**Nos. 18-1323, 18-1325**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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LONNY E. BALEY, MARK R. TROTMAN, BALEY TROTMAN FARMS, a partnership, JAMES L. MOORE, CHERYL L. MOORE, DANIEL G. CHIN, DELORIS D. CHIN, WONG POTATOES, INC., an Oregon Corporation, MICHAEL J. BYRNE, BYRNE BROTERS, a partnership, JOHN ANDERSON FARMS, INC., BUCKINGHAM FAMILY TRUST, EILEEN BUCKINGAM, KEITH BUCKINGHAM, SHELLY BUCKINGHAM, CONSTANCE FRANK,

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Appeal from the United States Court of Federal Claims,
Case Nos. 1:01-cv-00591, 1:07-cv-00194, 1:07-cv-10401, 1:07-cv-19402, 1:07-cv-19403, 1:07-cv-19404, 1:07-cv-10405, 1:07-cv-19406, 1:07-cv-19407, 1:07-cv-19408, 1:07-cv-10409, 1:07-cv-19410, 1:07-cv-19411, 1:07-cv-19412, 1:07-cv-10413, 1:07-cv-19414, 1:07-cv-19415, 1:07-cv-19416, 1:07-cv-10417, 1:07-cv-19418, 1:07-cv-19419, 1:07-cv-19420, Judge Marian Blank Horn

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# ANSWERING BRIEF FOR DEFENDANT-APPELLEE UNITED STATES

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JOHN FRANK, HILL LAND AND CATTLE CO., INC., JEFF HUNTER, SANDRA HUNTER, MCVAY FARMS, INC., BARBARA MCVAY, MATTHEW K. MCVAY, MICHAEL MCVAY, RONALD MCVAY, SUZAN MCVAY, TATIANA MCVAY, HENRY O'KEEFFE, PATRICIA O'KEEFFE, SHASTA VIEW PRODUCE, INC., EDWIN STASTNY, JR., ALL PLAINTIFFS,

*Plaintiffs-Appellants,*

v.

UNITED STATES, and

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

*Defendant-Appellees*

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**FEDERAL RULES AND REGULATIONS:**

**STATE STATUTES**



**MISCELLANEOUS:**

## GLOSSARY OF ACRONYMS & ABBREVIATIONS

Appx ..... Appendix

BIOP ..... Biological Opinion

ESA ..... Endangered Species Act

FWS ..... U.S. Fish and Wildlife Service

KBA ..... Klamath Basin Adjudication

KBA_ACFFOD ..... KBA Amended and Corrected Findings of Fact and Order of Determination

KID ..... Klamath Irrigation District

KWUA ..... Klamath Water Users' Association

NMFS ..... National Marine Fisheries Service

OWRD ..... Oregon Water Resources Department

Reclamation ..... U.S. Bureau of Reclamation

SONCC coho ..... Southern Oregon/Northern California Coast coho salmon

TID ..... Tulelake Irrigation District

Van Brimmer ..... Van Brimmer Ditch Company

## STATEMENT OF RELATED CASES

This Court has heard one previous appeal in these consolidated cases (Court of Federal Claims No. 01-cv-0591). *See Klamath Irrigation District v. United States*, Fed. Cir. No. 07-5115. In that appeal, this Court certified three questions to the Oregon Supreme Court. *Klamath Irrigation District v. United States*, 532 F.3d 1376 (2008) (Schall and Bryson, JJ.); *see also id.* at 1378 (Gajarsa, J., dissenting). The Oregon Supreme Court issued an opinion on the certified questions in 2010. *Klamath Irrigation District v. United States*, 348 Or. 15, 227 P.3d 1145 (2010) (en banc). This Court issued its opinion in 2011, reversing and remanding to the Court of Federal Claims. *Klamath Irrigation District v. United States*, 635 F.3d 505 (2011) (Schall and Bryson, JJ.); *see also id.* at 522 (Gajarsa, J., concurring). There are no other cases, known to counsel, pending in this Court or any other court of appeals that will directly affect or be directly affected by this Court's decision in the pending appeal.

## INTRODUCTION

The Klamath Project is a federal reclamation project on the Oregon-California border operated by the United States Bureau of Reclamation ("Reclamation"). In 2001, a year of severe drought, Reclamation directed irrigation districts and entities served by the Project to sharply curtail the diversion and delivery of Klamath Basin waters to Project irrigators. Reclamation's directives were compelled by the findings of federal wildlife agencies that Reclamation needed to maintain specified minimum water levels in Upper Klamath Lake and in the Klamath River downstream from the Project (1) to avoid jeopardy to fish listed as endangered and threatened under the Endangered Species Act, and (2) to protect tribal-trust fisheries. In the present consolidated class action, individual Project irrigators allege that the 2001 curtailment of water deliveries constituted an uncompensated taking of their beneficial interests in Project water rights.

The CFC held that Project operations in 2001 did not result in takings, because the waters retained in Upper Klamath Lake and the Klamath River were within the scope of federal reserved water rights for tribal fisheries that were senior in priority to Project rights. For some but not all Project irrigators, the CFC also held that Project contracts precluded takings lability. As explained herein, the CFC's judgment should be affirmed (1) because Klamath Basin tribes had senior priority under federal reserved rights to water withheld from irrigators in 2001, and

(2) because the relevant contracts preclude takings liability for damages from water shortages as to all Plaintiffs.

In a pretrial ruling, the CFC erred in determining that Reclamation's 2001 actions are subject to analysis as potential "per se" *physical* takings. If this Court determines that a remand is warranted—notwithstanding the senior tribal rights and the terms of the water-supply contracts—this Court should direct the CFC to consider Plaintiffs' takings claims under the multi-factored analysis applicable to *regulatory* takings.

## ISSUES PRESENTED

1. Whether the CFC correctly held that 2001 Project operations did not amount to a taking of the Klamath Project irrigators' water rights in light of senior federal reserved water rights for tribal fisheries.

2. Whether the CFC's judgment should be affirmed because the contracts defining the irrigators' beneficial interests preclude federal liability for water shortages on "account of drought . . . or other causes" or similar provisions.

3. Whether the CFC correctly dismissed the takings claims of the shareholders of the Van Brimmer Ditch Company because their alleged water rights are disputed and subject to resolution in the Klamath Basin Adjudication.

4. If the CFC's judgment is not affirmed for the above reasons, whether the case must be remanded with directions that the CFC evaluate Plaintiffs' claims under the framework for regulatory takings.

## STATEMENT OF THE CASE

### A. Course of Proceedings

#### *1. Initial Proceedings*

The Klamath Project consists of a series of dams, reservoirs, canals, and ditches that drain wetlands and deliver water to irrigate more than 200,000 acres of agricultural land in Oregon and California. *See Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 508 (Fed. Cir. 2011) ("*Klamath II*"); *see also* Appx3031 (map). Plaintiffs are members or shareholders of 14 organizations—13 irrigation or drainage districts and one private corporation—that receive water, under contract, from the Project. *See* Appx27, Appx3150-3155.

In October 2001, the 14 organizations and 13 individual farmers initiated this action (No. 1:01-cv-00591) in the CFC, seeking damages for the curtailment of Klamath Project water deliveries during the 2001 drought. Appx24. In their complaint as amended, Plaintiffs alleged that the curtailment constituted (1) the breach of water-delivery contracts, (2) the taking of water rights without just compensation in violation of the Fifth Amendment, and (3) the impairment of water rights in violation of the Klamath Basin Compact, a congressionally-approved interstate compact between Oregon and California. *See* Appx3160-3165.

The United States moved to stay the proceedings in light of the Klamath Basin Adjudication ("KBA"), a then pending (and still ongoing) general stream

adjudication in Oregon to determine water rights in the Oregon portion of the Klamath Basin. See Appx24; *see also United States v. Oregon*, 44 F.3d 758, 762-64 (9th Cir. 1994) (describing KBA). The United States and the 14 irrigation organizations have pending claims in the KBA, including claims concerning Klamath Project water rights. Appx24. The United States argued that the Plaintiffs' takings claims depended on the existence of water rights that remained to be adjudicated in the KBA. *Id.* In November 2003, based on Plaintiffs' representations that they do not claim "title" to Project water rights but instead assert the taking of "beneficial interests" not at issue in the KBA, the CFC denied the stay. Appx518.

In 2005, the CFC granted a motion by the Pacific Coast Federation of Fishermen's Associations ("PCFFA") to intervene as defendant. *See Klamath Irrigation Dist. v. United States*, 64 Fed. Cl. 328, 336 (2005). PCFFA represents approximately 3,000 small commercial operators who derive income from Pacific salmon that spawn in the Klamath River basin. *Id.* at 331.

The CFC granted summary judgment for the United States on all claims. *See Klamath II*, 635 F.3d at 510-14. In a 2005 interlocutory decision, the CFC held that the United States possesses all Oregon state-law water rights in waters appropriated for the Klamath Project, under a 1905 Oregon statute that enabled the United States to appropriate all unappropriated waters of the Klamath Basin (or other source). *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 523-535 (2005) (citing

Or. Gen. Laws, 1905, 228, § 2, pp. 401-02). The CFC determined that Plaintiffs' remedies for curtailment of water deliveries, if any, sounded in contract not in takings. *Id.* The CFC also held that the Klamath Basin Compact did not "enhance" Plaintiffs' contract rights and provided no basis for a cause of action against the United States in this case. *Id.* at 539-540. In a 2007 final decision, the CFC held that Plaintiffs could not recover for breach of contract because the curtailment of irrigation deliveries in 2001 was excused under the "sovereign acts" doctrine. *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677 (2007).

*2. Certification of Questions to Oregon Supreme Court*

Plaintiffs timely appealed. In a 2008 opinion, this Court determined that the Irrigators' takings claims depended, in part, upon interpretation of the 1905 Oregon statute and other unresolved matters of Oregon law. *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008). Accordingly, this Court certified three questions to the Oregon Supreme Court: (1) whether the 1905 statute "preclude[d] irrigation districts and landowners from acquiring a beneficial or equitable property interest" in water appropriated by the United States for the Klamath Project; (2) whether the landowners who beneficially use Project water have a "beneficial or equitable property interest appurtenant to their land," and (3) whether Oregon law recognizes a property interest, "whether legal or equitable,

in the use of Klamath Basin water that is not subject to adjudication in the [KBA]." *Id.* at 1377-78.

In a 2010 decision, the Oregon Supreme Court held, on the first certified question, that the 1905 statute did not preclude landowners from acquiring beneficial interests to water rights appropriated by the United States for the Klamath Project. *Klamath Irrigation Dist. v. United States*, 348 Or. 15, 37-42, 227 P.3d 1145, 1157-60 (2010) (en banc) ("*Klamath I*"). On the third question, the Oregon Supreme Court held that the question of beneficial ownership of water rights was not subject to adjudication in the KBA (which concerned only the existence and attributes of water rights). *Id.* at 52-57, 227 P.3d at 1166-68.

On the second question, the Oregon Supreme Court answered conditionally. Prior to Oregon's adoption of a 1909 Water Code, a water user acquired a vested State-law water right merely by diverting water from a natural stream course and applying it to beneficial use. *Id.* at 23, 227 P.3d at 1150 (citing *Low v. Rizor*, 25 Or. 551, 557, 37 P. 82, 84 (1894)). In circumstances where one party (*e.g.*, a ditch company) constructed works to divert and transport water for the beneficial use of another (e.g., an individual landowner), the ownership of the water right was held to be the "subject of contract between the person who initiate[d] the appropriation and the user." *Id.* at 27, 227 P.3d at 1152 (quoting *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 98, 45 P. 472, 482 (1896)). By agreement, an appropriator could transfer all

ownership interests to a user, or a user might act as the appropriator's agent and acquire no rights. *Id.* In addition, a ditch company could retain "title" to water rights in trust for landowners who hold a beneficial interest in such right. *Id.* at 43-44, 227 P.3d at 1161-62.

The Oregon Supreme Court identified three factors for determining whether a beneficial interest was created, under pre-1909 Oregon law, during a joint water appropriation: (1) whether the water right is appurtenant to the users' land; (2) whether the water was appropriated for the benefit of the users; and (3) the terms of agreements between the appropriator and users. *Id.* at 46-47, 227 P.3d at 1162-63. Here, the Oregon Supreme Court observed that Klamath Project water rights are appurtenant to the lands where beneficially used, and that the United States appropriated the waters for Project landowners, making the relationship between the United States and Project landowners "similar to that of a trustee and beneficiary." *Id.* at 47-50, 227 P.3d at 1163-65. But the Oregon Supreme Court declined to interpret Klamath Project contracts or to determine how those contracts affect water users' interests. *Id.* at 51-52, 227 P.3d at 1165-66.

*3. Decision after Certification of Questions*

Thereafter, this Court reversed the CFC's summary judgment on Plaintiffs' takings and Compact claims, and remanded with instructions that the CFC resolve the "third part" of the Oregon Supreme Court's "three-part test" relating to Project

water interests. *Klamath II*, 635 F.3d at 519. Specifically, this Court instructed the CFC to address "whether contractual agreements between plaintiffs and the government have *clarified, redefined, or altered* the . . . beneficial relationship so as to deprive plaintiffs of cognizable property interests for purposes of their takings and Compact claims." *Id.* (emphasis added). This Court also reversed the CFC's summary judgment on Plaintiffs' contract claim, ruling that the CFC erred in not requiring the United States to prove, as part of its "sovereign acts" defense, that the relevant sovereign acts rendered contract performance "impossible." *Id.* at 521-22.

*4. Consolidation and Trial*

In 2007, a group of 21 Project water users not party to the above-described action (collectively, "Anderson Farms") filed their own claims against the United States for breach of contract and takings relating to Klamath Project operations in 2001 (No. 1:07-cv-194). The CFC stayed *Anderson Farms* pending completion of the appeal in *Klamath Irrigation Dist.* Appx26. Following the appeal, Plaintiffs in both actions moved to voluntarily dismiss all of their breach-of-contract claims. *Id.* The CFC granted that motion and consolidated the cases for trial. *Id.*

In 2017, just prior to trial, the CFC granted a motion for class certification to include, as opt-in Plaintiffs, all persons who own or lease lands within, or receive water from, the 14 irrigation organizations and who claim an appurtenant right to Project water and allege a Fifth Amendment taking resulting from the 2001 Project

operations. *Id.* at 644. The CFC also granted Plaintiffs' motion in limine that Reclamation's actions should be analyzed as physical takings, not regulatory takings. Appx26.

Following trial and post-trial briefing, all organizational plaintiffs moved to voluntarily dismiss their claims. Appx28. The CFC granted that motion, leaving only individual plaintiffs. *Id.* The CFC issued a published opinion on September 17, 2017. Appx2-63 (*Baley v. United States*, 134 Fed. Cl. 619 (2017)). The CFC issued final judgment for the United States on October 23, 2017. Appx1.

### B. Klamath Project

#### *1. Reclamation Act*

Congress enacted the Reclamation Act of 1902 to enable the "massive projects" that were needed to reclaim arid and semi-arid lands in the western states that otherwise could not be settled. *California v. United States*, 438 U.S. 645, 663 (1978). The Act authorized and directed the Secretary of the Interior: (a) to identify suitable project locations; (b) to withdraw from public entry the lands needed for project works, as well as lands susceptible to irrigation from such works, (c) to construct project works; (d) to reopen project lands to homesteading, subject to water charges and other terms; (e) to designate any private lands to be served by a project; and (f) to impose charges upon homesteaders and private landowners,

equitably apportioned, to recover project construction and operation and maintenance costs. Act of June 17, 1902, ch. 1093, §§ 2-4, 32 Stat. 388, 388-89.

Congress directed the Secretary to "proceed in conformity with [state] laws" when appropriating waters for such projects. *Id.*, § 8, 32 Stat. at 390; 43 U.S.C. § 383; *California v. United States*, 438 U.S. at 665. Congress authorized the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" for carrying out the provisions of the Act. 43 U.S.C. § 373.

In 1905, the Oregon legislature authorized the United States to appropriate state waters for federal reclamation projects. Appx9 (citing 1905 Or. Gen. Laws 401-02). The 1905 statute provided that all unappropriated state waters designated in a project notice and ultimately appropriated for a reclamation project would "not be subject to further appropriation under the laws of this State, but [would] be deemed to have been appropriated by the United States." *Id.* Also in 1905, the United States gave notice of intent to utilize, for the Klamath Project, "[a]ll of the waters of the Klamath Basin in Oregon, constituting the enter drainage basin[] of the Klamath River." *Id.* The United States provided similar notice, under California law, to appropriate California waters. Appx2722.

*2. Project Setting and Components*

The Klamath Project is located in the upper basin of the Klamath River east of the Cascade Range. Although the climate is mostly semi-arid, basin lands receive substantial surface flows from the Cascades to the west and from uplands to the east. *See* USGS, *Groundwater Hydrology of the Upper Klamath Basin, Oregon and California* 1-2 (2010), available at: https://pubs.usgs.gov/sir/2007/5050/. Prior to construction, the Project area was dominated by three large shallow lakes (Upper Klamath Lake, Lower Klamath Lake, and Tule Lake) and by a network of wetlands that covered hundreds of square miles. *Id.* In most Reclamation projects, rivers are dammed to create large reservoirs and diversion works for the storage and delivery of water to otherwise dry lands. By contrast, the Klamath Project was a massive undertaking to *drain* lands that were flooded on a regular basis, and to regulate surface flows to deliver water to these and other lands for agricultural purposes. Appx611, Appx2067, Appx2078.

The principal storage feature of the Klamath Project is Upper Klamath Lake in Oregon. Appx2813-2814. The lake is formed by a natural reef where lake waters overflowed to the Link River, a short stream that empties into Lake Ewauna, which forms the headwaters of the Klamath River. Appx2712, Appx2814, Appx2825-2828. Reclamation constructed the Project's first irrigation structure, the A Canal, in 1905. Appx2711. The A Canal diverts water to lands southeast of Upper

Klamath Lake, from a diversion point at the bottom of the lake, just above where the lake empties into the Link River. *Id.*; Appx3191-3193. The A Canal supplies a majority of the Project's irrigation water. Appx2711.

The Link River Dam, just below the A-Canal headgate, was completed in 1921. Appx2712. In the same year, a 100-foot-wide channel was notched through the natural reef. *Id.* These changes enabled Reclamation, for the first time, to regulate lake levels, including to drain the lake to below natural levels. Appx2712, Appx2813-2814. The lake is nine to ten feet deep at maximum capacity and now can be lowered to a depth of four to five feet. Appx1976. Historically, Upper Klamath Lake had a surface area of approximately 105,000 acres, Appx2813, and lake elevations ranged between 4,140 and 4,143 feet above sea level. Appx2712, 2814. Due to Project changes, the surface area now ranges from 60,000 to 90,000 acres, Appx2712, Appx2813, and Reclamation can now store water up to 4,143.3 feet, Appx2814, and for a longer period. Appx1974-1975. The usable storage volume is approximately 500,000 acre feet. Appx1976.

Over several decades and in stages, Reclamation constructed additional Project structures, including additional diversion points downstream on the Klamath River (all in Oregon), and many canals, laterals, and drains (in both Oregon and California). *See* Appx2701-2720. In the process, Lower Klamath Lake, Tule Lake, and surrounding wetlands were largely drained. Appx2067, Appx2078. Remnants

of those lakes and wetlands became the Lower Klamath and Tule Lake National Wildlife Refuges. *See* Appx3183 (map). The Klamath Project now includes a vast drainage and distribution system, delivering water from Upper Klamath Lake and other diversion points on the Klamath River to approximately 1400 farms on more than 200,000 acres of irrigated lands, as well as to the two wildlife refuges. *Id.*; Appx2496.

### C. Project Contracts

As Klamath Project works were developed, and before delivering water through any works, Reclamation entered into contracts to govern delivery terms and water charges. Appx10-17.

#### *1. Individual Contracts (Forms A and B)*

For the primary divisions of the Klamath Project—which became the Klamath and Tulelake Irrigation Districts—Reclamation initially contracted with individual water users, utilizing standard "Form A" and "Form B" applications. Appx10-11. Under Form A, homesteaders on public lands applied for a "permanent water right" to be "appurtenant" to the "irrigable area" of their homestead tracts. Appx3357. The form specified that the quantity of the right would be governed by beneficial use; provided, that in times of shortage, the Project manager would determine an "equitable proportionate share" of water "actually available." Crucially, the form further provided:

> On account of drought, inaccuracy in distribution, or other cause, there may occur at times a shortage in the water supply, and while the United States will use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States, its officers, agents, or employees, for any damage direct or indirect arising therefrom.

*Id.* Homesteaders also agreed to pay an "annual operations and maintenance" charge and a "construction charge" to offset Project costs. *Id.* Form A stated that "[a]ll of the within terms and conditions, in so far as they relate to said land, shall be a charge upon said land to run with the title to same." *Id.*

When a Project homesteader completed homesteading requirements, the United States granted title in the subject tract via patent. Appx3360-3362. Each patent granted the lands "together with the right to the use of water from the Klamath Reclamation Project as an appurtenance to the irrigable lands in said tract." Appx3361.

Form B was styled a "Water-Right Application for Lands in Private Ownership." Appx3199. Under "Form B," preexisting land owners applied for a right to receive "up to" a specified per-acre amount of water for irrigation, in "no case exceeding the share . . . of the water supply actually available as determined by the Project Engineer or other proper officer of the United States." Appx3199. Like Form A, Form B established annual operations-and-maintenance charges and charges to offset Project construction costs. *Id.* Form B also provided that the

application "must bear the certificate, as attached hereto, of the water users' association under said project, which has entered into contract with the Secretary . . ." Appx3200.

*2. Klamath Irrigation District Contract*

In 1905, before accepting any Form A or B applications for water from the Klamath Project, Reclamation entered a contract with the Klamath Water Users Association ("KWUA"), a corporation comprising all "owners and occupants of lands" in the Project area. Appx3194-3195. The contract provided that "only those who are or who may become" shareholders of KWUA "shall be accepted as applicants for rights to the use of [Project] water," Appx3195, and that KWUA would collect and guarantee Project payments from shareholders, Appx3196. Under the contract, "all the relations between the United States and [KWUA] and [its] members," including "rights . . . to the use of water where the same have vested," were to be "determined and enjoyed" under federal and state law as "modified by the provisions of the articles of incorporation and by-laws of" KWUA. Appx3197. The Secretary reserved authority to make or approve "rules or regulations for [water] administration." *Id.*

In 1917, KWUA shareholders voted to organize under Oregon law as an irrigation district, with powers to tax water users for the costs of reclamation projects. Appx3203; *see also* Or. Rev. Stat. § 545.025 (authorizing irrigation

districts). Thus, in 1918, the Klamath Irrigation District ("KID") was formed and the District agreed to assume all obligations owed by KWUA to the United States. Appx12.

In 1926, Congress amended the Reclamation Act to require, for all new projects and divisions, that Reclamation contract with irrigation districts organized under state law (as opposed to individual water users) for the repayment of Project construction, operation, and maintenance. Act of May 25, 1926, ch. 383, § 46, 44 Stat. 636, 649 (codified as 43 U.S.C. § 423e); *see also Peterson v. Dep't of the Interior*, 899 F.2d 799, 804 (9th Cir. 1990). At the same time, Congress authorized Reclamation to amend any existing water rights contract upon the execution of a new contract with an irrigation district governing repayment. *See* Act of May 25, 1926, ch. 383, § 45, 44 Stat. at 648 (codified as 43 U.S.C. § 423d).

In 1954, Reclamation and KID entered an "Amendatory Contract" to enable KID to take over the operation and maintenance of certain Klamath Project works. Appx3295-3329. The contract established terms and conditions for the transfer of responsibilities and charges for prior debts and continuing operations. *Id.* Echoing Form A, the KID contract provides that "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 from a "shortage in the quantity of water available in Project reservoirs" "[o]n account of drought or other causes." Appx3323.

The Tule Lake division of the Klamath Project (including lands formerly inundated by Tule Lake) is in California. Appx1663. The division was settled and developed by homesteading between 1927 and 1948. Appx1736, Appx2236. In 1952, landowners within the division organized under California law as the Tulelake Irrigation District ("TID"). Appx1657; *see also* Cal. Water Code § 20700. In 1956, the United States entered a contract with TID to govern deliveries of Project water and repayment obligations. Appx3363-3403. The contract gives TID the "right in perpetuity" to receive Project water for beneficial use on district lands, in "equal" priority to KID, provided that the United States "may apportion the available supply" among users of equal priority in the event of water shortages from "drought or other unavoidable causes." Appx3398-3399. The contract also contains a provision, identical to the provision in the aforementioned KID contract, disclaiming any federal liability for damages relating to water shortages "on account of drought or other causes." Appx3395.

*3. Warren Act Contracts*

In 1911, Congress enacted the Warren Act, authorizing the delivery of water to irrigators outside of project lands, and the construction of additional works for such purposes, in any case where a project was deemed to have "excess storage or carrying capacity." Act of Feb. 21, 1911, Ch. 141, §§ 1-2, 36 Stat. 925-926; 43 U.S.C. §§ 523-24. In authorizing such deliveries, Congress directed that the "first

right" to project waters would be reserved for "lands and entrymen under the project." 43 U.S.C. § 523.

Between 1915 and 1953, Reclamation entered Warren Act contracts and amendatory contracts with 10 of the 14 irrigation organizations formerly party to this case and with a few individuals. *See* Appx13-15.[1] Each of these contracts provides that the United States shall deliver particular amounts of water to specified diversion points (varying with each contract), subject to various charges and other terms and conditions. *Id.* All of these contracts provide that the named water rights are subject to the first priority rights of Klamath Project lands. Appx13, Appx3115, Appx3138, Appx3212, Appx3218, Appx3230, Appx3246, Appx3258, Appx3345, Appx3414, Appx3461, Appx3071-3072, Appx3534, Appx3545, Appx3553 (individuals).

Most of the Warren Act contracts also contain a shortage provision like the Form A shortage provision disclaiming liability for shortages caused by drought or other causes. Appx3122-3123 (Klamath Drainage District), Appx3140 (Malin Irrigation District), Appx3220 (Sunnyside Irrigation District), Appx3236-3237 (Westside Improvement District), Appx3416 (Klamath Basin Improvement

[1] One of the former organizational plaintiffs, the Klamath Hills District Improvement Company, is not a Project contractor, but receives water from former plaintiff and Project contractor the Klamath Drainage District. Appx1587.

District), Appx3461 (Shasta View Irrigation District), Appx3080, Appx3535, Appx3550, Appx3560 (individuals). Four of the Warren Act contracts contain an alternative provision stating that:

> The United States shall not be liable for failure to supply water under this contract caused by hostile diversion, unusual drought, interruption of service made necessary by repairs, damages caused by floods, unlawful acts or unavoidable accidents.

Appx3215 (Enterprise Irrigation District), Appx3243 (Midland District Improvement Co.), Appx3258 (Poe Valley Improvement District), Appx3348 (Pine Grove Irrigation District).

*4. Van Brimmer Ditch Company*

In 1909, the United States entered a contract with the Van Brimmer Ditch Company ("Van Brimmer"), an Oregon Corporation organized to deliver water to shareholders who hold shares proportionate to the irrigated acres they own along the ditch. Appx3184-3189. Van Brimmer claimed "a vested right to use fifty second-feet of water for irrigation purpose" from a diversion point "on the margin of Lower Klamath Lake." Appx3185. The contracting parties agreed that the Klamath Project would likely "completely destroy or impair" this diversion point. Appx3184. In exchange for a commitment by the United States to deliver irrigation water, "not to exceed fifty second feet," to the Company's canals and ditches via Project works, Van Brimmer "waive[d] and renounce[d]" all of its "riparian rights." Appx3185. Notwithstanding this waiver, Van Brimmer filed a claim in the KBA,

asserting its right to fifty second-feet of water with an 1883 priority date. Appx18. The United States filed a competing claim, alleging that Van Brimmer's preexisting right was extinguished by the 1909 contract. *Id.*

*5. National Wildlife Refuge Leases*

The United States leases approximately 23,000 acres of land within the Lower Klamath and Tule Lake National Wildlife Refuges for agricultural use. Appx15. The leases are for short terms and do not guarantee any amount of water. *Id.*; Appx3166-3170. The "basic contract" lease provides that the "United States, its officers, agents and employees . . . shall not be held liable for damages because irrigation water is not available." Appx3170.

**D. Tribal Water Rights**

*1. Klamath Tribes*

In the early 19th Century, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians occupied 22 million acres of territory in southern Oregon, east of the Cascades. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 755 (1985) ("*ODFW*"). In an 1864 treaty, these tribes (collectively, the "Klamath Tribes") ceded their aboriginal territory in exchange for a reservation of approximately 1.9 million acres. *Id.* The 1864 Treaty gave the Klamath Tribes "the exclusive right of taking fish in the streams and lakes" of the reservation. *Id.* In 1901, the Klamath Tribes ceded certain lands as part of the resolution of a boundary

dispute. *Id.* In 1954, Congress terminated federal supervision of the Klamath Tribes and provided for the disposition of remaining reservation lands. *Id.*; *ODFW*, 473 U.S. at 761-62. The 1954 Termination Act did not, however, extinguish tribal treaty rights to hunt and fish on the former reservation (as reduced in 1901). *Kimball v. Callahan*, 493 F.2d 564, 567-70 (9th Cir. 1974); *see also ODFW*, 473 U.S. at 768-69. The United States presently owns a substantial part of the former reservation as part of a National Forest and as part of a National Wildlife Refuge. *United States v. Adair*, 723 F.2d 1394, 1398 (9th Cir. 1984).

In 1975, the United States filed suit in federal district court to obtain a declaration of federal water rights in the upper Williamson River in Oregon, *id.* at 1397-99, which flows through the former Klamath Reservation and into Upper Klamath Lake. Appx3181-82 (maps). The Klamath Tribes intervened to assert federal reserved rights for tribal hunting and fishing. *Adair*, 723 F.2d at 1397-99. The Ninth Circuit confirmed that the Klamath Tribes' fishing rights survived the 1954 Termination Act, and it held that the Tribes possess non-consumptive water rights sufficient to support tribal fishing on former reservation lands. *Id.* at 1408-15.

In 1986, Congress restored the Klamath Tribes to federal recognition. Pub. L. No. 99-398, 100 Stat. 849 (1986). The United States subsequently filed claims on behalf of the Klamath Tribes in the KBA. *See Amended and Corrected Findings of*

*Fact and Order of Determination* (Feb. 28, 2014), KBA_ACFFOD_04938, 04946.[2] The eastern shore of Upper Klamath Lake was the western boundary of the former Klamath Reservation. KBA_ACFFOD_04940; *Klamath & Moadoc Tribes v. United States*, 86 Ct. Cl. 614, 617 (1938). The United States claimed treaty and reserved water rights in Upper Klamath Lake, in the form of lake levels necessary to sustain harvestable levels of two fish species of longstanding significance to the Klamath Tribes: the Lost River sucker ("c'waam" in the Klamath language) and shortnose sucker ("qapdo" in the Klamath language). KBA_ACFFOD_04949; Appx2064, Appx2092. In 2014, the KBA Adjudicator issued an order confirming these water rights for the Klamath Tribes, with a priority date of "time immemorial." KBA_ACFFOD_04938-40, 04946; *see also* KBA_ACFFOD_04947-97. This order remains subject to judicial review. *See* Or. Rev. Stat. § 539.150

*2. Yurok and Hoopa Valley Tribes*

The Yurok Tribe and the Hoopa Valley Tribe are federally-recognized Indian tribes with reservations in the lower Klamath Basin in California. *See Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370-72 (Fed. Cir. 2000). After passing the diversion points for the Klamath Project (all in Oregon), Appx3031, the Klamath River flows downstream to the Iron Gate Dam and reservoir, a privately-owned

[2] Available at: https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Pages/ACFFOD.aspx

hydroelectric facility in California, and then westward across northern California to the Pacific Ocean. *See* Appx3181 (map). Four tributaries (the Shasta, Scott, Salmon, and Trinity Rivers) empty into the lower Klamath River below the Iron Gate Dam. *Id.* The Hoopa Valley Reservation is a nearly 12-mile square on the Trinity River at its confluence with the Klamath River. *See Short v. United States*, 486 F.2d 561, 562 (Ct. Cl. 1973). The Yurok Reservation runs along the Klamath River (one mile on each side) for roughly 45 miles, from the Hoopa Valley Reservation downstream to the Pacific Ocean. *Id.*; *Mattz v. Superior Court*, 46 Cal.3d 355, 362, 758 P.2d 606, 610 (1988); *see also* Appx3182 (map).

The lands of the Yurok Reservation were first reserved by the United States as the Klamath River Reservation in 1855. *Mattz v. Arnett*. 412 U.S. 481, 485-494 (1973). The Hoopa Valley Reservation was located by the United States in 1864 and formally established by President Ulysses S. Grant in 1876. *Id.* at 490, n.9. In 1891, President Benjamin Harrison extended the Hoopa Valley Reservation to incorporate the Yurok Reservation lands. *Id.* at 493. Historically, and for generations since the establishment of these reservations, the Yurok and Hoopa Valley Tribes have depended on Klamath River salmon for their nourishment and economic livelihood. *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). The United States selected the Klamath Basin lands to preserve the Tribes' traditional homelands and fishing rights. *Id.* at 542, 545-46.

### E. 2001 Curtailment of Water Deliveries

#### *1. Endangered and Threatened Fish*

Klamath Project operations impact three species of fish that have been listed under the Endangered Species Act ("ESA"): the Lost River sucker, the shortnose sucker, and the Southern Oregon/Northern California Coast coho salmon ("SONCC coho salmon"). Appx19. The two suckerfish are freshwater species endemic to the upper Klamath Basin. 53 Fed. Reg. 27,130 (July 18, 1988). They were "staples in the diet of the Klamath Indians for thousands of years" and were a "major food source" for Indians and settlers in the late 1800s. *Id.* Over the following century, however, the damming of rivers and draining of wetlands reduced the species' range and populations by more than 95 percent. *Id.* Upper Klamath Lake and its tributaries are now the species' remaining habitat. *Id.* The present suckerfish population is dominated by older adults (which can live more than 40 years) with limited reproductive success. *Id.* at 27,131. Oregon closed the fishery for both species in 1987. *Id.* at 27,132. The Fish and Wildlife Service ("FWS") listed both species in 1988 as "endangered." *Id.* at 27,133.

Coho salmon are anadromous fish of the Pacific Northwest. *See* 62 Fed. Reg. 24,588 (May 6, 1997). Juveniles rear for a year in Pacific coast rivers, spend two years as adults in the ocean, then return to the rivers in fall migrations to spawn and die. *Id.* SONCC coho are an ecologically significant unit that spawn in the Klamath

and nearby river systems. *Id.* SONCC coho are a traditional staple of northern California tribes and significant to Yurok and Hoopa Valley subsistence fisheries. *Id.* at 24,593. In the 1940s, spawning populations ranged up to 400,000. *Id.* By the end of the 20th Century, however, that number dropped to approximately 10,000. *Id.* Altered stream flows and lost spawning habitat factored into the decline. *Id.* at 24,592. In 1997, the National Marine Fisheries Service ("NMFS") of the Department of Commerce, which has jurisdiction under the ESA over ocean and anadromous fish, listed the SONCC coho as "threatened." *Id.* at 24,588.

*2. 2001 Operations Plan*

Section 7 of the ESA requires federal agencies, in consultation with FWS and NMFS (as to the species within their respective jurisdictions), to "insure that any action authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat." 26 U.S.C. § 1536(a)(2). In 1999, the Ninth Circuit held that Klamath Project operations are subject to this requirement. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999).

In 2001, due to severe drought, Project operators predicted a "critically dry" year and record-low inflows to Upper Klamath Lake of approximately 108,000 acre feet. Appx2054. The average annual inflows to the lake are 1.3 million acre feet.

Appx613. Because average inflows exceed the lake's usable storage capacity (approximately 500,000 acre feet), the Klamath Project has little carryover storage from one irrigation season to the next. Appx1976. Instead, the annual supply of water for irrigation and fish is generally limited by annual stream production. *Id.*

In formal consultation concerning Reclamation's proposed 2001 operations, FWS and NMFS issued biological opinions ("BIOPs") determining that the proposed diversions from Upper Klamath Lake and Klamath River for irrigation were likely—in light of the forecast record-low inflows—to jeopardize the continued existence of, and adversely modify critical habitat of, the endangered suckerfish and threatened SONCC coho salmon. Appx2673, Appx2995. As required by the ESA, 16 U.S.C. § 1536(b)(3)(A), the BIOPs identified "reasonable and prudent alternatives" (here, operating conditions) that would enable Reclamation to comply with the ESA. Appx2919-2929, Appx2995-3000. These conditions included minimum lake levels in Upper Klamath Lake to protect suckerfish habitat and minimum stream flows in the Klamath River below Iron Gate Dam to protect SONCC coho habitat. Appx2919-2921, Appx2996-2999.

In April 2001, Reclamation issued a final 2001 Operations Plan adopting the minimum water levels dictated by the reasonable and prudent alternatives. Appx3176-3180. Reclamation announced that such action would both meet the requirements of the ESA and protect tribal trust fisheries. Appx3176. Reclamation

notified all contractors that "no Project water shall be diverted or used in 2001 unless expressly authorized by Reclamation." Appx3569; Appx2166-2170. As forecast, from April through July 2001, there was insufficient water in the upper Klamath Basin to meet the minimum lake levels and stream flows and provide diversions for irrigation. *See Klamath II*, 635 F.3d at 509. Reclamation authorized agricultural diversions in late July; thereafter, just over 80,000 acre feet was delivered to Project irrigators for the 2001 irrigation season. Appx740.

## SUMMARY OF ARGUMENT

### A. Senior Tribal Rights

The CFC correctly acknowledged the existence of federal treaty and reserved rights in Klamath Basin waters—on behalf of Klamath Basin tribes—that are senior to Klamath Project water rights. When the United States reserved lands for the tribes in the mid to late 1800s, by treaty and executive orders authorized by Congress, those actions reserved tribal fishing rights and waters necessary to sustain tribal fisheries. The reserved water rights have been recognized by the Ninth Circuit and by the KBA Adjudicator (as to those rights within the scope of that adjudication). When withholding water from Klamath Project irrigators in 2001, Reclamation operated the Klamath Project in accordance with these senior federal reserved rights in Klamath Basin waters. Although the federal reserved rights were not then subject to state administration (because not finally adjudicated within or

outside the jurisdiction of the KBA), the absence of state administrative orders was no bar to the United States' operation of federal facilities in accordance with federal reserved rights, and is no bar to the United States' assertion of federal reserved rights in defense against Plaintiffs' takings claims.

### B. Contractual Provisions

Whether or not the United States may assert senior federal reserved rights in defense of Reclamation's 2001 directives to Klamath Project irrigators, Plaintiffs takings claim fail because they are foreclosed by contract. Reclamation delivers Klamath Project water to KID and TID under water-supply contracts that expressly foreclose any federal liability for damages from water shortages "on account of drought . . . or other causes." These provisions preclude any liability for shortages caused by events that Project officers reasonably could not "guard against." The severe drought of 2001 and the regulatory mandates of the ESA are precisely such events. Although individual water users did not execute the water-supply contracts, the contracts were duly executed by KID and TID on behalf of individual users and reflect conditions agreed to by individuals in the Form A and Form B applications.

All other individual users (excluding those served by Van Brimmer) developed their water rights under Warren Act contracts or leases. Those contracts and leases were also duly executed by irrigation districts on behalf of individual users or by individual users themselves; they contain shortage provisions identical to

or similar to the KID and TID provisions; and they convey water rights that are subordinate under the Warren Act to KID and TID water rights. Thus, the beneficial interests of all other Project users are contractually limited in the same manner as the beneficial interests of KID and TID water users.

### C. Van Brimmer Claims

The CFC properly dismissed the takings claims of Van Brimmer shareholders because they depend on pre-Project water rights disputed by the United States and subject to resolution in the KBA.

### D. Takings Framework

Should this Court determine that Plaintiffs' takings claims are not foreclosed by senior federal reserved water rights or by the terms of water-supply contracts, this Court must remand with instructions directing the CFC to evaluate Plaintiffs' claims under the multi-factor test for regulatory takings. The water use restrictions mandated by the ESA in 2001 were quintessential regulatory restrictions on the exercise of property rights. The CFC determined to the contrary that Reclamation's 2001 actions are to be construed as physical appropriations of Plaintiffs' water and therefore "per se" takings. This was legal error. The precedent on which the CFC relied addressed actions by the government to physically divert waters of a stream or physically appropriate water already diverted to private use. Here, Reclamation did not physically divert or appropriate water. Rather, Reclamation imposed restrictions

on the ability of private water users to exercise their appropriative rights. These use restrictions are no different in kind from restrictions on the mining of coal or other use restrictions that long have been evaluated under the framework for regulatory takings.

## ARGUMENT

### I. IRRIGATORS HAD NO RIGHT TO WATERS NECESSARY TO SATISFY SENIOR TRIBAL RIGHTS

Under the law of prior appropriation adopted by most western states, a water right is the right to divert a specified amount of water from a river or other water source for a specified beneficial use, in order of priority. *See, e.g., Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982); *Empire Ledge Homeowners Assoc. v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001). The basic precept is that "he whose appropriation is first in time" is first in right "as against subsequent appropriators." *McCall v. Porter*, 42 Or. 49, 57, 70 P. 820, 823 (Or. 1902). State and federal law also recognize, within the priority system, certain "instream" rights or rights to retain and beneficially use water within a natural stream or water source, e.g., for livestock watering or to preserve fish and wildlife habitat. *See, e.g., In re the Adjudication of the Existing Rights to the Use of Idaho v. United States*, 134 Idaho 106, 111-112, 996 P.2d 806, 811-12 (2000); *Adair*, 723 F.2d at 1408-11; Or. Rev. Stat. § 537.332. The holder of any right to divert water from a stream, or to beneficially use water within a stream, may exercise such right only to the extent that water is available in

accordance with the user's priority. *See Montana v. Wyoming*, 563 U.S. 368, 376 (2011). A senior right "may be fulfilled entirely before . . . junior appropriators get any water." *Id.*

In the present case, Plaintiffs claim a taking of their beneficial interests in Klamath Project water rights, which have a priority date of 1905. Appx9, Appx53. But as recently confirmed in the administrative phase of the KBA, the United States holds federal reserved water rights in Upper Klamath Lake, in trust for the Klamath Tribes, with priority dates of "*time immemorial*." KBA_ACFFOD_04938, 04946 (emphasis added); *see also Patterson*, 204 F.3d at 1213. Similarly, although the water rights of the Yurok and Hoopa Valley Tribes are not subject to determination in the KBA, those tribes hold federal reserved rights in the Klamath River with priority dates no later than 1855 and 1876, the dates on which their lands were reserved. Appx53.[3]

In 2001, Reclamation prohibited water diversions to Klamath Project irrigation canals and ditches, to avoid jeopardy to endangered and threatened fish

[3] The CFC observed that reserved water rights for the California tribes have a priority date no later than 1891, the date of the "last" relevant executive order. Appx53. On this view, Plaintiffs argue that the Van Brimmer shareholders' alleged 1883 water rights are senior to the reserved rights for the California tribes. The CFC correctly declined to consider the alleged 1883 rights because they remain subject to dispute in the KBA. *See infra*, pp. 68-70. In any event, the United States first reserved the lands of the Yurok and Hoopa Valley Reservations for tribal use in 1855 and 1876, well before 1883. *See Mattz*, 412 U.S. at 485-94 & n.9,

species and to protect tribal trust fisheries in the same species. Appx3176, Appx3569. As the CFC correctly found, the retained waters—in Upper Klamath Lake and the Klamath River—were within the scope of federal reserved rights for tribal fisheries that have priorities senior to Project rights. *See Montana*, 563 U.S. at 376. Because the retained waters were not available in priority to Project irrigators, Plaintiffs cannot state a claim for a taking of their beneficial interests in Project water rights. *Id.*; *see also Patterson*, 204 F.3d at 1214.

### A. Project Rights Are Junior to Federal Reserved Rights for Tribal Fisheries

Under federal law, the establishment of an Indian reservation impliedly reserves "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)); *Crow Creek Sioux Tribe v. United States*, No. 17-2340, 2018 WL 3945585, at *1 (Fed. Cir. Aug. 17, 2018). Decades before initiating the Klamath Project, the United States (and the Klamath Tribes by treaty) reserved Klamath Basin lands to provide tribal homelands and protect tribal fisheries, thereby impliedly reserving basin waters necessary for this purpose. *See Adair*, 723 F.2d at 1408-11.

### *1. The 1864 Treaty Impliedly Reserved Waters Rights in Upper Klamath Lake for Klamath Reservation Fisheries*

In their 1864 treaty with the United States, the Klamath Tribes ceded more than 20 million acres of land, including lands now within the Klamath Project, in exchange for a much smaller tribal reservation. *See ODFW*, 473 U.S. at 755; *see also supra*, pp. 21-22. At that time, the "c'waam" and "qapdo"—the presently endangered suckerfish—were a major food source and staple of the Klamath Indians' diet. 53 Fed. Reg. at 27,130; Appx2064. Through the treaty, the Klamath Tribes reserved exclusive fishing rights on reservation lands. *ODFW*, 473 U.S. at 755 & n.2. As the Ninth Circuit has determined, this reservation of lands for tribal subsistence fishing impliedly included waters needed to maintain the tribal fisheries. *Adair*, 723 F.2d at 1408-15.

While acknowledging the reserved rights decreed in *Adair*, Plaintiffs argue (Brief at 31-32) that *Adair* is inapposite because it did not address tribal water rights in Upper Klamath Lake. This is so, however, only because the suit was limited to a "portion of the Williamson River watershed." 723 F.2d at 1397; *see also id.* at 1419 (affirming decision on the "federal reserved rights involved in this litigation"). The CFC correctly relied on *Adair*, not for its adjudication of Upper Klamath Lake rights, but for the legal principle that the 1864 treaty reserved water rights in waters necessary for reservation fisheries. *See* Appx54; *see also Adair*, 723 F.2d at 1410.

While Plaintiffs stress that Upper Klamath Lake was not within the former Klamath Reservation (Brief at 8 & n.24), "[n]o court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation." *John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013). In the seminal *Winters* case, the Supreme Court found reserved rights in the Milk River, which formed the northern boundary of the Fort Belknap Reservation. 207 U.S. at 565-66. The Supreme Court has also recognized reserved rights from the Colorado River for reservations bordering that river. *See Arizona v. California*, 373 U.S. 546, 595-600 & n.97 (1963). This Court has similarly held that the extension of the Gila River Indian Reservation to the border of the Salt River included reserved rights in the latter. *Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559, 560-61 (Fed. Cir. 1982). As these cases illustrate, location and necessity of use are the critical factors for determining reserved water rights. *See United States v. Preston*, 352 F.2d 352, 357 (9th Cir. 1965) (Indian reservation includes reserved rights in waters that "arise, traverse or *border upon*" the reservation) (emphasis added); *see also Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262, 1271 (9th Cir. 2017) ("appurtenance" requirement "simply limits the reserved right to . . . waters attached to the reservation"), *cert. denied* 138 S.Ct. 468 (2017).

There is no dispute that Upper Klamath Lake formed the western boundary of the former Klamath Reservation and is hydrologically connected to waters that flow through such lands. *See* KBA_ACFFOD_04940; *Klamath & Moadoc Tribes*, 86 Ct. Cl. at 617. The record demonstrates that Upper Klamath Lake provides critical habitat for suckerfish that populate the fisheries on former reservation lands. *See* Appx2894-2900; Appx2919-29 (BIOP). Because minimum lake levels in Upper Klamath Lake are necessary to sustain the fisheries reserved for the Klamath Tribes in the 1864 treaty, the treaty impliedly reserved rights in lake waters. *See Cappaert*, 426 U.S. at 138-41; *Adair*, 723 F.2d at 1408-11; *see also* KBA_ACFFOD_04961-72.

In arguing for a different result, Plaintiffs mistakenly rely (Brief at 31) on the Supreme Court's holding in *ODFW*. That case held that the Klamath Tribe's exclusive *fishing* rights under the 1864 treaty are limited to former reservation lands. 473 U.S. at 755. But there is no basis for applying this geographic limitation on *fishing* rights to reserved *water* rights. As just explained, the reservation of irrigable lands for tribal farming may include rights in boundary waters needed for irrigating tribal lands, even though the Indians have no right to exclusive use and occupancy of the boundary waters. *See, e.g., Gila River Pima-Maricopa Indian Community*, 695 F.2d at 560-61. Likewise, the reservation of lands for subsistence fishing may include implied rights in off-reservation waters needed for on-reservation fisheries.

The absence of an exclusive right to harvest fish within the off-reservation waters is beside the point. *John*, 720 F.3d at 1230.

*2. The United States Impliedly Reserved Klamath River Water Rights for Hoopa Valley and Yurok Fisheries*

For similar reasons, the CFC correctly held that the United States reserved Klamath River flows necessary to sustain salmon fisheries on the Yurok and Hoopa Valley Reservations. Plaintiffs do not dispute that the Hoopa Valley and Yurok Reservations were set aside to protect tribal salmon fisheries in the Klamath River, which flows through both reservations, and that the reservations included implied water rights for the fisheries. *See Parravano*, 70 F.3d at 542, 545-46. Plaintiffs argue instead (Brief at 28-29) that the Executive Orders establishing the reservations cannot be deemed to have reserved rights to minimum flows in river segments upstream from the Yurok and Hoopa Valley Reservations, because such upstream flows are not (in Plaintiffs' view) "appurtenant" to those reservations.

As already explained, however, the "appurtenance" rule is a conceptual rather than a physical requirement, based on access to waters and necessity of use. *See supra*, p. 35. In reserving lands for the purpose of preserving tribal subsistence fishing, the United States reserved sufficient river flow to preserve adequate habitat for salmon stocks. *See* Appx3339-3341. Given the habitat needs of salmon, that purpose cannot be achieved solely by preserving minimum river flows within the reservation boundaries. *See Cappaert*, 426 U.S. at 138.

To be sure, Reclamation's 2001 Operations Plan required minimum stream flows at a point on the Klamath River—the Iron Gate Dam—approximately 190 river miles from the ocean and more than 100 miles upstream from the Yurok and Hoopa Valley Reservations. *See* Appx2832; *see also* Appx3182 (map).[4] Nonetheless, it is not unusual for downstream water rights, including reserved water rights, to impact distant upstream water use. *See Winters*, 207 U.S. at 568-69 ; *cf. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (affirming order requiring irrigation-project water release for protection of downstream salmon); *United States v. Gila Valley Irrigation Dist.*, 961 F.2d 1432, 1434 & n.1 (9th Cir. 1992) (addressing dispute to waters of the Gila River between "lower valley users" including the Gila River Indian Community south of Phoenix, Arizona and "upper valley" users in the Safford and Duncan-Virden Valleys near the New Mexico border, hundreds of miles distant).

Nor are Plaintiffs correct in relying (Brief at 27-28) on the status of the Yurok and Hoopa Valley Tribes at the time their lands were reserved. The United States set aside lands and appurtenant waters in trust for the Indians who occupied the reserved lands. *See Mattz*, 412 U.S. at 485-94; *Karuk Tribe*, 209 F.3d at 1370-72.

[4] The Iron Gate Dam, which has no fish passage, is the present upstream terminus of salmon migration in the Klamath River. Appx2109, Appx2832. The 2001 Operations Plan and NMFS's BIOP for the SONCC Coho Salmon focused on flows downstream from the Iron Gate Dam (the free-flowing section of the river) that provide habitat necessary for the species survival. Appx2926.

That the formal organization and federal recognition of the two Tribes came later does not alter water rights reserved for the Indians of the reservations.

The nature of the Tribes' property interest in the reservation lands is also irrelevant. In a 1988 settlement act, Congress partitioned the Hoopa Valley Reservation into the present-day Hoopa Valley and Yurok Reservations, which caused non-members of the Hoopa Valley Tribe to lose rights to share in timber revenues of the Hoopa Valley Reservation. *See Karuk Tribe*, 209 F.3d at 1372. This Court affirmed the dismissal of claims for an alleged taking of such interests, holding that the Executive Orders establishing the reservations did not convey compensable property interests to resident Indians. *Id.* at 1374-80. If extended to water rights, this ruling would mean that Yurok and Hoopa Valley Indians could not sue the United States for a taking of water rights. *Id.* But, contrary to Plaintiffs' argument (Brief at 28), *Karuk Tribes* in no way undermines the *United States'* property interests, including reserved water rights held in trust for the tribes. *Id.*

### B. Reclamation's 2001 Directives Were in Accordance with Senior Reserved Rights

#### *1. Stream Flows Required Under the ESA Were Within Senior Reserved Rights*

In *Adair*, the Ninth Circuit held that when the United States reserves rights in a "natural resource that once was thoroughly and exclusively exploited by Indians," the reservation secures "so much as, but not more than, is necessary to provide the

Indians with a livelihood" or "moderate living." 723 F.2d at 1415 (quoting *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979)). As Plaintiffs observe (Brief at 22-23), the minimum stream flows imposed in Reclamation's 2001 Operations Plan were not derived from this standard *per se*, but instead were based on requirements imposed by the ESA to avoid jeopardy to particular species. *See supra*, pp 25-28. Nonetheless, it does not follow, as Plaintiffs imply (Brief at 23-25), that the minimum stream flows were in excess of federal reserved rights.

Plaintiffs argue (Brief at 25) that suckerfish cannot provide the measure of reserved rights in Upper Klamath Lake because the Klamath Tribes are not presently able (due to population loss and ESA restrictions) to harvest suckerfish from former reservation lands for commercial or subsistence uses.[5] This is a non sequitur. In 1864, when the United States established the Klamath Reservation, suckerfish were "staples" of the Indians' diet and had been so "for thousands of years." 53 Fed. Reg. at 27,130. The water rights reserved for the Klamath tribal fisheries in 1864 are based on these historical circumstances. *See Adair*, 723 F.2d at 1413-14.

In subsequent years, the development of the Klamath Project, the draining of surrounding lands, and the appropriation of Klamath Basin waters for agricultural and other purposes, reduced suckerfish habitat by 95 percent. *Id.* Although other

[5] As Plaintiffs acknowledge (Brief at 25), prior to ESA listing, the Klamath Tribes were able to capture small numbers of suckerfish from the Williamson and Sprague Rivers for "hatchery propagation and other research purposes." Appx2820.

factors contributed to the decline of suckerfish, the record shows that the remaining Upper Klamath Lake waters are critical to the species' survival. *See* Appx2894-2900; Appx1919-29 (BIOP). On this record, the CFC did not err in concluding that the minimum lake levels imposed in the 2001 Operations Plan (to avoid jeopardy to the suckerfish) were within the scope of water impliedly reserved in 1864 to sustain suckerfish fisheries and harvests from that time forward. *See* Appx54-59.

Nor did the CFC err in assessing the reserved water rights for the salmon fisheries of the Hoopa Valley and Yurok Reservations. Plaintiffs argue (Brief at 23-25) that there is no evidence that water levels required to avoid jeopardy to the threatened SONCC coho salmon are needed for chinook salmon (presently unlisted), and that the tribes receive a "reasonable livelihood" in chinook salmon alone. But the ESA-related record demonstrates that the habitat needs of SONCC coho and chinook salmon are very similar. *See* Appx2987-2988, Appx2996. In determining minimum stream flows required for SONCC coho salmon, NMFS relied, in part, on habitat modeling for adult chinook salmon because "modeling specific to adult coho salmon in the Klamath River ha[d] not occurred." Appx2988. Moreover, although chinook are not listed, chinook populations have declined to levels warranting listing consideration, Appx2983; *see also* 83 Fed. Reg. 8410, 8414 (Feb. 27, 2018) (recent finding).

In contrast, Plaintiffs presented no evidence that significantly lower stream flows—i.e., river flows that would have allowed significantly greater agricultural diversions for the Klamath Project in 2001—would sufficiently protect chinook salmon runs in the Klamath River under the "reasonable livelihood" standard. *See* Appx58-59 & n.27. On this record, the CFC correctly held the minimum stream levels imposed in the 2001 Operations Plan were within levels required to maintain the salmon fishery generally and were within the federal reserved rights. *Id.*

*2. Reclamation Did Not Retain "Project" Water*

The CFC began its discussion of federal reserved rights with the statement that the three Klamath Basin tribes "hold rights to take fish from Klamath Project waters." Appx16. To the extent the CFC identified tribal rights to *harvest* fish in Upper Klamath Lake or waters diverted to Project canals, the CFC's statement is mistaken; as noted, the Klamath Tribes' place-of-fishing rights, under the 1864 treaty, are limited by former reservation boundaries. *See ODFW*, 473 U.S. at 755. The Yurok and Hoopa Valley Tribes likewise assert on-reservation fishing rights. Nonetheless, for reasons already stated, the CFC did not err in holding that the tribes have reserved water rights in Upper Klamath Lake, and in the Klamath River downstream from the Project, for these tribal fisheries.

Moreover, Plaintiffs miss the point in observing (Brief at 26-30, 40-41) that the basin tribes have no rights in "Project water" (i.e., waters available in priority to

Project irrigators). When curtailing Klamath Project deliveries to protect tribal fisheries, Reclamation did not assert "Project" water rights; rather, Reclamation acted in accordance with federal reserved rights to Klamath Basin waters that are senior to Project rights. *See Patterson*, 204 F.3d at 1214. Upper Klamath Lake is a natural lake with natural storage capacity, and Project improvements did not substantially increase maximum capacity or provide significant carryover storage from one year to the next. Appx1976; *see also supra* pp. 12-13.

Year 2001 was a critically dry year. Appx556-557. The fact that spring flows had nearly filled Upper Klamath Lake by the beginning of the 2001 irrigation season does not mean, as Plaintiffs argue (Brief at 41), that these waters were not available to satisfy federal reserved rights. The Klamath Tribes have rights to natural lake storage, and the Yurok and Hoopa Valley Tribes have rights in natural stream flows downstream from the lake, both of which have priority over storage and diversion for the Klamath Project. When operating the Klamath Project in accordance with senior rights in Klamath Basin waters, Reclamation did not withhold or take "Project water." [6]

[6] The minimum lake levels imposed in Reclamation's 2001 Operations Plan were within natural lake levels. See Appx2814, Appx3179. Under natural conditions—with no irrigation diversions and lake levels controlled by natural topography—seasonal inflows generally would become available to downstream use. Amici California Water agencies err in assuming (Brief at 11-18) that all lake waters are stored under Project rights and available exclusively to Project use.

### C. The Senior Reserved Rights Must Be Considered Even Though They Have Not Been Finally Adjudicated

As noted (*supra*, p. 23), the KBA Adjudicator issued findings of fact and an order of determination confirming reserved water rights in Upper Klamath Lake on behalf of the Klamath Tribes. Although these rights remain subject to judicial review in Oregon courts, *see* Or. Rev. Stat. § 539.150, this does not mean—as argued by Plaintiffs (Brief at 33, 39-40) and amicus curiae the State of Oregon (Brief at 27-28)—that the rights may be disregarded for purposes of Plaintiffs' takings claims. *See Patterson*, 204 F.3d at 1214 ("Reclamation has the authority to direct operation of the [Project] to comply with Tribal water requirements.")

Oregon argues (Brief at 27-28) that the Klamath Tribes did not have a reserved right in Upper Klamath Lake in 2001 because the right was not preliminarily decreed until 2014. But the KBA Adjudicator confirmed that the tribal right has *existed* since time immemorial, KBA_AFFCOD 04945-46, and reserved water rights *vest* under federal law no later than the establishment of the reservation, *Arizona*, 373 U.S. at 600. Oregon erroneously conflates judicial recognition and administrative enforceability of water rights with their existence. *See supra*, pp. 49-52.

Moreover, Plaintiffs themselves claim beneficial interests in Klamath Project water rights that have not yet been finally adjudicated and that were not administratively adjudicated in 2001. In considering Plaintiffs' claims to Klamath

Basin waters, this Court cannot disregard the senior claims of Klamath Basin tribes, merely because those rights *also* had not been fully and finally adjudicated by another court. Rather, it falls to this Court (upon review of the CFC's decision) to determine the scope and extent of the competing water rights, to the extent necessary to resolve Plaintiffs' claims. *See Gila River Pima-Maricopa Indian Community*, 695 F.2d at 561-62 (determining *Winters* right for purposes of takings claim).[7]

Nor is there any basis for Plaintiffs' suggestion (Brief at 32-33) that the reserved right in Upper Klamath Lake may be disregarded due to a non-enforceability agreement entered after the events of 2001. Plaintiffs allude (*id.*) to a conditional stipulation in the KBA (entered in 2009 and amended in 2012), in which the United States and Klamath Tribes agreed (on an interim basis) not to enforce federal reserved rights in Upper Klamath Lake against Klamath Project water users, in exchange for the irrigators' agreement to withdraw challenges to the reserved rights. *See* KBA_ACFFOD_04941-44. But this stipulation was not in effect in

[7] When asserting federal reserved rights in the present judicial proceedings (as a defense against Plaintiffs' takings claims) Reclamation did not claim for *itself*—as amicus Middle Rio Grande Conservancy District argues (Brief at 21-31)—"absolute discretion" to "quantify" the rights. Nor is amicus Family Farm Alliance correct to argue (Brief at 2-21) that the CFC erred in failing to defer all issues concerning federal reserved rights to the KBA. While the CFC reasonably might have *stayed* Plaintiffs' takings claims pending a final judgment of competing claims in the KBA, the CFC was not free to disregard claimed federal reserved rights, and the federal reserved rights for the California tribes were not before the KBA, *infra* pp. 46-49.

2001 and thus it can have no impact of Plaintiffs' takings claims. In any event, the non-enforceability agreement is not permanent. Because Congress failed to approve a broader "Klamath Basin Restoration Agreement" to resolve basin water disputes, the non-enforceability agreement will expire when the KBA is completed. *Id.*

### D. Federal Reserved Rights Have Not Been Forfeited

#### *1. Reserved Rights for the California Reservations are Not Subject to Adjudication in Oregon*

In arguing that the United States and the Yurok and Hoopa Valley Tribes forfeited reserved rights by not claiming them in the KBA (Pl. Brief at 30; Or. Brief at 22-26), Plaintiffs and Oregon disregard the territorial limits of that adjudication. The Oregon Water Code authorizes the Oregon Water Resources Department ("OWRD"), upon petition by any "appropriator[] of surface water from *any natural watercourse in this state*," or upon the OWRD Director's own motion, to determine the "relative rights of the various claimants to the *waters of that watercourse*." Or. Rev. Stat. § 539.021 (emphasis added). The administrative determination is then subject to review in Oregon courts. Or. Rev. Stat. §§ 539.130, 539.150. OWRD initiated the KBA—through public notices in 1975, 1977, and 1990—to determine relative rights in the Klamath River basin in Oregon. *See Oregon*, 44 F.3d at 762; KBA_AFFCOD 00001-08.

In the McCarran Amendment, Congress consented to the joinder of the United States 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." 43 U.S.C. § 666(a); *see also Oregon*, 44 F.3d at 765. In 1994, the Ninth Circuit held that the KBA constituted a "suit" under the McCarran Amendment. *Id.* at 770-71. Thereafter, the United States filed claims in the KBA for the Klamath Project, and the United States and the Klamath Tribes filed claims for reserved water rights in Upper Klamath Lake and Oregon tributaries.

Contrary to Plaintiffs' and Oregon's arguments, however (Pl. Brief at 30; Or. Brief at 22-26), the United States and the Yurok and Hoopa Valley Tribes were under no similar obligation to file KBA claims for reserved rights in *California* waters. Oregon water users who failed to file and prosecute claims in the KBA are subject to the forfeiture of their water rights. Or. Rev. Stat. § 539.210. But that rule, as a matter of Oregon law, can only apply to claims within OWRD's jurisdiction over the "natural watercourse[s] in this state," i.e., Oregon. *Id.* § 539.021. Oregon has no constitutional authority to compel California water users, upon penalty of forfeiture, to assert California water rights—i.e., rights to divert from or otherwise use California surface flows—in the Oregon proceedings. *See Shaffer v. Heitner*, 433 U.S. 186, 198 (1977) ("Any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power").

Nor can the McCarran Amendment be construed as somehow expanding state-court jurisdiction. Given the interstate nature of most river systems and territorial limits on state jurisdiction, the Supreme Court has held that McCarran Amendment waiver of sovereign immunity cannot be limited to river systems that physically exist wholly within a state, but instead "must be read as embracing" those parts of an interstate system "within [a] particular State's jurisdiction." *United States v. District Court in and for Eagle County, Colorado*, 401 U.S. 520, 523 (1971). Any more expansive interpretation, however, would be contrary to the rule that waivers of sovereign immunity must be narrowly construed. *See United States v. Idaho*, 508 U.S. 1, 6-7 (1993).

Indeed, neither the Plaintiffs nor Oregon contend that OWRD has jurisdiction, under the Oregon Water Code or the McCarran Amendment to adjudicate federal reserved rights in California waters. Rather, both Plaintiffs and Oregon incorrectly presume (Pl. Brief at 40-41; Or. Brief at 22-26) that the United States and California tribes are asserting rights to Klamath Project waters that are diverted and stored within Upper Klamath Lake in Oregon. To the contrary, the federal reserved rights for the Yurok and Hoopa Valley tribes are rights instream flows that Project users must let pass before storing and diverting water for Project uses. Such claims are no different (for purposes of KBA jurisdiction) from claims of other California users who divert or beneficially use Klamath River stream flows in California. Because

Oregon lacks jurisdiction to determine such rights, the United States and California tribes did not forfeit such rights by not claiming them in the KBA. [8]

*2. Indian Reserved Rights Cannot Be Forfeited For Nonuse*

Contrary to Plaintiffs' argument (Brief at 36), the United States and the Klamath Basin tribes likewise did not forfeit federal reserved rights for tribal fisheries by not asserting them in drought years before 2001. Reserved rights to minimum stream flows for tribal fisheries are not implicated until diversions for irrigation and other uses begin to adversely impact the fisheries. Such impacts often are not immediately apparent. Reclamation began to factor tribal reserved rights into Klamath Project operations in 1996, when impacts became apparent. *See* Appx2718; *see also* Appx3335-3344. In any event, unlike State-law water rights, federal reserved rights cannot be lost by nonuse, abandonment, or forfeiture. *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1155 (9th Cir. 2017); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

### E. The United States Did Not Need to "Call" on Junior Users to Exercise Its Senior Rights

Plaintiffs and Oregon also err in supposing (Pl. Brief at 36-39; Or. Brief at 26-28) that the United States could exercise federal reserved rights only through

[8] Nor is there any merit to the argument by amicus Oregon Water Resources Congress (Brief at 18-20) that the CFC violated Plaintiffs' "due process" rights by considering federal reserved rights for the California tribes in the present proceedings, *in which Plaintiffs had full opportunity to participate*.

Oregon administrative proceedings. Under Oregon law, once an Adjudicator makes findings of fact and a final determination of pre-1909 water rights in a general stream adjudication, the "division of water" within the subject stream "shall be made in accordance with" the Adjudicator's order, pending state court review. Or. Rev. Stat. § 539.170. Oregon interprets this provision to mean that OWRD may not enforce pre-1909 rights until they are preliminarily adjudicated in a final administrative order. *See* Or. Brief at 10, 18 (citing Or. Rev. Stat. § 540.045).

But any state-law limitation on the enforceability of pre-1909 rights has no bearing on the takings issues in this case. Contrary to Plaintiffs' argument (Brief at 38-39), while Reclamation must act in conformity with state law concerning the "appropriation, use, [and] distribution of water" when carrying out its duties under the Reclamation Act, 43 U.S.C. § 383, this requirement does not apply to federal reserved rights. *Id.* Moreover, the United States may operate federal facilities in accordance with federal reserved water rights—or raise such rights in defense of a takings claim—without awaiting a state administrative or judicial decree.[9] *See*

[9] While Plaintiffs argue (Brief at 42, n.166) that Oregon law provides a right to divert water physically available at a water user's headgate whenever there is no "pending senior call," this is an overstatement. The authority cited by Plaintiffs merely authorizes OWRD and watermasters (where appointed) to "regulate" water distribution in accordance with "existing water rights of record." Or. Rev. Stat. § 540.045. Even if federal reserved rights were not "of record" in 2001 for purposes of State administrative "calls," the United States had authority to operate federal facilities in accordance with federal reserved rights. *Patterson*, 204 F.3d at 1214. A determination that the United States possessed senior reserved rights in the water

*Patterson*, 204 F.3d at 1214. Indeed, Reclamation has exercised Klamath Project water rights since 1905 without aid of state administration.[10]

Nor is there any merit to Plaintiffs' argument (Brief at 33-36) that the United States should have enforced federal reserved rights against unnamed junior water users upstream from the Klamath Project, before directing the curtailment of Project deliveries. For reasons just explained, because *all* federal water-rights claims were unadjudicated in 2001, the United States had no ability, within Oregon's administrative "call" system, to enforce Klamath Project rights or federal reserved rights against any junior upstream users. Although the United States hypothetically might have sought an emergency injunction in federal court against junior water users, Plaintiffs do not allege or show that such efforts could have yielded substantial additional water, much less sufficient water to satisfy federal reserved rights and Klamath Project rights. More importantly, Plaintiffs do not show that they themselves (or the relevant irrigation districts) were unable to seek such relief.

At bottom, water needed and retained for federal reserved rights was not available in priority to Klamath Project irrigators. To the extent other waters were

withheld from Plaintiffs in 2001 will defeat Plaintiffs' takings claims, whether or not the United States then could have sought OWRD's aid in enforcing those rights.

[10] Project water is not distributed under prior appropriation principles. Project water rights, whenever developed, share the same 1905 priority and are distributed in accordance with contractual priorities. *See* KBA_AFFCOD 07049, 07085-86.

available in priority (i.e., waters being diverted by upstream junior appropriators), Plaintiffs remained free to seek priority enforcement. Reclamation's actions in 2001 did not interfere with, much less effect the taking of, Klamath Project water rights or any other water rights claimed by Plaintiffs.[11]

## II. PLAINTIFFS' TAKINGS CLAIMS ARE INDEPENDENTLY FORECLOSED BY THE WATER-SUPPLY CONTRACTS

For reasons stated above, this Court cannot hold that Plaintiffs' water rights were taken without resolving whether the United States and the Klamath Basin tribes had priority, under federal reserved rights, to waters withheld from Project users in 2001. But as explained below, this Court can affirm the CFC's judgment of no takings without resolving the competing claims to Klamath Basin water.

Under Oregon law, the nature and extent of a water users' beneficial interest in water is a matter of contract between the beneficial user and the "title" holder. *Klamath I*, 348 Or. at 51-52, 227 P.3d at 1165-66. Klamath Project water rights were perfected and made appurtenant to Project lands through beneficial use by individual irrigators. *Id.* at 47-49, 227 P.3d at 1163-64. But, in all cases, the irrigators' beneficial use was made possible only as the result of the appropriation

[11] Plaintiffs contend (Brief at 42-43) that the CFC disregarded non-Project water rights held by Klamath Drainage District and Klamath Hills District Improvement Company. But the CFC's rationale applies to all claims junior to federal reserved rights. Moreover, the irrigation districts are no longer parties to these proceedings and the class action suit applies only to beneficial interests in Klamath Project rights. *See supra*, pp. 9-10.

and delivery of water through Project works. And, in all cases, Reclamation made Project water available for beneficial use only under the terms and conditions of water-supply contracts. *See* Appx10-16. Accordingly, those contracts are properly construed as clarifying and defining (under Oregon law) the beneficial relationship between the United States and project users, and the terms of the irrigators' water rights. *Id.* at 50-52, 227 P.3d at 1165; *see also Klamath II*, 635 F.3d at 519.

As explained (*supra*, pp. 14-20), most of Plaintiffs water rights are held under water-supply contracts with shortage provisions that disclaim any and all federal liability "for any damage, direct or indirect, arising" from shortage in water availability "on account of drought or other causes." The CFC mistakenly held that only some of the Plaintiffs' takings claims are foreclosed by these contracts. Appx35-41. For reasons that follow, all of Plaintiffs' takings claims should be deemed contractually foreclosed. *See AstraZeneca Pharmaceuticals LP v. Apotex Corp.*, 669 F.3d 1370, 1377 (Fed. Cir. 2012) (court may affirm on any grounds presented to trial court).

### A. The Contract Shortage Provisions Preclude Takings Liability

There is no merit to Plaintiffs' argument (Brief at 50-52) that the CFC misconstrued the contract provisions that foreclose federal liability for water supply shortages due to "drought . . . or other causes." These terms unambiguously apply to the 2001 shortages, which were caused by drought and by ESA requirements.

*See, e.g.*, Appx3323. Plaintiffs urge a different result on the view that effectuating the "other cause" language would reserve to Reclamation "a method of unlimited exculpation," which would render Reclamation's commitments "illusory" and the contracts "void." Brief at 50 (quoting *Torncello v. United States*, 681 F.2d 756, 760 (Cl. Ct. 1982)). Plaintiffs argue that the "other cause" language must be excised to save the contracts. *See Torncello*, 681 F.2d at 760.

This argument presents a false choice. Contrary to Plaintiffs' contention (Brief at 46, 50), the "other cause" language does not entail a "complete surrender" of irrigators' rights or empower Reclamation to withhold water deliveries "for any reason." The contracts refer to "shortage[s]" that arise from "drought or other causes" despite Reclamation's use of "all reasonable means to guard against [the] shortages." Appx3323. If Reclamation were to withhold deliveries of Project water for reasons that are avoidable by Reclamation, there would be no qualifying "shortage." For a contract "shortage" to occur, the "other cause" must be one that Reclamation cannot "reasonably . . . guard against."[12] Here, the shortage provisions apply because water was physically and legally unavailable to Project irrigators due to severe drought and the ESA requirements.

[12] This interpretation is consistent with the interpretive canons "noscitur a sociis" (words in a list have similar meanings) and "ejusdem generis" (general phrase following a list takes on similar meaning). Amici Friant Water Users err in arguing otherwise (Brief at 27-29).

Plaintiffs also err (Brief at 51) in relying on *Stockton East Water District v. United States*, 583 F.3d 1344 (Fed. Cir. 2009). There, legislative and regulatory changes specific to the Central Valley Project compelled Reclamation to reduce water deliveries to contractors, prompting breach of contract and takings claims. *Id.* at 1349-53. In response, Reclamation invoked a contract provision that foreclosed federal liability for shortages from "drought, or other causes which, in the opinion of the Contracting Officer are beyond the control of the United States." *Id.* at 1360-61. This Court held that the subject changes were *within* the control of the United States—"a term that of course includes Congress"—and thus not subject to the shortage provision. *Id.* at 1361-65.

That decision has no applicability here. Unlike the shortage provision in *Stockton East*, the shortage provisions here do not require a cause "beyond the control" of Congress. Moreover, *Stockton East* involved legislative changes that this Court determined were not "sovereign acts" for the purpose of the sovereign acts doctrine. *Id.* at 1365-66. In contrast, in *Klamath II*, this Court held that the ESA requirements that impacted Klamath Project operations in 2001 "only incidentally fell" on Project contracts, and that Reclamation's "withholding" of water pursuant to ESA requirements was a "public and general act" subject to the sovereign acts defense. *See* 635 F.3d at 521-22; *accord Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1288 (Fed Cir 2008). Construing the

shortage provisions in this case as applying to "sovereign acts" outside of Reclamation's control does not render the water-supply contracts illusory or the contract terms voidable.[13]

Nor is there any merit to Plaintiffs' suggestion (Brief at 52-54) that the relevant shortage provisions are "reasonably read" as a waiver of contract liability but not takings liability. The provisions state that "in *no event* shall *any liability* accrue . . . for *any* damage. *E.g.* Appx3323. There is no parsing these terms to admit one type of liability but not another.

Finally, Plaintiffs mistakenly argue (Brief at 54-55) that the relevant shortage provisions impose "unconstitutional conditions" on irrigators' water rights. The "unconstitutional conditions" doctrine applies, for example, when an applicant is compelled to surrender property (without just compensation) in exchange for a land-use permit and there is no "nexus" and "rough proportionality" between the surrender condition and the "social costs" of the applicant's proposal. *See Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 605-606 (2013). Assuming arguendo that this doctrine applies to government contracting, it cannot apply to the

[13] This Court reversed the CFC's pretrial ruling on the United States' sovereign-acts defense, because the CFC had not determined whether ESA requirements made irrigation diversions in 2001 "impossible." *Klamath II*, 635 F.3d at 522. On remand, rather than attempting to show that Reclamation could have complied with the ESA without curtailing irrigation diversions, Plaintiffs dismissed their contract claims. Appx26.

water-supply contracts in this case. With the exception of the KID and TID contracts, the contracts provided irrigators the opportunity to *acquire* water rights under specified conditions; none compelled the *surrender* of preexisting property. Moreover, none of the contracts imposed conditions unrelated to water supply; as just explained, they simply required applicants to forego remedies for damages caused by shortages that Reclamation cannot reasonably "guard against." *See*, *e.g.*, Appx3323.[14]

### B. The Shortage Provisions in the KID and TID Contracts Apply to Individual Water Rights

While correctly holding that Warren Act contracts with the "other cause" shortage provisions foreclose takings liability for water rights perfected under those contracts, Appx40-41, the CFC mistakenly determined that virtually identical shortage provisions in the 1954 KID Contract (Appx3323) and the 1956 TID Contract (Appx3395) do not control the water rights of KID and TID irrigators. The CFC reasoned (1) that individual members of KID and TID perfected their water rights under the Form A and B applications, (2) that conditions imposed under Form A and B, for different reasons, no longer apply, and (3) that individual users are not

[14] In *United States v. Alpine Land & Reservoir Co.*, the Ninth Circuit held that contractual provisions defining project water rights in a manner contrary to a Reclamation Act directive were unenforceable. 697 F.2d 851, 855 (9th Cir. 1983). Contrary to the arguments of Plaintiffs (Brief at 47 n.180) and amicus Western Farm Bureaus (Brief at 12-14), the shortage provisions here are not contrary to any statutory directive.

bound by the later-executed KID and TID contracts. This reasoning does not survive scrutiny.

*1. Project Homesteaders Expressly Agreed to the Shortage Provisions*

All homesteaders who acquired Klamath Project water rights did so under Form A applications and thereby agreed that the United States would not be liable for "any damage[s]" relating to water shortages resulting from "drought . . . or other cause." Appx3357. Likewise, all homesteaders agreed that the terms and conditions of Form A would "run with the title" to the homestead tract. *Id.* Thus, the shortage provisions in the KID and TID contracts simply reflect conditions that all original homesteaders agreed would permanently govern their water rights.

In holding that successors-in-interest to homestead tracts are not bound by these agreements, the CFC mistakenly relied on the "merger" rule from California and Oregon property law. Appx37. Under that rule, a deed of property, once delivered and accepted, is ordinarily deemed to embody the entire agreement among the parties, extinguishing prior agreements or understandings not expressed in the deed. *See Ram's Gate Winery, LLC v. Roche*, 235 Cal. App. 4th 1071, 1079, 185 Cal. Rptr. 3d 935, 941 (2015); *Winters v. County. of Clatsop*, 210 Or.App. 417, 424 n.3, 150 P.3d 1104, 1108 n.3 (2007). The CFC reasoned that homestead land patents extinguished Form A conditions not reiterated in the patents. Appx37.

But Oregon and California law do not support this result. Recognizing that intent is the touchstone of contract interpretation, California has limited the merger rule to "circumstances where the [preexisting] contractual terms are *inconsistent* with the deed, or where the parties *clearly intend* to have all contractual obligations subsumed by the recitals of the recorded deed." *Ram's Gate Winery*, 235 Cal. App. 4th at 1081, 185 Cal. Rptr. at 942 (emphasis added). Similarly, under Oregon law, the merger rule does not apply to "collateral" agreements made by the parties on issues distinct from the "subject of the [deed] contract." *Johnston v. Linsday*, 206 Or. 243, 248-49, 292 P.2d 495, 498 (1956). Here, the patents conveyed Project lands "together with the right to the use of water from the Klamath Reclamation Project." Appx3361. There is no contradiction between the expressed intent in the patent to convey a particular type of water right—i.e., the right to "the use of water from the Klamath Project"—with the understanding that such right was and would be as defined in "Form A."

In any event, if Oregon and California law somehow were to mandate an interpretation of the patents that results in an extinguishment of the Form A conditions, state law cannot be applied. Under choice-of-law principles, federal common law governs the interpretation of contracts that are executed by the United States pursuant to federal statutes and regulatory programs. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-94 (1973). State law cannot be

"borrowed" to provide the rule of decision for interpreting federal contracts if the result would be "hostile" or inconsistent with federal statutory interests. *Id.* at 596. That would be the case here under the CFC's interpretation of State law.

In addition to the water shortage provisions, the Form A applications (1) grant certain rights of way to the United States; (2) grant liens to secure water charges; and (3) establish the landowners' obligations to pay charges to offset Project construction costs and for ongoing Project operations and maintenance. Appx3357. If the patents are interpreted as extinguishing the Form A agreements by "merger," all of these conditions would be extinguished. This cannot be squared with historic practice or congressional intent. *See* Appx2259-2260. Rather, the terms of the Reclamation Act plainly anticipate that homesteaders' financial and other obligations would continue beyond the issuance of land patents. *See* 43 U.S.C. § 541 (authorizing the issuance of patents as long as homesteaders' payments are current, not after all debts are discharged).

Finally, the CFC's application of the merger rule is inconsistent with the Oregon Supreme Court's holding in *Klamath I* regarding the nature of Plaintiffs' property rights. If the patents conveyed all federal interests in water rights appurtenant to Project homestead tracts (extinguishing any federal interests not expressed), the United States could not be said to retain "title" to Project water rights appurtenant to homestead tracts. *See* 348 Or. at 47-50, 227 P.3d at 1163-65.

Consistent with *Klamath I*, the patents are properly construed as granting homestead lands subject to the Form A applications, which define the landowners' beneficial rights. *See Klamath II*, 635 F.3d at 519.

*2. Preexisting Landowners Agreed Be Represented by a Water Users' Association*

All private landowners who acquired water rights on lands now part of KID did so through Form B applications.[15] *See* Appx3199-3201. Those applications did not address the consequences of water shortages. *Id*. At the same time, however, Form B did not guarantee or warrant any particular water supply. Instead, under "Form B," landowners applied for the right to use "up to" a specified amount of water for irrigation, in "no case exceeding" a proportionate share of the water "supply *actually available as determined by the Project Engineer or other proper officer of the United States.*" Appx3199 (emphasis added).

Moreover, in 1905, before accepting any Form B applications, Reclamation entered an agreement with KWUA—an entity organized to represent all "owners and occupants" of private lands within the Klamath Project area—to govern the delivery of Project water to landowners. Appx3194-3197. The agreement provided that only KWUA shareholders would be entitled to apply for Project water rights,

[15] TID lands were not privately owned before the Klamath Project, but were reclaimed by the draining of Tule Lake and opened to homesteading under the Project. Appx12.

Appx3195, and that such rights were to be "determined and enjoyed" under federal and State law, as "*modified* by the provisions of the articles of incorporation and by-laws of [KWUA]," Appx3197 (emphasis added). In executing Form B, private landowners acknowledged that their application required the endorsement (by "certificate") of the water users' association (here, KWUA) that had "entered into contract" with Reclamation. Appx3200. Thus, from the outset, Form B applicants agreed and understood (1) that Reclamation would determine the water supply "actually available" for irrigation of their lands during the irrigation season; and (2) that Project water users would be represented, on water supply issues, by a water users' association.

In 1917, KWUA shareholders voted to reorganize as KID, and KID assumed all rights and obligations under the KWUA contract. Appx12. In 1954, KID executed an "Amendatory Contract" including the provision foreclosing federal liability for water shortages due to drought or "other causes" that Reclamation could not reasonably guard against. Appx3323. In this context, the KID contract plainly clarified or redefined the scope of Plaintiffs' beneficial interests. *Klamath II*, 635 F.3d at 519.

The CFC held that successors-in-interest cannot be bound by the conditions of Form B because it did not specifically state that those conditions would "run with title to the lands." Appx37-38. But like Form A, Form B granted liens in the lands

to secure payments for water charges; granted easements for ditches, canals, and other structures; and committed landowners to pay ongoing water charges. Appx3199-3202. Moreover, Form B applicants expressly agreed to these terms "on behalf of [themselves], heirs, executors, administrators, and assigns" and "successors in interest." *Id.* These provisions plainly evidence the parties' intent to bind successors to Form B conditions.

*3. The KID and TID Contracts Bind Landowners*

For reasons stated, the CFC incorrectly relied on the fact that individual Plaintiffs did not sign the KID and TID Contracts. Appx38-39. KID and TID are municipal corporations (or akin to the same), organized under state law to represent the interests of district landowners relating to water supply. *See Shasta View Irrigation Dist. v. Amoco Chemicals Corp.*, 329 Or. 151, 157, 986 P.2d 536, 539 (Or. 1999); *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 741, 95 Cal. Rptr. 3d 53, 61 (Cal. App. 2009); *see also* Appx3150-3155. Oregon and California authorized the districts to enter contracts with the United States, on behalf of district water users, with respect to water supplied by federal reclamation projects. *See* Cal. Water Code §§ 22078, 22225, 22230, 23195; Or. Rev. Stat. §§ 545.025(1), 545.221(a), 545.225(1)(a). Congress authorized Reclamation to contract with the Irrigation Districts. *See* 43 U.S.C. §§ 373, 423d, 423e. For these reasons, KID and TID—and all other irrigation districts in this case—could

negotiate contracts that "clarified, redefined or altered" individual users' beneficial interests, consistent with the terms under which such rights were perfected. *See Klamath II*, 635 F.3d at 519.

The CFC's determination (Appx38) that the KID and TID contracts do "not purport to bind third parties" is belied by the contracts' plain terms. KID and TID are not water users and cannot conceivably suffer "direct" damages from water shortages. In foreclosing liability for "any damage, direct or indirect" arising from water shortages, the contracts plainly speak to damages that only could be suffered by individual water users. Appx3323; Appx3395.

### B. The Warren Act Contracts Preclude Takings Liability

Instead of foreclosing federal liability for water-supply shortages caused by "drought or other causes," four of the Warren Act contracts foreclose federal liability for shortages caused by "hostile diversion, unusual drought, interruption of service made necessary by repairs, damages caused by floods, unlawful acts or unavoidable accidents." Appx3215; Appx3243; Appx3258; Appx3348. Based on this distinction, for water users within the districts served by the latter contracts, the CFC determined that takings claims relating to the 2001 water-supply shortages are not foreclosed.

This analysis is mistaken. There is no dispute that 2001 was a year of "unusual drought." The CFC reasoned that supply shortages were caused by the

ESA requirements and *not* "unusual drought" because the drought alone did not prevent water deliveries. Appx41. Stated differently, but for the ESA requirements (assuming no senior reserved rights), water would have been physically and legally available to Project irrigators. *Id.* But the converse is also true. But for the "unusual drought"—i.e., if 2001 had been a year of ordinary stream flows—there would have been no curtailment in water deliveries. *See* Appx3569. In this regard, the 2001 shortages were "caused by . . . unusual drought." Appx3215.

In any event, as explained above (pp. 18-19), Klamath Project water rights are subject to contractual priority dictated by federal statute. Public and private lands initially designated part of a Reclamation Project have first priority to project waters. 43 U.S.C. § 523. Warren Act contractors are entitled to water deliveries only when there is an available supply of water in excess of the needs of Reclamation Act contractors. *Id.* This statutorily-mandated rule of contractual priority, enforced through all Warren Act contracts, undeniably defines the Plaintiffs' beneficial interests. *See Klamath II*, 635 F.3d at 519. It follows that when Reclamation is under no contractual obligation to deliver water to KID and TID (here, the Reclamation Act contractors), Reclamation has no contractual obligation to deliver water to Warren Act contractors and no corresponding "trust" obligation under Oregon water law. *See Klamath I*, 348 Or. at 47-52, 227 P.3d at 1164-66.

### C. The Lease Terms Preclude Takings Liability

For purposes of their takings claims, Plaintiffs argue (Brief at 44-45) that agricultural leaseholders on National Wildlife Refuge lands stand in the same relationship with the United States as Klamath Project landowners and must be found to hold beneficial interest in Project water rights on refuge lands (in addition to contract rights under their leases). The CFC agreed, on the understanding that this result was mandated by this Court's remand instructions in *Klamath II*. Appx42 n.18. This was error.

For purposes of Oregon's law of prior appropriation, a short-term lessee who first uses water appropriated by a landowner is properly viewed as an agent of the landowner, not as a beneficial owner of the resulting water right. *See Klamath I*, 348 Or. at 38, 227 P.3d at 1158 (citing *In re Waters of Walla Walla River*, 141 Or. 492, 498, 16 P.2d 939, 941 (1933) (company that enters "annual rental agreements" with its users on irrigated land "owns the entire water right"); *see also id.* at 60-61, 227 P.3d at 1170-71 (Walters, J., concurring). This is so because a lessee cannot acquire a beneficial interest in a perpetual water right appurtenant to a tract of land without acquiring a perpetual interest in the land, which would be contrary to nature of the leasehold.

In *Klamath I*, the Oregon Supreme Court did not hold otherwise. The court held that when Reclamation "appropriat[ed] water for the use and benefit of

*landowners*" and the water was put to beneficial use, the *landowners* (and homesteaders entitled to become landowners) acquired a beneficial interest under Oregon law in the Project water rights thereby perfected. *Id.* at 49-50; 227 P.3d at 1164-65. The court declined to address the property interest of any specific Plaintiff (including refuge lessees), noting that the relevant contracts were not before it. *Id.* at 50; 227 P.3d at 1165.

Nor did this Court address refuge leases in *Klamath II*. 635 F.3d at 515-19. Rather, in reversing the CFC's ruling that Plaintiff held real property interests under Oregon law, this Court remanded for a "case-by-case" determination of "any outstanding property interest questions," as well as a "case-by-case" determination of "all surviving takings . . . claims" and contract claims. *Id.* at 519- 22. Because the only compensable interests that refuge lessees held in 2001 were contract rights, the lessees were obligated to pursue their contract remedies in lieu of takings remedies. *See St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1385 (2008). The lessees cannot avoid contract defenses by alleging a taking of contract rights (as opposed to a contract breach). *Id.*; *cf.* Appx26 (observing that Plaintiffs voluntarily dismissed their contract claims).

In any event, the subject leases merely allow lessees to use water when available, and the "basic contract" lease expressly forecloses federal liability when "water is not available . . . " *E.g.*, Appx3170. These terms controlled lessees'

interests in Project water in 2001, for purposes of contract or takings liability. No water was "available" to lessees in 2001, due to the severe drought and ESA requirements. The CFC properly rejected the lessees' takings claims on this basis. Appx42.

Accordingly, the CFC's judgment that the United States is not liable for a taking may be affirmed on the independent ground that such liability is foreclosed by Plaintiffs' contracts.

## III. THE CFC PROPERLY DISMISSED THE CLAIMS OF VAN BRIMMER SHAREHOLDERS

The CFC also properly dismissed the takings claims of Van Brimmer shareholders. The United States moved for a stay of Plaintiffs' claims on the grounds that Plaintiffs were asserting takings of water rights that were disputed and subject to adjudication in the KBA. Appx24. Plaintiffs opposed the motion by arguing that they were asserting "vested beneficial interests" in Project rights, and that such interests were not subject to adjudication in the KBA. Appx518. In its 2003 order, the CFC allowed Plaintiffs to proceed on this theory, on the condition that Plaintiffs would not allege the taking of water rights that remained subject to adjudication in the KBA. Appx518.

Contrary to Plaintiffs' arguments (Brief at 55-60), the CFC did not err or abuse its discretion in holding Van Brimmer shareholders to this condition. *See Klamath II*, 635 F.3d at 517, 519 n.10 (leaving issue to CFC). Although Van

Brimmer shareholders claim to hold "beneficial interests" in water rights like those claimed by other Plaintiffs, this argument (Brief at 55-60) misses the point. As a group, Plaintiffs concede that the United States owns the Klamath Project water rights. The KBA had (and has) no jurisdiction to adjudicate Plaintiffs' claims to beneficial interests in those Project water rights. *Klamath I*, 348 Or. at 52-57, 227 P.3d at 1166-68. Thus, plaintiffs alleging the taking of beneficial interest in Project rights are not asserting property interests to be resolved in the KBA.

In contrast, Van Brimmer shareholders claim beneficial interests in pre-Project water rights allegedly perfected by Van Brimmer in 1883. *See* Brief at 36. Those 1883 rights remain in dispute in the KBA. Appx18-19. The United States filed a claim asserting that, in the 1909 contract with the United States, Van Brimmer relinquished its 1883 water rights in exchange for rights under the contract to Project water. *Id.* In a competing claim, Van Brimmer asserted that the 1909 contract was an agreement to deliver water, through Project works, in accordance with preexisting water rights retained by the company. *Id.* Because this dispute is subject to resolution in the KBA, Van Brimmer shareholders could not assert a taking of their interests in 1883 water rights without contravening the CFC's 2003 order. Appx518.[16]

[16] Although the KBA Adjudicator held in favor of Van Brimmer, that ruling remains subject to judicial challenge. *See* Appx18.

In short, because Plaintiffs' claims do not meet the conditions of the 2003 order, and because Plaintiffs do not contend (Brief at 50-55) that the CFC erred or abused its discretion in entering the 2003 order, the CFC's dismissal of the Van Brimmer claims should be affirmed.

## IV. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO A "PER SE" TAKINGS ANALYSIS

If this Court determines that Plaintiffs' takings claims are not foreclosed by the senior reserved rights for Klamath Basin tribes (*supra*, Part I) or the provisions of the Reclamation Act contracts (*supra*, Part II), this Court must remand for further proceedings. In such event, this Court should direct the CFC to review Plaintiffs' takings claims under the framework of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Contrary to the CFC's determination, the United States' actions in 2001 were not "per se" physical takings under the rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See Casitas*, 543 F.3d at 1289 (quoting *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 538 (2005)). That rule applies to "permanent physical invasion[s]." *Id.* In *Casitas*, this Court applied the *Loretto* "per se" rule to a physical appropriation of waters already appropriated by right. *Id.* at 1289-1297. But no court has held that *any* regulatory restriction, no matter how minor, on the exercise of a water right constitutes a "per se" taking mandating just compensation. The CFC's adoption of such a rule (Appx42-51) was error.

### A. The United States Did Not Physically Take Plaintiffs' Water

Water rights are "usufructuary," conveying a right to use of water rather than proprietary interests in the waters of a stream. *Rencken v. Young*, 300 Or. 352, 363, 711 P.2d 954, 960 (1985); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441, 658 P.2d 709, 724 (1983); *Crow Creek*, 2018 WL 3945585, *4. Although water rights often include the right to physically remove and consume a specified amount of water from a natural water source, *see Adair*, 723 F.2d at 1411, a government regulatory restriction on a landowners' ability to exercise a water right in the first instance is not a "physical invasion" or a "direct appropriation" of water from the landowner's possession. *Lingle*, 544 U.S. at 537-38.

In this regard, water rights are no different from other real property rights. For example, a "mineral lease conveys an interest in land in place that permits the lessee to reduce to possession and to dispose of part of the land involved." *Chevron Oil Co. v. United States*, 200 Ct. Cl. 449, 462-63 (1973). If the government were to physically apprehend a truckload of coal from a lessees' stockpile—after the coal has been mined and "reduced to possession"—such action would be a "direct appropriation of property" and "per se" taking, even if the coal seized by the government is de minimis in relation to the leased amount. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). But a government regulation that requires a lessee to keep a portion of the

coal in the ground is not a per se taking, *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499-500 (1987), even if the regulation prevents mining of the greater part of the lease. *See Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001)

In the present case, when Reclamation directed Klamath Project irrigators in 2001 that they could not open headgates and divert Klamath River waters for irrigation until further notice, Reclamation did not physically occupy Plaintiffs' farms or "physically take possession" of water already appropriated by Plaintiffs. *Tahoe-Sierra*, 535 U.S. at 322. Rather, pursuant to Congress's mandates in the ESA, Reclamation directed Project irrigators not to exercise their water rights. Such a restriction on the exercise of real property rights constitutes a taking only if goes "too far." *Keystone Bituminous*, 480 U.S. at 508; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Although there is no "set formula" for determining when use restrictions go "too far," courts generally apply the multi-factor analysis of *Penn Central*. *Casitas*, 543 F.3d at 1289.

### B. The CFC Misconstrued *Casitas*

In determining that Reclamation's 2001 actions constitute "permanent physical invasions" subject to a per se takings analysis, the CFC misconstrued *Casitas.* Although *Casitas* also involved regulatory actions under the ESA, those actions were different in kind from the regulatory restrictions in the present case.

543 F.3d at 1281-82. In *Casitas*, this Court found that federal officials compelled a water user to construct a fish ladder within the water user's diversion flume and canal. *Id.* at 1290-91. The fish ladder "caused the physical diversion of water away from the [diversion canal] *after* the water had left the Ventura River and was in the [canal] . . . thus reducing [the water users'] supply." *Id.* at 1291-92 (emphasis added). Because the government took "physical possession" of water that already had been lawfully diverted (pursuant to a state-law water right), and effectively "pip[ed] the water to a different location" for government use, *id.* at 1294, this Court deemed the action a per se physical taking, *id.* at 1294-97.

Contrary to the CFC's determination (Appx46), Reclamation did not similarly "cause water to be diverted away" from Plaintiffs in 2001. Reclamation did not compel Klamath Project irrigators to construct a permanent physical structure within their canals to permanently divert a portion of the appropriated water to a public use. Rather, Reclamation directed irrigators to keep headgates closed temporarily, in order to prevent river water from being diverted in the first instance. Appx3569. Precluding the diversion of water from a water source is not essentially different from precluding the removal of coal from the ground, *see Keystone Bituminous Coal*, 480 U.S. at 496-97, or the harvesting of timber on timber lands, *see Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354-55 (Fed. Cir. 2002). When restricting the exploitation of natural resources appurtenant to a landowners'

property, the government regulates property use; it does not physically occupy the owners' property or physically appropriate any part thereof. *Id.*

Nor was the CFC correct to focus on the "permanent" loss of water use during the 2001 irrigation season. Appx50. To be sure, any water that was available in priority for diversion by Klamath Project irrigators but withheld under Reclamation's 2001 Operations Plan was "gone forever" as to Klamath Project irrigators. *Id.* But the irrigators own "usufructuary" rights, not "particular molecules of water," *Crow Creek*, 2018 WL 3945585, at *4, and water is a renewable resource. The irrigators' *right of use* was temporarily restricted (within one irrigation season), not "permanently taken away." *Cf. Casitas*, 543 F.3d at 1296.

### C. Supreme Court Precedent Does Not Mandate a "Per Se" Rule for Regulatory Restrictions on Water Use

In determining that any restriction on priority water use is a per se physical taking, the CFC also mistakenly relied on a "trilogy" of Supreme Court cases. Appx44-47. Two of these cases involved construction of the Central Valley Project in California, which left a "dry river bed" on the plain just below the Friant Dam, *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 729 (1950), and "severely diminished" flows along agricultural lands downstream. *Dugan v. Rank*, 372 U.S. 609, 613 (1963). In *Gerlach*, the Supreme Court affirmed an award of compensation for the complete taking of riparian rights on the lands below the dam.

339 U.S. at 730, 752-55. In *Dugan*, the Supreme Court denied injunctive relief to the downstream appropriators, observing that the only "appropriate proceeding" was a suit for the taking or partial taking of water rights. 372 U.S. at 624-26. Both cases addressed government action that *physically* eliminated or diminished water flows available to downstream landowners. Analogizing to cases concerning physical interference with a landowners' airspace, the Supreme Court observed that a physical "seizure" of water rights can occur upstream. 372 U.S. at 625 (citing *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962); *United States v. Causby*, 328 U.S. 256, 261 (1946)). These cases do not control *regulatory* restrictions on the use of air or water rights. *See Penn Central*, 438 U.S. 104.

The third case cited by the CFC concerned water that a power company leased to a paper mill under the power company's state-law right to divert the water into a canal for power production. *International Paper Co. v. United States*, 282 U.S. 399, 404-05 (1931). During World War I, the United States requisitioned the entirety of the company's maximum power production, compelling the power company to use the water it had leased to the paper mill. *Id.* But the United States agreed only to compensate the power company. *Id.* at 406-07. Because the United States affirmatively appropriated and condemned the entirety of the power, the Supreme Court held the United States liable for all water appropriated to generate the power, including the paper mill's interest. *Id.* at 407-08. This holding is limited

to these unique circumstances. *Id.* In any event, the water taken from the paper mill—like the water taken from the irrigators in *Casitas*—was physically diverted from the paper mill after it had entered the power company's canal. *Id.* at 405. Thus, as in *Casitas*, the appropriation was akin to a physical "piping" of water from the paper mill's store. *See* 543 F.3d at 1294. It was not a regulatory restriction on use of the underlying water right.

### D. The CFC's Rule is Unworkable

For reasons stated, the CFC's determination that any regulatory restriction on the use of a water right constitutes a "permanent physical invasion" is contrary to prior precedent and would improperly expand federal takings liability. A typical water right conveys the ability to divert a specific amount or rate of flow over the course of a year or irrigation season. *See, e.g.*, *Laurance v. Brown*, 94 Or. 387, 392, 185 P. 761, 762-63 (1919). Reclamation's 2001 restrictions prevented the exercise of irrigation rights in their entirety for the majority of the irrigation season. But use restrictions mandated by the ESA might as easily result in a short delay in the onset of use, or a small reduction in amounts available for diversion without a complete curtailment of rights. If any such restriction is a "permanent physical invasion," it will generate takings liability "however minor." *Casitas*, 543 F.3d at 1289. This Court should clarify that regulatory use restrictions on the exercise of water rights—just like use restrictions on the exercise of mineral rights, timber rights, or a host of

other property rights—are not "paradigmatic" physical takings, but are subject instead to the multi-factored takings analysis set out in *Penn Central*.

## CONCLUSION

For the foregoing reasons, the judgment of the CFC should be affirmed.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Fed. Cir. R. 32(a), I hereby certify that the attached answering brief:

is proportionately spaced, has a typeface of 14 points or more, and contains **17,977** [*] words (exclusive of the table of contents, table of authorities, statement of related cases, certificates of counsel, glossary, signature block, and addendum).

*September 17, 2018* s/ *John L. Smeltzer*

Date John L. Smeltzer

[*] The United States is filing an unopposed motion, concurrent with the filing of this brief, for leave to file an extended brief.

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Answering Brief for the United States as Appellee* with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on **September 17, 2018.**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ John L. Smeltzer*

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