHALL, BRYSON, and GAJARSA, Circuit Judges.

Order for the court filed by Circuit Judge SCHALL. Dissent from order filed by Circuit Judge GAJARSA.

Opinion

SCHALL, Circuit Judge.

CERTIFICATION ORDER

This case presents the question of whether an uncompensated taking of property in violation of the Fifth Amendment to the United States Constitution has occurred. It also presents the question of whether the United States breached certain contracts in failing to provide water to various irrigation districts, companies, and individual landowners in the Klamath River Basin ("Irrigators"). In addition, it presents the question of whether the United States violated an interstate compact in failing to provide such water. The answer to the takings question depends upon complex issues of Oregon property law, including the interpretation of Oregon General Laws, Chapter 228, § 2 (1905). This court discerns an absence of controlling precedent in the decisions of the Oregon Supreme Court and the intermediate appellate courts of Oregon on the pertinent issues of Oregon property law. At the same time, this court believes that the Oregon Supreme Court would be in a better position than would

this court to issue a pronouncement on the proper interpretation of the law at issue. The State of Oregon has a procedure pursuant to which this court may certify unsettled questions of state law to the Oregon Supreme Court. *See* Or. Rev. Stat. §§ 28.200-28.255 (2007).

Following oral argument in this case on February 8, 2008, this court decided to certify three questions of law to the Oregon Supreme Court. The questions of law pertain to the 1905 Oregon statute and its effect on the property rights of the Irrigators.

The questions of law this court hereby certifies to the Oregon Supreme Court are:

> 1. Assuming that Klamath Basin water for the Klamath Reclamation Project "may be deemed to have been appropriated by the United States" pursuant to Oregon General Laws, Chapter 228, § 2 (1905), does that statute preclude irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right acquired by the United States?
>
> 2. In light of the statute, do the landowners who receive water from the Klamath Basin Reclamation Project and put the water to beneficial use have a beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States, and do the irrigation districts that receive water from the Klamath Basin Reclamation Project have a beneficial or equitable property

> interest in the water right acquired by the United States?
>
> 3. With respect to surface water rights where appropriation was initiated under Oregon law prior to February 24, 1909, and where such rights are not within any previously adjudicated area of the Klamath Basin, does Oregon State law recognize any property interest, whether legal or equitable, in the use of Klamath Basin water that is not subject to adjudication in the Klamath Basin Adjudication?

Except with respect to one matter, the parties to this case have agreed to a Joint Statement of Facts pertinent to the three certified questions. By letter dated May 27, 2008, the parties have informed this court that, on account of their inability to agree on that one matter, they have submitted two versions of the Joint Statement of Facts, marked Version 1 and Version 2. The two versions are identical except that Version 1 has a paragraph 23, which Version 2 does not. The third paragraph of the May 27 letter states the nature of the difference between the parties with respect to paragraph 23. This court does not believe that the inability of the parties to agree on paragraph 23 bears upon the ability of the Oregon Supreme Court to address the three certified questions.

A copy of the parties' May 27, 2008 letter to this court and copies of Versions 1 and 2 of the Joint Statement of Facts are attached hereto. Also attached hereto

is a copy of the Joint Appendix to the case filed in this court.

Section 28.210 of the Oregon Revised Statutes specifies the required contents of a certification order. It requires that a certification order contain (a) "[t]he questions of law to be answered" and (b) "[a] statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose." *Id.* § 28.210. We have set forth above the three questions of law to be answered. At the same time, recognizing the parties' disagreement on one matter, Versions 1 and 2 of the Joint Statement of Facts set forth the facts relevant to the questions certified and necessary to illustrate the nature of the controversy in which the questions arise. In addition to the questions certified and the facts relevant to the questions, set forth above, this court hereby acknowledges that the Oregon Supreme Court, as the receiving court, has the discretion to reframe the questions and is not bound to answer the questions as certified. *See W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 311 Ore. 361, 811 P.2d 627, 633-34 (Or. 1991).

The names and addresses of the counsel of record to the parties are set forth on page two of the parties' May 27, 2008 letter, a copy of which is attached hereto. To the best of this court's knowledge, there are no parties appealing in this case without counsel. The three questions set forth above are hereby certified to the Oregon Supreme Court.

So ordered.

FOR THE COURT

/s/ Alvin A. Schall
Alvin A. Schall
Circuit Judge

Dated July 16, 2008

Dissent

GAJARSA, *Circuit Judge*, dissenting.

Although the majority of the panel has requested a certification of three issues to the Oregon Supreme Court, I must respectfully dissent from such a request. We need not certify the questions because of the unique procedural posture of this case, and because the answers sought, in my judgment, are not required to decide the issues before this court. In particular, I disagree with the proposition that the effect of the 1905 Statute is a critical question with respect to the matter of certification vel non. In my judgment, the effect of the 1905 Statute is determinative as to the relative property rights of the United States and the irrigators in Klamath Basin water, that is, who owns the right to the beneficial use of the water; however, this determination has no bearing on the property interest alleged by the irrigators *in this case.* That is clearly the issue presented in the State of Oregon's Klamath Basin Adjudication (hereinafter "Adjudication") under Oregon Revised Statutes chapter 539. *See*, *e.g.*, Brief of *Amicus Curiae* State of Oregon Regarding Defendant's Motion for Stay and Plaintiff's Opposition Thereto at 2-3,

Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005) (No. 01-591 L) (Doc. No. 61) (hereinafter "State of Oregon Amicus Brief"). Therefore, because the claimants in this case have disclaimed any claims pending in the Adjudication, this court need not certify Questions One and Two.

At the outset, all water rights arising under Oregon law, including those affected by the 1905 Statute, may be divided into two categories – those arising before the February 24, 1909 passage of the Water Rights Act ("WRA") and those arising after. Rights arising before the passage of the WRA are undisturbed by its passage, but *must* be adjudicated in a general stream adjudication. Or. Rev. St. § 539.010 (especially subsection 4 relating to earlier appropriations). Indeed, in 1989 the Oregon legislature imposed a deadline for the filing of unadjudicated claims based on pre-1909 water rights. *See* Or. Rev. St. § 539.240 (stating that claims for undetermined vested rights must be filed by December 31, 1992). After the passage of the WRA, "any person intending to acquire the right to the beneficial use of any of the surface waters of this state shall make an application to the Water Resources Department for a permit to make the appropriation." Or. Rev. St. § 537.130(1); *see also Hannigan v. Hinton*, 195 Ore. App. 345, 97 P.3d 1256, 1258-59 (Or. App. 2004).

The water rights alleged by the claimants in this case do not fall into either of these categories, and thus cannot be said to arise under Oregon law. With respect to the latter category, those arising post-1909, the Appellants do not allege a single vested water right

arising under the permit and certificate requirement of the WRA. *Cf.* Or. Rev. St. §§ 537.250 (stating that appropriation is completed with issuance of certificate); 537.252 (stating the water right certificate which has not been contested becomes conclusive evidence of an appropriation). As to the former category, those arising pre-1909, all such rights are currently pending in the Adjudication. In particular, the record before the CFC demonstrates that both the State of Oregon (as an amicus in this case) and the Oregon Water Resources Department (as a participant in the Adjudication) consider the relative rights of the United States and the irrigators with respect to the right to use Klamath water to be a key issue in the Adjudication. *See* State of Oregon Amicus Brief at 2-3; Oregon Water Resources Department's Closing Brief on Reply at 37-41, *In re the Determination of the Relative Rights of the Waters of the Klamath River*, Lead Case No. 003 (Or. Water Res. Dep't July 13, 2005) (submitted as Ex. 1 to Doc. No. 242 in *Klamath Irrigation*, 67 Fed. Cl. 504) (discussing impact of 1905 Statute on conflicting water rights claimed by the United States and the irrigators in the Adjudication).

Moreover, additional filings in the Adjudication, and submitted by the parties on appeal to this court, clearly demonstrate that the ownership of the beneficial use of Klamath project water, as informed by the effects of the 1905 Oregon Statute, is a central issue in the Adjudication. In the addendum to its Appellee Brief, the United States submitted a proposed order issued by the Administrative Judge ("AJ") in the

Adjudication. *See* Proposed Order, *In re Determination of the Relative Rights of the Water of the Klamath River*, Lead Case No. 003 (Or. Water Res. Dep't Nov. 14, 2006) (hereinafter "Proposed Order"). The Proposed Order begins its Opinion section with an analysis of the 1905 Oregon Statute. *Id.* at 19-25. It concludes that the operation of the statute is clear and that the rights of the United States cannot be disturbed by any beneficial use of Klamath Project Water by the irrigators. *Id.* at 20, 23. This Proposed Order does not, of course, conclusively establish the meaning of the 1905 Oregon statute as informed by other aspects of Oregon water rights law, and indeed, the Oregon Water Resources Department ("OWRD") filed its Exceptions to the Proposed Order with the AJ in the Adjudication proceeding. Or. Water Res. Dep't's Exceptions to Proposed Order, *In re Determination of the Relative Rights of the Water of the Klamath River*, Lead Case No. 003 (Or. Water Res. Dep't Mar. 30, 2007) (hereinafter "Exceptions to Proposed Order"). The OWRD argued that by virtue of compliance with the 1905 statute, the United States secured a priority date in a water right that could only be converted to a vested right by application to a beneficial use. *Id.* at 9. The OWRD asserted that in this circumstance "the beneficial user 'holds' or 'owns' an interest in water rights appropriated pursuant thereto for the purpose of the beneficial use." *Id.* The position of the OWRD similarly fails to conclusively establish Oregon law on this issue, but the Adjudication filings together make clear that the AJ will decide the exact issues sought to be addressed by the proposed certification Questions One and Two.

Certification is therefore unnecessary because the record before the Court of Federal Claims ("CFC") is clear that all state law claims to property rights in Klamath Project waters that are currently pending in the Adjudication are not presented to this court on appeal. The claimants were clear in their arguments below that the water rights which they are claiming are not the water rights which are being adjudicated in the State proceedings. This was the basis for claimants' objection to the government's motion to stay, and they subsequently filed a motion for partial summary judgment requesting a ruling that the water rights upon which their takings claims were predicated in the CFC were not the water rights subject to the Adjudication. Memorandum Supporting Plaintiffs' Revised Motion for Partial Summary Judgment at 10, *Klamath Irrigation*, 67 Fed. Cl. 504 (Aug. 29, 2003). The CFC granted the claimants' motion, stating as follows:

> Accordingly, plaintiffs' motion for partial summary judgment that their water interests are not property interests at issue in the Adjudication is granted and defendant's motion for a stay pending the outcome of the Adjudication is denied. Based on plaintiffs' assertion that no rights or interests in this case are affected by the Adjudication (see Plaintiff's Revised Motion for Partial Summary Judgment at 10), plaintiffs are barred from making any claims or seeking any relief in this case based on rights, titles, or interests that are or may be subject to determination in the Adjudication.

Klamath Irrigation Dist. v. United States, No. 01-591L (filed Nov. 13, 2003). This holding is now the law of the case and is binding on the claimants.[1] *See*, *e.g.*, *Toro Co. v. White Consol. Indus.*, 383 F.3d 1326, 1337 (Fed. Cir. 2004) ("The law is well-settled; decisions once made are not to be disregarded except for exceptional circumstances. Such circumstances are not evident here.").

In the absence of asserting any property right based on state law, the claimants must argue that their alleged property interest arises under federal law. The claimants thus argue that the Reclamation Act itself directly creates their property interest, that the Klamath Compact gives them a right to just compensation, and that the United States conveyed whatever property interests it had to the irrigators via homestead patent deeds. None of these alleged property interests require certification to the Oregon Supreme court. They should not be able to obtain a second opportunity to avoid the results of their actions, and this court should not provide them with a second bite at the apple of state law property rights in Klamath Basin

[1] To the extent that claimants attempt to argue that they are asserting state law property rights which are not subject to the Adjudication, Question 3 seeks to determine whether Oregon law recognizes any such category of rights. Before this court, claimants have not clearly articulated any theory of property rights in the Klamath Basin water that is not pending in the Adjudication. Thus, it is my view that a negative answer to Question Three, if certification is accepted by the Oregon Supreme Court, ends the inquiry as to whether the claimants can be heard to assert any state law property interest at all in this case.

Water. For these reasons, I do not believe that certification is proper or necessary.

In the United States Court of Federal Claims

No. 01-591 L

(Filed: August 31, 2005)

KLAMATH IRRIGATION DISTRICT, *et al*.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant,

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

Defendant-Intervenor.

* Motions for partial
* summary judgment;
* Takings claims under
* Fifth Amendment; Contract
* claims; Interest in water
* of the Klamath Basin;
* Private property; Federal
* reclamation law –
* Reclamation Act of 1902;
* Section 8 - appurtenancy
* and beneficial use clause;
* *California*; Water distri-
* bution to be determined
* under state law; *Ickes*
* line of cases; State law –
* Oregon Act of 1905;
* Pre-1905 interests;
* Post-1905 interests;
* Interests based on
* contracts; Third-party
* beneficiaries; Standing
* of districts to sue;
* Interests based on
* deeds and certificates.

OPINION

Nancie Gail Marzulla and Roger J. Marzulla, Marzulla & Marzulla, Washington, D.C., for plaintiffs.

Kristine Sears Tardiff, United States Department of Justice, Washington, D.C., with whom was Assistant Attorney General *Thomas L. Sansonetti*, for defendant.

Todd Dale True, Earthjustice Legal Defense Fund, Seattle, Washington, and *Robert B. Wiygul*, Waltzer & Associates, Biloxi, Mississippi, for defendant-intervenor.[1]

ALLEGRA, Judge:

What is property? The derivation of the word is simple enough, arising from the Latin *proprietas* or "ownership," in turn stemming from *proprius*, meaning "own" or "proper." But, this etymology reveals little. Philosophers such as Aristotle, Cicero, Seneca, Grotius, Pufendorf and Locke each, in turn, have debated the meaning of this term, as later did legal luminaries such as Blackstone, Madison and Holmes, and even economists such as Coase.

Here, the court must give practical meaning to the term "property" as used in a specific legal context, a constitutional one, *to wit*, the Fifth Amendment's mandate "nor shall private property be taken for public use, without just compensation." In the case *sub judice*, a group of water districts and individual farmers seek

---

[1] An *amicus curiae* memorandum was filed by John D. Echeverria, Georgetown Environmental Law & Policy Institute, Georgetown University Law School, on behalf of the Natural Resources Defense Council and in support of defendant. Various other *amici* have participated in this litigation, including the State of Oregon, the Yurok Tribes, the Klamath Tribes, the Sierra Club, the Northcoast Environmental Center, Waterwatch of Oregon, the Oregon Natural Resources Council, the Klamath Forest Alliance, the Wilderness Society, and the Institute for Fisheries Resources.

just compensation under the Fifth Amendment, as well as damages for breach of contract, owing to temporary reductions made in 2001 by the Department of Interior's Bureau of Reclamation (the Bureau) on the use, for irrigation purposes, of the water resources of the Klamath Basin of southern Oregon and northern California. At issue in the pending cross-motions for partial summary judgment is whether plaintiffs' various interests in the use of Klamath River Basin water constitute cognizable property interests for purposes of the Takings Clause. Relatedly, the court must consider the limitations, if any, inherent in such interests, particularly regarding various forms of contract rights possessed by the plaintiffs to receive water from the Klamath Basin reclamation project. As will be seen, it is ultimately these contract rights, and not any independent interests in the relevant waters, that dominate the analysis here.

TABLE OF CONTENTS

I. FACTS AND BACKGROUND[2]

A. Plaintiffs

Plaintiffs – 13 agricultural landowners and 14 water, drainage or irrigation districts in the Klamath River Basin area of Oregon and northern California – all receive, directly or indirectly, water from irrigation works constructed or operated by the Bureau. They trace their alleged interests in that water to a variety of sources, including federal reclamation law, general state water law principles, water-delivery contracts between the irrigation districts and the United States, deeds to real property purporting to convey a right to receive water, and a federal-state water law compact. The landowning plaintiffs seek just compensation both as beneficiaries of the district plaintiffs' contracts with

[2] These facts shall be deemed established for purposes of future proceedings in this case. RCFC 56(d).

the United States and as owners of what they describe as "Klamath Project water rights" that exist independently of the district contracts. The districts, in turn, seek breach of contract damages, as well as just compensation on behalf of their members, who are the beneficiaries of the district contracts and the persons ultimately harmed by the Bureau's reduction in water deliveries in 2001.

B. The Federal Reclamation Laws

The Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified, as amended, at 43 U.S.C. §§ 371 *et seq.*) (the Reclamation Act), directed the Secretary of the Interior (the Secretary) to reclaim arid lands in certain states through irrigation projects and then open those lands to entry by homesteaders. As recently recounted by the Supreme Court, this enactment "set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Orff v. United States*, 125 S. Ct. 2606, 2608 (2005); *see also Nevada v. United States*, 463 U.S. 110, 115 (1983); *California v. United States*, 438 U.S. 645, 650 (1978). Congress originally envisioned that the United States would "withdraw from public entry arid lands in specified western States, reclaim the lands through irrigation projects," and then "restore the lands to entry pursuant to the homestead laws and certain conditions imposed by the Act itself." *Nevada*, 463 U.S. at 115. Nonetheless, Congress specifically directed, in section 8 of the Reclamation Act, that the

United States would act in accordance with state law to acquire title to the water used. 32 Stat. 390 (codified, in part, at 43 U.S.C. § 383); *see California*, 438 U.S. at 650-51. It gave the Department of the Interior responsibility for constructing reclamation projects and for administering the distribution of water to agricultural users in a project service area. *See* Reclamation Act, §§ 2-10, 32 Stat. 388-90.

In 1911, Congress enacted the Warren Act, ch. 141, 36 Stat. 925 (codified at 43 U.S.C. §§ 523-25), section 2 of which authorized the Secretary "to cooperate with irrigation districts, water users' associations, corporations, entrymen or water users . . . for impounding, delivering, and carrying water for irrigation purposes." 43 U.S.C. § 524. Under a 1912 amendment of the Reclamation Act, individual water users served by a reclamation project could acquire a "water-right certificate" by proving that they had cultivated and reclaimed the land to which the certificate applied. Act of Aug. 9, 1912, ch. 278, § 1, 37 Stat. 265 (codified, as amended, at 43 U.S.C. § 541). Congress required that the individual's land patent and water right certificate would "expressly reserve to the United States a prior lien" for the payment of sums due to the United States in connection with the reclamation project. § 2, 37 Stat. 266 (codified at 43 U.S.C. § 542).

In 1922, Congress enacted legislation expanding the United States' options to allow it to contract not only with individual water users, but also with "any legally organized irrigation district." Act of May 15, 1922, ch. 190, § 1, 42 Stat. 541 (codified at 43 U.S.C.

§ 511). In the event of such a district contract, the United States was authorized to release liens against individual landowners, provided that the landowners agreed to be subject to "assessment and levy for the collection of all moneys due and to become due to the United States by irrigation districts formed pursuant to State law and with which the United States shall have entered into contract therefor." § 2, 42 Stat. 542 (codified at 43 U.S.C. § 512).[3] The Fact-Finders Act of 1924, 43 Stat. 702 (codified at 43 U.S.C. §§ 500-01), required that once two-thirds of a division of a reclamation project was covered by individual water-rights contracts, that division was required to organize itself into an irrigation district or similar entity in order to qualify for certain financial incentives. The newly-formed district would, thereafter, assume the "care, operation, and maintenance" of the project, and the

[3] The legislative history of the 1922 act reflects that Congress viewed these changes as significant. *See* H.R. Rep. No. 662, at 2 (1922) ("the Federal Government is dealing with the irrigation district instead of the individual owner or water users' association"); 62 Cong. Rec. 3573 (1922) (statement of Rep. Kinkaid) ("This language authorizes the taking of the district collectively, taking the lands of the district collectively, for the payment of the cost of the construction of the irrigation works, in lieu of holding each farm unit singly for its proportionate share of the cost of the construction."); *id.* at 3575 (statement of Rep. Mondell) ("The Reclamation Service has for years encouraged the organization of irrigation districts . . . whereby the water users as a body, as a whole, become responsible for all of the charges."); *id.* at 5859 (statement of Sen. McNary) ("the Government is dealing with organized irrigation districts rather than the various individual entrymen who take water in the projects").

United States would deal directly with the district instead of the individual water users. *Id.*

In 1926, Congress enacted additional measures providing that, thenceforth, the United States could enter into contracts for reclamation water only with "an irrigation district or irrigation districts organized under State law." Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649 (codified as amended at 43 U.S.C. § 423e). Thereafter, the United States contracted exclusively with irrigation districts. The exclusivity of these arrangements was reemphasized in the Reclamation Act of 1939, ch. 418, 53 Stat. 1187, section 9(d) of which provided that "[n]o water may be delivered for irrigation of lands . . . until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States." 53 Stat. at 1195 (codified at 43 U.S.C. § 485h(d)).

Various provisions in these reclamation laws expressed Congress' desire to create a financing mechanism that would allow the government to recoup the costs of constructing and operating the reclamation projects by requiring the irrigation districts to reimburse the United States for water delivery costs through long-term water service contracts. *See* 43 U.S.C. §§ 391, 419, 423e, 423f, 461, 485a, 485b-1, 492-93. However, there are indications that this financing mechanism has not worked as originally anticipated, leaving significant reclamation costs unamortized. Studies conducted by the General Accounting Office (GAO) have documented this failure and attributed it to several causes: (i) while spreading project repayment obligations over

several decades, Congress did not require the payment of interest on the costs of the project, *see* 42 U.S.C. § 485a; (ii) Congress generally has limited the repayment obligation to only those costs that are considered within the irrigation district's ability to pay, *see* 43 U.S.C. § 485b-1(b); and (iii) Congress has enacted charge-offs that selectively eliminate portions of the repayment obligations in the case of certain projects. *See* GAO, Rep. No. 96-109, Bureau of Reclamations: Information on Allocation and Repayment of Costs of Constructing Water Projects 15-22 (1996); GAO, Rep. No. 81-07, Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs 9-12 (1981). The parties disagree as to the existence (and, if so, extent) of such a shortfall as to the Klamath Reclamation Project (the Klamath Project).

C. The Klamath Project

The Klamath River Basin, naturally a semi-arid region, has been the site of extensive water reclamation and irrigation projects since the late nineteenth century. The Klamath Project, originally authorized in 1905, was one of the first to be constructed under the Reclamation Act. *See Bennett v. Spear*, 520 U.S. 154, 158-59 (1997); *Tulelake Irrigation Distr. v. United States*, 342 F.2d 447, 448 (Ct. Cl. 1965). The federal legislation authorizing the project provided, *inter alia*, that "the Secretary of the Interior is hereby authorized in carrying out any irrigation project . . . to raise or lower the level of" the lakes and rivers of the Klamath River Basin "as may be necessary and to dispose of any

lands which may come into the possession of the United States as a result thereof." Act of February 9, 1905, ch. 567, 33 Stat. 714 (codified at 43 U.S.C. § 601).

The Klamath Project provides water to about 240,000 acres of irrigable land, as well as several national wildlife refuges. It is operated by the Bureau to "serve[] and affect[] a number of interests," including the supply of irrigation water to agricultural interests in the Klamath River Basin and the supply of water to the Tule Lake and Lower Klamath National Wildlife Refuges "for permanent and seasonal marshlands and irrigated crop lands." *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 138 F. Supp.2d 1228, 1230 (N.D. Cal. 2001) (hereinafter *PCFFA*). Water for the project is stored primarily in Upper Klamath Lake, on the Klamath River in Oregon. *See Kandra v. United States*, 145 F. Supp.2d 1192, 1196 (D. Or. 2001). The Link River Dam regulates water flows from Upper Klamath Lake into the lower portions of the Klamath River. *Id.* The Klamath Project lacks a major water storage reservoir, and because Upper Klamath Lake is itself relatively shallow and "unable to capture and store large quantities of water from spring run-off," the Bureau is unable to store up enough water during wet years for use in subsequent dry years – a fact that apparently makes the Klamath Project more vulnerable to droughts. *Id.* at 1197.

In operating the Klamath Project, the Bureau prepares periodic streamflow forecasts and annual operating plans "in order to provide operating criteria and to assist water users and resource managers in

planning for the water year." *Kandra*, 145 F. Supp.2d at 1197. In the late 1990s, the Bureau announced its intent to establish a new, long-term operating plan for the project. As of mid-2001, that plan was still not in place, and the Bureau instead was operating the Project using one-year interim plans. *Id.* at 1197; *see PCFFA*, 138 F. Supp.2d at 1232. Those plans required it to "manage water resources carefully in order to meet . . . competing purposes and obligations," a balance that was particularly difficult to strike because of the limited storage capacity caused by the shallowness of the lake. *PCFFA*, 138 F. Supp.2d at 1231.

In its operations, the Bureau must take into account its obligation, under the Endangered Species Act (ESA), to ensure that project operations are not "likely to jeopardize the continued existence of any endangered species." 16 U.S.C. § 1536(a)(2). In regards to this statute, the Supreme Court has stated: "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). That obligation requires the agency to perform a biological assessment "for the purpose of identifying any endangered species which is likely to affected" by the operations of the Klamath Project. 16 U.S.C. § 1536(c)(1). The Bureau has delegated its authority to conduct such assessments for two species – the coho salmon and suckerfish – to the National Marine Fisheries Service (NMFS) and the

Fish and Wildlife Service (FWS), respectively.[4] *See* 50 C.F.R. §§ 17.11, 402.01(b). Under the ESA, if the Bureau determines that an endangered or threatened species may be affected by its proposed action, it must send the NMFS or the FWS a request for a "formal consultation," in response to which the appropriate agency will produce its biological opinion. *See* 16 U.S.C. § 1536(a)(2), (b); 50 C.F.R. § 402.14. "If the Biological Opinion concludes that the proposed action is likely to jeopardize a protected species, the agency must modify its proposal" to alter that result. *See Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999). Failure to observe this procedure has led to litigation and injunctive relief against the Bureau for violating the ESA. *See, e.g.*, *PCFFA*, 138 F. Supp.2d at 1248.

D. Water Rights in Oregon and the Klamath Project

Shortly after passage of the 1905 federal authorization for the Klamath Project, the State of Oregon enacted legislation permitting an appropriate Federal official to file with the State Engineer "a written notice that the United States intends to utilize certain specified waters . . . unappropriated at the time of the filing." Or. Gen. Laws, 1905, Ch. 228, § 2, p. 401. The filing of such a notice would result in those waters being

[4] NMFS is now part of the National Oceanographic and Atmospheric Administration (NOAA) and known as "NOAA Fisheries." For the sake of clarity and convenience, the court will continue to use this agency's old title in this opinion.

"deemed to have been appropriated by the United States" and "not . . . subject to further appropriation" under state law. *Id.* at 401-02 On May 17, 1905, the Bureau filed a notice indicating that "the United States intends to utilize . . . [a]ll of the waters of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath river and Lost river, and all of the lakes, streams and rivers supplying water thereto or receiving water therefrom" for purposes of the "operation of works for the utilization of water . . . under the provisions of the . . . Reclamation Act." Agents of the United States also posted notices of its appropriation on sites along the Klamath and Link Rivers in Oregon and in the California portions of the Basin.

In 1905, the Oregon legislature passed a second law, providing that "for the purpose of aiding in the operations of irrigation and reclamation . . . the United States is hereby authorized to lower the water level of" various Klamath Basin lakes. Or. Gen. Laws, 1905, ch. 5, § 1, p. 63. This law ceded to the United States "all the right, title, interest, or claim of this State to any land uncovered by the lowering of the water levels." *Id.* The reclaimed lands were ultimately sold or ceded by the United States to homesteaders, including predecessors to some of the plaintiffs in this action. The Bureau required these and other homesteaders who wished to receive deliveries of Project water to file with the Bureau one of two "water rights applications." The first type, a "Form A" water rights application, was used by homesteaders on reclaimed land and, by its terms, generally sought sufficient water as "may be

applied beneficially in accordance with good usage in the irrigation of the land." This form included a "water shortage" clause that allowed the applicant an "equitable proportionate share . . . of the water actually available." The second type of application, a "Form B" water rights application, was used by existing landowners in the Basin who were not on reclaimed lands. This form typically provided that "the measure of the water right" applied for was "that quantity of water which shall be beneficially used for the irrigation" of the applicant's land, "but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the Project Manager or other proper officer of the United States."

By 1911, when the Warren Act was passed, apart from the United States, water rights in the Klamath Project were mostly held by individual landowners – although as early as 1905, the Bureau entered into a "repayment contract" with an incorporated entity, the Klamath Water Users Association, which was made up of owners and occupiers of lands within the Project, some of whom were already appropriators of water for irrigation. According to this contract, the association "guarantee[d] the payments [to the United States] for that part of the cost of the irrigation works apportioned by the Secretary of the Interior to each shareholder" and also undertook to collect shareholders' payments on the government's behalf. It appears that at least ten of the plaintiff irrigation, drainage or water

districts in this action initially entered into contracts with the Bureau under the auspices of the Warren Act.[5]

As noted above, the decades that followed saw the reclamation laws shift away from having the Bureau enter into individual water-rights contracts and toward district-level water delivery contracts. As part of this trend, 13 of the 14 districts involved in this action eventually obtained contracts with the Bureau for the delivery of Klamath Project water.[6] The fourteenth district, Klamath Hills District Improvement Company, has no such contract. Of the 13 districts that have water delivery contracts with the Bureau, eight include provisions holding the United States harmless for "any damage, direct or indirect," resulting "[o]n account of drought or other causes" of "a shortage in the quantity of water available" from Project sources.[7] Some of those

---

[5] Those 10 are Klamath Drainage District, Sunnyside Irrigation District, Klamath Basin Improvement District, Malin Irrigation District, Westside Improvement District No. 4, Shasta View Irrigation District, Poe Valley Improvement District, Midland District Improvement Co., Enterprise Irrigation District, and Pine Grove Irrigation District.

[6] Those 13 are Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Sunnyside Irrigation District, Klamath Basin Improvement District, Malin Irrigation District, Westside Improvement District No. 4, Shasta View Irrigation District, Poe Valley Improvement District, Midland District Improvement Co., Enterprise Irrigation District, Pine Grove Irrigation District, and Van Brimmer Ditch Company.

[7] Those 8 with the same or substantially similar provisions are Klamath Irrigation District, Tulelake Irrigation District, Klamath Drainage District, Sunnyside Irrigation District, Klamath Basin Improvement District, Malin Irrigation District, Westside Improvement District No. 4, and Shasta View Irrigation District.

provisions also require the United States to "use all reasonable means to guard against such shortage[s]." Four other districts' contracts include a similar provision stating that "[t]he United States shall not be liable for failure to supply water under this contract caused by . . . unusual drought."[8] The contract for plaintiff Van Brimmer Ditch Company includes no such shortage provision.

Certain individual water users' application contracts with the Bureau plainly have been superseded by the district-level contracts, under which the districts assumed both the individual water users' repayment obligations and the Bureau's water delivery obligations. The Bureau's September 10, 1956, contract with Tulelake Irrigation District, for example, states that "[t]he United States hereby consents to the cancellation of individual water right applications issued pursuant to Public Notice No. 13 of September 29, 1922. . . . [u]pon the furnishing to the United States of the written consent of the person or persons in whose ownership said individual water right application is vested." Likewise, the July 20, 1953, contract between the Bureau and the Poe Valley Improvement District provides that "[t]he United States and the District agree and recognize that certain lands included within the District are subject to contracts with the United States for water supply, and that it is the intent of the

[8] Those four are Enterprise Irrigation District, Poe Valley Improvement District, Midland District Improvement Co., and Pine Grove Irrigation District. The Poe Valley and Midland contracts omit the word "unusual" before "drought."

parties to such contracts to terminate the same," subject to enumerated conditions. And the November 29, 1954, contract with the Klamath Irrigation District provides that "[t]he District hereby assumes and agrees to carry out . . . all the obligations imposed upon the United States by the contracts listed on Exhibit 'A' . . . for the carriage and delivery of water," and that "the District shall be entitled to collect and retain for its own use . . . all revenues payable to the United States under the hereinabove mentioned contracts." This contract also states, however, that "[a]ll other provisions of said contracts shall remain unaffected hereby." Other district contracts, however, make no mention of the individual water users' contracts and do not explicitly provide for the cancellation of the individual water rights applications of the district members; several do state that the water rights accruing to the district under the contract are "inferior and subject to prior rights reserved for the lands of the Klamath Project."

Several plaintiffs claim other sources of property rights in Klamath Project water. Thus, certain plaintiffs who acquired their land as homesteaders were, after complying with a regulatory scheme, granted title to their land in "patent deeds." To obtain a patent deed, homesteaders were required to file with the Bureau two documents: an Application for Permanent Water Right – Form A, and an affidavit "attesting to the fact that [the homesteader] had put [the] Klamath Project water to beneficial use." Once an applicant met the requirements, he was issued the patent deed conveying the land "together with the right to the use of water

from the Klamath Reclamation Project as an appurtenance to the irrigable lands . . . subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes." The parties disagree as to the scope of the interest in irrigation water conveyed by the patent deeds.

Two of the plaintiffs, the Klamath Drainage District and the Klamath Hills District Improvement Company, hold water right permits that they claim evidence their ownership of a "vested and determined water right" under Oregon law. These permits, which were limited both in terms of a specific cubic feet per second of water, as well as to the amount of water that could be applied to beneficial use, were issued after the State of Oregon repealed the 1905 law in 1953. In addition, it should not be overlooked that a number of Oregon tribes, including the Klamath and Yurok, hold fishing and water treaty rights in the Klamath Project waters. In some instances, these rights derive from treaties, *see* Treaty of 1864, 16 Stat. 708; *Or. Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766-78 (1985), while, in other instances, they were created by statute and executive order, *see* Hoopa-Yurok Settlement Act of 1988, Pub. L. No. 100-580, 102 Stat. 2924 (confirming the existence of these water rights).

Oregon state law has a procedure for sorting out certain competing interests to water. Thus, the Water Rights Act of 1909 authorizes the adjudication of federal reserved and state law water rights initiated prior to the passage of the Act. *See* Or. Rev. Stat. §§ 539.005-240 (2003). All water rights "that had vested

prior to 1909, but had never been subject to a judicial determination" were "left intact as 'undetermined vested rights.' " *United States v. Oregon*, 44 F.3d 758, 764 (9th Cir. 1994) (quoting Or. Rev. Stat. § 536.007(11)). Any person holding an "undetermined vested right" or federal reserved right is required to file a "registration statement" with the Oregon Water Resources Department that must state, among other things, the stream from which the claimed water was diverted, the claimed beneficial use to which it was put, and the time the claimed used [sic] first began. *See* Or. Rev. Stat. § 539.240(2). All such claims are then entered into the state's records, and are made subject to a final determination of rights in a statutory adjudication process. *See* Or. Rev. Stat. §§ 539.240(8), 539.10-240; *see also United States v. Oregon*, 44 F.3d at 764.

An adjudication process for the Klamath River Basin (the Adjudication) was initiated in 1976 and remains pending. The Bureau, plaintiffs, and a variety of other organizations and individuals have filed competing claims in that proceeding. No final decisions regarding those claims have been rendered.

E. History of this Litigation

For decades, Klamath Basin landowners generally received as much water for irrigation as they needed. In severe drought years, they simply received somewhat less. That changed in the spring of 2001, when several federal agencies produced studies indicating that water levels in the basin were so low as to

threaten the health and survival of certain endangered species. Water forecasts for 2001 predicted that year would be "critical[ly] dry," with an inflow volume into Upper Klamath Lake of 108,000 acre-feet from April through September – "the smallest amount of inflow on record." *Kandra*, 145 F. Supp.2d at 1198. In January, 2001, the Bureau forwarded a biological assessment of the Project's operations on the coho salmon and requested the initiation of formal consultation with the NMFS under section 7 of the ESA. *Id.* A similar assessment regarding the endangered shortnose and Lost River suckerfish – two species that "live in Upper Klamath Lake and nearby Project waters and nowhere else," *PCFFA*, 138 F. Supp.2d at 1230 – was forwarded to the FWS in March 2001. *Kandra*, 145 F. Supp.2d at 1198. Both assessments concluded that operation of the Project was likely to affect adversely the three species in violation of the ESA, 16 U.S.C. § 1531, *et seq*.

The two agencies then performed their own analyses and delivered draft Biological Opinions in March, 2001. Both draft opinions concluded that the Project's operations in 2001 would jeopardize the endangered species in question. Upon review of those opinions and the "reasonably prudent alternatives" for the benefit of the fish proposed in them, the Bureau advised the agencies that "the forecasted water supplies for 2001 were not adequate to meet the needs" of the proposed alternatives, which involved maintaining water levels and river flows sufficient to increase water quality for the endangered fishes' habitat. On March 28, 2001, the Governor of Oregon issued an executive order

declaring a "state of Drought Emergency in Klamath County."

On April 5, 2001, the FWS, acting in furtherance of its statutory duties under the ESA, issued a final biological opinion concluding that the proposed 2001 Operation Plan for Upper Klamath Lake, Link River Dam, Tulelake, and the related irrigation delivery facilities threatened the continued existence of the shortnose and Lost River sucker fish. Noting that 2001 was "likely to be the driest year on record," resulting in "extremely limited water resources" in the Basin, the opinion concluded that the proposed operation plan for 2001 would likely result in "loss of larval and juvenile sucker habitat at critical phases of their life cycle," significantly increased "loss of life" among suckerfish, and potentially lethal water quality conditions. The next day, on April 6, 2001, the NMFS issued a final biological opinion concluding that the proposed Operation Plan threatened the coho salmon. The opinion concluded that the proposed plan would "result in the continued decline in habitat conditions" such that "the survival and abundance of . . . coho salmon would be expected to decrease." *See* NMFS Biological Opinion for Klamath Project Operations 3 (May 31, 2002) (describing conclusions of Biological Opinion issued April 6, 2001).

As required by the ESA, the biological opinions of both agencies included "reasonable and prudent

alternatives"[9] to address the threat to the three fish species, including reducing the amount of water available during 2001 for irrigation from Upper Klamath Lake. On April 6, 2001, the Bureau issued a revised Operation Plan that incorporated the "reasonably prudent alternatives" proposed by the agencies. That plan terminated the delivery of irrigation water to plaintiffs for the year 2001.[10] Three days later, on April 9, 2001, two of the plaintiffs herein, the Klamath Irrigation District and the Tulelake Irrigation District, filed a breach-of-contract action in the U.S. District Court for the District of Oregon to challenge the validity of the biological opinions and to enjoin the Bureau from implementing the revised Operation Plan. That court denied a preliminary injunction motion, and the two districts voluntarily dismissed their suit in early October 2001.

On October 11, 2001, plaintiffs then brought suit in this court. Their complaint raised two claims: one for just compensation for their water rights, which they aver were taken by defendant's termination of delivery of irrigation water in 2001; and another for just

---

[9] The ESA directs the Secretary of the Interior or the Secretary of Commerce to suggest "reasonable and prudent alternatives" when consulted about Federal activities that might adversely affect endangered species. *See Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 315 n.2 (2001) (citing 16 U.S.C. § 1536(b)(3)(A)).

[10] Plaintiffs concede that defendant released 70,000 acre-feet of Klamath Project water to users in July 2001, but assert that this delivery came too late in the growing season to allow them to grow crops.

compensation for the impairment of their water rights, which they allege were recognized and vested by the interstate agreement known as the Klamath Basin Compact.

In May 2002, defendant filed a motion to stay this action, arguing that the rights claimed by plaintiffs are "a matter of state law," and that because the "questions at issue in the Adjudication also are required elements of Plaintiffs' takings claims," this court should stay this action pending resolution of the Adjudication. On March 24, 2003, plaintiffs filed an amended complaint, in which, in addition to their prior takings claims, they added a breach of contract count. In September 2003, plaintiffs filed a motion for partial summary judgment seeking a determination that their interests in Klamath Project water were not property interests at issue in the Adjudication. On October 3, 2003, defendant filed a cross-motion for summary judgment on the issue of the nature and scope of plaintiffs' property interest in Klamath Project water and the question whether that interest was a compensable property interest for purposes of the Takings Clause of the Fifth Amendment. On November 13, 2003, this court denied defendant's motion to stay and granted plaintiff's motion for partial summary judgment, concluding that plaintiffs' claim "assert[ed] no property interest determinable in the Adjudication," because plaintiffs claim not title to, "but only 'vested beneficial interests' in, the Klamath Basin Project water." This action was then permitted to proceed with the understanding that "plaintiffs are barred from making any

claims or seeking any relief in this case based on rights, titles, or interests that are or may be subject to determination in the Adjudication."[11]

On January 27, 2004, plaintiffs filed a cross-motion for summary judgment on the issues of the nature and scope of their property interest and whether the United States was liable to pay just compensation for the taking of that interest. On March 23, 2004, the court granted defendant's motion to hold in abeyance the portions of plaintiffs' brief addressing the issue of ultimate liability. This case was transferred to the undersigned on December 9, 2004. On January 11, 2005, plaintiffs were permitted to file a second amended complaint, in which they reduced their damages claim. On February 28, 2005, the court granted a motion to intervene filed by the Pacific Coast Federation of Fishermen's Associations. *See Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328 (2005). On March 14, 2005, the parties simultaneously filed supplemental briefs on the property right issue. Two weeks later, on March 30, 2005, the court held oral argument on the

---

[11] It bears noting at this juncture that there is no *per se* rule requiring this court to abstain in favor of a state water rights adjudication. Indeed, as a general rule, "federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 15 (1983) (quoting *Colorado River*, 424 U.S. 800, 817 (1976)); *see also New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) ("The [federal] courts . . . are bound to proceed to judgment . . . in every case to which their jurisdiction extends.").

parties' cross-motions for summary judgment on the property rights issue.[12]

II. DISCUSSION

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In order to prevail on their claim under this amendment, the plaintiff-irrigators must each establish that they had a property interest in the waters of the Klamath Basin as of the date of the alleged taking in 2001.[13] Whether their respective interests in the

---

[12] On April 12, 2005, plaintiff filed a motion to reconsider the court's order granting, in part, and denying, in part, the motion to intervene. On April 21, 2005, the court denied plaintiff's motion to reconsider and, by separate order, invited defendant and defendant-intervenor to file short briefs replying to portions of plaintiff's reconsideration motion that appeared to be directed at the property-rights issue. On May 19, 2005, defendant and defendant-intervenor filed supplemental briefs in response to the court's order of April 21, 2005. Additional memoranda were filed by the parties on July 14, 2005, and July 22, 2005.

[13] *See Karuk Tribe v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (stating that under a takings analysis, "[f]irst, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action"); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993), *cert.*

waters of the Klamath Basin qualified as "private property" protected by the Fifth Amendment is ultimately a question of federal constitutional law. *Powelson*, 319 U.S. at 279. However, "[b]ecause the Constitution protects rather than creates property interests," *Phillips v. Wash. Legal Foundation*, 524 U.S. 156, 164 (1998), "property," for purposes of the Takings Clause, is defined by law independent of the Fifth Amendment. Thus, it has been said that "[t]he Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment," which interests instead are defined by " 'existing rules or understandings' and 'background principles' derived from an independent source, such as state, federal, or common law." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)).[14] Under these principles, it is axiomatic that "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); *see also* Thomas W. Merrill, "The Landscape of Constitutional Property," 86 Va. L. Rev. 885, 970-81 (2000).[15]

---

denied, 516 U.S. 870 (1995) (citing *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281 (1943)).

[14] *See also Palazzola v. Rhode Island*, 533 U.S. 606, 626-28 (2001); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *Hansen v. United States*, 65 Fed. Cl. 76, 123 (2005).

[15] Federal constitution law, of course, still impacts the definition of private property interests for purposes of the Takings Clause. In *Lucas*, *supra*, for example, the Supreme Court said

In applying these principles to water, it is important to understand that the issue here is not who owns the water. Generally speaking, water "belongs to the public" and is held in trust by the states involved. *See, e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Shively v. Bowlby*, 152 U.S. 1, 11-14 (1894). This is certainly true in the two States at issue, Oregon and California. *See* Or. Rev. Stat. § 537.110 ("[a]ll water within the state from all sources of water supply belongs to the public"); *Milton v. Coast Property Corp.*, 151 Or. 208, 213 (Or. 1935) (noting that Oregon statute dates to 1909); Cal. Const., Art. 10, § 2. Rather, at least in the first instance, this case involves so-called "usufructuary" rights – a right to use the water, ordinarily for a particular purpose and with specified limitations and priorities. *Rencken v. Young*, 300 Or. 352, 363 (1985); *Rank v. Krug*, 90 F. Supp. 773, 787 (C.D. Cal. 1950) ("Such water rights are 'usufructuary, and consist not so much of the fluid itself as the advantage of its uses,' and have been so regarded since the earliest day.") (*quoting Eddy v. Simpson*, 3 Cal. 249 (Cal. 1853)).[16]

---

that state-law definitions of private property rights must be based on an "objectively reasonable application of relevant precedents." 505 U.S. at 1032 n.18. Such objectivity is vital if the integrity of the Takings Clause is to be preserved as against entirely novel and unprincipled definitions of property designed artificially to defeat or buttress a takings claim. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

[16] As explained in *Rencken*, 300 Or. at 363 –

> "[W]aters of a natural stream or other natural body of water are not susceptible of absolute ownership as specific tangible property. Prior to the segregation of water

Based on these principles, the issues whether and, if so, to what extent, the plaintiff-irrigators possess property rights in the waters of the Klamath Basin require the court to look at three possible sources for such rights: Federal law, apart from the Constitution; Oregon, and to the extent relevant, California, law; and, potentially, contract law, looking at whether the farmers acquired rights from a third party. The court will consider these potential sources, and the parties' conflicting arguments with respect thereto, *seriatim*.

A. Federal Reclamation Law

Plaintiffs' banner assertion is that their property interests in the Klamath water spring from the Reclamation Act of 1902, 32 Stat. 388 (1902) (codified, as amended, at 43 U.S.C. §§ 371 *et seq.*). Their view is bottomed on section 8 of that Act, which provides, in pertinent part:

> [N]othing 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,

---

from the general source, the proprietary right is usufructuary in character." 1 Clark (ed.), Water and Water Rights 349 (1967) (footnotes omitted). "According to the modern accepted doctrine, it is the use of water, and not the water itself, in which one acquires property in general." *Sherred v. City of Baker*, 63 Or. 28, 39, 125 P. 826 (1912).

See also Washoe County v. United States, 319 F.3d 1320, 1322 (Fed. Cir. 2003).

> 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, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or use of water in, to, or from any interstate stream or the water thereof: Provided, ***That the right to 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.***

32 Stat. 388, 390 (1902) (codified at 43 U.S.C. §§ 372, 383 (2000)) (emphasis added). Focusing on the highlighted language, the irrigators asseverate that because they own the irrigated land that is appurtenant to the water in question, the statute confers upon them a property interest in that water. Thus, they contend, their interests in the water derive directly from Federal law, rather than the law of Oregon or California. There are sundry reasons, however, why this contention is rootless.

To begin with, there is the statutory language.[17] On its face, section 8 requires the Secretary, in carrying

[17] "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). In this regard, the Supreme Court has instructed that

out his responsibilities under the Reclamation Act, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution of water." It is beyond peradventure that, rather than authorizing the Secretary to acquire his water rights independent of state law, this section treats the Secretary as an appropriator under the states' appropriation laws, requiring him to obtain his water rights in the same manner as others. Nothing in this language suggests that third parties, including irrigators, could obtain title to appropriative water rights at Bureau projects other than through state law. Indeed, while the Reclamation Act indicates that the right to the use of certain water "shall be appurtenant to the land irrigated," this language refers only to water "acquired under the provisions of this Act," which "provisions" require the claimant to obtain those rights in accordance with state law. Accordingly, the Reclamation Act does not, as plaintiffs intimate, independently define who owns interests in the water of Bureau projects, including the Klamath Basin. To the contrary, that question is controlled by state law, in this case, that of Oregon, or perhaps, California.

This reading of the statute is confirmed by extensive legislative history. As private and state efforts at irrigating the arid lands of the West failed, pressure mounted during the last decade of the 19th century for

---

"[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

some form of federal support for irrigation. Many bills were introduced in Congress during this decade and up until 1902.[18] As reflected in these bills, a primary point of contention was whether the irrigation projects should be built and operated by the Federal government or instead be built by the Western States using land ceded to them for this purpose. Ultimately, those who supported the Reclamation Act's passage, particularly representatives from the Western States that stood to benefit most from the Act's passage, convinced a majority that reclamation was a national function and that the projects should be built by the federal government.[19] A robust secondary debate involved whether the Federal government or the States should control the appropriation and distribution of project water. Opponents of what would become the Reclamation Act espoused the view that, if the Federal government was to build and operate the projects, it should control the appropriation and distribution of the water. Supporters, however, retorted that this control should reside in the Western States, each of which,

---

[18] *See, e.g.*, 57th Cong., 1st Sess (1902): H.R. 52, H.R. 63, H.R. 125, S. 595, H.R. 7676, H.R. 9676, and S. 3057; 56th Cong., 2d Sess. (1901): H.R. 13846, S. 5833, H.R. 13993, H.R. 14072, H.R. 14088, H.R. 14165, H.R. 14192, H.R. 14203, H.R. 14241, H.R. 14250, H.R. 14280, H.R. 14388; 56th Cong., 1st Sess. (1900): S. 205, H.R. 5022; 55th Cong., 3d Sess. (1899): H.R. 11795; 55th Cong., 2d Sess. (1898): S. 4017, H.R. 9994. S. 3057 is the bill that ultimately became, as amended, the Reclamation Act.

[19] *See* H. Rep. No. 57-1468, at 3-4 (1902); S. Rep. No. 57-254, at 5 (1902); *see also* 35 Cong. Rec. 6675-76 (1902) (Cong. Mondell); *id.* at 6673, 6734 (Cong. Newlands); *id.* at 6673 (Cong. Shafroth); *id.* at 6740 (Cong. Reeder).

by this time, had regimes for dealing with water rights. They noted that the creation of a Federal regime for establishing water rights would inevitably compete with the preexisting state regimes, threatening a lifeblood issue for the arid states and leading potentially to unintended results.[20] The approach of placing

---

[20] President Roosevelt, a main supporter of this approach, stated in a 1901 message to Congress that "[t]he distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights." 35 Cong. Rec. 6775 (1902). Senator Clark of Wyoming, the chief senatorial sponsor of S. 3057, which became the Reclamation Act, disclaimed the notion that "a great Government bureau . . . shall have control of all the . . . waters in our arid regions." 35 Cong. Rec. at 2222. In a floor statement, he further explained –

> The question of the conservation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition. . . . [I]t is right and proper that the various States and Territories should control in the distribution. The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . . [T]o take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men. . . .

Id. A parallel history is revealed by the debates in the House. *See* 35 Cong. Rec. 6676 (Cong. Mondell) (asserting that section should "reserv[e] control of the distribution of water for irrigation to the respective States and Territories"); *id.* at 6678 (Cong. Mondell);

control in the States, these legislators emphasized, had been adopted by Congress in passing the Mining Acts of 1866 and 1870, and the Desert Land Act of 1877.[21]

The legislative history – not to mention the statutory language – reflects that the latter view won out. In this regard, the relevant Senate Report provided that "[b]y section 8 there is to . . . be no interference with State or Territorial laws on the subject of irrigation." S.Rep. No. 254, *supra*, at 2. The accompanying House Report, in much greater detail, adumbrates that "[s]ection 8 recognizes State control over waters of nonnavigable streams such as are used in irrigation, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to such laws." H. Rep. No. 1468, *supra*, at 6. It emphasizes that "nothing in the act shall be held as changing the rule of

---

id. at 6672-73 (Cong., Shafroth); *id.* at 6748 (Cong. Glenn); *id.* at 6752 (Cong. Jones); *id.* at 6763 (Cong. Mercer); *id.* at 6770 (Congressman Sutherland) ("if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail"); *id.* at 6728 (Cong. Burkett).

[21] *See* Mining Act of 1866, ch. 262, 14 Stat. 251, 253, (1866), as amended by Act of July 9, 1870, ch. 235, 16 Stat. 217, 218 (1870) (protecting a miner's claim to water to the extent based on "local customs, laws, and the decisions of the courts"); Desert Land Act of 1877, 19 Stat. 377 (1877) (settlers' water right "shall depend upon bona fide prior appropriation"); *see also* 35 Cong. Rec. 6678 (Cong. Mondell) (noting the desire to "follow[ ] the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water"); *California*, 438 U.S. at 656-58 (observing this point in construing these statutes); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-58 (1935) (same).

priorities on interstate streams," *id.* at 6, noting further that "[u]nder this section uniformity of record of the rights is secured and the rules of priorities of rights are not disturbed," *id.* at 7. Describing the Federalism balance struck by the legislation, this same report reveals that the portions of section 8 requiring appurtenancy and beneficial use, together with those in section 5 of the Reclamation Act, limiting, for example, the size of certain irrigated parcels to 160 acres, were designed not to supplant state water law, but rather to ensure that under that law, monopolistic ownership of public waters (and eventually the lands associated therewith) would not occur. *Id.* at 6-7 (noting that these provisions were designed to "absolutely insure the user in his right and prevent the possibility of speculative use of water rights").[22] Indeed, the House Report anticipated that the Secretary would not begin construction of works for the irrigation of lands in any State or

[22] *See also* 35 Cong. Rec. 6679 (1902) (Cong. Mondell) (provision designed to prevent "the evils which come from recognizing a property right in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended"); 35 Cong. Rec. 2222-23 (1902) (Sen. Clark) (indicating that these provisions were designed to prevent "large areas of public domain" from being "placed in the hands of the larger corporate interests"). Subsequent Supreme Court cases construed these limitations consistent with this legislative history. *See, e.g.*, *Bryant v. Yellen*, 447 U.S. 352, 368 n.19 (1980) (noting that the 160 acres limitation "helps open project lands to settlement by farmers of modest means, insures wide distribution of the benefits of federal projects, and guards against the possibility that speculators will earn windfall profits from the increase in value of their lands resulting from the federal project"); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 297 (1958) ("The project was designed to benefit people, not land").

Territory "until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated." *Id.* at 7.

Recounting this legislative history, the Supreme Court, in *California*, *supra*, concluded that "the Act clearly provided that state water law would control in the appropriation and later distribution of the water." 438 U.S. at 664. Writing on behalf of the majority, then Justice, now Chief Justice, Rehnquist emphasized that "[f]rom the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects." *Id.* at 665. "First," he noted, "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* Repudiating *dicta* in earlier cases, Justice Rehnquist then dismissed the notion that state law control over the appropriation of water was a mere technicality, in the process making short shrift of the argument that "§ 8 merely require[s] the Secretary of the Interior to file a notice of his intent to appropriate but to thereafter ignore the substantive provisions of state law." Instead, he found that the legislative history made it "abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675; *see also Nebraska v. Wyoming*, 295 U.S. 40, 42-43 (1935). "Second," Justice Rehnquist continued, "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." *California*, 438 U.S. at 667. The only exceptions to these rules, he indicated, were two specific provisions of the

Reclamation Act that were to govern to the extent inconsistent with state law: section 5, which forbade the sale of reclamation water to tracts of land of more than 160 acres, and section 8 of the Act, which required that the water right must be appurtenant to the land irrigated and governed by beneficial use. *Id.* at 668 n.21.

California thus authoritatively teaches that defining property rights as to the water in question is a matter of state, not federal, law. Consistent with this view and the statute's legislative history, courts and commentators alike have viewed the appurtenancy/beneficial use clause at the end of section 8 merely as an overlay to state law, designed to prohibit monopolistic control over western waters.[23] If the law were otherwise, a property owner could claim water rights under section 8 solely based upon appurtenancy and beneficial use, even without a contract or some other arrangement to receive project water. Yet, such naked claims have been rejected by courts holding that the

---

[23] *See, e.g.*, *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 802 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990) ("Congress was particularly concerned that the reclamation projects not fuel land speculation in the West or contribute in any way to the monopolization of land in the hands of a few private individuals."); Joseph L. Sax, "Problems of Federalism in Reclamation Law," 37 U. Colo. L. Rev. 49, 67 (1964-65) (appurtenancy/beneficial use was "designed to insure that the benefits of federal irrigation programs went to, and stayed with, small family farmers, and that water did not fall into the hands of large speculators and corporations"); Paul S. Taylor, "The Excess Land Law: Execution of a Public Policy," 64 Yale L.J. 477, 483-86 (1955) (the Reclamation Act was "drawn with unusual care to prevent monopoly of water on reclaimed public lands").

appurtenancy and beneficial use concepts of section 8 only apply to properties otherwise entitled to receive distributions of project water. Thus, for example, in *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217 (9th Cir. 1989), the Ninth Circuit explained –

> [T]he beneficial use requirement occurs only in the context of determining how much water duty is appropriate for lands ***already*** entitled to receive Project water. Section 8 of the Act strictly limits the beneficial use concept to properties that are entitled to receive Project water. Section 8 explains that beneficial use is the measure of the right to the use of water ***acquired under the provisions of this Act***.
>
> The critical defect with the transferee properties involved in this case, however, is that they generally have no right to receive Project water. The landowners do not hold contracts or certificates entitled their properties to be irrigated. The beneficial use discussion . . . is therefore of no consequence to the presumed right of transferee properties to receive transferred water rights.

Id. at 1228-29 (emphasis in original); *see also United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1163 (9th Cir .2004); Reed D. Benson, "Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water," 16 Va. Envtl. L.J. 363, 397-98 (1997).

Seeking to sidestep the *California* case, plaintiffs place heavy reliance on a triumvirate of cases – *Ickes*

v. Fox, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945) and *Nevada v. United States*, 463 U.S. 110 (1983). They claim that these cases hold that the Reclamation Act establishes a federal property right to the use of water in the case of irrigation appurtenant to the land, subject to beneficial use. But, even a cursory review of these cases reveals that they hold nothing of the sort, but rather merely reflect the perceived result of the interaction between the Reclamation Act and the particular laws of the states involved. Given the importance of this point, a few words of elaboration are in order.

Plaintiffs cite statements in these cases describing water rights associated with reclamation projects and arising out of appurtenancy as "the property of the land owners," *Ickes*, 300 U.S. at 95, or a "property right," *Nebraska*, 325 U.S. at 614, or conversely, recognizing that the United States ownership of certain water rights was "at most nominal," *Nevada*, 463 U.S. at 126. But, read in context and in their entirety, these statements only describe either: (i) the impact of section 8 on water rights that were deemed established under state law; or (ii) the fact that that section does not confer independently any significant interest in the reclamation waters upon the United States. In *Ickes*, *supra*, for example, the Supreme Court held that the United States was not an indispensable party to a lawsuit brought by farmers in Washington against the Bureau. *Ickes*, 300 U.S. at 96-97. In concluding that the United States did not become the owner of the water rights at issue, the Court rejected the government's

reliance upon the Reclamation Act and instead relied on contracts and a Washington state law that provided that "[t]he right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used." 300 U.S. at 94 n.3 (citing Laws of Wash., 1917, c. 117, § 39, p. 465; Laws of Wash., 1929, c. 122, § 6, p. 274; Rem. Rev. Stat. § 7391, vol. 8, p. 425). Likewise in *Nebraska*, *supra*, an original proceeding to apportion the waters of the Platt River, the Supreme Court again refused to find that section 8 granted the United States any water rights, and instead looked to state law on appropriation to determine the existence and nature of the property interest at issue in those cases. *Nebraska*, 325 U.S. at 612-15. Applying Nebraska and Wyoming law, the Court noted the Reclamation Act's "direction . . . to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes," and stated that it "intimate[d] no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights," noting that "[n]o such attempt was made." *Id.* at 614-15. Finally in *Nevada*, *supra*, the Court, reaffirming its decision in *California*, focused on "the law of the relevant State [*i.e.*, Nevada] and the contracts entered into by the landowners and the United States" in deciding that beneficial use gave rise to private rights in water. 463 U.S. at 122. Nonetheless, it ultimately resolved this case, which involved an attempted reallocation of reclamation water rights, based upon *res judicata* principles. *Id.* at 145.

While these cases certainly hold that section 8 does not confer water rights on the United States, that conclusion did not spring from the notion that section 8, rather than state law, somehow grants those rights to other parties. Indeed, few, if any, broad principles can be distilled from the Court's comments on the state water rights at issue in these cases because those comments depended upon several key assumptions. In *Ickes*, those assumptions derived from the procedural posture of the case – the sovereign immunity question presented involved a motion to dismiss, requiring the Court, under familiar rules, to treat the allegations made in plaintiffs' amended bills of complaint as true, including those involving their claimed water rights and those of the United States. The latter principle so drove the analysis in *Ickes* that, later in *California*, the Supreme Court characterized *Ickes* as not involving a construction of section 8. *See California*, 438 U.S. at 651 ("so far as we can tell, the first case to come to this Court involving the Act at all was *Ickes* . . . and the first case to require construction of § 8 of the Act was *United States v. Gerlach Live Stock Co.*, *supra*, decided nearly half a century after the enactment of the 1902 statute"). Likewise, in both *Nebraska* and *Nevada*, the genuinely operative portions of those opinions focused not on whether the parties competing with the United States had perfected interests in the subject water under state law, but rather on how those rights were affected by the Reclamation Act (and the Desert Land Act before it) and whether the United States had

somehow obtained a priority interest in such waters.[24] Neither of these cases undertook a comprehensive review of the laws of the states in question, nor addressed whether the United States could have obtained an overriding interest in the waters under some other state procedure. *See, e.g.*, *Nebraska*, 325 U.S. at 615.

To the extent that these cases may be viewed as construing the interrelationship between state laws and the overlaying principles of section 8, they say virtually nothing about the interaction between section 8 and the underlying provisions of Oregon and California law that are at issue here. Suggestions in the *Ickes* line that there is a uniform body of western water

---

[24] In *Ickes*, 300 U.S. at 96, the case came before the Supreme Court on defendant's motion to dismiss, which "concede[d] the truth of" plaintiff's allegations that "their water-rights ha[d] become vested" under state law. The Court indicated that given the procedural posture, even if those allegation [sic] had been denied, "we should still be obliged to indulge the presumption . . . that respondents might be able to prove them." *Id.* Similarly, in *Nebraska*, 325 U.S. at 612, the Court based its decision, in part, on the premise that "the water rights on which the North Platte [Reclamation] Project and the Kendrick [Reclamation] Project rest have been obtained in compliance with state law." The Court found that Congress, in passing section 8, had chosen to require the Secretary to ensure that "projects were designed, constructed and completed according to the pattern of" state appropriation laws, and found that the Secretary, indeed, had complied with these laws by obtaining permits from state officials. *Id.* at 612-14. Finally, in *Nevada*, *supra*, the Court concluded that the "beneficial interest in the rights confirmed to the Government resided in the owners of the [appurtenant] land," observing "[a]s in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of the relevant State and the contracts entered into by the landowners and the United States make this point very clear." 436 U.S. at 126.

rights law must be viewed cautiously, recognizing that the laws in these States largely, but not completely, overlap. Because those differences sometimes are pronounced – particularly, as they apply to the United States, and especially, in terms of reclamation – any attempt to extrapolate the reclamation water rights owned by an individual in one state from cases involving the laws of another state is perilous, at least until relevant congruencies between the two regimes have been established. The Court had no need to make the latter type of comparison in any of the *Ickes* line of cases, and did not do so. Nor did any of these cases mention, even in passing, the laws of Oregon or California. Indeed, while plaintiffs blithely claim otherwise, there is not the slightest hint that any of those cases remotely considered laws similar to those specifically governing reclamation in the two states at issue here.[25] Perhaps for these reasons, in trumpeting

---

[25] At oral argument, plaintiffs' counsel asserted that the laws of Oregon mirrored, in pertinent respects, the laws of the states involved in *Ickes, Nebraska* and *Nevada.* That proposition, however, is not borne out by the copies of the state statutes which plaintiffs provided subsequent to the argument. Any notion that the water laws of the Western States are uniform can be readily dispelled by even a cursory review of Wells A. Hutchins's seminal treatise *Water Rights Laws in the Nineteen Western States*, which dedicates three volumes and approximately 2,000 pages to describing, in magisterial detail, the many variations in water laws and water rights in those states. Notably, Hutchins divides the Western States and their approaches to water into three broad groups – Oregon and California are placed in a different category than Nevada, Colorado, Wyoming, and Nebraska. The latter, of course, were the states *sub judice* in the triumvirate of Supreme Court cases on which plaintiffs rely. *See* Wells A. Hutchins, I *Water Rights Laws in the Nineteen Western States* 2-3 (1971); *see also*,

certain [statements from the *Ickes* line of cases, plaintiffs gloss over the associated references to individual state laws, not to mention the many qualifiers and caveats that the Supreme Court employed in indicating, for example, that a given rule "generally" applied in Western States or represented an approach held "in common with most other states."[26] With these qualifications restored, the *Ickes* troika hardly provides an analytical stepping stone from which to leap to the conclusion that Congress, in passing the reclamation laws, intended to create usufructuary rights independent of state law.

Finally, plaintiff's construction of the *Ickes* line of cases runs headlong into a wide range of precedent. Certainly, nothing in these cases conflicts with the Supreme Court's holding in *California*, that, under the Reclamation Act, state water law controls the

---

e.g., 1 Waters and Water Rights § 8.02 (Robert E. Beck, ed. 1991) (providing "a State-by-State account of the adoption of appropriative rights or of dual [appropriation and riparian] systems" in the Western States, and dividing those states' water laws as falling into three broad categories); 6 Waters and Water Rights, Part XI, Subpart B (Robert E. Beck, ed. 1991) (summarizing the differences and similarities among the water laws of all 50 states); David Getches, Water Law In a Nutshell 192 (1984).

[26] *See* (*with emphasis added*): *Nevada*, 463 U.S. at 126 ("[t]he law of Nevada, ***in common with most other western States***, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land"); *Ickes*, 300 U.S. at 95-96 (in Western states "*generally* . . . it long has been established law that the right to the use of water can be acquired only by appropriation for beneficial use"); *see also Arizona v. California*, 460 U.S. 605, 620 (1983) ("the ***prevailing law*** in the western states").

appropriation and later distribution of water, and any rights inherent in these functions. Plaintiffs are left to argue that *Ickes* and *Nebraska* were inconsistent with the *California* case, yet somehow survived the latter (and later) decision. That bit of *ipse dixit* is dubious enough on its face, let alone if one gives those cases the broad compass plaintiffs would afford them – a compass that would inevitably bring them all the more into conflict with *California.* And, even though *Nevada* was decided five years after *California*, any notion that the former, *sub silentio*, overruled the latter can best be described as unrealistic – 70 years of decisions in the Supreme Court[27] and elsewhere,[28] which have

---

[27] *See Bryant v. Yellen*, 447 U.S. 352, 371 n.22 (1980) ("the source of present perfected rights is to be found in state law"); *City of Fresno v. California*, 372 U.S. 627, 630 (1963) ("the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made"); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950) (under the reclamation laws, "Congress proceeded on the basis of full recognition of water rights having valid existence under state law"); *Silas Mason Co. v. Tax Comm'n of State of Wash.*, 302 U.S. 186, 199 (1937) (section 8 "directed the Secretary of the Interior to proceed in conformity with the state laws in carrying out the provisions of the act and provided that nothing therein contained should be construed as interfering with the laws of the State relating to the control, appropriation, use or distribution of water used in irrigation"); *Nebraska v. Wyoming*, 295 U.S. 40, 42 (1935) ("[a]ll of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming"); *see also California v. FERC*, 495 U.S. 490, 504 (1990) (discussing the holding of *California* as it applies to the Reclamation Act of 1902).

[28] *See, e.g.*, *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 461 (9th Cir. 1994) (subjecting the United States, as owner of water rights in California, to provisions of

consistently construed the Reclamation Act as deferring to state law in determining who has interests in reclamation waters, prove that notion false. In the last analysis, to rule in plaintiffs' favor on this issue, this court would not only have to defenestrate this authority, contraindications in the *Ickes* cases themselves, *see, e.g.*, *Nevada*, 463 U.S. at 121 (reaffirming the ruling in *California*) and a wealth of legislative history, but also be prepared to flip the statute onto its head, treating the majority of the language therein not as the embodiment of an important principle of cooperative Federalism, but rather as an empty formalism.[29] While

---

California water law restricting the location and use of that water); *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989) (concluding that "[s]tate law regarding the acquisition and distribution of reclamation water applies if it is not inconsistent with congressional directives"); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) ("[i]t generally can be said that state law governs the distribution of water from federal projects unless Congress expresses a different approach"); *Grey v. United States*, 21 Cl. Ct. 285, 295 (1990) (quoting *California*, *supra*, for the proposition that the Reclamation Act provides that "state water law would control in the appropriation and later distribution of [Reclamation Project] water"); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1201 (D. Or. 2001) ("[u]nder federal reclamation law, the Secretary of the Interior is required to proceed in conformity with state laws with respect to the control, appropriation, use, or distribution of water used in irrigation"); *Westlands Water Dist. v. United States*, 805 F. Supp. 1503, 1509 (E.D. Cal. 1992) ("federal reclamation projects must be operated in accordance with state water law, when not inconsistent with congressional directives" and requires the United States to "respect [the state's] appropriative water rights hierarchy").

[29] In searching vainly for evidence of a more sweeping interpretation of the *Ickes* line of cases, plaintiffs rely on documents

plaintiffs may cling to such a *res ficta*, it remains that Congress enacted no such fantasy.

As such, it is apparent that this court must proceed to consider state law in determining whether plaintiffs have property rights in the waters of the Klamath Project.

B. State Law

Under the umbrella of the prerogatives created by the Reclamation Act, the States, in the years following the passage of the Act, began to pass reclamation legislation, often prompted by the desire of luring a

---

issued by the Solicitor and a Regional Solicitor of the Department of the Interior in 1989 and 1995, respectively. But, even these documents recognize that the determination and distribution of water rights in reclamation projects is dependent upon state law. *See, e.g.*, Memorandum from the Regional Solicitor, Pacific Southwest Region to the Regional Director, Bureau of Reclamation, Pacific Southwest Region 2 (Jul. 25, 1995). Moreover, in a 1933 decision, the Department of Interior opined that the United States rights to the waters of the Klamath Basin were based upon Oregon law. *See* Water Rights on Lower Klamath Lake, 53 Interior Dec. 693, 695-98 (1932). At all events, by all appearances, the documents cited by plaintiff were not arrived at through formal adjudication or notice-and-comment rule making and thus do not represent any agency's formal position on this issue. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *see also Cuyahoga Metr. Hous. Auth. v. United States*, 65 Fed. Cl. 534, 551 n.19 (2005). Even were these documents indicative of the agency's formal position, it is beyond peradventure that an agency may change its mind, provided, critically, its new position is supported by the law. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 416-17 (1993); *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 180-86 (1957). In the court's view, the latter requirement has been met here.

project within their borders. Defendant claims that it owns controlling rights to the Klamath Project water based upon one such statute, the Act of the Oregon legislature of February 22, 1905, which read, in relevant part, as follows:

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

Or. Gen. Laws, 1905, Chap. 228, § 2, p. 401-02. In a separate 1905 law, the Oregon Legislature also authorized

the raising and lowering of Upper Klamath Lake in connection with the Project, allowed the use of the bed of Upper Klamath Lake for storage of water for irrigation; this law "ceded to the United States all the right, title, interest, or claim of this State to any land uncovered by the lowering of the water levels, or by the drainage of any or all of said lakes not already disposed of by the State." Or. Gen. Laws, 1905, ch. 5, §§ 1-2, p. 63-64.[30]

In February of 1905, the Congress authorized the development of the Klamath Irrigation Project. Act of February 9, 1905, ch. 567, 33 Stat. 714. Pursuant to that legislation, on May 17, 1905, the United States filed a notice of intention to appropriate Klamath River water, stating:

> Notice is hereby given that the United States intends to utilize certain specified waters, as follows, to-wit: All of the waters of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath River and Lost River, and all of the lakes, streams and

---

[30] On February 3, 1905, California enacted a statute similar to this provision. It stated – "[t]hat for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service of the United States . . . the United States is hereby authorized to lower the water levels of any or all of the following lakes: Lower or Little Klamath lake, Tule or Rhett lake, Goose lake, and Clear lake, . . . and to use any part or all of the beds of said lakes for the storage of water in connection with such operations." 1905 Cal. Stat., p. 4. The statute also "ceded to the United States all the right, title, interest, or claim of this State to any lands uncovered by the lowering of the water levels, of any or all of said lakes, not already disposed of by this state." *Id.*

> rivers supplying water thereto or receiving water therefrom, including the following and all their tributaries . . . [listing tributaries].
>
> It is the intention of the United States to completely utilize all the waters of the Klamath Basin in Oregon, and to this end this notice includes all lakes, springs, streams, marshes and all other available waters lying or flowing therein.
>
> That the United States intends to use the above described waters in the operation of works for the utilization of water in the state of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat, 388), known as the Reclamation Act.

In addition, the Bureau posted notices of appropriation for the Lost River system, which flowed from California to Oregon and back to California. The record reflects that it also acquired, by purchase from private parties, water rights with earlier priorities for the benefit of the Klamath Project.

Every indication is that the May 1905 notice triggered the provisions of the 1905 Oregon legislation, thereby vesting in the United States, as of that time, the appropriative water rights associated with the Klamath project that were unappropriated as of the date of the filing.[31] This conclusion is confirmed by

---

[31] It should be noted that the United States met the other two requirements imposed by the 1905 Oregon law. Thus, on May 6, 1908, the Bureau filed plans and specifications for the Klamath Irrigation Project with the State Engineer. And, on May 8, 1909,

In re Waters of the Umatilla River, 168 P. 922, 925 (Or. 1917), in which the Oregon Supreme Court held that, under the 1905 legislation, a similar notice by the United States "vested the United States with title to all the then unappropriated water of the Umatilla River." On rehearing, that court reaffirmed its prior conclusion, explaining further –

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

In re Waters of Umatilla River, 172 P. 97, 100 (Or. 1918); *see also* Paul S. Simmons, "Klamath Basin: Endangered Species Act and Other Water Management Issues," SJ023-ALI-ABA 127, 133 (2003) (hereinafter

---

the Bureau filed proof of authorization to construct the necessary works. On May 17, 1909, the Bureau filed supplemental plans with the State Engineer.

"Simmons") (noting that via the notice, "under Oregon law, water was thus 'deemed appropriated' and unavailable for other uses"). Commenting on these opinions, as well as the 1905 Act, a 1933 decision of the United States Department of the Interior stated – "This section of Oregon law was considered by the Supreme Court of Oregon in *Re Waters of Umatilla River* . . . in which it was held that the right of the United States through compliance with this act to all the waters not then appropriated is not affected by its lack of diligence in completing its project or by the fact of all the waters not being required to irrigate the lands served by its ditches, these matters not being conditions of the statute." *Water Rights on Lower Klamath Lake*, 53 Interior Dec. at 698. This decision concluded that "[t]he right conferred upon the United States by the State of Oregon to appropriate unappropriated waters in that State for agricultural purposes was plenary as to its use. . . ." *Id.* at 698.[32]

---

[32] Although research reveals no other case that has directly examined this issue, a number of prior opinions proceeded from the uncontested assumption that the United States, in 1905, appropriated all unappropriated water rights in the Basin. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 2000) ("In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects."); *Kandra*, 145 F. Supp.2d at 1196 (same); *PCFFA*, 138 F. Supp.2d at 1230 (same); *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp.2d 990, 991-92 (D. Or. 1998) (same). Moreover, other state courts construing state law provisions identical to the Oregon law have similarly concluded that the United States obtained all available appropriative water rights in given

In arguing to the contrary, plaintiffs place stock in a 1950 Oregon Attorney General opinion, which found that the United States, by filing its notice under the 1905 Act, acquired the unappropriated water of the Klamath Basin "reasonably necessary" to the Project, but only to the extent the United States put those waters to "beneficial use." *See* Oregon Attorney General Opinion No. 1583, 25 Op. Atty. Gen. 62 (Nov. 10, 1950). Plaintiffs intimate that this "beneficial use" concept limits the scope of the rights obtained by the United States under the 1905 Act, paving the way for them to assert contrary interests under state law. *Per contra.* To the extent the 1950 opinion may be viewed as applying such a use limitation to the United States, it is inconsistent not only with the plain language of the 1905 Act,[33] but also with the holding in *Umatilla*, *supra*, that the United States had "vested" rights in the subject water "regardless of the amount of water

---

reclamation water simply by filing an appropriate notice. *See Oklahoma Water Resources Bd. v. Foss Reservoir Master Conservancy Distr.*, 527 P.2d 162, 163-65 (Okla. 1974); *City of Stillwater v. Oklahoma Water Resources Bd.*, 524 P.2d 938, 943 (Okla. Civ. App. 1974) (federal government granted "appropriative water rights to unappropriated water simply by filing notice of intent to utilize it").

[33] In holding that interests adverse to those of the United States could arise independently under state law, the 1950 opinion not only clashes with the portion of 1905 Act that provides waters appropriated via the notice "shall not be subject to further appropriation under the laws of this state," but also with the portion that states "[n]o 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 "may be formally released in writing by an officer of the United States."

required to irrigate the lands served by the government ditches." 172 P. at 100.[34] Perhaps not coincidentally, the 1950 opinion clashes with at least four earlier opinions of the Oregon Attorney General. The first of these, issued in 1925, ordered the State Engineer to revoke a water permit that had been provided to a power company, finding, based upon the 1905 Act, that "[i]t is clear, therefore, that the waters of Upper Klamath Lake are thereby withdrawn in favor of the federal government and that no private person or corporation can acquire the right to the use of any thereof except such as may be hereafter specifically released by the federal government." Op. Or. Atty. Gen. 321, 322 (Jul. 1, 1925). Five years later, the Attorney General, in opining against a power company's application for a

---

[34] The 1950 opinion appears to proceed from the mistaken view that the *Ickes* line of cases somehow overruled the opinions in *Umatilla*, *supra*, thus adopting the same overly-expansive interpretation of the *Ickes* line that underlies plaintiffs' claims here. *See* 25 Op. Atty. Gen. at 64. While the opinion also makes a glancing reference to the "beneficial use" language in section 8, *id.* at 63, any notion that the latter section somehow trumps the 1905 Act ignores not only the legislative history of that section, which focuses on preventing monopolistic control by private entities, but also the Supreme Court's admonition that, in implementing the reclamation laws, the Secretary should "follow state law in all respects not directly inconsistent with the[ ] directives" of section 8. *California*, 438 U.S. at 678. Indeed, if the 1905 Oregon law were viewed as being "directly inconsistent" with the "beneficial use" requirement of section 8, it also would be directly inconsistent with section 8's requirement that water rights be "appurtenant to the land irrigated." The result would be to render the entire 1905 Act invalid. Plaintiffs do not make this argument, perhaps recognizing that Congress did not intend the appurtenancy/beneficial use clause of section 8 to be wielded in this disruptive fashion.

water appropriation, discussed, at length, the 1905 Act and the *Umatilla* opinions, finding that "based upon the statute as interpreted by the supreme court," "without release by the federal government," there was no water "subject to appropriation at this time." Op. Or. Atty. Gen. 43, 47 (Nov. 14, 1930). Lastly, on two occasions in 1931, when requested to comment on bills involving the Klamath waters pending before the Oregon legislature, the Attorney General responded – "As a matter of law, as decided by the supreme court in the case of *In re Waters of Umatilla River* . . . it seems clear that no such appropriations subsequent to the act of 1905, above cited, are valid, until the United States government releases a portion of the waters above mentioned from the appropriation made by it under the provisions of said act of 1905." Op. Or. Atty. Gen. 134-35 (Feb. 25, 1931) and Op. Or. Atty. Gen. 143, 144 (Mar. 5, 1931). Forced to choose between the solitary 1950 opinion, on the one hand, and the opinions of the Oregon Supreme Court, as well as others of the Oregon Attorney General, on the other, the court opts for the latter, particularly since the analysis therein comports with the plain language of the 1905 Act.[35]

Accordingly, the court concludes that, pursuant to relevant Oregon law, in 1905, the United States obtained rights to the unappropriated water of the

[35] Flaws similar to those found in the 1950 opinion are exhibited in the position the Oregon Attorney General has taken in the Adjudication. *See* In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean, Oregon Water Resources Department's Closing Brief on Reply 36-41 (Jul. 14, 2005).

Klamath Basin and associated tributaries. Of course, this conclusion only goes so far – at least initially. It does not answer whether any of the individual plaintiffs hold water rights that predate the 1905 notice – in other words, that were already appropriated as of the date of the filing. Nor does it reveal whether any of the individual plaintiffs hold water rights that postdate the 1905 notice – that were obtained from the United States. The court will consider these possibilities *seriatim*.

1. Pre-1905 Potential Interests

"Prior to 1909, there was no comprehensive state regulatory system in Oregon for water." Simmons, *supra*, at 130. Under Oregon law, to establish a right to the use of water prior to the adoption of the Water Rights Act of 1909, three elements had to be proven:

> (1) An intent to apply [the water] to a beneficial use, existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, canal or other structure; and (3) an application of it within a reasonable time to some useful industry.

In re Water Rights in Silvies River, 237 P. 322, 336 (Or. 1925); *see also In re Rights of Deschutes River and Tributaries*, 286 P. 563, 567 (Or. 1930); *Low v. Rizor*, 37 P. 82, 84 (Or. 1894). The Oregon Water Rights Act of 1909 essentially preserves rights obtained in this fashion prior to February 24, 1909, when that statute took effect – such rights are vested, but undetermined

pending an adjudication. *See* Or. Rev. Stat. 539.010(4) ("[t]he right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act" where various conditions are met); *see also Staub v. Jensen*, 178 P.2d 931 (Or. 1947).

Defendant asserts that "to the extent that any waters in the Klamath Basin were 'unavailable' because such water already had been appropriated under state law to be used on lands identified as part of the Klamath Project, [the Bureau] acquired all of these 'pre-Project' water rights and integrated them into the Project." These acquisitions are detailed in various documents, including a 1911 report of the Board of Army Engineers,[36] as well as a stipulation of facts filed in the Klamath Basin Adjudication, which involves many of the plaintiffs here and defendant.[37] Plaintiffs do not seriously contest that this occurred and, indeed, have provided no pre-1905 documentary evidence of water rights that they claim are still existing. However, they asseverate that the alleged pre-1905 rights of at least seven parties[38] were exchanged by them (or their

---

[36] *See* "Fund for Reclamation of Arid Lands: Message of the President of the United States Transmitting a Report of the Board of Army Engineers in Relation to the Reclamation Fund," H.R. Doc. No. 61-1262, at 119-20 (1911).

[37] *See In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean*, Statement of Stipulated Facts (hereinafter "Adjudication Stipulation of Facts") 49, 54, 58, 63, 66, 73, 77 (Aug. 4, 2003).

[38] The affected parties are the Van Brimmer Ditch Company, Mike J. Byrne, Daniel W. Byrne, Deloris Chin, Daniel G. Chin, Cheryl M. Moore and James L. Moore.

antecedents) for a perpetual right to receive water from the Klamath Project, thereby creating, in their view, beneficial interests in the water. In fact, these exchanges appear to have taken the form of a series of post-1905 contracts between the United States and various entities, under which the former made various commitments regarding the Klamath Project waters. It appears that whatever property interests may still exist in those waters derive from, and are limited by, those commitments, a subject to which the court now turns.

2. Post-1905 Potential Interests

The 1909 Oregon Water Rights Act established a procedure under which persons could obtain a certificate to divert and use water for specified purposes. *See* Or. Rev. Stat. §§ 537.120, *et seq*. The water rights created under this law were generally characterized by a priority date, an authorized point of diversion, an authorized rate of diversion, a place of use, purpose of use, season of use and a "duty" expressed in acre-feet per acre. *Id.* at § 537.140; *Tudor v. Jaca*, 164 P.2d 680, 686-87 (Or. 1945); *see also* Simmons, *supra*, at 130. But, these provisions did not apply to the Klamath Project water, given the 1905 Oregon law's admonition that "[n]o adverse claim 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." Instead, it appears that whatever interests were obtained by the plaintiffs after 1905 were obtained – necessarily so – directly from the United States, as the Klamath Project was constructed.[39] *See Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977) ("Project water" is "not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.").

These transactions – a subset of the approximately 250 Klamath water distribution arrangements still being administered by the Bureau – occurred at different times and took various forms. Since plaintiffs' rights under Oregon law appear to be inextricably linked to these transactions, it is appropriate to examine them at greater length.

Distribution of interests in the water of the Klamath Project began even before the works were constructed. Early on, owners of riparian or littoral rights to certain water bodies exchanged those rights for a right to receive water from the Klamath Project.

---

[39] A detailed description of the construction of the various phases of the Klamath Project is provided in the Adjudication Stipulation of Facts, *supra*, at 76-86. This summary states, in part, that: "[a]s part of the development of the Klamath Project, lands and rights of way were acquired for facilities. In addition, waivers of riparian rights were secured from a large number of landowners on the Lost River, Tule Lake and along Klamath River." *Id.* at 77.

Among the earliest such agreements was a November 6, 1909, contract between one of the plaintiffs, the Van Brimmer Ditch Company, and the United States, in which the former agreed to –

> waive[ ] and renounce[ ] to the use and benefit of the United States any and all of its riparian rights, in relation to the waters and shores of Lower Klamath Lake appurtenant or incident to the lands now being irrigated by the Company, or any other lands now owned or controlled by the Company, and also waives and renounces any and all claims for damages consequent upon or arising from any change of the course or water-level of the said Lower Klamath Lake, and its tributaries, due to the operations of the United States.

In exchange, the United States agreed to "deliver to the Company during each and every irrigation season . . . a quantity of water, not to exceed fifty second feet, in which the Company claims the right to the exclusive use to irrigate sufficiently" certain defined pieces or parcels of land.[40] The contract further provided that "[n]o interest in this agreement shall be transferred to any other party, and any such transfer shall cause annulment of the contract so far as the United States is concerned. . . ." Nonetheless, the United States agreed

---

[40] Plaintiffs assert that this contract recognized the ditch company's prior vested right to use the water for irrigation purposes. It did not. Instead, it merely recited that "the Company claims that is [sic] has established a vested right to the use of fifty second feet of water for irrigation purposes from the water of Lower Klamath Lake . . . "

to recognize "the right as existing in the Company to the perpetual use of said fifty (50) second-feet of water, according to the provisions herein set forth, subject, however, to any possible established priority to the use of said fifty (50) second-feet of water, other than such as may be claimed by the United States or those claiming thru it."

While there are indications that other individuals exchanged pre-1905 water rights for a right to receive water from the Klamath Project, the record reveals no details of any such agreements as to any of the plaintiffs, other than the Van Brimmer Ditch Company.

More commonly, the United States or the Bureau agreed to provide water to certain irrigators in exchange for payments designed to cover the cost of the project. On November 6, 1905, the United States entered into such an agreement with the Klamath Water Users Association, an Oregon corporation, whose incorporators and shareholders were owners of land within the Klamath Basin. The agreement, again executed prior to the time the irrigation works were constructed, did not purport to ascertain or determine "the extent of the individual appropriation of such water," or the "relative priority and extent of their several appropriations." Rather, these issues were to be determined under the rules and principles adopted by the Association. The agreement provided that only those who became members of the Association could be "accepted as applicants for rights to the use of water available by means of [the] proposed irrigation works." It further stated that "the aggregate amount of such rights to be

issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose," and that "the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid . . . "[41] Payments were to be made for the water rights to be issued to the shareholders of the Association, with the "cost of said proposed irrigation works [to be] apportioned equally per acre among those acquiring such rights." In the agreement, the Association guaranteed these payments and agreed to take various steps to collect them on behalf of the United States.

Following the execution of this contract, various landowners entered into stock subscription agreements and contracts with the Association, which provided for the issuance of one share of stock for each

---

[41] Regarding these water rights, the agreement further provided –

> That in all the relations between the United States and this Association and the members of the Association, the rights of the members of the Association to the use of water where the same have vested, are to be defined, determined and enjoyed in accordance with the provisions of [the Reclamation Act of 1902] and of other acts of Congress on the subject of the acquisition and enjoyment of the right to use water; and also by the laws of the States of Oregon and California where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said Association.

It also indicated that any rules or regulations subsequently promulgated by the Secretary for the administration of the water to be supplied were to be treated as if they expressly had been incorporated in the agreement.

acre of irrigable land owned by the water user within the Klamath Project boundaries. Each such landowner desiring to receive water through Project facilities filed a Water-Right Application for Land in Private Ownership with the Department of Interior. These so-called "Form B" applications typically provided that "the measure of the water right" applied for was "that quantity of water which shall be beneficially used for irrigation" of the applicant's land, "but in no case exceeding the share of proportionate to irrigable acreage, of the water supply actually available as determined by the Project Manager or other proper officer of the United States."

The United States also entered into various water arrangements in conveying or leasing land reclaimed under the Klamath Project to homesteaders. Under Oregon and California law, this land was ceded to the United States and was opened to homesteaders over several decades, beginning in the late 1910s. *See* United States Department of the Interior, "Klamath Project: Historic Operation" 6 (Nov. 2000). The homesteaders obtained a right to the use of water through the Klamath Project in a multi-step process. Upon initial entry, the homesteaders generally filed a temporary water right application in which they agreed to include the land within an irrigation district and to repay a proportionate cost of the construction of the Klamath Project. Upon fulfilling the requirements for a homestead, the settlers filed an application for a permanent water right. In this so-called "Form A" water rights application, the homesteader applied "for a

permanent water right for the irrigation of and to be appurtenant to all of the irrigable area now or hereafter developed" on the applicant's land. The application further stated that "[t]he quantity of water to be furnished hereunder shall be that quantity which may be applied beneficially in accordance with good usage in the irrigation of the land." However, in case of water shortages, the amount to be delivered would be "an equitable proportionate share . . . of the water actually available at the time," with that proportionate share "to be determined by the project manager," who, "[i]n distributing and apportioning the water," was permitted "to take into consideration the character and necessities of the land." The application further cautioned that "[o]n account of drought, inaccuracy in distribution, or other cause, there may occur at times a shortage in the water supply," and that "such shortages" would in no event result in liability on the part of the United States "for any damage direct or indirect arising therefrom." It was anticipated that certificates would be issued to these homesteaders, but there is no indication that any of the plaintiffs actually received such certificates. Several of the individual irrigators possess patent deeds apparently stemming from these applications, which grant to them a tract described, "together with the right to the use of water from the Klamath Reclamation Project as an appurtenance to the irrigable lands in said tract."

Additional contracts between the United States and certain individuals and entities were entered into under the Warren Act of 1911, ch. 141, 36 Stat. 925

(codified at 42 U.S.C. §§ 523-35), which authorized the Secretary to sell surplus water to non-project irrigators. These contracts provided for a water supply at a given point, but placed the responsibility on the contractor to construct all the necessary conveyance facilities. These contracts typically included clauses holding the United States not liable for the failure to supply water caused by drought.[42]

Over time, many of the above-referenced contracts were subsumed and supplanted by contracts between the United States or the Bureau and various water districts. For example, in 1917, the stockholders of the Association desired to form irrigation districts that would assume the debt to the United States and, on December 8, 1917, created the Klamath Irrigation District (KID). On July 6, 1918, the United States, the KID and the Association entered into an agreement whereby the KID assumed the obligations of the Association and its stockholders.[43] Later, on April 10, 1922, the United States entered into another contract with the KID in which the latter assumed the liability for the annual cost of carrying and delivering water to the Van Brimmer Ditch Company. The Klamath Irrigation

---

[42] Examples of such provisions may be found, for example, in a 1952 contract between the United States and the Midland District Improvement Company.

[43] The Contract between KID and the United States was amended six times between 1920 and 1950. In 1954, a seventh amendment of the contract provided that KID would assume the obligation of the United States for the delivery of water to other districts and private Warren Act contractors who received water through the delivery system that served KID.

District continues to deliver water to Van Brimmer. On November 29, 1954, the United States entered into an "amendatory contract" with KID that restated the parties' obligations regarding the delivery of water and payments therefor. Paragraph 26 of this agreement provided:

> 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 or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom and the payments to the United States provided for herein shall not be reduced because of any such shortage.

Virtually identical clauses absolving the United States from liability associated with "drought or other causes" appeared in contracts between the United States and various other districts in Oregon, including the Sunnyside Irrigation District (entered into in 1922), the Malin Irrigation District (1922), the Shasta View Irrigation District (1948), and the Klamath Basin Improvement District (1962). Somewhat similar, although not identical, "shortage" clauses appeared in other district contracts, including those with the Pine Grove Irrigation District (entered into in 1918), the Enterprise Irrigation District (1920), the Midland District Improvement

Co. (1952), and the Poe Valley Improvement District (1953).[44]

In 1956, as authorized by the Act of August 1, 1956, Pub. L. 877, the Bureau also entered into a contract with the Tulelake Irrigation District (TID), which had been formed in 1952 by landowners in Modoc and Siskiyou Counties, California. As with similar contracts, under this contract, TID assumed the responsibility for the operation and maintenance of certain (but not all) project works within the Klamath Project and for delivering water within the district. The contact provided for the collection by TID, and payment to the United States, of outstanding repayment obligations of landowners within the district. As in many of the other district contracts, paragraph 26 of this contract provided –

> On account of drought or other causes, there may occur at times a shortage in the quantity of water available by means of the Project 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 or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom and the payments

[44] Commonly, these contracts included a water shortage clause stating that "[t]he United States shall not be liable for failure to supply water under this contract caused by hostile diversion, drought, interruption of service made necessary by repairs, damages caused by floods, unlawful acts, or unavoidable accidents."

> to the United States provided for herein shall not be reduced because of any such shortage.

In addition, the contract provided that "[i]n the event a shortage of water available from the Klamath Project arises as a result of drought or other unavoidable causes, the United States may apportion the available supply among the District and others having rights of priority equal to the rights of the District." The repayment obligations subsumed by this contract included those of certain of the homesteaders discussed above, as well as those associated with the Warren Act contract lands.

Finally, it appears that two of the plaintiffs, the Klamath Drainage District and the Klamath Hills District Improvement Company, hold water right permits that evidence their ownership of a "vested and determined water right" under Oregon law. These permits, which were limited both in terms of a specific cubic feet per second of water, as well as to the amount of water that could be applied to beneficial use, were issued after the State of Oregon repealed the 1905 law in 1953.

3. The Nature of the Interest Created in the Post-1905 Transactions

Based on the foregoing, it appears that the various plaintiffs' interests in the Klamath Project water fall into five basic categories: (i) interests based upon an exchange agreement, in which preexisting water rights were exchanged for an interest in the Project water; (ii) interests deriving from district contracts with the

United States or the Bureau, claimed by the districts; (iii) interests deriving from the district contracts with the United States, claimed by individual irrigators as alleged third-party beneficiaries; (iv) interests based upon application for the beneficial use of water filed either by homesteaders on reclaimed lands (Form A), or by homesteaders or other landowners whose property does not involve reclaimed lands (Form B), and the patent deeds issued allegedly in response thereto; and (v) interests based upon alleged water rights permits granted by the State [sic] Oregon after the repeal of the 1905 Oregon legislation in 1953. As detailed in the accompanying Appendix A, at least one of these categories covers each of the plaintiffs.

a. Interests based on contracts

The first three categories listed above all involve claims based upon contracts with the United States. It is, of course, well-established that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934).[45] Nonetheless, the Federal Circuit "has cautioned against commingling takings compensation and contract damages." *Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). In *Hughes*, the plaintiff

[45] *See also Bass Enter. Prod. Co. v. United States*, 133 F.3d 893, 896 (Fed. Cir. 1998); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978); *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 737 (2004); *see generally Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

asserted that NASA's breach of a contract to launch its satellites amounted to a takings, entitling it to prejudgment interest. The Federal Circuit rejected this claim, reasoning –

> If, as Hughes, asserts, the Government's breach of the [contract] was a taking under the Fifth Amendment, then nearly all Government contract breaches would give rise to compensation under the Fifth Amendment . . . Indeed, "the concept of 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. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim." . . . Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity. . . . Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights . . .

Hughes, 271 F.3d at 1070 (quoting *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978)). These principles have been applied by the Federal Circuit and this court in rejecting a wide range of Fifth Amendment takings claims deriving from the alleged interference with contract rights. *See J.J. Henry Co. v. United States*, 411 F.2d 1246, 1249 (Ct. Cl. 1969); *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 303 (2003) (noting that it is inappropriate to permit a

plaintiff "to pursue a takings remedy in order to circumvent the limitations inherent in its contractual relationship with the Government"); *Home Sav. of Am., F.S.B. v. United States*, 51 Fed. Cl. 487, 494 (2002) (same).

In the *Winstar* context, the refusal to invoke takings principles has been explained as directly resulting from the availability of contract remedies. As Justice Scalia wrote in his concurrence in *Winstar*, "[v]irtually ***every*** contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else.'" *United States v. Winstar Corp.*, 518 U.S. 839, 919 (1996) (Scalia, J., concurring) (citations omitted) (emphasis in original); *see also Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379-80 (Fed. Cir. 2001). More recently, in *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002), the Federal Circuit opined that "despite breaching the contract, the government did not take the plaintiffs' property because they retained 'the range of remedies associated with the vindication of a contract.'" *Id.* at 1342 (quoting *Castle v. United States*, 48 Fed. Cl. 187, 219 (2000)). Instead of conferring a right protected from a taking, "the contract promised either to regulate [plaintiffs] consistently with the contract's terms, or to pay damages for breach." *Id.*; *see also Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1034 (Fed. Cir. 1992); *Franconia*, 61 Fed. Cl. at 737-38; *Fifth Third Bank of West. Ohio v. United States*,

57 Fed. Cl. 586, 588-89 (2003); *McNabb v. United States*, 54 Fed. Cl. 759, 778-79 (2002). Under this approach, the availability of contract remedies is sufficient to vitiate a takings claim, even if it ultimately is determined that no breach occurred. *See, e.g.*, *Baggett Transp. Co.*, 969 F.2d at 1034 (no breach of contract and no takings); *Canal Elec. Co. v. United States*, 65 Fed. Cl. 650, 656 (2005) (takings claim dismissed, contract claim allowed to proceed).[46]

Both of the rationales favoring the use of contractual remedies over takings remedies apply here – that is, the United States may be viewed as acting in its proprietary capacity in entering into the water contracts in question, and it appears that the affected plaintiffs retain the full range of remedies with which

---

[46] To be sure, some cases suggest that, under this rule, a takings claim is resurrected if a breach of contract is not found, *see System Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172-73 (2005). But such suggestions reflect a misunderstanding of the rationale for this rule. At least as described in *Winstar* and *Castle*, the rule favoring contract remedies depends upon there being symmetry between the contract rights to be enforced and the contract damages that are potentially available. Once this symmetry is established, a finding on the merits that no breach occurred does not break that relationship, but merely reflects that the contract rights that were asserted either never existed or were not adversely affected by the government's actions. Under either scenario, those same contract rights cannot provide the predicate for a takings because the government cannot take what the claimant does not have. *See, e.g.*, *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1579-80 (Fed. Cir. 1997); *see also B & B Trucking, Inc. v. U.S. Postal Serv.*, 406 F.3d 766, 769 (6th Cir. 2005) (no taking of a contract right where that right did not exist); *McNabb v. United States*, 54 Fed. Cl. 759, 779 (2002) (same).

to vindicate their contract rights. It follows that while the contracts between the districts and the United States, as well as that between Van Brimmer and the United States, gave rise to private property rights within the meaning of the Fifth Amendment, the proper remedy for the alleged infringement lies in a contract claim, not one for a takings. *See Franconia*, 61 Fed. Cl. at 739-40; *Allegre Villa v. United States*, 60 Fed. Cl. 11, 18-19 (2004); *Detroit Edison Co.*, 56 Fed. Cl. at 303. The situation here is distinguishable from those encountered by the Federal Circuit in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) and *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003), in which the court allowed takings claims to proceed. In both those cases, plaintiffs entered into loan agreements with private lenders that were insured by HUD. The government subsequently restricted the plaintiffs' prepayment right, which the appeals court ruled was a takings. However, because their contracts were with private lenders, the plaintiffs in *Cienega Gardens* and *Chancellor Manor* were not in privity with the Government; thus, no contract claim against the Government was available to address the subsequent prepayment limitations by the Government. Such is not the case here as to the contracts involving the districts and Van Brimmer. *See Franconia*, 61 Fed. Cl. at 740 n.34; *Allegre Villa*, 60 Fed. Cl. at 19.

The foregoing analysis, of course, applies to the individual irrigators only to the extent that they actually have contract claims against the United States. For that to be true, "there must be privity of contract

between the plaintiff and the United States." *Chancellor Manor*, 331 F.3d at 899.[47] Such privity would exist if the irrigators are properly viewed as third-party beneficiaries to the district contracts. *See Chancellor Manor*, 331 F.3d at 901; *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999). "In order to prove third party beneficiary status," the Federal Circuit has instructed, "a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001), *amended on reh'g*, 273 F.3d 1072 (Fed. Cir. 2001); *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). "The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby." *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). The cases thus have distinguished between those instances where a party "show[s] that [the contract] was intended for his direct benefit," *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912), and those in which it is shown only that an individual was an "incidental and indirect beneficiar[y]," *Schuerman v. United States*, 30 Fed. Cl. 420, 433 (1994); *see also Castle*, 301 F.3d at

---

[47] *See also*, *e.g.*, *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998) ("The effect of finding privity of contract between a party and the United States is to find a waiver of sovereign immunity."); *Katz v. Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994) ("Absent privity between [plaintiffs] and the government, there is no case.").

1337-38; Restatement (Second) of Contracts (Restatement) § 302 & illus. 2 (distinguishing between intended and incidental beneficiaries).[48] The requisite intent may be ascertained by "ask[ing] whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *Montana*, 124 F.3d at 1273.

Plaintiffs assert that under the plain language of the various district contracts, a number of the irrigators are third-party beneficiaries and thus entitled to enforce those contracts' terms. *See* Restatement § 304; *cf. id.* at § 315. None of the parties disagree that this question may be resolved by reference to the language of the relevant contracts.[49] A review of the relevant

---

[48] The Restatement explains, in pertinent part –

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement § 302; *see also Klamath Water Users Protective Assn.*, 204 F.3d at 1211.

[49] It is, of course, axiomatic that this court must construe a Federal contract in terms of the parties' intent, primarily based on the plain meaning of the language employed. *See, e.g.*, *Winstar Corp.*, 518 U.S. at 911 (Breyer, J., concurring); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Franconia*, 61 Fed. Cl. at 729-30. While the question whether a given individual is a third-party beneficiary is a mixed question of law and fact, it has, in appropriate circumstances, been resolved in the context

district contracts reveals that they each express the intent of the relevant district and the United States to benefit the irrigators directly by having the district assume the primary responsibility for providing water within the district in exchange for collecting amounts owed by the irrigator in payment for their water. For example, the 1956 contract between the Tulelake Irrigation District and the United States provides –

> Contracts between the United States and landowners within the District in effect at the time of the execution of this contract are set forth in Exhibit '2' attached to and by this reference made a part of this contract. Said contracts . . . shall remain in full force and effect, except as otherwise modified herein, and the District shall perform, in accordance with the true intent and meaning of such contracts, the obligations of the United States described therein and shall recognize all of the rights as set forth in said contracts.

Similar provisions may be found in each of the district contracts. Moreover, some of these contracts specifically indicate that the district is the "duly authorized representative" of the water users within the district, and provide that the Secretary shall maintain oversight over water deliveries and shall resolve disputes between the districts and the individual irrigators. All of these provisions, of course, are evidence that the

---

of a motion for summary judgment. *See, e.g.*, *Guardsman Elevator Co., Inc. v. United States*, 50 Fed. Cl. 577, 582 (2001).

purpose of the contracts was to provide benefits to the latter users.

Beyond this, several cases in this circuit have found that similarly-situated irrigators were third-party beneficiaries under drainage district agreements apparently like those at issue here. Principal among these is *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), in which the Federal Circuit reversed a decision of this court which had held that irrigators similarly situated to the irrigators in this case were not third-party beneficiaries. There, the court concluded –

> Finally, we disagree with the Claims Court's determination that appellants were not correct parties to sue under the consent decree and subsequent alleged implied contracts. It is undisputed that appellants have a property right in the water to the extent of their beneficial use thereof. *Fox v. Ickes*, *supra.* The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court "every action shall be prosecuted in the name of the real party in interest." Claims Court R. 17(a). Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest.

Id. at 1576.[50] While defendant correctly notes that *H.F. Allen Orchards* is distinguishable in some regards – most notably in terms of the interests the irrigators had in the pertinent water under Washington law – it appears that the Federal Circuit's decision also was grounded on provisions in the district contract that were viewed as directly benefitting the irrigators there. Indeed, the opinion of this court that was reversed by the Federal Circuit contained a detailed analysis of the provisions of that contract – one with which the Federal Circuit eventually disagreed. *See H.F. Allen Orchards v. United States*, 4 Cl. Ct. 601, 609-13 (1984). Moreover, several other decisions of this court have concluded that irrigators in similar situations had enforceable rights against the United States as third-party beneficiaries. *See Henderson County Drainage Dist. No. 3. v. United States*, 53 Fed. Cl. 48, 52 (2002) ("The court finds that the plaintiff landowners 'would be reasonable in relying on the promise' to the drainage districts, if any, made in the releases and are therefore third party beneficiaries of any contractual undertakings by defendant in the releases."); *see also Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816-17 (9th Cir. 1990); *Henderson County*

---

[50] The *Fox* decision cited in *H.F. Allen Orchards* was that of the D.C. Circuit, on remand from the Supreme Court. *See H.F. Allen Orchards*, 749 F.2d at 1575 (citing *Fox v. Ickes*, 137 F.2d 30 (D.C. Cir. 1943)). Consistent with the construction of the *Ickes* line of cases outlined above, this D.C. Circuit opinion heavily relied upon Washington State law. *Fox*, 137 F.2d at 33 (Secretary "must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington.").

Drainage Dist. No. 3 v. United States, 60 Fed. Cl. 748, 756 n.9 (2004), *aff'd*, 2005 WL 1395109 (Fed. Cir. Jun. 14, 2005); *Schuerman v. United States*, 30 Fed. Cl. 420, 430 (1994); Benson, *supra*, at 394 ("[A]s third party beneficiaries of such contracts water users can sue to protect their rights to receive project water.").[51]

Accordingly, the court must conclude that the individual irrigators here are third-party beneficiaries of the district contracts. Because of this, their claims against the United States also sound in contract, not in takings. This result makes particular sense in the context of this case, in which, from a contracts perspective, the irrigators claiming interests based upon their contracts with the districts cannot possibly have rights to water that exceed the limitations found in the contracts between those districts and the United States.

---

[51] To be sure, the Ninth Circuit reached a different conclusion in *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004). The Supreme Court recently affirmed that decision – not based upon the Ninth Circuit's third-party beneficiary analysis, but rather based upon the conclusion that Congress had not waived the sovereign immunity of the United States to allow such a suit to proceed in the district courts. *See Orff*, 125 S. Ct. at 2609-11. While defendant relies upon the Ninth Circuit's decision in *Orff*, as well as several other Ninth Circuit cases, *see, e.g.*, *Klamath Water Protective Ass'n*, 204 F.3d at 1211-12, this court, of course, is bound to follow the contrary decision of the Federal Circuit. *See also Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1329-30 (Fed. Cir. 2004) (holding void a regional circuit's ruling in a case in which that court lacked jurisdiction). Moreover, the circumstances of this case certainly are different from those in which individual members of the public were deemed incidental beneficiaries of government contracts. *Cf.* Restatement § 313; *see also Schuerman*, 30 Fed. Cl. at 429-30.

Simply put, plaintiffs could not obtain an interest from the districts better than what the districts themselves possessed or once possessed – "*nemo dat qui non habet,*" the venerable maxim provides, "one who does not have cannot give."[52] Indeed, while "rights that arise independently from the contract may be brought through a takings action," *Allegre Villa*, 60 Fed. Cl. at 18,[53] such is not the case as to the third-party beneficiaries here. Rather, even to the extent that they may claim that there was a taking of their contract rights *vis a vis* the districts, it remains that those rights are entirely subsumed within the contract claim based on the alleged breach, by the United States, of the district contracts. Benson, *supra*, at 397 ("Because users' rights to project water arise from reclamation contracts, the contracts necessarily limit those rights."). As such, the irrigators qualifying as third-party beneficiaries must proceed in contract. *See Commonwealth Edison Co. v. United States*, 56 Fed. Cl. 652, 656 (2003); *Coast Federal Bank, FSB v. United States*, 48 Fed. Cl.

---

[52] *See* Black's Law Dictionary 1736 (8th ed. 2004). This common sense principle and a corollary – *nemo plus juris ad alienum transferre potest quam ipse haberet* – have been applied in a variety of contractual contexts. *See, e.g.*, *Wilbur v. Almy*, 53 U.S. 180, 181 (1851); *United States v. Harris*, 246 F.3d 566, 574-76 (6th Cir. 2001); *Commerce Bank, N.A. v. Chrysler Realty Corp.*, 244 F.3d 777, 783 (10th Cir. 2001); *United States v. Lavin*, 942 F.2d 177, 185-86 (3d Cir. 1991); *see also* 3 E. Allan Farnsworth, Farnsworth on Contracts § 11.5 (2d ed. 2001).

[53] *See also*, *e.g.*, *Integrated Logistics Support Sys. Int'l, Inc. v. United States*, 42 Fed. Cl. 30, 34-35 (1998).

402, 443-44 (2000); *Medina Constr. Ltd. v. United States*, 43 Fed. Cl. 537, 560 (1999).[54]

So where does this leave us? Before this case was reassigned, briefing was stayed on the ultimate issue whether the Bureau breached the district contracts in question in 2001. Accordingly, that issue must await another day. But, based upon arguments fully briefed by the parties, several observations regarding the nature of the contract rights at issue are appropriate.

First, for most of the district contracts *sub judice*, plaintiffs' "beneficial interest" in the Klamath Project water is not, as they claim, an absolute right, limited only by appurtenancy and beneficial use. This is particularly true as to those contracts which provide, either in exact or similar terms, that the government shall not be liable for "water shortages" resulting from "drought or other causes." The plain language of these

---

[54] In a separate motion for partial summary judgment filed on March 14, 2005, plaintiffs asserted that the various districts in this case had the constitutional and prudential standing to assert not only the claims they have in their own right, but also to assert, in a representational fashion, claims on behalf of the individual landowners. While defendant, in its opposition to this motion filed on May 4, 2005, disagreed that the districts had such standing to assert any takings claims, it agreed that the districts had the ability to assert contract claims on their own behalf and on behalf of the individual landowners, provided this court concluded that the landowners were third-party beneficiaries to the district contracts. Based upon its rulings above, as well as defendant's concessions, the court concludes that the districts have standing to assert not only their contract claims, but, to the extent relevant, those of the third-party irrigators.

provisions expressly absolves the United States from liability for all types of water shortages – not only the hydrologic causes, as claimed by plaintiffs, but also any other cause that impacts the availability of water through the system. *See Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 723-24 (E.D. Cal. 1993) ("The express language of [the shortage clause] negates any absolute contract right in Movants to the unqualified delivery of irrigation water."); Brian Gray, "The Property Right in Water," 9 Hastings W. – Nw. J. Envtl. L. & Pol'y 1, 26 (2002) ("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."). From a contractual standpoint, the shortage clauses thus limit plaintiffs contractual rights and thus become the focus of whether a breach occurred when water deliveries were strictly limited in 2001.

Notably, various courts have construed similar water shortage clauses as protecting the United States from damages based upon the enforcement of the ESA. In *O'Neill v. United States*, 50 F.3d 677, 682-84 (9th Cir. 1995), for example, the Ninth Circuit held that the terms of the water delivery contract did not obligate the Bureau to deliver the full contractual amount of water if such delivery would not be consistent with the ESA and a second statute, the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4706. *Id.* at 681. In terms reminiscent of several of the district contracts here, Article 11(a) of the water service contract at issue provided that the government would

not be held liable for "any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes." 50 F.3d at 682. The Ninth Circuit concluded that this language absolved the Bureau of any liability for complying with the Congressional mandates, observing that –

> [T]he terms of Article 11(a) admit of one meaning and are internally consistent. On its face, Article 11(a) unambiguously disclaims any liability for damages in the event the United States is unable to supply water in times of shortage. Clearly captioned "United States Not Liable for Water Shortage," Article 11 explicitly recognizes that "[t]here may occur at times during any year a shortage in the quantity of water available for furnishing to the District" and provides that "in no event shall any liability accrue against the United States . . . for any damages . . . arising from a shortage on account of errors in operation, drought, ***or any other causes***." . . . As the district court duly noted, there are no enumerated exceptions to this provision . . .

Id. at 683 (emphasis in original). The court concluded that "the contract's liability limitation is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'" *Id.* at 684. Other cases, involving shortage clauses like those in various

of the district contracts at issue. have reached similar conclusions.[55]

Second, even as to the contracts that do not contain broad water shortage clauses, it is at least arguable that any reductions ordered by the Bureau here did not result in a breach under the so-called sovereign acts doctrine. This doctrine recognizes that "the Government-as-sovereign must remain free to exercise its powers," *Yankee Atomic*, 112 F.3d at 1575, and shields the United States from contract liability based upon its "public and general acts as a sovereign," *Horowitz v.*

---

[55] *See, e.g.*, *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1127-31 (10th Cir. 2003), *vacated on other grounds*, 355 F.3d 1215 (10th Cir. 2004) ("the plain terms of the shortage clauses provide the basis for [the Bureau's] retaining discretion to allocate available water to comply with the ESA"); *Klamath Water Users Protective Ass'n*, 204 F.3d at 1213; *Natural Res. Def. Council v. Houston*, 146 F.3d at 1118 (under shortage clause, "the total amount of available project water could be reduced in order to comply with the ESA or state law"); *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 812 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990); *Barcellos and Wolfsen, Inc.*, 849 F. Supp. at 723-24 (water shortage clause "negates any absolute contract right . . . to the unqualified delivery of irrigation water"); *see also Westlands Water District v. U.S. Dept. of Interior*, 805 F. Supp. 1503, 1512-13 (E.D. Cal. 1992). A number of these cases analyzed the shortage clauses in reviewing whether the water delivery contracts prohibited the Bureau from modifying its deliveries to make water available for endangered species. Traditional water users insisted that since the requirements of the ESA only apply to discretionary federal actions, *see* 16 U.S.C. § 1536(a)(1), and the contracts precluded such discretion, the Bureau lacked the ability to reallocate the already-committed water. *See, e.g.*, *Rio Grande Silvery Minnow*, 333 F.3d at 1131, 1133-34. This claim was rejected based, *inter alia*, upon the language of the shortage clauses.

United States, 267 U.S. 458, 461 (1925); *see also Winstar*, 518 U.S. at 893-96; *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir. 1990).[56] The Federal Circuit has indicated that determining whether the government, in passing legislation, is acting as a contractor or a sovereign, requires "a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts." *Yankee Atomic*, 112 F.3d at 1575. An act of government will be considered to be sovereign so long as its impact on a contract is "merely incidental to the accomplishment of a broader governmental objective." *Winstar*, 518 U.S. at 898. But, such an act will not be held to be "public and

[56] The sovereign acts doctrine dates back to one of the earliest decisions of the Court of Claims, *Deming v. United States*, 1 Ct.Cl. 190, 1865 WL 2004 (1865). In that case, the court, noting the twin character of the United States as contracting party and sovereign, observed that "[t]he United States as a contractor are not responsible for the United States as a lawgiver." *Id.* at 191, 1865 WL 2004. In *Jones v. United States*, 1 Ct.Cl. 383, 1865 WL 1976 (1865), the court extended the doctrine to executive branch actions in concluding that the government was not liable when the presence of federal troops hindered a surveyor under contract to the government. It stated: "Whatever 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." *Id.* at 384, 1865 WL 1976. The "public and general" language in *Jones* was eventually adopted by the Supreme Court in *Horowitz*. *See Cuyahoga Metr. Housing Auth. v. United States*, 57 Fed. Cl. 751, 763 n.18 (2003). For a further discussion of the history of, and policies underlying, the sovereign acts doctrine, *see* Edward A. Fitzgerald, "Conoco, Inc. v. United States: Sovereign Authority Undermined by Contractual Obligations on the Outer Continental Shelf," 27 Pub. Cont. L.J. 755, 777-81 (1998).

general if it has the substantial effect of releasing the Government from its contractual obligations." *Id.* at 899; *see also Centex Corp. v. United States*, 395 F.3d 1283, 1308 (Fed. Cir. 2005); *Precision Pine & Timber, Inc. v. United States*, 50 Fed. Cl. 35, 72 (2001).

Several courts have concluded that the enactment and subsequent enforcement of the ESA should be viewed as sovereign acts that override the Bureau's obligations to provide water under various contracts. *See, e.g.*, *Klamath Water Users Protective Ass'n*, 204 F.3d at 1213 (noting "[i]t is well settled that contractual arrangements can be altered by subsequent Congressional legislation"); *see also Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1406-07 (9th Cir. 1993) (Hall, J., concurring). Other cases in this court have likewise held that the suspensions of contracts under the ESA qualify as "public and general acts." *See, e.g.*, *Precision Pine & Timber, Inc.*, 50 Fed. Cl. at 72-73 (suspension of timber sales contracts under the ESA); *Croman Corp. v. United States*, 44 Fed. Cl. 796, 806-07 (1999) (same), *withdrawn in part*, 49 Fed. Cl. 776, 782-84 (2001). While these cases suggest that plaintiffs face an uphill battle in showing that the ESA was designed to abrogate their various contracts, that issue, as well as other aspects of the applicability of the sovereign acts doctrine, have not been adequately briefed and, in the court's view, should be decided only in the context of

determining whether, in fact, a breach of the various water contracts here occurred in 2001.[57]

In arguing, despite the foregoing, that the Bureau effectuated a taking of their contract rights, plaintiffs harken to this court's decision in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001). In that case, various districts in California argued that their contractually conferred water rights were taken as a result of the Bureau's restrictions on water use as required by the ESA. *Id.* at 314. This court ruled that a physical taking had occurred as a result of the restrictions and granted the

---

[57] Other courts have examined the language of district contracts and concluded that the United States did not, in unmistakable terms, surrender its rights to exercise its sovereign powers. *See, e.g.*, *O'Neill*, 50 F.3d at 686. These cases, in particular, have noted that most of the district contracts contain language indicating that they were entered into pursuant to the reclamation laws and "all acts amendatory or supplementary thereto." *Rio Grande Silvery Minnow*, 333 F.3d at 1130. Like the sovereign acts doctrine, the so-called "unmistakability doctrine" recognizes that "'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'" *Bowen v. Pub. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, (1982)); *see also Cuyahoga Metr. Hous. Authority*, 57 Fed. Cl. at 764-74. Of course, a prerequisite for invoking the unmistakability doctrine is that a sovereign act must be implicated. *See Centex Corp.*, 395 F.3d at 1307; *Cuyahoga Metr. Housing Authority*, 57 Fed. Cl. at 774-75. Whether the unmistakability doctrine applies here depends, in the first instance, upon whether the passage of the ESA may be viewed as a sovereign act and thus must also be resolved in determining whether an actual breach of the district contracts occurred here.

plaintiffs summary judgment. *Id.* at 319, 324. But, with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events.

For one thing, *Tulare* failed to consider whether the contract rights at issue were limited so as not to preclude enforcement of the ESA. Rather, the court treated the contract rights possessed by the districts essentially as absolute, without adequately considering whether they were limited in the case of water shortage, either by prior contracts, prior appropriations or some other state law principle. *Tulare*, 49 Fed. Cl. at 318 ("[t]hose contracts confer on plaintiffs a right to the exclusive use of prescribed quantities of water"). Thus, although the court noted that there were agreements between the United States and the State of California creating a coordinated pumping system, *id.* at 315 n.1, it did not examine those agreements to see whether they, like the district contracts here, limited the plaintiffs' rights derivatively. *Id.* at 320-21. Rather, it focused on the districts' contracts with state agencies as if they were free-standing. *Id.* Nor did the court consider whether the plaintiffs' claimed use of water violated accepted state doctrines, including those designed to protect fish and wildlife, finding that issue to be reserved exclusively to the state courts. *Id.* at 321. Because the state courts had not ruled on those issues, this court refused to rule on them, as well. As a result, it awarded just compensation for the taking of interests that may well not exist under state law. Moreover, because it did not view the

districts as having a third-party beneficiary contract claim against the United States, the court never reached the issue whether the violations of the contract rights should be analyzed as breaches, not takings, and, as a result, never considered the potential application of the sovereign acts and unmistakability doctrines.[58] On these counts, this court disagrees with the approach taken in *Tulare* and concludes that decision lends no support to the views espoused by plaintiffs here.[59]

---

[58] If the contract rights possessed by the district were subject to the sovereign acts doctrine, and the ESA were viewed as a sovereign act under that doctrine, then the ESA could not effectuate a taking here, as it did not take a right that the district possessed (*i.e.*, the right to water as against the enforcement of the ESA). The Federal Circuit reached a similar conclusion in *Yankee Atomic*, *supra.* There, the court first held that the sovereign acts and unmistakability doctrines precluded the plaintiff utility from claiming that the assessment of an excise tax breached its prior contracts with the government for decommissioning services. 112 F.3d at 1579-80. It then went on to reject the utility's takings claim, stating, *id.* at 1580 n.8 –

> Our conclusion on this point also resolves Yankee Atomic's takings argument. Because the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment. At most, Yankee Atomic has a vested right to be immune from later attempts to retroactively increase the prices charged. This right has not been taken because, as explained in the sovereign acts discussion, the assessment is a general, sovereign act rather than a retroactive price increase.

[59] *Tulare* has been the subject of intense criticism by commentators who, *inter alia*, have challenged the court's application of a physical taking theory to what was a temporary reduction in

b. Interests based upon Patent Deeds and State Permits

Recall that the fourth and fifth categories of interests in the Klamath Project waters described above derive from two sources: (i) patent deeds for property located in Oregon that were received from the United States by homesteaders and other property owners in response to the filing of various applications; and (ii) state water permits that were received from the State of Oregon by at least two of the districts involved here that were issued by the State after the 1905 legislation was repealed.

Notably, both the patent deeds and water permits contain appropriation dates well after the 1905 period that marks the appropriation of the Klamath waters by the United States. This is significant, as, under its 1909 Water Act, Oregon recognizes the prior appropriation doctrine – "*qui prior in tempore, prior in jure est*" or "first in time, first in right."[60] Under this system,

---

water. *See, e.g.*, Michael C. Blumm, Lucas Ritchie, "Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses," 29 Harv. Envtl. L. Rev. 321, 329 (2005); Cari S. Parobek, "Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Right Collide," 27 Harv. Envtl. L. Rev. 177, 212-23 (2003); Brittany K.T. Kauffman, "What Remains of the Endangered Species Act and Western Water Rights after Tulare Lake Basin Water Storage District v. United States," 74 U. Colo. L. Rev. 837 (2003).

[60] *See* Or. Rev. Stat. §§ 537.120, 537.160, 537.250; *United States v. State of Or. Water Resources Dept.*, 774 F. Supp. 1568, 1573 (D. Or. 1991), *aff'd, in part, and rev'd, in part, on other grounds*, 44 F.3d 758 (9th Cir. 1994) ("Under the laws of the State

"[t]he person holding the most senior (oldest) right is entitled to have his or her entitlement fully satisfied before the next most senior person receives water, and so on." Simmons, *supra*, at 130. Thus, "in times of shortage, the most senior right holder is entitled to insist that junior users curtail their use in order that the senior have sufficient water to satisfy his senior right." *Id.*[61] Hence, any water rights provided through these deeds and permits are subservient to the prior interests not only of the United States, but of the various tribes at issue here, whose interests "carry a priority date of time immemorial." *Klamath Water Protective Ass'n*, 204 F.3d at 1214; *see also United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1984). Therefore, assuming *arguendo* that the patent deeds and water permits

---

of Oregon, the principle upon which claims of rights to water are based is the doctrine of prior appropriation, which prioritizes claims of rights to water according to a simple rule: first in time, first in right."); *Tudor v. Jaca*, 164 P.2d 680, 686 (Or. 1945); *see also* 1 Waters and Water Rights §§ 348-49, 351-56 (Robert E. Beck ed. 1991).

[61] *See Fitzstephens*, 344 P.2d at 227; *Phillips v. Gardner*, 469 P.2d 42, 44 (Or. Ct. App. 1970); Henry B. Lacey, "New Approach or Business as Usual: Protection of Aquatic Ecosystems under the Clinton Administration's Westside Forests Plan," 10 J. Envtl. L. & Litig. 309, 351 n.202 ("Under the prior appropriation doctrine of water law which prevailed in . . . Oregon . . . a diverter of water from a stream who applies the water to a 'beneficial use' is granted priority for his uses in times of shortage over other appropriators who made later diversions."); *see also Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 805 (1976) (under the doctrine of prior appropriation, "[i]n periods of shortage, priority among confirmed rights is determined according to the date of initial diversion").

actually reflect perfected interests in water,[62] they give rise to interests that could not have been taken or infringed by the failure of the Bureau to deliver water in 2001.[63]

Nor is this reality altered, as plaintiffs claim, by the Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957), which was entered into between Oregon and California for the division of the Klamath River water. Although Congress consented to this compact, the United States was not a party thereto. Plaintiffs emphasize Congress' adoption of Article XIII of the Compact, providing that "[t]he United States shall not, without payment of just compensation, impair any rights to the use of water [for domestic or irrigation purposes] within the Upper Klamath River Basin." 71 Stat. at 507. However, Article III of the Compact, 71 Stat. at 498, generally states, in relevant part, that "[t]here are hereby recognized vested rights to the use of waters originating in the Upper Klamath River Basin validly established and subsisting as of the effective date of this compact under the laws of the state in

---

[62] There are other potential problems with these deeds and permits. For one thing, the permits may not yet been [sic] perfected under state law, as there is no evidence that Oregon has issued a water rights certificate. Further, the permit of the Klamath Drainage District indicates that it is entitled to water between October 1 and March 1 of a given year, a period that appears to be outside that during which the suspension of water occurred in 2001.

[63] Indeed, apart from state appropriations law, the patent deeds in question specifically provided that the water rights granted thereunder were "subject to any vested and accrued water rights."

which the use or diversion is made, including rights to the use of waters for domestic and irrigation uses within the Klamath Project." More specifically, as to the United States, the Compact provides that "[n]othing in this compact shall be deemed: [t]o impair or affect any rights, powers or jurisdictions in the United States, its agencies or those acting by or under its authority, in, over and to the waters of the Klamath River Basin." *Id.* at Art. XI, 71 Stat. at 505. The Ninth Circuit construed this language in accordance with its plain meaning, as "preserv[ing] all federal rights, powers and jurisdiction except as explicitly conceded." *Adair*, 723 F.2d at 1419. As such, nothing in the Compact enhances the rights of any of the plaintiffs here as against the United States.

III. CONCLUSION

Concluding this *tour d'horizon*, the court is mindful that, despite the potential for contractual recovery here, this ruling may disappoint a number of individuals who have long invested effort and expense in developing their lands based upon the expectation that the waters of the Klamath Basin would continue to flow, uninterrupted, for irrigation. But, those expectations, no matter how understandable, do not give those landowners any more property rights as against the United States, and the application of the Endangered Species Act, than they actually obtained and possess. Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property – they enjoy no elevated or more protected status. In

the case *sub judice*, those rights, such as they exist, take the form of contract claims and will be resolved as such.

Based upon the foregoing, the court, **GRANTS, IN PART**, and **DENIES, IN PART**, the parties' cross-motions for partial summary judgment (including the motion filed on March 14, 2005). On or before October 4, 2005, the parties shall file a joint status report indicating how this case should proceed.

IT IS SO ORDERED.

s/ Francis M. Allegra
Francis M. Allegra
Judge

APPENDIX

Klamath Irrigation District, et al, v. United States
Case No. 01-591

Basis of Plaintiffs' Claimed Property Rights

Plaintiff	Basis of Claim	Shortage Provision
Klamath Irrigation District	Contract with United States	Drought or "other causes" – see ¶ 26
Tulelake Irrigation District	Contract with United States	Drought or "other causes" – see ¶ 26
Sunnyside Irrigation District	Contract with United States	Drought or "other cause" – see ¶ 9
Malin Irrigation District	Contract with United States	Drought or "other cause" – see ¶ 11
Westside Improvement District No. 4 (formerly Colonial Realty Company)	Contract with United States	Drought or "other causes" – see ¶ 13
Shasta View Irrigation District	Contract with United States	Drought or "other causes" – see ¶ 18 (of 1948 contract)
Klamath Drainage District	1. Contract with United States 2. State permit dated Sept. 5, 1978	1. Drought or "other causes" – see ¶ 24
Klamath Hills District Improvement Co.	1. Contract with Klamath Drainage District 2. State permit dated May 30, 1984	Drought or "other cause" – see ¶ 4
Poe Valley Improvement District	Contract with United States	Drought only – see Art. 11

Midland District Improvement Company	Contract with United States	Drought only – see ¶ 5
Enterprise Irrigation District	Contract with United States	"Unusual" drought only – see ¶ 10
Pine Grove Irrigation District	Contract with United States	"Unusual" drought only – see Art. 10
Klamath Basin Improvement District	Contract with United States	Drought or "other cause" – see ¶ 4
Van Brimmer Ditch Company	Contract with United States	None
Fred A. Robison	1. Beneficiary of Tulelake Irrigation District contract 2. Form A Water Right Application dated Nov. 29, 1951 3. Patent deed dated May 14, 1952	Drought or "other cause"
Fred A. Robison and Albert Robison	1. Beneficiary of Tulelake Irrigation District contract 2. Form A Water Right Application dated July 15, 1940 3. Patent deed dated Feb. 25, 1941	Drought "or other cause"

Mark Trotman and Lonny Baley and Baley Trotman Farms	1. Beneficiary of Tulelake Irrigation District contract 2. Patent deeds dated January 13, 1928, August 13, 1929, and August 21, 1936	
Michael and Daniel Byrne and Byrne Brothers	1. Beneficiary of Klamath Irrigation District contract 2. Pre-1905 right subsequently exchanged or surrendered	
Daniel and Deloris Chin	1. Beneficiary of Klamath Irrigation District contract 2. Pre-1905 right subsequently exchanged or surrendered	
Wong Potatoes, Inc.	1. Beneficiary of Klamath Basin Improvement District contract and Klamath Irrigation District contract 2. Pre-1905 right subsequently exchanged or surrendered	

James and Cheryl Moore	1. Beneficiary of Van Brimmer Ditch Company contract 2. Pre-1905 right subsequently exchanged or surrendered.	

Reclamation Act of 1902 – Section 8
43 U.S.C. §§ 372, 383

§372. Water right as appurtenant to land and extent of right

The 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. (June 17, 1902, ch. 1093, §8, 32 Stat. 390.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 17, 1902, popularly known as the Reclamation Act, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 371 of this title and Tables.

CODIFICATION

Section is comprised of the proviso in section 8 of act June 17, 1902. Remainder of section 8 is classified to section 383 of this title.

SECTION AS UNAFFECTED BY SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of this title.

§383. Vested rights and State laws unaffected

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, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, ch. 1093, §8, 32 Stat. 390.)

References in Text

This Act, referred to in text, is act June 17, 1902, popularly known as the Reclamation Act, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 371 of this title and Tables.

Codification

Section is comprised of section 8 (less proviso) of act June 17, 1902. The remainder of section 8 is classified to section 372 of this title.

Section as Unaffected by Submerged Lands Act

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of this title.

McCarren Amendment
(Department of Justice Appropriation Act, 1953)
43 U.S.C. §§ 666

§666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

(July 10, 1952, ch. 651, title II, §208(a)–(c), 66 Stat. 560.)

CODIFICATION

Section is comprised of subsections (a) to (c) of section 208 of act July 10, 1952. Subsection (d) of section 208 is omitted as it referred to the limitation on the use of any appropriation in act July 10, 1952 to prepare or prosecute the suit in the U.S. District Court for the Southern Division of California, by the United States v. Fallbrook Public Utility Corporation.

Oregon Revised Statutes (2019)
Chapter 539—Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes
Determination of Water Rights Initiated

539.005 Purpose of chapter; rules. (1) The Legislative Assembly declares that it is the purpose of this chapter to set forth the procedures for carrying out a general stream adjudication in Oregon.

(2) In accordance with the applicable provisions of ORS chapter 183, the Water Resources Director shall adopt rules necessary to carry out the provisions of this chapter. [1989 c.691 §§2,3]

539.010 Protection of water rights vested or initiated prior to February 24, 1909. (1) Actual application of water to beneficial use prior to February 24, 1909, by or under authority of any riparian proprietor or the predecessors in interest of the riparian proprietor, shall be deemed to create in the riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

(2) Where any riparian proprietor, or any person under authority of any riparian proprietor or the predecessor in interest of the riparian proprietor, was, on February 24, 1909, engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in the riparian proprietor; provided, that the works were completed and the water devoted

to a beneficial use within a reasonable time after February 24, 1909. The Water Resources Director, in the manner provided in subsection (5) of this section, may determine the time within which the water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the director.

(3) Nothing contained in the Water Rights Act (as defined in ORS 537.010) shall affect relative priorities to the use of water among parties to any decree of the courts rendered in causes determined or pending prior to February 24, 1909.

(4) The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.

(5) The director shall, for good cause shown upon the application of any appropriator or user of water under an appropriation of water made prior to February 24, 1909, or in the cases mentioned in subsections (2) and (4) of this section, where actual construction work was commenced prior to that time or within the time

provided in law then existing, prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use. In determining said time the director shall grant a reasonable time after the construction of the works or canal or ditch used for the diversion of the water, and in doing so, the director shall take into consideration the cost of the appropriation and application of the water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. For good cause shown the director may extend the time.

(6) Where appropriations of water attempted before February 24, 1909, were undertaken in good faith, and the work of construction or improvement thereunder was in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or voided in proceedings under this chapter because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording or publication thereof.

(7) In any proceeding to adjudicate water rights under this chapter, the Water Resources Department may adjudicate federal reserved rights for the water necessary to fulfill the primary purpose of the reservation or any federal water right not acquired under ORS chapter 537 or ORS 540.510 to 540.530.

(8) All rights granted or declared by the Water Rights Act (as defined in ORS 537.010) shall be adjudicated and determined in the manner and by the tribunals provided therein. The Water Rights Act shall not be held to bestow upon any person any riparian rights where no such rights existed prior to February 24, 1909. [Amended by 1989 c.691 §6; 1993 c.157 §1]

539.015 Certification of statements of claimants; oaths. Each claimant or owner who files a statement and proof of claim form or a registration statement shall be required to certify to the statements of the claimant or owner under oath. The Water Resources Director or the authorized assistant of the director may administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for the statement. [1989 c.691 §4]

539.020 [Repealed by 1987 c.541 §1 (539.021 enacted in lieu of 539.020)]

539.021 Determination by Water Resources Director of rights of claimants; transfer of action to director. (1) The Water Resources Director upon the motion of the director or, in the discretion of the director, upon receipt of a petition from one or more appropriators of surface water from any natural watercourse in this state shall make a determination of the relative rights of the various claimants to the waters of that watercourse.

(2) If an action is brought in the circuit court for determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the

director for determination as provided in this chapter. [1987 c.541 §2 (enacted in lieu of 539.020)]

539.030 Notice of investigation of stream. The Water Resources Director shall prepare a notice, setting forth the date when the director or the assistant of the director will begin such investigation as may be necessary for a proper determination of the relative rights of the various claimants to the use of the waters of the stream. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which the stream is situated, the last publication of the notice to be at least 10 days prior to the date set in the notice for the beginning of the investigation by the director or the assistant of the director. [Amended by 1955 c.669 §1; 1979 c.53 §1; 1987 c.541 §8]

539.040 Notice of hearing by director. (1) As soon as practicable after the examination and measurements are completed, as described in ORS 539.120, the Water Resources Director shall prepare a notice setting forth a place and time certain when the director or the authorized assistant of the director shall begin taking testimony as to the rights of the various claimants to the use of the waters of the stream or its tributaries. The notice shall be published in two issues of one or more newspapers having general circulation in the counties in which the stream is situated, the last publication of the notice to be at least 30 days prior to the beginning of taking testimony by the director or the authorized assistant of the director.

(2) The director shall also send by registered mail or by certified mail with return receipt to each claimant or owner who filed with the director a registration statement as provided in ORS 539.240 and to the Attorney General of the United States or the designated representative of the Attorney General of the United States, on behalf of the United States and its agencies and as trustee for the Indian tribes, a notice similar to that provided in subsection (1) of this section setting forth the date when the director or the authorized assistant of the director will take testimony as to the rights to the use of the water of the stream. The notice must be mailed at least 30 days prior to the date set therein for taking testimony.

(3)(a) For purposes of the Klamath Basin adjudication, the Water Resources Department will provide notice, substantially like that specified in subsection (2) of this section, to claimants or owners who desire to claim a water right under this chapter, or to contest the claims of others, and have so notified the director. The notice shall be accompanied by a blank form on which the claimant or owner shall present in writing all of the particulars necessary for determination of the right of the claimant or owner to contest the claims of others or to the use of the waters of a stream to which the claimant or owner lays claim. That form shall require substantially the same information required in a registration statement, as provided in ORS 539.240 (2), except that the map need not be prepared by a certified water right examiner, as required by ORS 539.240 (2)(d).

(b) In the already adjudicated areas of the Klamath Basin, the notice provided to holders of permitted or certificated surface water rights acquired under ORS chapter 537 will specify that they may contest the statement and proof of claims of others made under this chapter, but only in the unadjudicated areas of the Klamath Basin. [Amended by 1955 c.669 §2; 1987 c.541 §9; 1989 c.691 §7; 1991 c.249 §45; 1993 c.157 §2; 2013 c.1 §77]

539.050 [Amended by 1955 c.669 §3; repealed by 1987 c.541 §10]

539.060 [Repealed by 1987 c.541 §10]

539.070 Hearing by director; adjournments. Upon the date named in the notice for taking testimony, the Water Resources Director or the authorized assistant of the director shall begin taking testimony and shall continue until completed. But the director may adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested.

539.080 [Amended by 1971 c.621 §37; 1975 c.607 §40; 1979 c.67 §3; 1981 c.627 §2; 1983 c.256 §2; repealed by 1987 c.541 §6 (539.081 enacted in lieu of 539.080)]

539.081 Fees for registration statement or statement and proof of claim; exemption; disposition. (1) At the time the owner or registrant submits a registration statement under ORS 539.240 or, if a registration statement is not filed, when a statement and proof of claim is filed pursuant to notice by the Water Resources Director under ORS 539.030, the owner or registrant shall pay a fee as follows:

(a) If for irrigation use, $2.30 for each acre of irrigated lands up to 100 acres and $1.20 for each acre in excess of 100 acres. The minimum fee for any owner or registrant for irrigation use shall be $120.

(b) If for power use, $2.30 for each theoretical horsepower up to 100 horsepower, 90 cents for each horsepower in excess of 100 up to 500 horsepower, 60 cents for each horsepower in excess of 500 horsepower up to 1,000 horsepower and 40 cents for each horsepower in excess of 1,000 horsepower, as set forth in the proof. The minimum fee for any owner or registrant for power use shall be $350.

(c) If for mining or any other use, $580 for the first second-foot or fraction of the first second-foot and $120 for each additional second-foot.

(2) The fees under subsection (1) of this section shall not apply to any federally recognized Indian tribe, or to the United States acting as trustee for such a tribe, claiming, under ORS 539.010, an undetermined vested right to the use of surface water for any nonconsumptive and nondiverted in-stream use to satisfy tribal hunting, fishing or gathering rights.

(3) If the registration statement shows that the water right was initiated by making application for a permit under the provisions of ORS chapter 537, the owner or registrant shall be given credit for the money paid as examination and recording fees. A credit under this subsection shall be allowed only if the application under ORS chapter 537 was for a permit to appropriate

water to be applied to the same parcel of land or for the same use as set forth in the registration statement.

(4) All fees paid under this section shall be deposited into the General Fund of the State Treasury and credited to an account of the Water Resources Department. The fees shall be used to pay for the expenses of the department to:

(a) Register claims to undetermined vested rights or federal reserved rights under ORS 539.230 and 539.240; and

(b) Determine claims filed or registered under ORS 539.230 and 539.240.

(5) No registration statement or statement and proof of claim shall be accepted for filing unless the registration statement or claim is accompanied by the fee in the amount set forth in this section. If the federal government is determined to be immune from the payment of such fees, the director may elect to accept a federal claim for filing without the accompanying fees. [1987 c.541 §7 (enacted in lieu of 539.080); 1989 c.691 §8; 1993 c.157 §3; 1993 c.535 §1; 2013 c.644 §§11,12; 2017 c.571 §§9,10]

539.090 Notice of right to inspect evidence, and of place of court hearing. Upon the completion of the taking of testimony by the Water Resources Director, the director shall at once give notice by registered mail or by certified mail with return receipt to the various claimants and to any party who has notified the director that the party wishes to contest the

claims of others, that all of the evidence will be open to inspection of the various claimants or owners. The notice shall specify the times when and the places where the evidence will be open to inspection, and the director shall keep the evidence open for inspection at the specified times and places. The earliest time for inspection shall be at least 10 days after mailing the notice; and, in the aggregate, the hours during which the director is to keep the evidence open to inspection shall at least equal 80 hours, counting only the hours between 8 a.m. and 5 p.m. during any day of the week except Sunday. The director shall also state in the notice the county in which the determination will be heard by the circuit court; provided, that the cause shall be heard in the county in which the stream or some part thereof is situated. [Amended by 1955 c.191 §1; 1989 c.691 §9; 1991 c.249 §46]

539.100 Contest of claims submitted to director; notice by contestant; service on contestee. Any person owning any irrigation works, or claiming any interest in the stream involved in the determination shall be a party to, and bound by, the adjudication. Any party who desires to contest any of the rights of the persons who have submitted their evidence to the Water Resources Director as provided in ORS 539.021 to 539.090 shall, within 15 days after the expiration of the period fixed in the notice for public inspection, or within such extension of the period, not exceeding 20 days, as the director may allow, notify the director in writing, stating with reasonable certainty the grounds of the proposed contest, which statement shall be

verified by the affidavit of the contestant, the agent or attorney of the contestant. A party not claiming an undetermined vested right under this chapter or not contesting the claim of another need not participate further in the proceeding, nor be served with further notices or documents regarding the adjudication. Upon the filing of a statement of contest, service thereof shall be made by the contestant upon the contestee by mailing a copy by registered mail or by certified mail, return receipt requested, addressed to the contestee or to the authorized agent or attorney of the contestee at the post-office address of the contestee as stated in the statement and proof of claim of the contestee. Proof of service shall be made and filed with the Water Resources Department by the contestant as soon as possible after serving the copy of statement of contest. [Amended by 1989 c.691 §10; 1991 c.102 §5; 1991 c.249 §47]

539.110 Hearing of contest; notice of; procedure. The Water Resources Director shall fix the time and a convenient place for hearing the contest, and shall notify the contestant and the person whose rights are contested to appear before the director or the authorized assistant of the director at the designated time and place. The date of hearing shall not be less than 30 nor more than 60 days from the date the notice is served on the parties. The notice may be served personally or by registered or certified mail, return receipt requested, addressed to the parties at their post-office addresses as stated in the statement and proof of claimant. The director may adjourn the hearing from

time to time upon reasonable notice to all the parties interested; may issue subpoenas and compel the attendance of witnesses to testify, which subpoenas shall be served in the same manner as subpoenas issued out of the circuit court; may compel the witnesses so subpoenaed to testify and give evidence in the matter; and may order the taking of depositions and issue commissions therefor in the same manner as depositions are taken in the circuit court. The witnesses shall receive fees as provided in ORS 44.415 (2), the costs to be taxed in the same manner as are costs in suits in equity. The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest. The burden of establishing the claim shall be upon the claimant whose claim is contested. The evidence may be taken by a duly appointed reporter. [Amended by 1989 c.980 §14d; 1991 c.249 §48]

539.120 Examination by director of stream and diversions in contest; record; map. The Water Resources Director, or a qualified assistant, shall proceed at the time specified in the notice to the parties on the stream given as provided in ORS 539.030, to make an examination of the stream and the works diverting water therefrom used in connection with water rights subject to this chapter, for which a registration statement has been filed as provided in ORS 539.240. The examination shall include the measurement of the discharge of the stream and of the capacity of the various diversion and distribution works, and an examination and approximate measurement of the lands irrigated from the various diversion and distribution

works. The director shall take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested. The observations and measurements shall be made a matter of record in the Water Resources Department. The department shall make or have made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of the stream, the location of each diversion point and each ditch, canal, pipeline or other means of conveying the water to the place of use, and the location of lands irrigated, or in connection with which the water is otherwise used, within each legal subdivision. [Amended by 1955 c.669 §4; 1989 c.691 §11; 1991 c.102 §6]

539.130 Findings of fact and determination of director; certification of proceedings; filing in court; fixing time for hearing by court; notice; force of director's determination. (1) As soon as practicable after the compilation of the data the Water Resources Director shall make and cause to be entered of record in the Water Resources Department findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the director, and certified copies of the observations and measurements and maps of record, in connection with the determination, as provided for by ORS 539.120, together with a copy of the order of determination and findings of fact of the director as they appear of record in the Water Resources Department, shall be certified to by

the director and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the director shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy to the department by registered mail or by certified mail with return receipt.

(3) The department shall immediately upon receipt thereof notify by registered mail or by certified mail with return receipt each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered or certified mail, addressed to the claimant or owner at the post-office address of the claimant or owner, as set forth in the proof of the claimant or owner theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the department as soon as possible after mailing the notices.

(4) The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its

operation shall be stayed by a stay bond as provided by ORS 539.180. [Amended by 1991 c.102 §7; 1991 c.249 §49]

539.140 Water right certificates. Upon the final determination of the rights to the waters of any stream, the Water Resources Department shall issue to each person represented in the determination a certificate setting forth the name and post-office address of the owner of the right; the priority of the date, extent and purpose of the right, and if the water is for irrigation purposes, a description of the legal subdivisions of land to which the water is appurtenant. The original certificate shall be mailed to the owner and a record of the certificate maintained in the Water Resources Department. [Amended by 1971 c.621 §38; 1975 c.607 §41; 1979 c.67 §4; 1991 c.102 §8]

539.150 Court proceedings to review determination of director. (1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.

(4) After final hearing the court shall enter a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment. [Amended by 1979 c.284 §165; 1989 c.691 §12; 1991 c.249 §50]

539.160 Transmittal of copy of decree to department; instructions to watermasters. The clerk of the circuit court, upon the entry of any decree by the circuit court or judge thereof, as provided by ORS 539.150, shall transmit a certified copy of the decree to the Water Resources Department where a record of the decree shall be maintained. The Water Resources Director shall issue to the watermasters instructions in compliance with the decree, and in execution thereof. [Amended by 1991 c.102 §9]

539.170 Division of water pending hearing. While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal shall be made in accordance with the order of the director.

Note: Sections 1 and 2, chapter 445, Oregon Laws 2015, provide:

Sec. 1. Leasing or temporary transfer of determined claim. (1) As used in this section, "determined claim" means a water right in the Upper Klamath Basin determined and established in an order of determination certified by the Water Resources Director under ORS 539.130.

(2) Except as provided in subsections (3) and (4) of this section, during the period that judicial review of the order of determination is pending, a determined claim is:

(a) An existing water right that may be leased for a term as provided under ORS 537.348; and

(b) A primary water right that is subject to temporary transfer for purposes of ORS 540.523.

(3) Subsection (2) of this section:

(a) Does not apply to a water right determined and established in an order of determination that has been stayed by the filing of a bond or irrevocable letter of credit under ORS 539.180;

(b) Does not apply to a water right transfer that includes changing the point of diversion upstream; and

(c) Does not allow a person to purchase, lease or accept a gift of a determined claim for conversion to an in-stream water right as described in ORS 537.348 (1).

(4) For purposes of determining under ORS 537.348 (5) or 540.523 (2) whether the Water Resources Department may approve a lease or temporary transfer of a determined claim, an injury to another determined claim is an injury to an existing water right. Notwithstanding ORS 537.348 (6) or 540.523 (5), the department shall deny, modify or revoke the lease or temporary transfer of a determined claim if the department determines that the lease or temporary transfer has resulted in, or is likely to result in:

(a) Injury to another determined claim or other existing water right; or

(b) Enlargement of the determined claim.

(5) The department shall revoke the lease or temporary transfer of a determined claim if a court judgment stays the determined claim.

(6) If a determined claim is removed from land by lease or temporary transfer, the land from which the determined claim is removed may not receive water during the term of the lease or temporary transfer. [2015 c.445 §1]

Sec. 2. (1) Section 1 of this 2015 Act is repealed January 2, 2026.

(2) Notwithstanding the repeal of section 1 of this 2015 Act by subsection (1) of this section, subject to modification or revocation under section 1 of this 2015 Act, a lease or temporary transfer of a determined claim under section 1 of this 2015 Act for a term beginning prior to January 2, 2026, may continue in effect

for the term of the lease or temporary transfer. If a court judgment results in a modification of the determined claim, the parties may continue the lease or temporary transfer of all or part of the water right as modified for all or part of the original term of the lease or temporary transfer. [2015 c.445 §2]

539.180 Bond or irrevocable letter of credit to stay operation of director's determination; notice to watermaster. At any time after the determination of the Water Resources Director has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 in the circuit court wherein the determination is pending, in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced. Upon the filing and approval of the bond or letter of credit, the clerk of the circuit court shall transmit to the Water Resources Department a certified copy of the bond or letter of credit, which shall be recorded in the department records, and the department shall give notice thereof to the watermaster of the proper district. [Amended by 1991 c.102 §10; 1991 c.331 §79; 1997 c.631 §486]

539.190 Rehearing by circuit court. Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed, within six months from the date of the decree of the circuit court on the decision of the Supreme Court, the Water Resources Director or any

party interested may apply to the circuit court for a rehearing upon grounds to be stated in the application. If in the discretion of the court the application states good grounds for the rehearing, the circuit court or judge shall make an order fixing a time and place when the application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of the application to the director and to every party interested, and state in the notice the time and place when the application will be heard. [Amended by 1981 c.178 §15]

539.200 Conclusiveness of determinations as to water rights. The determinations of the Water Resources Director, as confirmed or modified as provided by this chapter in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

539.210 Duty of claimants to appear and submit proof; nonappearance as forfeiture; intervention in proceedings. Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the

water theretofore claimed by the claimant. Any person interested in the water of any stream upon whom no service of notice has been had of the pendency of proceedings for determination of the rights to the use of water of the stream, and who has had no actual knowledge or notice of the pendency of the proceedings may, at any time prior to the expiration of one year after entry of the determination of the Water Resources Director, file a petition to intervene in the proceedings. The petition shall contain, among other things, all matters required by this chapter of claimants who have been duly served with notice of the proceedings, and also a statement that the intervenor had no actual knowledge or notice of the pendency of the proceedings. Upon the filing of the petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable and thereafter shall have all rights vouchsafed by this chapter to claimants who have been duly served.

539.220 Procedure when rights to same stream have been determined in different proceedings. Whenever the rights to the waters of any stream have been determined as provided in this chapter and it appears by the records of such determination that it had not been at one and the same proceeding, then the Water Resources Director may open to public inspection all proofs or evidence of rights to the water, and the findings of the director in relation thereto, in the manner provided in ORS 539.090. Any person who then desires to contest the claims or rights of other persons, as set forth in the proofs or established by the director,

shall proceed in the manner provided for in ORS 539.100 and 539.110; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

539.230 Notice of need to file registration statement; publication requirements; additional methods of providing notice. (1) In order to preserve information relating to claims to undetermined vested rights as described in ORS 539.010 and federal reserved rights, the Water Resources Director shall prepare a general notice stating the need for any person, corporation or governmental agency claiming an undetermined vested right, federal reserved right or a right derived from such rights to file a registration statement as required under ORS 539.240. The notice shall outline the process for obtaining a blank registration statement and shall describe the rights that may be claimed under this chapter.

(2) The notice required under subsection (1) of this section shall be published at least two times in one or more newspapers having general circulation in each county in which streams with potentially vested rights or reserved rights that have not been adjudicated under this chapter are located.

(3) In addition to the notice described under subsection (2) of this section, in any rural county in which there is not a newspaper having general circulation, the director shall use additional methods of providing notice of the requirement to file a registration

statement. These methods may include but need not be limited to holding public meetings, inserting announcements in trade or organization newsletters, public service announcements on local radio stations and informing the county extension agent of the requirement. [1987 c.541 §4; 1989 c.691 §13; 1991 c.67 §154]

539.240 Claim to undetermined right to appropriate surface water; registration statement; contents; effect of failure to file; recognizing changes to right; rules. (1) Any person, corporation or governmental agency claiming an undetermined vested right, federal reserved right or right derived from such rights to appropriate surface water under ORS 539.010 shall file in the office of the Water Resources Department, on or before December 31, 1992, a registration statement of the claim.

(2) Upon request, the Water Resources Director shall make available a blank registration statement required under subsection (1) of this section. The claimant shall complete the registration statement by providing the information necessary for determination of the claimed vested or reserved right. The registration statement shall include at least the following:

(a) The name and mailing address of the claimant.

(b) The claimed beneficial use of the water and the amount used.

(c) The stream from which the water is diverted.

(d) A map from a survey prepared by a water right examiner certified under ORS 537.798 showing:

(A) The location of the point of diversion in reference to an established corner of the United States Public Lands Survey or, if within a platted and recorded subdivision, from an established lot corner of the subdivision.

(B) The location of the place of use by quarter-quarter section of the United States Public Lands Survey. If the use is for irrigation, the number of acres irrigated within each quarter-quarter section.

(e) The time of commencement of the claimed use of water.

(f) The times of beginning and completion of any division and distribution works used to appropriate the claimed use of water and the water carrying capacity of such works, if known.

(g) The location of the place of use by quarter-quarter section of the United States Public Lands Survey. If the use is for irrigation, the number of acres irrigated within each quarter-quarter section during the first year of use and during each subsequent year until the full amount of claimed use was accomplished.

(h) The period of the year during which the claimed use of water is usually made.

(3) The failure of any person, corporation or governmental agency to file a registration statement for an undetermined vested right or federal reserved right shall create a rebuttable presumption that the claim has been abandoned.

(4) For good cause shown, any person who fails to file a registration statement within the period set forth in subsection (1) of this section may file within one year after December 31, 1992, a petition with the director requesting that the person be given an opportunity to rebut the presumption that the person has abandoned the claim. Upon the filing of such a petition, the director may schedule a hearing to take testimony and evidence on the date the water was applied to beneficial use or the director may accept sworn statements in writing in support of such petition. The director shall not deny a petition without first holding a contested case hearing. If it appears after hearing or from such sworn statements that the person has a use of water that would be subject to registration under this chapter, the director shall issue an order authorizing the person to file a registration statement as described under subsection (1) of this section. A person who files a petition under this subsection shall submit with the petition a fee, the amount of which shall be one and one-half times the amount the person would have submitted under ORS 539.081 with a timely registration statement.

(5) The director shall accept for filing all registration statements described in subsections (1) and (4) of this section made in proper form when the

statements are accompanied by the fees prescribed in ORS 539.081. The director shall indorse the date of receipt on each registration statement.

(6) The director shall examine each registration statement to insure that the statement is complete and in proper form. If the director determines the information required under subsection (2) of this section is complete and in proper form, the director shall:

(a) Enter the indorsed statement in the record of the department;

(b) Mail a copy of the indorsed statement to the person filing the registration statement; and

(c) Include the person or the properly designated assignee of the person in any further proceeding to adjudicate the water rights represented by the indorsed registration statement.

(7) Upon entry of the indorsed statement in the department's records, the registrant is entitled to continue to appropriate the surface water and apply it to beneficial use to the extent and in the manner disclosed in the recorded registration statement. However, the registrant shall not be entitled to the benefits of an existing water right of record under ORS 540.045.

(8) No registration statement recorded under this section shall be construed as a final determination of any matter stated therein, nor shall the act of indorsement by the director constitute a determination of the validity of the matters contained in the registration statement. The right of the registrant to appropriate

surface water under a recorded registration statement is subject to determination under ORS 539.010 to 539.240, and is not final or conclusive until so determined. A right to appropriate surface water under a recorded registration statement has a tentative priority from the date claimed in the indorsed registration statement.

(9) Any indorsed registration statement may be assigned, subject to the conditions in the registration statement, but no such assignment will be binding, except upon the parties to the assignment, unless filed with the department.

(10) Notwithstanding the filing deadline prescribed under subsection (1) of this section, and the late filing period allowed under subsection (4) of this section, if any person submitted, before December 31, 1994, a registration statement or other similar documentation claiming a right to appropriate surface water under ORS 539.010, the director shall examine the material submitted to determine if the documents filed would substantially comply with the requirements of subsection (2) of this section. If the director determines that the documents substantially comply with the surface water registration filing requirements of subsection (2) of this section, the director may accept the registration. If the director determines that the documents filed under this subsection are incomplete or if additional information is required to comply with subsection (2) of this section, or fees required under ORS 539.081 have not been submitted, the director shall notify the claimant of the deficiency, setting a

date certain for submittal of the information or fees. The time for submittal of additional information or fees shall be not less than 30 days nor more than 180 days after the director notifies the claimant of the deficiency. If the additional information or fees are not submitted on or before the date certain, the registration statement shall be considered void and shall be returned to the claimant.

(11) The director shall adopt by rule a process and standards for recognizing changes in the place of use, type of use or point of diversion of water uses registered pursuant to this section. [1987 c.541 §5; 1989 c.691 §14; 1993 c.157 §4; 1995 c.365 §7; 1999 c.860 §1]

WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES

539.300 Legislative findings. The Legislative Assembly of the State of Oregon finds it is desirable to provide a procedure for conducting negotiations to determine the water rights of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon. [1987 c.81 §2; 1993 c.67 §1]

539.310 Negotiation for water rights. (1) The Water Resources Director may negotiate with representatives of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon and representatives of the federal government as trustee for the federally recognized Indian tribe to define the scope and attributes of rights to water claimed by the federally recognized Indian tribe to satisfy tribal

rights under treaty between the United States and the tribes of Oregon. All negotiations in which the director participates under this section shall be open to the public.

(2) During negotiations conducted under subsection (1) of this section, the director shall:

(a) Provide public notice of the negotiations;

(b) Allow for public input through the director; and

(c) Provide regular reports on the progress of the negotiations to interested members of the public. [1987 c.81 §3; 1993 c.67 §2]

539.320 Agreement; submission to court. When the Water Resources Director and the representatives of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon and the federal government have completed an agreement, the Water Resources Director shall submit an original copy of the agreement to the appropriate court. The copy shall be signed by the Water Resources Director on behalf of the State of Oregon and by authorized representatives of the Indian tribe and the federal government as trustee for the Indian tribe. [1987 c.81 §4; 1993 c.67 §3]

539.330 Notice to persons affected by agreement. (1) Upon filing of the agreement with the appropriate court under ORS 539.320, the Water Resources Director shall notify owners of water right certificates or permits that may be affected by the agreement:

(a) That the agreement has been filed with the court; and

(b) Of the time and manner specified by the court for filing an exception to the agreement.

(2) Unless notice by registered mail is required by the court, the notice required under subsection (1) of this section may be given by:

(a) Publication; or

(b) Any other method the director considers necessary. [1987 c.81 §5]

539.340 Court decree; effective date of agreement; remand. (1) An agreement negotiated under ORS 539.310 to 539.330 shall not be effective unless and until incorporated in a final court decree, after the court has provided an opportunity for an owner of a water right certificate or permit that may be affected by the agreement or for a claimant in an adjudication that may be affected by the agreement to submit an exception to the agreement.

(2) If the court does not sustain an exception, the court shall issue a final decree incorporating the agreement as submitted without alteration.

(3) If the court sustains an exception to the agreement, the court shall remand the agreement to the Water Resources Director for further negotiation according to the provisions of ORS 539.300 to 539.350, if desired by the parties to the agreement. [1987 c.81 §6; 1997 c.708 §1]

539.350 Procedures after remand of agreement. Within 180 days after the court remands the agreement under ORS 539.340, the Water Resources Director shall file with the court:

(1) An amended agreement complying with ORS 539.320, which shall be subject to the procedure specified by ORS 539.330;

(2) A motion to dismiss the proceedings, which shall be granted by the court; or

(3) A stipulated motion for a continuance for a period not to exceed 180 days, within which period the parties shall submit to the court an amended agreement, a motion to dismiss or a motion for further continuance. [1987 c.81 §7]

539.360 Participation in management of Upper Klamath Basin Comprehensive Agreement. (1) As used in this section:

(a) "Joint management entity" means the entity that is:

(A) Composed of the landowner entity, the Klamath Tribes, the United States and the State of Oregon; and

(B) Responsible for overseeing the implementation of the settlement agreement.

(b) "Landowner entity" means the entity formed by eligible landowners as provided in section 8 of the settlement agreement.

(c) "Settlement agreement" means the Upper Klamath Basin Comprehensive Agreement dated April 18, 2014.

(2) The Water Resources Department may participate in activities related to the joint management entity that are consistent with the terms of the settlement agreement. The activities may include, but need not be limited to:

(a) Providing assistance in the formation of an Oregon tax-exempt nonprofit corporation to function as the joint management entity for the settlement agreement;

(b) Drafting and giving approval of the articles of incorporation and bylaws of the corporation;

(c) Participating as a voting member of the board of directors for the corporation; and

(d) Participating as a member of the technical team for the corporation. [2015 c.449 §1]

Note: The Upper Klamath Basin Comprehensive Agreement terminated December 28, 2017, following a negative determination by the United States Secretary of the Interior.

Note: 539.360 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 539 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

Oregon Revised Statutes (2019)
Chapter 540—Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures

540.010 Water districts; creation; purposes. The Water Resources Commission shall divide the state into water districts, which shall be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the state. Water districts shall not be created until necessary. [Amended by 1985 c.673 §82]

540.045 Watermaster duties. (1) Each watermaster shall:

(a) Regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the users' existing water rights of record in the Water Resources Department.

(b) Upon the request of the users, distribute water among the various users under any partnership ditch, pipeline or well or from any reservoir, in accordance with the users' existing water rights of record in the department.

(c) Divide the waters of the natural surface and ground water sources and other sources of water supply among the canals, ditches, pumps, pipelines and reservoirs taking water from the source for beneficial use, by regulating, adjusting and fastening the headgates, valves or other control works at the several

points of diversion of surface water or the several points of appropriation of ground water, according to the users' relative entitlements to water.

(d) Attach to the headgate, valve or other control works the watermaster regulates under paragraph (c) of this subsection, a written notice dated and signed by the watermaster, setting forth that the headgate, valve or other control works has been properly regulated and is wholly under the control of the watermaster.

(e) Perform any other duties the Water Resources Director may require.

(2) When a watermaster must rely on a well log or other documentation to regulate the use or distribution of ground water, the regulation shall be in accordance with ORS 537.545 (4).

(3) For purposes of regulating the distribution or use of water, any stored water released in excess of the needs of water rights calling on that stored water shall be considered natural flow, unless the release is part of a water exchange under the control of, and approved by, the watermaster.

(4) As used in this section, "existing water rights of record" includes all completed permits, certificates, licenses and ground water registration statements filed under ORS 537.605 and related court decrees. [1985 c.421 §3; 1989 c.691 §15; 1991 c.102 §11; 1993 c.157 §5; 1995 c.673 §3; 2009 c.819 §3]

Oregon Revised Statutes (2019)
Chapter 540—Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures

540.210 Distribution from ditch or reservoir.

(1) Whenever any water users from any ditch or reservoir, either among themselves or with the owner thereof, are unable to agree relative to the distribution or division of water through or from the ditch or reservoir, either the owner or any such water user may apply to the watermaster of the district in which the ditch or reservoir is located, by written notice, setting forth such facts, and asking the watermaster to take charge of the ditch or reservoir for the purpose of making a just division or distribution of water from it to the parties entitled to the use thereof.

(2) The watermaster shall then take exclusive charge of the ditch or reservoir, for the purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir, and shall continue the work until the necessity therefor shall cease to exist.

(3) The distribution and division of water shall be made according to the relative and respective rights of the various users from the ditch or reservoir, as determined by the Water Resources Director, by decree of the circuit court, or by written contract between all of the users filed with the watermaster.

(4) The circuit court having jurisdiction may request the watermaster of the district to take charge of any such ditch or reservoir, and to enforce any decree respecting such ditch or reservoir made under the jurisdiction of the court.