Appeal Nos. 18-1323, 18-1325

United States Court of Appeals

for the

Federal Circuit

LONNY E. BALEY, *et al*., JOHN ANDERSON FARMS, INC., *et al*.,

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees,

APPEALS FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN NOS. 1:01-CV-00591-MBH, 1:07-CV-00194-MBH, 1:07-CV-19401-MBH, 1:07-CV-19402-MBH, 1:07-CV-19403-MBH, 1:07-CV-19404-MBH, 1:07-CV-19405-MBH, 1:07-CV-19406-MBH, 1:07-CV-19407-MBH, 1:07-CV-19408-MBH, 1:07-CV-19409-MBH, 1:07-CV-19410-MBH, 1:07-CV-19411-MBH, 1:07-CV-19412-MBH, 1:07-CV-19413-MBH, 1:07-CV-19414-MBH, 1:07-CV-19415-MBH, 1:07-CV-19416-MBH, 1:07-CV-19417-MBH, 1:07-CV-19418-MBH, 1:07-CV-19419-MBH, 1:07-CV-19420-MBH (HON. MARIAN BLANK HORN)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

I. Summary of Argument

Certainty and finality are goals of adjudicated water rights. Once determined, water rights are permanent and provide certainty in shortage/drought.[1] In contrast, biological opinions (BiOps) under the Endangered Species Act (ESA) are created to address science in current time, and to help change existing conditions that are causing a species to be endangered. Determinations about water needs for endangered species under BiOps are not property rights. The 2001 water shutoff was based on the ESA.[2] But, BiOps change (for example, the Klamath Project has been subject to multiple BiOps since 2001, and currently there is an ongoing reconsultation to replace the 2013 BiOp).[3] The U.S. Court of Federal Claims (CFC) incorrectly equated the 2001 BiOp to a water right. That runs counter to Oregon state law that seeks to finally adjudicate rights, so they can be administered under the prior appropriation doctrine.[4]

In its responsive brief, the Government admits that the cornerstone of the CFC's judgment—that "[t]hree Native American tribes, the Klamath, Yurok, and

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[1] Or. Rev. Stat. § 539.010(4); State of Oregon Amicus Br. at 7 (June 29, 2018) (Doc. 94).
[2] Appx22.
[3] *See* NAT'L MARINE FISHERIES SERV. AND U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINIONS ON THE EFFECTS OF PROPOSED KLAMATH PROJECT OPERATIONS FROM MAY 31, 2013, THROUGH MARCH 31, 2023, ON FIVE FEDERALLY LISTED THREATENED AND ENDANGERED SPECIES (May 2013) at 1-3 (describing the history of BiOps for the Klamath Project, issued in 2001, 2002, and 2010).
[4] Or. Rev. Stat. § 537.120; Or. Rev. Stat. § 539.010(4).

Hoopa Valley Tribes, (collectively, the Tribes) hold rights to take fish from Klamath Project waters"[5]—is factually erroneous: "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 . . . ."[6] Without a right to fish in Upper Klamath Lake, the tribes have no senior reserved water right in the water stored in the lake, removing the Government's only defense to payment of just compensation. The CFC's other clear factual errors, including its confusion of the protected coho salmon with the abundant and unprotected chinook salmon and its mistaken understanding that the Hoopa and Yurok tribes hold adjudicated water rights (they do not), simply compound the CFC's errors warranting reversal.

In addition, the CFC failed to correctly apply the reserved water rights doctrine, which entitles the Tribes to "that amount of water necessary to fulfill the purpose of the reservation, no more."[7] The CFC ignored that "the Government has no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing water rights."[8] In its responsive brief, the Government fails to offer any support—factual or legal—for why its actions to conserve fish, taken under

[5] Appx16.
[6] Appellee's Resp. Br. at 42 (Sept. 17, 2018) (emphasis in original).
[7] *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350, 1356 (Fed. Cir. 2018) (quoting *Cappaert v. United States*, 426 U.S. 128, 141 (1976)).
[8] *United States v. Adair*, 723 F.2d 1394, 1418 (9th Cir. 1983).

authority of the ESA, also qualify as a beneficial use of water "necessary to fulfill the purpose of the reservation,"[9] as the *Winters* doctrine requires.[10]

The CFC also made no finding to support a conclusion that the amount of water Reclamation released to maintain instream flows was necessary to fulfill the salmon-fishing rights of the Hoopa and Yurok Tribes, whose reservations are far downstream of the Project and Iron Gate. So, there is simply no support for the Government's argument that this water belonged to these two tribes, and not to Klamath Farmers.

The Government's arguments for alternative grounds to affirm the CFC's judgment also fail. The Government dredges up non-liability language, which has no legal force today—if it ever did. The Government fails to explain how the Klamath Farmers could have waived their constitutional rights, based on contracts made before they were born.

However, the CFC erred in treating differently certain Klamath Farmers, including those who receive water from districts with Warren Act contracts with "other cause" language in a shortage provision or Van Brimmer Farmers. All the Klamath Farmers have beneficial interests in the Klamath Project water, and the court erred as a matter of law in holding that these Farmers are not entitled to just

[9] *Crow Creek*, 900 F.3d at 1356.

[10] The Government cites to Appx2894-2900 and Appx2919-2929 (BiOp), but this exhibit makes no mention of fish populations or fishing rights on former Klamath reservation lands. Appellee's Resp. Br. at 36.

compensation for the taking of their water rights in 2001. Further, this Court and the Oregon Supreme Court have already squarely rejected the Government's argument that Klamath Farmers' water right derives from, or is defined by, contract rather than Oregon water law.[11] The Government's argument fails because the Reclamation Act requires Reclamation to defer to state water law, and does not give Reclamation contracting authority to alter water rights based on state law.

The CFC correctly held that the Klamath Irrigation District (KID) and Tulelake Irrigation District (TID) contracts do not define or otherwise clarify or alter any water rights of any Klamath Farmers. As a number of district representatives testified, district contracts with Reclamation govern the operation and maintenance of Project water delivery facilities—they are not water rights or even water delivery contracts.

Looking to remand, contrary to the Government, the CFC correctly held that the taking test applicable to this case is the categorical or physical taking test. The Government does not, nor do amici or the Defendant-Intervenors, cite any case in which the taking of water rights was analyzed as a regulatory taking. The taking test that the trial court applied in this case has been in place since at least 1931

[11] Appx367, Appx370, Appx397.

when the Supreme Court issued its decision in *International Paper Co. v. United States*.[12]

II. Argument

A. The CFC's erroneous ruling that the Tribes have fishing rights in Upper Klamath Lake, which the Government now admits as error, requires reversal

The Government offers no support—factual or legal—for why Klamath Project water used to conserve fish, taken under authority of the ESA, also qualify as a beneficial use of water "necessary to fulfill the purpose of the reservation,"[13] as the *Winters* doctrine requires.[14] Directly on point is this Court's recent decision in *Crow Creek Sioux Tribe v. United States*, holding that the mere existence of a tribal senior water right does not mean that the tribe has ownership of all the water in the river—as the CFC mistakenly ruled in this case.

Further, the Government now admits that the CFC's factual finding was erroneous, that "[t]o 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 . . . ."[15] Likewise, the court made no factual findings to support the amount of water it concluded was necessary to support instream flows to protect

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[12] *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931).
[13] *Crow Creek*, 900 F.3d at 1356.
[14] The Government cites to Appx2894-2900 and Appx2919-2929 (BiOp), but this exhibit makes no mention of fish populations or fishing rights on former Klamath reservation lands. Appellee's Resp. Br. at 36.
[15] Appellee's Resp. Br. at 42 (emphasis in original).

salmon, and the Government offers no support in its response. Nor did the CFC examine the executive orders that reserved the present-day Hoopa/Yurok reservation to determine whether they were intended to create reserved water rights in the Klamath River far upstream of their reservation, including water stored in Upper Klamath Lake in 2001—as this Court's precedent requires.[16] In addition, for these tribes "the Government has no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing water rights."[17]

1. The Klamath Tribes have no federal reserved water right in water in Upper Klamath Lake, which is downstream of their reservation and does not support any tribal fishery

The CFC mistakenly believed that the Klamath Tribes had a right to fish for sucker fish in Upper Klamath Lake, but it failed to make any other finding to support its conclusion that Klamath Farmers had no property right in the stored water because the Klamath Tribes had senior water rights under the *Winters* reserved rights doctrine. In its responsive brief, the Government fails to offer any support—factual or legal—for why its actions to conserve the sucker fish, taken under authority of the ESA, should also qualify as a beneficial use of water "necessary to fulfill the purpose of the reservation,"[18] as the *Winters* doctrine

[16] *Crow Creek*, 900 F.3d at 1352.
[17] *Adair*, 723 F.2d at 1418.
[18] *Crow Creek*, 900 F.3d at 1356.

requires.[19] "[T]he Government has no ownership interest in, or right to control the use of, the Klamath Tribe's hunting and fishing water rights."[20] The Ninth Circuit has already rejected the Government's attempt to convert the Klamath Tribes' reserved water right (for fishing and hunting) into a different right (here, protection of endangered species), stating:

> We conclude that it would be inconsistent with the principles expressed in *United States v. New Mexico* to hold that the Government may "tack" a currently claimed *Winters* right to a prior one by asserting that it has merely changed the purpose of its previously reserved water right.[21]

The record simply does not support the Government's argument that Upper Klamath Lake water supports "sucker fish that populate the fisheries on former reservation lands."[22] To the contrary, the record shows that the sucker fish fishery has been closed since 1987, Upper Klamath Lake is the sole remaining habitat, and the species were listed as endangered in 1988, making fishing for sucker fish a federal offense.[23] While we might speculate that someday in the future there will be abundant sucker fish populations to resurrect the Klamath Tribes' historic

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[19] The Government cites to Appx2894-2900 and Appx2919-2929 (BiOp), but this exhibit makes no mention of fish populations or fishing rights on former Klamath reservation lands. Appellee's Resp. Br. at 36.
[20] *Adair*, 723 F.2d at 1418.
[21] *Id.* at 1419.
[22] Appellee's Resp. Br. at 36.
[23] *Id.* at 25; 16 U.S.C. § 1538(a)(1)(B) ("[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.").

sucker fish fishery, the Government introduced no such evidence at trial—and the CFC made no finding that would support this speculation.

The cases that the Government cites regarding tribal rights in off-reservation waters all deal with waters that flow into the reservation—not waters that have already flowed through the reservation and are no longer beneficially usable on reservation lands.[24] As the Government correctly states: "[L]ocation and necessity of use are the critical factors for determining reserved water rights."[25] Here, Upper Klamath Lake is downstream of the former Klamath Tribes' reservation.[26] The waters flow away from the reservation toward the Pacific Ocean.[27] They, therefore, provide no instream flows to support any fishery within the Klamath Tribes' reservation.

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[24] *Arizona v. California*, 373 U.S. 546, 595-600, n.97 (1963); *Winters v. United States*, 207 U.S. 564, 565-66 (1908); *John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013); *Adair*, 723 F.2d at 1410; *Gila River Pima-Maricopa Indian Cmty. v. United States*, 695 F.2d 559, 560-61 (Fed. Cir. 1982).

[25] Appellee's Resp. Br. at 35 (citing *United States v. Preston*, 352 F.2d 352, 357 (9th Cir. 1965)).

[26] OR. WATER RES. DEP'T, SPECIAL SUPPLEMENT – KLAMATH BASIN GENERAL ADJUDICATION at 7 (1999), https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathRiverBasinAdj/Documents/klamath_summary99.pdf (map showing 1864 reservation boundary).

[27] *See id.*; KYNA POWERS, ET AL., CONG. RESEARCH SERV., KLAMATH RIVER BASIN ISSUES AND ACTIVITIES: AN OVERVIEW at 1 (2005), http://www.energy.ca.gov/hydroelectric/klamath/documents/CRS_REPORT_RL33098.PDF.

To the extent there exist tribal water rights in Upper Klamath Lake or the storage releases into the Klamath River, such rights would not include a right to water having the legal character as "stored water." Stored water is water that is impounded in Upper Klamath Lake by means of a dam during the high runoff period for use later in the year (or even in a subsequent year), and would not exist but for the Project facilities.[28] Link River Dam was constructed in 1917 and it impounds water in Upper Klamath Lake for later irrigation use only.[29] Any diversion to storage at Link River Dam must be met for authorized purposes of the Klamath Project.[30] Stored water and released stored water are distinct from natural flow.[31]

The implied-reservation-of-water doctrine is based on judicially inferred intent to reserve a source of water then unappropriated at the time certain

[28] Amicus Curiae Br. of the Klamath Tribes at 12 (Sept. 24, 2018) (Doc. No. 128); *see Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977) ("Project water [unlike naturally-flowing water] would not exist but for the fact that it has been developed by the United States.").
[29] *See* Amended and Corrected Findings of Fact and Order of Determination, *In re the Matter of the Determination of the Relative Rights to the Use of the Water of Klamath River and Its Tributaries*, KBA_ACFFOD_07117 (Or. Water Res. Dep't Feb. 28, 2014) (Findings and Determination).
[30] *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1138-39 (10th Cir. 1981).
[31] Or. Rev. Stat. § 537.400; *Cookingham v. Lewis*, 58 Or. 484, 491-92 (1911); Opinions Request OP-6423, 1992 Ore. AG LEXIS 32 (Sept. 14, 1992).

reservations are created.[32] Any reserved water rights the Tribes might hold extend only to those water sources that existed at the time Congress established a respective reservation (e.g., 1864 for the Klamath Reservation).

The Government points out that Upper Klamath Lake is a naturally occurring lake.[33] That is true, but the dam and controlled storage and release of water are not natural. Storage raises the surface elevation of the lake artificially. Release from storage to the Klamath River augments flows such that they are greater than would occur if water simply flowed through the lake unimpeded. In the Adjudication, the Government claimed, and the state confirmed, a right to impound water artificially to storage, for irrigation purposes, in an amount equal to nearly 500,000 acre-feet, a quantity sufficient to irrigate all of the Klamath Farmers' lands.[34] Districts claimed, and were confirmed to hold, legal title to rights of use of that water and Klamath Farmers hold the beneficial interest in that right.[35] Upper Klamath Lake was full in the spring of 2001, meaning there was nearly 500,000 acre-feet of artificially stored water in that waterbody. Reclamation sent previously stored water down the river, artificially increasing stream flow for ESA purposes. Reclamation also held back stored water in Upper Klamath Lake itself,

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[32] *See, e.g., United States v. New Mexico*, 438 U.S. 696, 700-01, n.4 (1978); *Cappaert*, 426 U.S. at 139.
[33] Appellee's Resp. Br. at 12.
[34] Findings and Determination at KBA_ACFFOD_07117.
[35] *Id.* at KBA_ACFFOD_07075, 07117; Appx397.

preventing access by the Klamath Farmers. There are no tribal rights in water stored in Upper Klamath Lake.

Adair, on which the Government and the CFC rely, involved a tribal reserved water right in the Williamson River, which is upstream from the former reservation, flows through the former reservation, and then exits the reservation into Upper Klamath Lake.[36] *Adair* provides no support for the Government's argument that waters, which have already flowed through and exited the reservation and can no longer be used on the reservation, are encumbered by a federal reserved water right.

Nor does the fact that the Klamath Tribes had a sucker fish fishery in 1864, when the reservation was created, show that the Klamath Tribes had the right to all of the water in Upper Klamath Lake in 2001 when there was no sucker fish fishery.[37] The Tribe is entitled to "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864."[38] Also, bringing species back from possible extinction—the purpose of the ESA—is not a

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[36] U.S. FISH AND WILDLIFE SERV., THE KLAMATH RIVER BASIN (Aug. 25, 2003), https://www.fws.gov/yreka/Maps/KlamathRvBasinV4.jpg.

[37] *Crow Creek*, 900 F.3d at 1357 ("The Tribe argues that, because its *Winters* rights vested at the founding of the Reservation, any subsequent action affecting the waters of the Missouri River constitutes an injury of those rights, even if the action does not affect the Tribe's ability to draw sufficient water to fulfill the purposes of the Reservation.").

[38] *Adair*, 723 F.2d at 1414-15.

purpose of the Klamath Tribes' reservation. While Congress has granted the Secretary of Interior the authority to acquire land or water to protect species, Congress did not impliedly grant the Klamath Tribes the same authority in the form of a reserved water right.

Defendant-Intervenor, Pacific Coast Federation of Fisherman's Associations (PCFFA), correctly notes that the State of Oregon owns fish in the navigable lakes and rivers in the state (which includes only suckers in Upper Klamath Lake and not coho salmon in California).[39] Oregon, therefore, can adopt regulations to protect the resource by enacting laws governing hunting and fishing seasons or limits and similar provisions. But, that authority is irrelevant here. Klamath Farmers' water rights include no inherent limitation related to fish. Their water rights are vested property under pre-1909 appropriations.[40] Under current statutory procedures, when the state considers whether to issue a permit for a proposed application, it may impose terms and conditions for the protection of fish.[41] There are no such conditions here. Further, state law provides procedures by which instream water rights for fisheries protection can be created.[42] Any such water rights are

[39] Appellee PCFFA's Resp. Br. at 29-30 (Sept. 17, 2018) (Doc. 105).
[40] *See, e.g.*, Findings and Determination at KBA_ACFFOD_07117; Or. Rev. Stat. 539.010.
[41] *See, e.g.*, Or. Rev. Stat. § 537.147(4) (conditioning the issuance of a post-1909 water right permit on the potential requirement of a fish screen).
[42] Or. Rev. Stat. § § 537.332, *et seq*.

characterized by a quantity of water and a priority date.[43]

There are also no instream water rights in Upper Klamath Lake with priorities before those of the Klamath Farmers. Notably, the Klamath River Basin Compact, a law of Oregon and California that has been confirmed by Congress, creates an express priority for new irrigation rights over water rights for fish and wildlife.[44] Accordingly, PCFFA actually has the priority system in the Klamath River backwards; the Klamath River Basin Compact expressly prioritizes irrigation rights over water rights for fish and wildlife.

The Government also argues that federal reserved rights are generally not lost through non-use.[45] That said, Congress can legislate otherwise. In the Klamath Termination Act, Congress stated that Oregon's law of abandonment does not apply to any (Klamath Tribes) tribal water rights until 15 years after the date of issuance of a proclamation.[46] The logical inference is that Oregon's law of abandonment does apply in certain circumstances. *Adair* ruled that the statute does not bar instream rights claims, but that holding is not binding on the Klamath Farmers or the state adjudication court, and the Klamath Farmers take the position in the Adjudication proceedings that abandonment should apply.

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[43] *Id.* § 537.350.
[44] *See id.* § 537.620; Appx2603-2604.
[45] Appellee's Resp. Br. at 49.
[46] 25 U.S.C. § 564m(a).

This Court may disregard the interim determination of the Klamath Basin Adjudication, to the effect that the Klamath Tribes have a federal reserved water right in Upper Klamath Lake, because it is interim and being appealed, and because administratively determined water rights is not a basis on which Project diversions can be curtailed.[47]

2. The CFC's erroneous definition of the Hoopa/Yurok water right, which the Government concedes, requires reversal

As with the Klamath Tribes, the Government also concedes that the CFC erred in finding that the Hoopa and Yurok tribes hold fishing rights in Upper Klamath Lake.[48] The CFC also erred in finding that the Tribes hold an adjudicated water right, apparently misreading an exhibit stating just the opposite—that the Tribes' rights are "unadjudicated."[49] In addition, the CFC mistakenly believed that the protected species of salmon (coho), for which Reclamation released water from Upper Klamath Lake, was the same species that provided the salmon fishery for the Hoopa and Yurok Tribes (which was the chinook, not the coho):[50]

> Coho salmon harvested by California Native American tribes in the northern California portion of the Southern Oregon/Northern

[47] Appellant's Opening Br. at 33 (May 23, 2018) (Doc. 27) (In their opening brief, Appellants explain that "[t]he Adjudicator's determination is under review in the state court, which will resolve many factual disputes and legal issues in order to determine the nature and measure of Klamath Tribal water rights.").
[48] Appellee's Resp. Br. at 42.
[49] Appx3745-3746.
[50] Appellant's Opening Br. at 23-24.

> California Coast ESU is primarily incidental to larger chinook salmon subsistence fisheries in the Klamath and Trinity Rivers . . . .[51]

The CFC made no finding to support a conclusion that the water Reclamation released was necessary to fulfill the salmon-fishing rights of the Hoopa and Yurok Tribes, so there is simply no support for the Government's argument that this water belonged to these two tribes, and not to Klamath Farmers.

Nor did the CFC examine the executive orders that reserved the present-day Hoopa/Yurok reservation to determine whether they were intended to create reserved water rights in the water from Upper Klamath Lake in 2001—as Supreme Court precedent requires: "Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."[52]

The Government fails to discuss that the location of the reservations shows that the flows and salmon runs of the Trinity River were more likely the primary location of reserved water rights impliedly created by the executive orders.[53] Nor

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[51] Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,593 (May 6, 1997).

[52] *New Mexico*, 438 U.S. at 700.

[53] U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, FISHING RIGHTS OF THE YUROK AND HOOPA VALLEY TRIBES (Oct. 4, 1993), available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-36979.compressed.pdf.

does the Government discuss the numerous decisions of this Court regarding creation of the Hoopa and Yurok reservations, leading to the conclusion that Congress did not confer any property rights (which include water rights) for these tribes.[54]

Amici tribes offer only cursory arguments regarding stored water, citing the irrelevant dicta from *Patterson*.[55] They also cite cases from completely distinct basins (such as the Yakima River Basin)[56] without recognition of the legal circumstances of water rights in those basins.[57] In the case of the Yakima Project, allocations of water were defined in legislation enacted in 1914 and a 1945 consent decree,[58] which eliminated distinctions between natural flow and stored water.[59] The Yakima situation involves a project-specific exception to the fundamental principle that natural flow and stored water are distinct. There is no equivalent legal history in the Klamath Basin.

Similarly, *Joint Board of Control v. United States*,[60] does not support the Hoopa and Yurok's position, with respect to stored water in the Klamath Project.

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[54] *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1375 (Fed. Cir. 2000).
[55] Hoopa Valley Tribe Amicus Br. at 13 (Sept. 21, 2018) (Doc. 108-2); Yurok Tribe Amicus Br. at 16 (Sept. 24, 2018) (Doc. 126).
[56] *See, e.g. Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985).
[57] Hoopa Valley Tribe Amicus Br. at 13; Yurok Tribe Amicus Br. at 16.
[58] *Kittitas*, 763 F.2d at 1033.
[59] *Id.* at 1034-35.
[60] *Joint Bd. of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987).

In *Joint Board of Control*, the Ninth Circuit reviewed a decision of the federal district court concerning BIA's operations of an irrigation project. At the time of the decision, the State of Montana was adjudicating the subject water rights. The Ninth Circuit found error in the district court ordering "just and equal" distribution in the face of "potentially superior" tribal water rights represented by adjudication claims.[61] The Ninth Circuit, however, merely recognized the existence of prior appropriation; it made no finding as to what the tribal water rights were, or whether they in fact extended to stored water.

Since the CFC erroneously ruled that the Tribes had senior water rights in the Klamath Project, when in fact that water was the property of the Klamath Farmers, the CFC's ruling to the contrary is erroneous as a matter of law and should be reversed.

B. The Government's argument that various contracts (to which Klamath Farmers are not parties) waive Klamath Farmers' constitutional right to just compensation is incorrect factually and legally

This Court should reject the Government's waiver-of-constitutional-rights argument based on contracts that Klamath Farmers never even signed, and because the Government failed to meet the heightened standard of scrutiny.

The Government's argument that drought excuses its Fifth Amendment taking liability also fails because the CFC made an explicit factual finding that the

[61] *Id.* at 1132.

reason Reclamation withheld water from Klamath Farmers was to comply with the ESA, not because of drought.[62] The Government makes no suggestion that this finding is clear error, and the record does not support such an argument.

1. Reclamation has no statutory authority to define the Klamath Farmers' water rights by contract

This Court and the Oregon Supreme Court have already squarely rejected the Government's argument that Klamath Farmers' water rights derive from, or are defined by, contract rather than Oregon water law.[63] This Court should reject the Government's attempt to resurrect that argument yet again in this appeal.

The Reclamation Act gives the Interior Department no authority to create water rights. To the contrary, it requires Reclamation to defer to state law in the creation and definition of water rights:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.[64]

Interpreting this provision, the Supreme Court further stated:

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[62] Appx55.
[63] Appx367, Appx370, Appx397.
[64] 43 U.S.C. § 485h-4.

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.[65]

In the Reclamation Act, Congress authorized the Secretary of Interior to enter the repayment and water supply contracts, not water rights contracts, with special districts—not with individuals—formed "[f]or the purpose of providing for United States reclamation projects a feasible and comprehensive plan for an economical and equitable treatment of repayment problems . . . and which will protect adequately the financial interest of the United States in said projects . . . ."[66] Reclamation is authorized to contract with "an organization, satisfactory in form and powers to the Secretary,"[67] providing that the organization must repay "the part of the construction costs allocated by the Secretary to irrigation"[68] in installments over no more than 40 years, "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper."[69]

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[65] *California v. United States*, 438 U.S. 645, 653 (1978).
[66] 43 U.S.C. § 485.
[67] *Id.* § 485h(d).
[68] *Id.* § 485h(d)(2).
[69] *Id.* § 485h(c)(1); *see also Westlands Water Dist. v. United States*, 109 Fed. Cl. 177, 184-85 (2013) (Project expenditures were "meant to be reimbursed.").

Nothing in the Reclamation Act authorized the United States to create or define water rights by contract.[70]

2. The trial court correctly held that the KID and TID contracts do not bind the Klamath Farmers, who are not parties to either contract

The Government offers no reason why language in the KID or TID contracts precludes Klamath Farmers, who are not parties to those contracts, from recovering just compensation under the Fifth Amendment. Made under authority of the Reclamation Act, the TID contract "was a repayment contract set up and essentially transferred the operation and maintenance responsibilities from the United States Bureau of Reclamation to the Tulelake Irrigation District that was formed."[71] The Reclamation water and land specialist responsible for Klamath Project contracts, Moss Driscoll, similarly testified as to the KID contract.[72]

The Government is wrong in arguing that the districts incur no losses if Reclamation fails to deliver water. Since all the districts pay the costs of maintaining Klamath Project facilities, including canals that crack and grow dense

[70] *Westlands Water Dist.*, 109 Fed. Cl. at 185.
[71] Appx1659 (Kirby); *see also* Appx1257-1258 (Russell) (discussing the purpose of operation and maintenance assessments to landowners within the districts); Appx1810 (Kandra) (same).
[72] Appx2248-2249 (Driscoll); *see also* Appx1660 (Kirby).

vegetation when dry, these districts do suffer losses when Reclamation fails to supply water.[73]

The Government cites no authority for its argument that because qualified electors authorized the formation of the districts as local government agencies back in the 1910s to 1950s, Klamath Farmers—who were not around at the time—are somehow parties to, or contractually bound by, the districts' contracts with Reclamation.[74] Klamath Farmers have not agreed to have their respective districts modify or abdicate their water rights. The Government points to no authority authorizing the districts to enter into such a transaction with Reclamation—because no such authority exists.[75]

3. The trial court correctly held that the Form A and B applications and the 1905 Klamath Water Users Association (KWUA) contract do not define or alter Klamath Farmers' water rights

The Government's invocation of Form A and B applications as waivers of Klamath Farmers' constitutional rights strays still farther afield. These forms were part of an old program the Government discontinued decades ago when it ceased

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[73] Appx742-743 (Stuntebeck); *see, e.g.*, Appx1673-1674 (Kirby).
[74] Appx223-224.
[75] *See Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1166 (E.D. Cal. 2001) ("The 1963 and 1978 Contracts' [between Reclamation and certain water districts] water-shortage provisions do not bind any non-signatories who hold senior vested water rights."); *see also* RESTATEMENT (SECOND) OF AGENCY § 140 (2018) ("The liability of the principal to a third person upon a transaction conducted by an agency, . . . may be based upon the fact that: (a) the agent was authorized . . . .").

dealing with individual farmers and made contracts with water districts instead.[76] The Government admitted this in the CFC, stating that "[b]y 1956, these individual [Form A] contracts [on the California side of the Klamath Project] had been replaced or supplemented with TID's contract with the United States,"[77] and "the Form B contracts between individual landowners and the United States [used on some of the land on the Oregon side of the Klamath Project] were supplanted by contracts between the United States and irrigation districts as those districts were formed."[78] Whatever provisions those forms may have contained, it has no legal significance for this case.

The Government's own witness, Moss Driscoll, also testified that these forms have nothing to do with the Klamath Farmers' water rights established under state law.[79] Likewise, the Supreme Court has in three leading cases examined the equitable rights of landowners acquired under Forms A and B and held that any property rights acquired thereunder are fully vested water rights protected under

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[76] Appx3621 (citing Reclamation Project Act of 1939, Pub. L. No. 260 (codified at 43 U.S.C. § 485h(c)-(e))); *see also* Appx3674.
[77] Appx3716.
[78] Appx3698.
[79] Appx2248 (Driscoll); *see also* Appx393 ("As the court explained in *Hindman*, settlers who entered onto public land (but who had not yet perfected title to the land) acquired 'a valuable property right [in the land] which the courts will protect and enforce,' and the water they put to beneficial use became appurtenant to the land." (quoting *Hindman v. Rizor*, 27 P. 13, 13 (Or. 1891))).

state law and the Fifth Amendment.[80]

Similarly futile is the Government's invocation of the 1905 KWUA contract, which as the Government stated, was subsumed by the KID contract 100 years ago: "In 1918, the United States entered into a contract with KWUA and KID based on the planned dissolution of KWUA and the orderly assumption of KWUA's contractual obligations by KID under federal reclamation law."[81]

None of the Klamath Farmers were parties to any of those Form A and B water rights applications, and none of them were parties to any contract between KWUA and the Government.

4. The Government fails to address the requirement that waiver of a constitutional right must be clear and convincing

As Klamath Farmers explained in their opening brief, "courts indulge every presumption against waiver [of a constitutional right],"[82] and do "not presume acquiescence in the loss of fundamental rights."[83] Waiver can only be "established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent,"[84] and "a heavy burden must be borne by the party claiming . . ." that a

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[80] *Nevada v. United States*, 463 U.S. 110, 126 (1983); *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937).
[81] Appx166.
[82] *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972).
[83] *DeVoren Stores, Inc. v. City of Philadelphia*, 1990 WL 10003, at *4 (E.D. Pa. Feb. 7, 1990).
[84] *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991).

waiver has occurred.[85] "[A] waiver or release may be insufficient where it does not contain language specifically speaking to those rights."[86] The Government neither discusses this critical rule of law, nor cites any contract language that could possibly be construed as a knowing and voluntary waiver of Klamath Farmers' Fifth Amendment right to just compensation.[87]

5. The CFC correctly held that the Government was liable for a taking of water in 2001 for Klamath Farmers who receive water from districts with Warren Act contracts not containing the "other causes" language

All of the lands benefitted by the United States' 1905 appropriation of water for irrigation and on which water was put to beneficial use—that is, all lands within the Klamath Project—have the same appurtenant state water rights. The Warren Act contracts, recognizing the limited carrying capacity of project facilities, are traditionally "excess capacity" contracts. Capacity was not a constraint in 2001 (or other years for that matter).[88] These Warren Act contracts, thus, provide no defense to this just compensation action.

The Government mistakenly suggests that the Warren Act contracts are

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[85] *Gonzalez v. Hidalgo Cty.*, 489 F.2d 1043, 1046 (5th Cir. 1973); *Miller v. United States*, 363 F.3d 999, 1006 (9th Cir. 2004).
[86] *Oaks Christian Sch. v. CIF-SS*, 2014 WL 12589319, at *5 (C.D. Cal. Jan. 14, 2014).
[87] The Government has therefore waived any argument on this point. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived.").
[88] 43 U.S.C. § 523.

water rights contracts. But, these contracts, too, are water delivery contracts.[89] The water rights of holders of Warren Act contracts, thus, base their beneficial interest in a water right, based on beneficial use and defined by state law.[90]

The Ninth Circuit has also rejected the Government's argument that it can limit the amount of water it delivers to project water rights holders based on limits set forth in contract. The court explained that project water rights are based on state law, and those rights cannot be arbitrarily limited by the Secretary of Interior by contract.[91]

6. The sovereign acts doctrine is a defense to contract claims, not Fifth Amendment takings

Although conceding that water was "legally unavailable" due to "ESA requirements,"[92] the Government contends that it is shielded from taking liability by the sovereign acts doctrine. But, the doctrine's only purpose is to relieve the Government of contract liability when contract performance is made impossible by

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[89] Appx238.

[90] Appx370 ("[T]he parties do not dispute that plaintiffs have put Klamath Project water to beneficial use . . . ."); Appx370 ("[T]he [Oregon Supreme Court] concluded that, as a matter of Oregon law, (1) plaintiffs who have taken Klamath Project water, applied it to their land, and put it to beneficial use have acquired a water right appurtenant to their land . . . .").

[91] *United States v. Alpine Land & Reservoir Co*., 697 F.2d 851, 855 (9th Cir. 1983) (quoting *California*, 438 U.S. at 678 n.31 and citing *Fox v. Ickes*, 137 F.2d 30 (D.C. Cir. 1943), *cert. denied*, 320 U.S. 792 (1943)).

[92] Appellee's Resp. Br. at 54.

a federal statute.[93] A sovereign act may still give rise to taking liability—in fact, the taking must be a sovereign act under the power of eminent domain.[94]

The Government's argument that it is not liable for a taking because Reclamation's actions were compelled by the ESA, a law passed by Congress, is contrary to this Court's holding in *Stockton East*.[95] In *Stockton East*, this Court held that acts of Congress are within the control of the United States, and the "other causes" language in shortage provisions, therefore, does not apply to actions taken under statutes, such as the ESA.[96] The Government's argument that it is not liable because Reclamation was the contracting party is unsupported and should be rejected.

7. Drought was not the reason Reclamation refused to provide water in 2001

The Government does not challenge the CFC's finding of fact that there was water available to satisfy all the Klamath Farmers' irrigation needs in 2001. Based

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[93] *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1366-67 (Fed. Cir. 2009).

[94] *Kelo v. City of New London*, 545 U.S. 469, 488-90 (2005); *Preseault v. ICC*, 494 U.S. 1, 11-13 (1990); The sovereign acts doctrine is used to assess government liability for *breaches of contract*. The Government's reliance on it here is disingenuous. This Court asked the CFC not to review whether there was a breach of contract, but whether the language of the contracts affected Klamath Farmers' right to just compensation under the Constitution.

[95] *Stockton E. Water Dist.*, 583 F.3d 1344.

[96] *Id.* at 1361-65.

on unrebutted evidence, the trial court found that Upper Klamath Lake was full in 2001, prior to the 2001 growing season.[97]

Using Reclamation's own data, Marc Van Camp, Klamath Farmer's expert hydrologist, testified that Reclamation could have allowed all Klamath Farmers a full supply of irrigation water in 2001.[98] Several farmers corroborated Van Camp's testimony.[99]

Numerous Klamath Farmers and Government witnesses also testified that there had been worse droughts in the Klamath Basin in other years, but, even in those years, Reclamation had delivered water to the Klamath Farmers.[100] The trial court thus correctly concluded that Reclamation's decision to take water in 2001 was based on its need to comply with the federal ESA, not drought conditions.

8. The Government fails to show why the CFC's dismissal of Plaintiffs who lease land from the federal government or who receive water from the Van Brimmer Ditch Company was anything but clear legal error

The CFC erred as a matter of law in holding that Klamath Farmers, who receive their water through Van Brimmer's facilities, do not have constitutionally

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[97] Appx641 (Van Camp); Appx3053; *see also* Appx860 (Unruh); Appx1275 (Hartman); Appx1364 (Moore); Appx808 (F. Anderson).
[98] Appx629 (Van Camp); *see also* Appx3039.
[99] *See, e.g.*, Appx1275 (Hartman) ("Q. In the beginning of 2001, was Upper Klamath Lake full or nearly full? A. As near as I can tell."); Appx1364 (Moore) ("A. It was nearly full . . . ."); Appx808 (F. Anderson) ("Q. To your knowledge, was there water in Upper Klamath Lake in 2001? A. Oh, absolutely.").
[100] Appx636-637 (Van Camp); *see also* Appx3050.

protected water rights. Van Brimmer Farmers are, and always have been, part of the Klamath Project lands, to which the 1905 water right is appurtenant.[101] Like all the other landowners in the Klamath Project, Van Brimmer Farmers receive their Klamath Project water stored in Upper Klamath Lake, which is then conveyed to them from the KID headgates, through the A and C canals, and over to Van Brimmer delivery facilities on the same basis as every other landowner in the Klamath Project.[102] The Government misreads the CFC's 2003 decision. Counsel for the Klamath Farmers correctly advised the court that none of the Farmers, including Van Brimmer Farmers, had any beneficial interests at stake in the Adjudication, even though most of the Districts (including Van Brimmer) claimed legal title to the water. The Oregon Supreme Court agreed, holding that the beneficial interests of the Klamath Farmers are not involved in the Adjudication.[103] The court's 2003 order thus does not prevent Van Brimmer from asserting taking claims in this case.

Like all other landowners within the Klamath Project, the landowners, who receive their water from Van Brimmer, received no water in 2001 (other than those

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[101] Appx3576-3577; Appx3740 (Map identifying Van Brimmer Ditch Company in purple just south of the Adams Pumping Station within the Klamath Project); Appx3739 (Klamath Project schematic map showing how Van Brimmer receives its water from the C Canal of the Klamath Project); Appx3031 (Klamath Project map showing Project features and identifying major water districts in the Klamath Project, including Van Brimmer Ditch Company).
[102] Appx1372; Appx1367 (Moore).
[103] Appx396-397.

who received late summer deliveries), because of Reclamation's compliance with the 2001 BiOps.[104] Van Brimmer landowners' beneficial interest in water derives from state law because, under the Federal Circuit's decision (and the Oregon Supreme Court's first answer) in this case: "[T]he district plaintiffs are not precluded, under Oregon's 1905 Act, from acquiring a beneficial or equitable property interest in Klamath water that was appropriated by the United States under that statute."[105] As James Moore, a Van Brimmer Farmer, testified at trial, he put the irrigation water he received through Van Brimmer to beneficial use on his land like all the other project Farmers.[106]

The Government also argues that those Farmers, who leased federally owned farm land, do not have state-based water (property) rights.[107] Again, there is no legal or factual support for this argument. These Klamath Farmers, like all the Farmers in this case, have consistently argued that their property rights are based on state law, and not in any contract.[108]

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[104] Appx1364-1366 (Moore).
[105] Appx369 (citing *Klamath Irr. Dist. v. United States*, 227 P.3d 1145, 1157-60 (Or. 2010).
[106] Appx1362 (Moore).
[107] Appx241-244.
[108] *See, e.g.*, Appx3619-3620; Appx3596-3603.

C. There is also no authority supporting the Government's argument that water rights should be analyzed as a regulatory taking; the CFC's ruling that the appropriate taking test to be applied in this case is a per se, categorical taking test is correct and should not be reversed

The Government argues that the CFC erred in applying a per se taking test to Reclamation's taking of Plaintiffs' water in 2001 and asks this Court to instruct the court on remand to apply a regulatory taking test.[109] According to the Government, applying the per se taking test to the taking of water rights would be "unworkable." But, the taking test the CFC applied in this case has been in place since at least 1931 when the Supreme Court issued its decision in *International Paper Co. v. United States*.[110]

1. The CFC did not err in ruling that the Government's actions in 2001 caused a physical taking of the Klamath Farmers' water rights

The CFC correctly relied on established and binding precedent from this Court and the Supreme Court uniformly holding that the taking of water rights is

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[109] Appellee's Resp. Br. at 70, 76; Amici curiae, the California State Water Resources Control Board and NRDC, rely on *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), as support for their contention that a regulatory taking test should apply to the taking of water rights. In fact, the Supreme Court never reached the issue of which taking test applied, holding that the plaintiff lacked a constitutionally protected property right. Justice Holmes, writing for the Court, explained that one cannot acquire a property right to use riparian water rights outside state boundaries, without the state's permission: "A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end." *Hudson Cty. Water Co.*, 209 U.S. at 357.

[110] *Int'l Paper Co.*, 282 U.S. 399.

analyzed as a categorical taking.[111] Citing with approval *International Paper*, *Gerlach Live Stock Co.*,[112] *Dugan v. Rank*,[113] and *Casitas*,[114] the court explained that, because the Government caused the water to be diverted away from Klamath Farmers' land, the per se taking test applied.[115] The Supreme Court in *Horne v. Department of Agriculture*[116] explained the difference between regulatory takings, which are analyzed under the *Penn Central* test, and physical appropriations, which turn on the Government's possession and control of private property.[117]

The Supreme Court has long-recognized that, when the Government appropriates or "cut[s] off water being taken"[118] for public or third-party use, it affects a physical taking. In *International Paper*, the Niagara Falls Power Company leased a portion of its water to International Paper Company, which then diverted the water through a canal to its mill.[119] Niagara Power, at the direction of the United States, cut off this water supply to International Paper to increase power production for the war effort, which caused International Paper to idle its mill for

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[111] Appx50-51.
[112] *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).
[113] *Dugan v. Rank*, 372 U.S. 609 (1963).
[114] *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008).
[115] Appx46-47 (internal citations omitted).
[116] *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).
[117] *Id.* at 2428-29.
[118] *Int'l Paper Co.*, 282 U.S. at 405-06.
[119] *Id.* at 404-05.

roughly 10 months.[120] The Supreme Court concluded that this was a direct appropriation of water that the paper company had a right to use.[121]

In *Dugan v. Rank*, the Supreme Court specifically rejected the argument made by the Government that a physical taking requires the Government to actually physically invade claimants' land: "A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here."[122] This Court stated that the Government's appropriation of water should be analyzed as a physical taking.[123]

The Government further argues erroneously that, because "water rights are 'usufructuary,'" a physical taking has not occurred.[124] The CFC, however, has ruled that, when the Government prevents farmers from using water to which they are entitled and from exercising their usufructuary rights, it affects a physical taking: "[T]he denial of a right to the use of water accomplishes a complete extinction of all value."[125]

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[120] *Id.* at 404-06.
[121] *Id.* at 408.
[122] *Dugan*, 372 U.S. at 625.
[123] *Casitas*, 543 F.3d at 1290.
[124] Appellee's Resp. Br. at 71.
[125] *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001).

The Government relies on *Crow Creek Sioux Tribe v. United States*,[126] a recent decision holding that an Indian tribe failed to allege that the Government's diversion of water from a river amounted to a taking of the tribe's reserved water rights. This Court held that "[t]he Tribe's *Winters* rights . . . simply cannot be injured by government action that does not affect the Tribe's ability to use sufficient water to fulfill the purposes of the Reservation."[127] The case did not address the proper taking test to be applied, since the tribe there suffered no injury at all to its reserved water right.

The Government also relies on cases where it has, through regulation, prevented landowners or leaseholders from extracting a resource, such as coal or other minerals. But, this logic is faulty and inconsistent with precedent distinguishing physical, from regulatory, takings.[128] Water, by its nature, presents an entirely different circumstance because it cannot be recovered once it is diverted or withheld. As this Court explained in *Casitas,* the taking of water rights are properly analyzed as a permanent physical taking in instances because water not delivered is permanently gone. [129]

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[126] *Crow Creek*, 900 F.3d 1350.
[127] *Id.* at 1357.
[128] *Casitas*, 543 F.3d at 1296 (quoting *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002)).
[129] *Id.* at 1296.

The Government's argument that Reclamation did not cause water to be diverted away from Klamath Farmers' land is factually incorrect. Reclamation required that water artificially stored in the Klamath Project not be released for irrigation, where it would have gone but for Reclamation's actions, and additional water be released from the dam to flow downstream to benefit protected fish—a per se taking under *Casitas*.[130]

2. The CFC properly relied upon and applied *Casitas* in finding that the Klamath Farmers asserted a physical taking

The CFC correctly relied on *Casitas* in determining that Reclamation's 2001 actions amounted to a permanent physical taking subject to a per se taking analysis.[131] Relying on *Casitas*, the court correctly found that this case and *Casitas* are factually similar.[132] In *Casitas*, Reclamation "caused water to be diverted away from plaintiffs' property"[133] and used that water for "a government or third party use that served a public purpose."[134] Noting that the Government controls the Klamath Project,[135] the CFC rightly concluded that in 2001, Reclamation controlled water deliveries by telling Klamath Farmers that "no Project water shall

[130] Appx46-47.
[131] Appx49-51.
[132] Appx43-44.
[133] *Casitas*, 543 F.3d at 1290.
[134] *Id.*
[135] Appx46.

be diverted or used unless expressly authorized by Reclamation."[136] Also, Reclamation "caused Klamath Project water to be diverted away from"[137] Klamath Farmers.

Reclamation's actions were properly analyzed as a categorical taking, and the CFC's ruling should be affirmed.

III. Conclusion

The Klamath Farmers ask this Court to reverse and remand this case to the CFC for a determination of just compensation.

Respectfully submitted,

/s/ Nancie G. Marzulla

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[136] Appx3569.
[137] Appx46.

United States Court of Appeals for the Federal Circuit

CERTIFICATE OF SERVICE

I, Julian Hadiz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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October 11, 2018

/s/ Julian Hadiz
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