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End of a Long Dry Road: Federal Court Of Claims Rejects Klamath Farmers' Takings Claims

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In a seventy-five page opinion, the United States Court of Federal Claims in September brought to a bitter end takings litigation that began 16 years before, in 2001.[1] The opinion held that while several plaintiffs had property interests that were physically taken by the United States government, they could not pursue their takings claims because their water rights were junior to the earlier priority rights of the Klamath, Yurok, and Hoopa Valley Indian Tribes. This was so, the court held, even though those Tribal rights were unquantified and unenforced by the Tribes at the time of the taking. The case contains potentially useful analyses for future takings cases. But it also presents some disquieting conclusions from the perspective of traditional Western prior appropriation water law.

Background

One may remember the long lines of Klamath farmers protesting the Bureau of Reclamation's shut-off of water in the Klamath basin in 2001. That year brought a devastating drought. An Operations Plan prepared that year by the Bureau of Reclamation to conform to Endangered Species Act (ESA) biological opinions from the United States Fish and Wildlife Service and the National Marine Fisheries Service mandated that federal project water that otherwise would have gone to irrigators be left in Upper Klamath Lake (UKL) and in the Klamath River for the benefit of listed species.[2] The impact on farmers and communities in the region was severe. To help compensate for their losses, water users initiated a lawsuit in October of that year in the

Court of Federal Claims alleging takings under the Fifth Amendment to the United States Constitution, breach of the Klamath Compact, and breach of contract. The breach of contract claims were later dismissed, but the other claims crawled their way through litigation till they were barred in the recent opinion.

As one might expect an opinion of this length, the court covered a lot of ground, factually, procedurally, legally, contract by contract, claim by claim, with exceeding thoroughness. Several factors made the case especially complex. To begin with, there were different types of plaintiffs whose Klamath project water rights were characterized in somewhat different ways. There were the Klamath Irrigation District and Tulelake Irrigation District repayment contracts; the Warren Act contracts; settlement contracts with the Van Brimmer Ditch Company; and water rights associated with leased lands in the National Wildlife Refuges.[3] Those entities each had different forms of contract and contract histories with Reclamation. Adding to the complexity was the fact that water rights in the basin had not been quantified, but were grinding through the administrative processes of The Klamath Basin Adjudication (KBA) which began in 1975.

Then too, there were strong forces competing for the water that year. There are three Native American tribes, the Klamath, Yurok, and Hoopa Valley tribes (the Tribes) who assert Federal reserved water rights within their reservations to support the harvest of fish for tribal purposes in the basin's streams and lakes in Oregon (claimed by the Klamath Tribes under its 1864 treaty with the United States) and in California (claimed by the Yurok and Hoopa Valley tribes, pursuant to various presidential executive orders).[4] These water rights are asserted to exist from time immemorial. None of these rights were quantified in 2001.

The Klamath Project is also subject to ESA requirements.[5] Klamath Project operations potentially affect three species of fish protected under the ESA: the endangered Lost River Sucker (LRS); the endangered Short Nose Sucker (SNS); and the threatened SONCC coho salmon.[6] These species were the subjects of biological opinions issued in the spring of 2001. USFWS presented its final biological opinion in April 2001, and concluded that Reclamation's proposed operations plan was likely to jeopardize the continued existence of the LRS and SNS, and adversely modify their critical habitat.[7] The day after that opinion was released, NMFS issued its final biological opinion concluding that the proposed operation plan was likely to jeopardize the existence of some coho salmon and adversely modify its critical habitat.[8] The reasonable and prudent alternatives of those opinions required that Reclamation not divert water from UKL if surface elevations went below certain minimum lake levels. As a result of these

biological opinions, Reclamation announced a Revised 2001 Operations Plan in April 2001 that allocated no irrigation water to the farmers in the basin.[9]

In short, the spring of 2001 was a perfect storm of water demand and regulation at a time of extreme drought and need. The court briefly detailed the effect on farmers in the Klamath Basin. Essentially thousands of acres of crops died. Reclamation's late release of water did no good.[10] Some farmers received payments and reimbursements from various federal programs, but the remaining losses became the subject of this lawsuit.

Did the plaintiffs have cognizable property interests?

Of critical consequence in this case was the fact that it was brought by individuals whose beneficial interest in Klamath project water was deemed appurtenant to their lands. In response to questions earlier certified to it by the Court of Federal Claims, the Oregon Supreme Court concluded that the individual plaintiffs had equitable, beneficial interests in federal project water.[11] The Court's conclusion is important because in order to prevail in a takings claim case one needs a cognizable property interest. The three-factor test for determining, under Oregon law, whether plaintiffs acquired an equitable or beneficial property interest in their water right was:

> whether plaintiffs put the water to beneficial use with the result that it became appurtenant to their land, whether the United States acquired the water right from plaintiffs' use and benefit, and, if it did, whether the contractual agreements between the United States and plaintiffs somehow have altered this relationship.[12]

The first two elements of the test were admittedly satisfied.[13] It was clear plaintiffs put the water to beneficial use, and it was clear that in creating the Klamath project, the United States acquired the water rights within the appropriate legal authorities in order to organize water deliveries to those plaintiffs for their use and benefit. What was not clear was whether individual contracts had changed those interests. So, the federal court undertook a contract-by-contract analysis and came to the conclusion that with the exception of several plaintiffs,[14] the contracts did not alter their interest in their water right, or bar them from making a takings claim.[15]

Almost every Reclamation contract contains a standard disclaimer of liability for water shortages. A typical disclaimer states that:

> On account of drought, inaccuracy in distribution *or other cause*, there may occur at times a shortage in the quantity of water provided for herein, and while the

> United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States, its officers, agents or employees, for any damage, direct or indirect, arising therefrom, and the payments due hereunder shall not be reduced because of any such shortage.[16] [Italics added.]

Some of the Warren Act contracts at issue in the Klamath case contained this or a very similar disclaimer, but others had an important variation. The phrase "or other cause" was missing from contracts of four districts. These contract disclaimers read:

> The United States shall not be liable for failure or 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.[17]

The court found this to be a critical distinction because the phrase "or other cause" included water shortages arising from meeting the requirements of the ESA biological opinions.[18] But disclaimers in the Warren Act contracts that did not have that did not give Reclamation an out.[19]

The repayment contracts between Reclamation and Klamath Irrigation District and Tulelake Irrigation District contained a broad-form Reclamation exculpation from liability:

> On account of drought *or other causes*, there may occur at times a shortage in the quantity of water available in Project reservoirs and, while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States … for any damage, direct or indirect, arising therefrom and the payments to the United States provided for herein shall not be reduced because of any such shortages.[20] [Italics added.]

The key distinction in this contract situation, however, was that no plaintiffs were signatories to either of these Reclamation Repayment Contracts with the irrigation districts. Therefore, they were not bound by the contracts or the water shortage provisions in them.[21] The court found that the defendant did not provide any "alternative legal grounds arising outside of the language of the contract as to why individual landowners would be bound by their terms."[22]

The court found therefore that there was a select group of class members who "asserted cognizable property interests for which they may seek compensation from defendant…"[23]

But at this point we are only two thirds of the way through the opinion and some of the biggest challenges to plaintiffs' chances of success yet remain on this long road. The first is the thorny question of whether those cognizable property interests can be regarded as eligible for a takings analysis under applicable law, and if so, what form should that analysis take? Then one must ask: would the diversion of water for ESA purposes be a considered physical taking or a regulatory taking? And finally, would the loss of water in 2001 be deemed a permanent taking or a temporary taking? After that, we come around the final turn and encounter the biggest and ultimate hurdle: the effect of senior Tribal rights. Before we get there, let us briefly review the court's holdings on the takings questions.

Was plaintiffs' property taken or impaired?

To answer the question whether the eligible plaintiffs' interests were taken or impaired, the court needed to decide whether Reclamation's actions constituted a regulatory or a physical taking. These are the two broad frameworks of takings jurisprudence currently active in this country.[24] The court decided that the government's actions "should be analyzed under the physical takings rubric."[25]

The United States had insisted that it did not actually operate the Klamath project diversion works, or physically redirect the water to or from UKL or the Klamath River. Having taken no physical action with regard to Project water diversions, it could not have physically taken the water.[26] All Reclamation did, it argued, was to issue instructions which impaired the use of the project water, but that did not constitute a physical taking. Defendant argued that "[i]nstructions are not physical actions."[27] But the court found this argument incorrect as a matter of law, finding that diversions were clearly controlled by the government. Reclamation wrote to the irrigation districts in March 2001 stating that "no Klamath project water could be diverted … without the Bureau of Reclamation's express authorization."[28] The government's letter was taken as an order. The government effectively took control of the diversion operations, and this was deemed a physical appropriation of water because it "caused the water to be diverted away from plaintiffs' property."[29]

Was the taking temporary or permanent?

The government argued that if its actions were to be considered as physical takings, the court should analyze them as temporary rather than as permanent. This is because water rights are appurtenant to the land, and perpetual, whereas the interruption in water use occurred only in 2001.[30] The court rejected this argument and held that the size and scope of the physical invasion is immaterial; even if the government physically appropriates only a tiny slice of a person's holdings a takings has occurred and compensation must be provided.[31] The water that plaintiffs were deprived of in 2001 is "gone forever"[32] and as such the taking was not temporary.

Senior Tribal rights: the coup de grace to the irrigators' junior claims

The United States' last line of argument was that the government did not take plaintiffs water rights because the plaintiffs' water rights were already subordinate to those of the Klamath, Yurok, and Hoopa Valley Indian Tribes. The United States argued that the amount of Klamath Project water needed to satisfy the Tribes' rights was "at least equal to the quantity needed to satisfy the requirements of the Endangered Species Act…"[33] In addition, it argued that Reclamation's Revised 2001 Operations Plan showed that the water hold-back was based in part on the government's obligation to "satisfy its trust obligation towards the Tribes to supply the water to meet their senior water rights."[34]

The court found these arguments persuasive. It laid out the well-settled legal bases for Tribes' water right claims, including the statement that the Tribes reserved rights are senior to those of all plaintiff users with a priority date of "time immemorial."[35] The court followed this discussion with an in-depth analysis of the two biological opinions, with the aim of showing that the "Tribal water rights were at least co-extensive to the amount of water that was required by defendant to satisfy its obligations under the Endangered Species Act…"[36]

The court thus ended its arduous analysis of contracts, takings law, tribal water rights, and biological opinions with the holding that there was, after all, no taking or impairment because plaintiffs' water rights are (as we know) junior to Tribal rights:

> Although the court recognizes that many plaintiffs, including those who testified before the court, were severely and negatively impacted by the government's actions, the government's decision in 2001 to withhold water from plaintiffs in order to satisfy its Endangered Species Act and Tribal Trust obligations did not constitute an improper taking of plaintiffs water rights or an impairment of plaintiffs' water rights because plaintiffs' junior water rights did not entitle them to receive any Klamath Project water in 2001. For the same reason, the

government's actions did not improperly impair plaintiff's right to Klamath Project water in violation of the Klamath Compact.[37]

Concluding comment

While the court's analyses of the contracts and of the nuances of takings law was presented in commendable detail, one wonders whether all of it was entirely necessary, given the final rationale for the holding. It is indisputable that the Tribal water rights have time-immemorial priority, senior to all other water rights, a conclusion unchallenged by plaintiffs. This legal fact, obvious as it was from the first page of the opinion, became decisive to the entire case six dozen pages later. "Based on the superior water rights held by the Klamath, Yurok, and Hoopa Valley Tribes … the remaining class members were not entitled to receive water in 2001. The government's actions in 2001, did not, therefore, constitute a taking of these plaintiffs property…"[38]

The surprise ending to this complex mystery is that whole case turned on the simple, traditional, Western water right rule that a junior user cannot complain when a senior appropriator takes his water. A junior user cannot cry foul – or apparently claim a taking – when his right to the use of water was always subject to dispossession by a senior appropriator's prior right to use. But should this be true when the senior user never made a call on his water? What if he could not have made his call under State law?

The conclusion to the case did not appear to be as thoroughly analyzed as the other, technical, matters that ultimately had no bearing whatever on its outcome. For example, from a traditional, prior appropriation water rights perspective, it is not necessarily obvious (at least to this author) that the existence of an unquantified Tribal right upon which no call was made, or injunction sought, means that the plaintiffs had no right to the use of their water; more, that they were not "entitled" (to use the court's words) to receive their water.[39] The court seemed to be saying that if, hypothetically, the Tribes could have sought to enforce their rights in 2001, whether or not they actually did so, that hypothetical case was good enough to take the United States completely off the hook for any takings liability.[40]

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[1] *Lonny Bailey v. United States*, 2007-5115 (U.S. Ct. of Fed. Claims, 2017) (herein referred to as the Opinion). A copy of the opinion may be found at https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2001cv0591-567-0.

[2] Reclamation issued a Revised 2001 Operations Plan on April 6, 2001, that had the effect of terminating the delivery of irrigation water from UKL to the plaintiffs. The only relief came in July 2001, when the Bureau of Reclamation finally released approximately 70,000 acre-feet of water. *Opinion* at 22.

[3] *See Opinion*, 2-12 for a description of the contracts.

[4] These rights are more particularly described in the *Opinion*, at 12-14.

[5] 15 U.S.C. §1531, et seq. In an earlier case, certain Klamath water users raised the question of whether their rights were subservient to the ESA. The federal District Court in Oregon answered an emphatic yes. *See Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) *amended* by 203 F.3d 1175 (9th Cir. 2000).

[6] *Opinion* at 16.

[7] These biological opinions followed Reclamation's own Biological Assessments, forwarded to the respective services earlier that year, concluding that the operation of the Project result was likely to adversely affect each of those species in violation of the ESA. *Opinion* at 18.

[8] *Opinion* at 18-22.

[9] *Opinion* at 21.

[10] Reclamation's July release of 70,000 acre-feet of water from UKL was described as "too little, too late." *Opinion* at 22-23.

[11] *Opinion* at 38.

[12] *Id.*, *citing Klamath Irrigation District v. United States*, 635 F.3d at 515 (quoting *Klamath Irrigation District vs. United States*, 227 P.3d at 1169.)

[13] The Oregon Supreme Court stated that the first two factors suggested that plaintiffs acquired a beneficial or equitable property interest in the water right to which the United States claimed legal title. It could not provide an answer on the contract issues because all the agreements were not before the court. *Opinion* at 38.

[14] *See, e.g.*, *Opinion* at 46-48. "Therefore, the shortage provisions in Warren Act contracts which immunize the United States from liability due to 'other causes' are

applicable in the present case. As such, plaintiffs whose claims arise from water they receive from Irrigation Districts whose contracts with the United States contain such shortage provisions … have had their beneficial rights to receive Klamath Project water altered in such a way that they are barred from seeking compensation for a taking under the Fifth Amendment or an impairment under the Klamath Compact of those rights in 2001." *Opinion* at 47. The court also held that "plaintiffs who leased lands in the National Wildlife Refuges are barred from recovering damages based on the denial of water to those lands." *Opinion* at 48. The reason was that those leases provided broadly that the United States "shall not be held liable for damages because irrigation water is not available." *Id.*

[15] Pre-project homesteaders under "Form A and B" applications which contained water shortage exculpation provisions benefiting Reclamation were issued patent deeds. These patents did not contain such exculpations. The court found that the doctrine of merger applied to extinguish the applications and no disclaimer would be applicable to these water users. *Opinion* at 40-42.

[16] This disclaimer is quoted from *Opinion* at 10, and is found in six of the district plaintiffs' Warren Act contracts.

[17] *Opinion* at 10.

[18] "In the circumstances of the present cases, the presence or absence of the two words 'other cause' in a Warren Act contract is dispositive. Although 2001 was a dry year, the Bureau of Reclamation's statements in 2001 make clear that the reason the Bureau refused to supply water to the plaintiffs in 2001 was not because of drought, but because of what it perceived as the requirements of the Endangered Species Act as set forth in the FWS and NMFS Biological Opinions and of its tribal trust obligations toward the Klamath, Yurok and Hoopa Valley tribes." *Opinion* at 45.

[19] The court's contract-by-contract analysis is found in the *Opinion* at 38-48.

[20] *Opinion* at 8. The cited KID contract was dated November 29, 1954. The TID contract was dated September 10, 1956 and contained the identical water shortage provision. *Id.*

[21] The contracts were signed only by the districts, and not by landowners. It was conceded that the landowners' water rights were already appurtenant to their lands within these districts, prior to the creation of the districts. There was no evidence that any landowner assumed the obligations of the contracts. *Opinion* at 42-43.

[22] *Opinion* at 43.

[23] *Opinion* at 48. The claims of Van Brimmer Ditch Company shareholders was dismissed for technical reasons based in part upon its position in the Klamath Basin Adjudication. *Opinion* at 31-38.

[24] *Opinion* at 48. "A permanent physical taking involves a 'permanent physical occupation of property' and is treated as a per se taking for which the government must pay compensation regardless of the circumstances." (Citations omitted.) On the other hand, regulatory takings "involve 'restrictions on the use of… property,' and determining whether such restrictions constitute a compensable taking requires 'balancing and 'complex factual assessments' utilizing the so-called *Penn Central* test.'" (Citations omitted). *Id.*

[25] *Opinion* at 49. The court relied heavily on Casitas *Municipal Water District v. United States*, 543 F.3d 1276 (Fed Cir. 2008)(*Casitas*), a recent physical takings case involving water rights.

[26] *Opinion* at 52.

[27] *Id.*

[28] *Opinion* at 52-53

[29] *Id.*

[30] *Opinion* at 56-57.

[31] *Opinion* at 57.

[32] *Opinion* at 59, citing Casitas at 1294 n.15.

[33] *Opinion* at 60.

[34] *Id.*

[35] *Opinion* at 62. The full discussion of the well-settled law of Tribal water rights is found in the Opinion at 60-66.

[36] *Opinion* at 74. The full discussion of the interaction between the requirements of the ESA and the Tribal water rights is found at *Opinion* 64-74.

[37] *Opinion* at 74.

[38] *Opinion* at Opinion at 75.

[39] The court relied partly on *Winters v. United States* 207 U.S. 564 (1908) involving a Tribal claim for injunctive relief to prevent the off-reservation diversion of water from Fort Belknap Indian reservation to protect unquantified Tribal water rights. *Opinion* at 65.

[40] In the present context, it is interesting to recall that in 2001, the Klamath adjudication had not yet issued a single Finding of Fact and Order of Decision (FFOD) quantifying anyone's rights. The administrative phase of the Klamath Basin Adjudication, including contested case hearings on pre-1909 water rights and the FFODs arising from those hearings were more than a decade in the future, Tribal rights being the last on the list to be quantified. It has also been the case that in Oregon, calls on unquantified water have not generally been enforceable; the Oregon Water Resources Department, consistent with ORS 539.170, began enforcing calls (including as to Tribal rights) only after FFODs were issued. Nor is there any indication in this case that the Tribes in 2001 tried to call or enjoin any water diversions from UKL.

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