Author: Brian E. Gray
Source: Hastings West–Northwest Journal of Environmental Law & Policy
Citation: 9 Hastings W.–Nw. J. Envtl. L. & Pol'y 1 (2002).
Title: The Property Right in Water

Originally published in HASTINGS WEST–NORTHWEST JOURNAL OF ENVIRONMENTAL LAW & POLICY. This article is reprinted with permission from HASTINGS WEST–NORTHWEST JOURNAL OF ENVIRONMENTAL LAW & POLICY and University of California, Hastings College of the Law.
I. Introduction

"We have the water rights. We weren’t allowed to use them. So they took our private property away.”

—Mike Byrne, a Tulelake farmer and plaintiff in Klamath Irrigation District v. United States, No. 01-591 L (Fed. Cl. 2001). 1

“A lot of the subsidized farming in the Klamath Basin can be replaced. These endangered species cannot.”

—Wendell Wood, Southern Oregon Field Representative for the Oregon Natural Resources Council. 2

The debate over takings and water rights suffers from bipolar disorder. Consumptive water users—some of whom have relied for generations on the West’s developed water resources—believe that their rights are vested and inviolable. Environmentalists—who have successfully argued that many of our river systems have been overdeveloped to the detriment of fish, wildlife, and water quality—deny that these users have any property


2. Eric Bailey, “Farmers Seek U.S. Help to Regain Water Diverted to Protect Fish,” L.A. Times, July 4, 2001, § 2, p. 8 (reporting the filing of an application to convene an “Endangered Species Committee”—i.e., God Squad—to review the biological opinions for the Klamath Project that resulted in the elimination of water service to more than 200,000 acres of farmland in the basin).
or contract rights to divert water under circumstances that harm environmental interests.

These opposing views of water rights illustrate a fundamental tension in water rights law. On the one hand, water rights are recognized as property under both state and federal law, and the holders and beneficiaries of these rights have legitimate reliance interests in the continued supply of water. In the Klamath Basin, for example, some users (or their predecessors) have been farming for more than 100 years. As one Tulelake resident has put it, "My grandfather homesteaded in 1939 and was given the promise that water would be there to irrigate his farm. The devastation for our family and friends is unbelievable." On the other hand, water rights are a unique form of property—limited by hydrologic variability, competing demands, the doctrines of reasonable and beneficial use, and in some states overtly environmental laws such as the public trust and statutory directives to protect instream flows and water quality. Moreover, in those situations where water is supplied by contract (such as in the Klamath Project and other components of the federal reclamation system), the terms and conditions of water service set forth in those contracts also may limit the water users' property rights. The first question in all water rights takings cases therefore is: Does the plaintiff in fact possess water rights (or contract rights to water service) that allegedly have been impaired by government action or regulation?

II. Private Property and Takings

"The just compensation clause requires compensation for the taking of property, which is to say the taking of a thing, tangible or intangible, recognized by law as property."

3. William Kittredge, Balancing Water: Restoring the Klamath Basin 52-57 (2000). The Klamath Project, one of the oldest in the federal reclamation system, was authorized by Congress in 1905. Water deliveries began in 1910. Id.

4. Peter Hecht, "Scientific Review of Klamath Irrigation Shutoff Begins," Sacramento Bee, Nov. 11, 2001 (quoting Bill Heiney, who was able to irrigate only eight percent of his normal planting of mint, alfalfa, potatoes, and sugar beets on his 500 acre farm).


The Fifth Amendment to the Constitution sets forth the elements of takings claims in grammatical sequence: "Nor shall private property be taken for public use without just compensation." As the text indicates, before property may be "taken," there must exist "private property" capable of being taken. The Supreme Court has made clear in several important decisions that the plaintiff in takings cases must establish that he or she possesses property rights vis-à-vis the government, which the government has taken either by eminent domain or by regulation. If the plaintiff cannot prove such a property right, the takings claim fails ab initio.

Two cases involving the federal navigational servitude are illustrative. In United States v. Rands, the plaintiffs owned land along the Columbia River near the confluence with the John Day. They leased the land to Oregon with an option to purchase. The state planned to use the property as an industrial site and port. If Oregon exercised this option, however, it would have had to pay market value for the land in the John Day Lock and Dam Project. Instead, the United States then condemned the Rands' land as part of the John Day Lock and Dam Project and subsequently transferred fee title to the state "at a price considerably less than the option price at which respondents had hoped to sell." In the condemnation case, the Government asserted the federal navigational servitude and argued that all value in the land attributable to its proximity to the Columbia River must be excluded from the determination of "just compensation." The district court agreed and decided that the compensable value of the

5. U.S. Constitution, Amendment V. The takings clause is applicable to the states through the due process clause of the Fourteenth Amendment. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465, 1470 n.1 (2002).


7. Id. at 122.
property should be "limited to its value for sand, gravel, and agricultural purposes and that its special value as a port site could not be considered. The ultimate award was about one-fifth the claimed value of the land if used as a port." 8

In upholding the district court's application of the federal navigational servitude, the Supreme Court concluded that the plaintiffs did not have property rights vis-à-vis the United States in any aspect of their property subject to the servitude. These included the flow of the water in the Columbia River, the submerged lands below the median high water mark, access to the water, and other values attributable to the property's proximity to the river. According to the Court, "these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States." 9

United States v. Cherokee Nation of Oklahoma 10 applied the principles of Rands to an alleged regulatory taking. The Cherokee Nation, which held fee title to the bed and banks of the Arkansas River, sued the United States for just compensation for damage to its interests caused by the Army Corps of Engineers' construction of navigational improvements in the river. The Tribe claimed that the treaty that conveyed fee title to the riverbed also abrogated the federal navigational servitude. The Supreme Court held that the servitude may be waived only by express and unmistakable language in the treaty. Because the treaty was silent on the question, the United States retained its paramount authority under the federal navigational servitude. As in Rands, the Court concluded, "the tribal interests at issue here simply do not include the right to be free from the navigational servitude, for exercise of the servitude is 'not an invasion of any private property rights in the stream or the lands underlying it.'" 11

The principle that a takings claimant must first establish the existence of a property right against the government is frequently overlooked, or misunderstood, both by courts and litigants. Indeed, in the two most prominent pending takings cases involving water and contract rights, the distinction between property rights and takings has been inappropriately blurred. In Tulare Lake Water Storage District v. United States, 12 the Court of Federal Claims decided that a reduction in water service to several California State Water Project contractors—which was caused by a combination of drought and the application of the Endangered Species Act—was a taking of the contractors' property. The court reached this conclusion, however, before it determined either that the plaintiffs' SWP contacts gave them the right to water service under these conditions of shortage or that the United States' implementation of the Endangered Species Act violated the underlying water rights for the project. 13 Similarly, the plaintiffs in the Klamath Basin takings case, Klamath Irrigation District v. United States, 14 have alleged that the reduction in water service from the Klamath Project, also caused by drought and endangered species obligations, was a taking of their water rights without just compensation. The complaint ignores the fact that the plaintiffs' rights to water service from the project are defined by the contracts by which the Bureau of Reclamation delivers water to them. For takings purposes, whatever water rights the plaintiffs may possess have been superceded by the terms and conditions set forth in those water contracts. 15

8. Id.
9. Id. at 126.
11. Id. at 708 (quoting Rands, 389 U.S. at 123).
13. Tulare Lake will be the focus of part III of this article.
15. The Klamath takings litigation will be a focus of part IV.
If the first question in any takings case then is whether the plaintiffs actually own “property” vis-à-vis the government, the more intriguing next question arises: What exactly is the property right in water? The answer is layered and in some cases elusive. A water user’s rights may be found in contracts, permits and licenses, administrative orders, statutes, state constitutions, judicial opinions, common law doctrines, and combinations thereof.

III. Water Rights and Takings.

“While plaintiffs correctly argue that a property right cannot be taken or damaged without just compensation, they ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the reasonable use of the flow of the water... There is now no provision of law which authorizes an unreasonable use or endows such use with the quality of a legally protectible interest merely because it may be fortuitously beneficial to the lands involved.”


Water rights are a unique form of property, because the property right in water is limited (or rendered less certain) by a variety of factors that seldom affect real property and other property rights. These limitations are both physical and legal. They include:

• the common nature of the resource (which is shared not only by water right holders and other consumptive users, but also by in situ uses such as fish and wildlife, aquatic and riparian habitat, water quality, and other environmental uses);

• hydrologic variability and consequent uncertainties regarding the availability of water for diversion, storage, and distribution;

• ambiguities in quantification and priority, as well as inaccuracies in the measurement of diversion, use, and return flow;

• tensions between privatization of the resource through the water rights system and declarations of state ownership of all water resources; and

• express limitations on the property right in water—such as reasonable and beneficial use, the federal navigational servitude, and the public trust—that are designed to protect the common and public interest.

The concept of a “vested” water right—protected by the Fifth and Fourteenth Amendments from takings without payment of just compensation—is defined by these physical and legal limitations.\(^6\) As a consequence, both the states and the federal government have broad authority to regulate the appropriation and use of water—without violating the property rights of water right holders and other water users—to protect fish, wildlife, water quality, and other aspects of the natural environment. The most general, and important of the limitations embodied in the water right is the doctrine of reasonable and beneficial use. Application of the doctrine is heavily dependent on the facts of each case, and the definition of reasonable and beneficial use varies from state to state. To understand how the doctrine works as a potential limitation on the property right in water, therefore, it is best to look at one case—the most significant water rights takings case litigation to date—Tulare Lake Water Storage District v. United States.\(^7\)

As with the other cases discussed in this article, Tulare Lake arose out of the application of the Endangered Species Act to long-stand-

\(^{16}\) The California Supreme Court explained the link between hydrologic forces and the unique features of the water right in Peabody v. City of Vallejo, 2 Cal. 2d 351, 368, 40 P.2d 486, 491 (1935): “The waters of our streams are not like land which is static, can be measured and divided and the division remain the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in nowise remains the same. When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield.”

\(^{17}\) 49 Fed. Cl. 313 (2001). For a detailed analysis of the Tulare Lake litigation, see Melinda Hart Benson, Tulare Lake Case: Water Rights, the Endangered Species Act, and the Fifth Amendment, 32 Environmental Law 551 (2002).
ing water supply arrangements. This is no coincidence, because the Endangered Species Act presents the starkest contrast between the ancien régime—the era of seemingly limitless water resources development—and our contemporary world in which consumptive users must compete both with each other and with the natural environment for the developed (and, in many cases, overextended) water resources. As Judge John Paul Wiese noted at the outset of his opinion in the case, the decisions made by the National Marine Fisheries Service and the United States Fish and Wildlife Service to protect the Sacramento River Winter-Run Chinook Salmon and the Delta Smelt—"specifically by restricting water outflows in California's primary water distribution system—bring together, and arguably into conflict, the Endangered Species Act and California's century-old regime of private water rights."\(^{18}\)

The plaintiffs in Tulare Lake are four California water agencies, as well as several water users within the agencies, that receive water by contract from the California State Water Project.\(^{19}\) The SWP is owned and operated by the California Department of Water Resources, which also holds the water rights for the project. Pursuant to a 1985 agreement, DWR coordinates its operation of the SWP with the Bureau of Reclamation's operation of the Central Valley Project.\(^{20}\) One consequence of the Coordinated Operation Agreement is that DWR's ability to supply water to customers of the SWP is governed by the consultation requirements of section 7 of the Endangered Species Act, which without the agreement would apply only to the Bureau of Reclamation's operation of the CVP.\(^{21}\) At the time the litigation arose, two species of fish that inhabit the Sacramento-San Joaquin River and Delta water system—the Winter Run Chinook Salmon and the Delta Smelt—had been listed for protection under the Act.\(^{22}\) The biological opinions for the coordinated operation of the two projects for water years 1992-1994 gave rise to the plaintiffs' takings claims against the United States.\(^{23}\)

The reasonable and prudent alternatives set forth in the biological opinions led to significant changes in both CVP and SWP operations, including restrictions on pumping to protect in-migrating adult salmon and out-migrating juveniles, the routing of additional flows from the Sacramento River away from the interior channels of the Delta into the Carquinez Strait and San Francisco Bay, and compliance with temperature and salinity standards to protect both species of fish during their respective spawning seasons. Among the immediate consequences of these changes were shortages in both the CVP and SWP systems. Most CVP agricultural contractors located south of the Delta received only about half of their stated contract supplies in 1993,\(^{24}\) and SWP contractors incurred signifi-

\(^{18}\) Id. at 314.

\(^{19}\) Two of these agencies—the Tulare Lake Basin Water Storage District and the Kern County Water Agency—have contracts with the SWP water service. The others two agencies—Lost Hills Water District and Wheeler Ridge-Maricopa Water Supply District—have subsidiary contracts with Tulare Lake and KCWA. Id. at 315.


\(^{21}\) Section 7 requires federal agencies such as the Bureau of Reclamation to consult with NMFS or USFWS 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 destruction or adverse modification" of the species' critical habitat. 16 U.S.C.A. § 1536(a)(2).


\(^{23}\) NMFS issued biological opinions on the effects of joint project operations on the Winter-Run Salmon for all three water years in question. Because of the later listing of the Delta Smelt, USFWS issued biological opinions only for water years 1993 and 1994. See Tulare Lake, 49 Fed. Cl. at 315-16.

\(^{24}\) The litigation over the CVP water service deficiencies is analyzed in Part IV.
cant shortages as well. Tulare Lake alleged that the restrictions on project operations set forth in the biological opinions deprived its users of 58,820 acre feet during water years 1992-1994. KCWA claimed that DWR's compliance with the biological opinions cost its users 319,420 acre feet over the same period. 25 Although these shortages were partly the result of prolonged drought—water years 1987 through 1992 were either dry or critically dry years—there also is no question but that the Endangered Species Act contributed to the water supply deficiencies by mandating the reallocation of water from consumptive uses in the CVP and SWP systems to the in situ needs of the two protected species of fish. The water shortages at issue in Tulare Lake thus resulted from a hybrid drought—a drought caused by both hydrologic and regulatory forces.

The Court of Federal Claims has concluded that the United States is legally responsible for these water shortages and must pay the Tulare Lake plaintiffs just compensa-

tion for taking their property. 26 Judge Wiese based his decision on three grounds.

First, he held that the application of the Endangered Species Act to reduce the plaintiffs' water supplies did more than simply frustrate the performance of their State Water Project contracts. 27 Rather, "[t]hose contracts confer on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of [the SWP] permits. That right remains in place until formally changed by administrative process." 28 Because the reasonable and prudent alternatives imposed on the project by NMFS and USFWS deprived the plaintiffs of this right of use, the court concluded, the Government engaged in a taking of their property. 29

Second, Judge Wiese ruled that the reduction in the plaintiffs' SWP water deliveries was a per se taking under the permanent physical occupation rule of Loretto v. Manhattan Teleprompter CATV Corp. 30 The court analogized

25. See 49 Fed. Cl. at 316. Tulare Lake's SWP normal allocation is 118,500 afa, while KCWA's contract allotment is 1,153,400 afa. Id. at 315. All of the SWP contracts provide, however, that "neither the state nor any of its officers, agents, or employees shall be liable for any damage, direct or indirect, arising from shortages . . . caused by drought, operation of area of origin statutes, or any other cause beyond [their] control." California State Water Project Contracts ¶ 18(f); see 49 Fed. Cl. at 320.

26. At this writing, the United States has decided not to seek an interlocutory appeal, and the parties are preparing to present evidence on damages.

27. The United States argued that the Act rendered full performance of the SWP contracts illegal and thus simply frustrated the contractors' expectations. Accordingly, the Government neither appropriated the contracts themselves, nor engaged in a taking of the underlying right to full water service. See 49 Fed. Cl. at 317.


29. Judge Wiese rejected the United States' reliance on Omnia Commercial Co. v. United States, 261 U.S. 502 (1923), in which the Supreme Court held that the Government did not take Omnia's property when it requisitioned Allegheny Steel Company's entire production of steel plate during World War I. Omnia had a contract with Allegheny to purchase large quantities of steel plate at below-market price and claimed that the United States' preemption of this contract violated its Fifth Amendment rights. The Supreme Court held that the Government did not take Omnia's property, because the takings clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." Id. at 510 (citation omitted). In Tulare Lake, Judge Wiese distinguished Omnia on the ground that the plaintiffs' SWP contract rights to water were more "matured." "Unlike the situation in Omnia, where the plaintiff could claim only a contract expectancy but not an ownership right in the steel, our plaintiffs can claim an identifiable interest in a stipulated volume of water." 49 Fed. Cl. at 318.

The court's contract analysis is questionable. For what is an executory contract right if not an "ownership right" in the steel, water, or other good or service the contractor has been promised? More relevant to this article, however, is the antecedent conclusion that the SWP contractors have "an identifiable interest in a stipulated volume of water." As explained in the text that follows, this definition of the property right in water is incorrect under California water rights law.

the case to *United States v. Causby.* in which
the Supreme Court held that the Government
was liable for the invasion of airspace imme-
diately above the plaintiffs' land by military
planes taking off and landing at a nearby air-
field. Judge Wiese also relied heavily on
three other cases in which the Supreme Court
suggested that the construction and opera-
tion of the CVP (and consequent interference
with downstream water rights) was tantam-
ount to an invasion of land and therefore
was a taking of property.22

Third, "[h]aving concluded that a deple-
tration of water amounts to a physical tak-
ing"—not to mention an abridgement of
contract rights—Judge Wiese then turned "to
the question of whether plaintiffs in fact
owned the property for which they seek to be
compensated."33 As noted at the outset, the
court's analysis of this question as something
of an afterthought is backward, because there
can never be a taking of property or breach of
contract unless the plaintiffs in fact possess
the property or contract rights that form the
basis of their claim for just compensation.

The United States argued that the plain-
tiffs simply did not have rights to water ser-
vice under the conditions that gave rise to the
litigation: prolonged drought; water
shortages among consumptive users; com-
petition between consumptive users and in-
stream uses over available supplies; and valid
regulatory judgments made by NMFS and
USFWS that the projects could not fully ex-
ercise their appropriative rights without jeop-
ardizing the Winter-Run Chinook Salmon and
the Delta Smelt. Under these circumstances,
the Government contended, fundamental
limitations on the water rights for the
SWP—and, hence, the plaintiffs' derivative
rights as project contractors—came into play.
The 'plaintiffs' contract rights are subject to
the public trust doctrine, the doctrine of rea-
sonable use, and common law principles of
nuisance, all of which provide for the protec-
tion of fish and wildlife. To the extent that
the reductions in the water supply that plain-
tiffs suffered are designed to advance those
interests, . . . the reductions merely reflect the
limitations of title inherent in the background
principles of state law, [and] no right to com-
ensation attends the assertion of such back-
ground principles."34

Judge Wiese rejected the Government's
characterization of the plaintiffs' property
rights in the water supplied by the SWP. He
based his decision on the water rights per-
mits for the project, which were modified by
the California State Water Resources Control
Board in a 1978 decision that is commonly
known as Decision 1485 or simply "D-1485."35
The Board adopted Decision 1485 concur-
rently with its promulgation of ambient water
quality standards for the Delta.36 As the Cali-
ifornia Court of Appeal has explained,

In the Plan, the Board set new water
quality standards to protect fish and
wildlife and to protect agricultural, in-
dustrial and municipal uses of Delta
waters. In the Decision, the Board
modified the permits held by the U.S.
Bureau and the DWR to compel the
projects to release enough water into
the Delta or to reduce their exports
from the Delta so as to maintain the

---

31. 328 U.S. 256 (1945).
32. 49 Fed. Cl. at 319. Judge Wiese cited *United
States v. Gerlach Livestock Co.,* 339 U.S. 725 (1950),
and *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275
(1958), and quoted the Court's declaration in *Digan v.
Rank,* 372 U.S. 609, 625 (1963), that a "seizure of water
rights need not necessarily be a physical invasion of land.
It may occur upstream, as here." He rejected the United
States' attempt to distinguish these cases on the ground
that "each involved actual diversions of water by the gov-
ernment for its own consumptive use, whereas here, it is
claimed, the government has merely regulated the plain-
tiffs' method of diverting water." *Id.* Judge Wiese did not
explain why he believed this factual distinction was of no
consequence.
33. *Id.* at 320.
34. 49 Fed. Cl. at 320.
35. California State Water Resources Control Board,
Water Right Decision 1485: Sacramento-San Joaquin Delta
and Suisun Marsh (1978).
36. California State Water Resources Control Board,
Water Quality Control Plan: Sacramento-San Joaquin Delta
and Suisun Marsh (1978).
water quality standards set in the Plan.\footnote{37}

According to Judge Wiese, because the Water Quality Control Plan and Decision 1485 focused \textit{inter alia} on fish and allocated the available water to the SWP (and the CVP) based on the water requirements of the fish and other \textit{in situ} uses, the diversion rights set forth in D-1485 define the Department of Water Resources' (and its contractors') water rights:

Once an allocation has been made—as was done in D-1485—that determination defines the scope of plaintiffs' property rights, pronouncements of other agencies notwithstanding. While we accept the principle that California water policy may be ever-evolving, rights based on contracts with the state are not correspondingly self-adjusting. Rather, the promissory assurances they recite remain fixed until formally changed. In the absence of a reallocation by the State Water Resources Control Board, or a determination of illegality by the California courts, the allocation scheme imposed by D-1485 defines the scope of plaintiffs' contract rights.\footnote{38}

Judge Wiese acknowledged that all California water rights are subject to the requirement of reasonable use, the public trust doctrine, and principles of nuisance law, but he rejected the United States' argument that the plaintiffs' rights to water service were limited by these rules during the three water years at issue. Were it not for the restrictions imposed by the biological opinions, he noted, Decision 1485 allocated sufficient water to DWR to enable it to provide full water deliveries to its contractors. The delivery of project water to the plaintiffs therefore could not be termed a nuisance under existing principles of California law, because that allocation "was specifically authorized by the state in D-1485."\footnote{39} Although the SWRCB subsequently declared these project operations to be illegal to the extent they were inconsistent with the reasonable and prudent alternatives established by NMFS and USFWS, Judge Wiese observed that this modification of the SWP water rights permits occurred in 1995—"after the period in dispute, and cannot therefore be construed as altering the scope of plaintiffs' contract rights for the 1992-1994 period."\footnote{40}

Nor would the court accept the Government's invitation to consider whether full water service to the plaintiffs—under conditions that the fisheries services believed would be likely to harm the Winter-Run Chinook Salmon and the Delta Smelt—would have violated the reasonable use doctrine and the public trust. These laws "require a complex balancing of interests," Judge Wiese explained, and call for "an exercise of discretion for which this court is not suited and with which it is not charged."\footnote{41} He concluded that "[i]t is the Board that must provide the necessary weighing of interests to determine the appropriate balance under California law between the cost and benefit of species preservation. The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."\footnote{42}

38. \textit{Id.} at 322.
39. \textit{Id.} at 323.
40. \textit{Id.} at 322.
42. \textit{Id.} at 324. Judge Wiese also decided that the shortage provision in the SWP contracts protected only the State from liability for water supply deficiencies "caused by drought, operation of an area of origin statutes, or any other cause beyond its control." California State Water Project Contracts \textsection{18}(f); see supra note 26. According to the court, this contract term "insulates DWR from liability for circumstances beyond its control; not the federal government." 49 Fed. Cl. at 321 (emphasis in original). Nor does it "render plaintiffs' interest in the water contingent; it merely provides DWR with a defense against a breach of contract action in certain specified circumstances. With that exception, plaintiffs' contract rights are otherwise fully formed against DWR, and certainly against a third party [viz. the United States] seeking to infringe on those rights." \textit{Id.}

This aspect of the court's analysis is correct. The exemption from liability set forth in the shortage provision of the contracts expressly applies only to the State and its officers, agents, and employees, and the court properly re-
Reluctant to delve into the nuances of the reasonable use and public trust doctrines, the Court of Federal Claims seized on Decision 1485 as the conclusive definition of the water rights for the State Water Project and hence the plaintiffs’ derivative rights to water service from the project. In essence, the court decided that an appropriator is legally entitled to engage in (and has property rights to) any conduct that is authorized by its water rights permit or license. This interpretation oversimplifies—and therefore misapprehends—the nature of California water rights.

The California Constitution declares that the right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. The doctrine of reasonable use applies to all uses of water, including water appropriated and distributed by the State Water Project. Whether a specific use of water under particular circumstances is reasonable depends on the facts of each case. Moreover, the definition of reasonable use is a dynamic and utilitarian concept. As the California Supreme Court has stated: “What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes . . . . [R]easonable use of water depends on the circumstances of each case; and such an inquiry cannot be resolved in vacuo from statewide considerations of transcendent importance.”

The California courts have applied the doctrine of reasonable use to overturn longstanding priorities of water rights, and they have held that consumptive uses of water based on appropriative rights may become unreasonable because of the adverse effects of the diversion or use on the natural environment. Indeed, in its review of the 1978

43. The most cogent articulation of this interpretation comes at the conclusion of the court’s opinion: “There is, in the end, no dispute that DWR’s permits, and in turn plaintiffs’ contract rights, are subject to the doctrines of reasonable use and public trust and to the tenets of state nuisance law. Nor is there serious challenge to the premise that the SWRCB, under its reserved jurisdiction, could at any time modify the terms of those permits to reflect the changing need of the various water users. The crucial point, however, is that it had not.” 49 Fed. Cl. at 324.

46. Id. at 130 n.24, 227 Cal. Rptr. at 187 n.24.
Water Quality Control Plan and Decision 1485, the court of appeal emphasized that the Department of Water Resources’ rights to appropriate water for distribution to SWP contractors are dependent on the effects of project operations on the beneficial uses (including fish) protected by the water quality standards. In rejecting SWP and CVP contractors’ challenges to the SWRCB’s authority to alter the projects’ water rights, the court explained that the board had “determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects’ permits to curtail their use of water on the ground that the projects’ use and diversion of the water had become unreasonable.”

Although the court referred to the board’s power to alter water rights based on a finding of unreasonable use, the California Constitution expressly provides that the reasonable use requirement is “self-executing.” and the California Supreme Court has held that reasonable use is an inherent limitation on all water rights (whether they are subject to the board’s direct jurisdiction or not).

The Court of Federal Claims’ failure to address the question whether the provision of full water deliveries to the plaintiffs—under circumstances that in the judgment of NMFS and USFWS would jeopardize the existence of the Winter-Run Chinook Salmon and the Delta Smelt—would have been unreasonable is contrary to California water rights law. Furthermore, it also represents an abdication of the court’s responsibility to determine whether the plaintiffs in fact possessed property rights that were capable of being taken without just compensation as a result of the SWP’s compliance with the biological opinions. The DWR’s rights to divert water under its water rights permits for the SWP (and hence the plaintiffs’ derivative contract rights to water service) depend on DWR’s reasonable exercise of its water rights—regardless of the permit terms set forth in Decision 1485. Indeed, the California Supreme Court could not have articulated the link between reasonable use and the property right in water more clearly than in its conclusion in Joslin v. Marin Municipal Water District, in which the court unanimously rejected an inverse condemnation claim brought by riparians whose long-standing exercise of their water rights had been destroyed by the construction of an upstream dam. As a result of the new appropriation for domestic water supply, the plaintiffs’ continuing exercise of their riparian rights became unreasonable. “[S]ince there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable.”

The Court of Federal Claims also erred in failing to consider whether the provision of full water service to the plaintiffs would have violated the public trust. In its landmark decision in National Audubon Society v. Superior Court, the California Supreme Court held that the public trust doctrine is an integral part of the water rights system and “imposes a duty of continuing supervision over the taking and use of the appropriated water.” The court’s decision to merge the two legal systems paralleled its articulation of the reasonable use doctrine in three respects. First, the court stated that, along with the principle of


51. The last sentence of article X, section 2 declares: “This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.” California Constitution, art. X, § 2 (West 1996).


54. Id. at 145, 429 P.2d at 898, 60 Cal. Rptr. 386.

reasonable use, the public trust renders all water rights contingent on their continuing exercise in a manner that comports with current public values—in this case protection of the natural environment.56 “In exercising its sovereign power to allocate water resources in the public interest,” the court declared, “the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.”57 Second, this evolving governmental authority means that the property right in water is equally dynamic. The doctrine “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.”58 Third, neither the public trust nor the consumptive use of water necessarily takes precedence over the other. Rather, the state has a continuing obligation to seek an accommodation between the competing interests and “to preserve, so far as consistent with the public interest, the uses protected by the trust.”59 To emphasize this point, the court held that “[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use.”60

As with the doctrine of reasonable use, protection of the public trust is not dependent on enforcement by the SWRCB. The courts and the Board have “concurrent original jurisdiction in suits to determine water rights,” and the public trust is an integral component of such rights.61 In other words, when a court is asked to evaluate or to construe a water right, it must consider the public trust.62 If the water right holder cannot exercise their rights without violating the public trust, restricting the exercise of the water right to provide water for public trust uses cannot be a taking because there exists no valid water right to be taken. As the California Supreme Court stated at the end of its opinion in Audubon, the integration of the public trust doctrine into the water rights system “precludes anyone from acquiring a vested right to harm the public trust.”63

By declining to consider the effects of the reasonable use and public trust doctrines on SWP contractors’ rights to full water service under conditions that would be likely to jeopardize two species of fish protected by the Endangered Species Act, the Court of Federal Claims thus abjured its first responsibility in a water rights taking case—to determine whether the plaintiffs in fact have “property” capable of being taken by the government action at issue. For our purposes, the exact determination of the plaintiffs’ property rights under California water law is less important than what the inquiry illustrates: In takings cases based on state-created water rights, the decision whether the plaintiffs have property rights vis-à-vis the government is a complex, yet unavoidable, inquiry. The questions that the court should have addressed in Tulare Lake include:

- Was the allocation of water to protect the Winter-Run Chinook Salmon and the Delta Smelt set forth in the biological opinions for the coordination operation of the SWP and the CVP during water years 1992-1994 reasonable in light of the water available to the projects during the protracted drought, the needs of the protected species, and the

56. Consistent with its earlier description of the public trust, see Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1970), the court held that the doctrine may be applied to protect brine shrimp in Mono Lake (which it decided qualified as a “fishery” under the traditional public trust cases), as well as recreational and ecological interests such as “the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds.” Audubon, 33 Cal. 3d at 439, 658 P.2d at 719, 189 Cal. Rptr. at 356.

57. Id. at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

58. Id. at 445, 658 P.2d at 727, 189 Cal. Rptr. at 364.

59. Id. at 446-47, 658 P.2d at 728, 189 Cal. Rptr. at 365.

60. Id. at 443, 658 P.2d at 725, 189 Cal. Rptr. at 362.

61. Id. at 451, 658 P.2d at 731, 189 Cal. Rptr. at 368.

62. The court did note that, “If the nature or complexity of the issues indicate that an initial determination by the board is appropriate, the courts may refer the matter to the board for assistance in adjudicating the public trust claims. Id. at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.

63. Id.
competing consumptive uses of water supplied by the projects? 

- Were the restrictions on pumping and other changes in project operations directed by the biological opinions reasonable, taking into account the limited water available in the system, the needs of the species, the reasonable demands for water by project contractors, and the contractors' ability to conserve or to obtain water from other sources (such as water transfers or increased groundwater pumping)? 

- Were the limitations imposed on water service to SWP contractors reasonably necessary to protect the public trust in the waters of the Sacramento-San Joaquin River and Delta system? Did the reasonable demands for water by SWP contractors outweigh the needs of the two protected species of fish? Did the allocation of additional water in compliance with the biological opinions "better balance the diverse interests" than would full water deliveries under conditions that would have been likely to jeopardize the existence of the species? 

The answers to these questions necessarily subject federal regulatory decisions to judicial review under state law. Yet, this awkwardness is unavoidable in water rights takings cases, because state law defines the property right in water. The Court of Federal Claims (or any other court that adjudicates such a takings case) must decide the "reasonableness" of restrictions on state water rights imposed by NMFS or USFWS only for the purpose of deciding whether the plaintiffs possess water rights to support their takings claim. The court does not review the reasonableness of the federal regulatory decision on the merits and of course has no authority to enjoin or to invalidate that decision in adjudicating the takings claim. Moreover, in determining the reasonableness of the federally mandated restrictions on the exercise of state water rights, the Court of Federal Claims should give deference to the decisions made by NMFS and USFWS just as a court would provide in direct review of the agencies' decisions under section 706 of the Administrative Procedure Act. For example, the court must accept the services' opinions that the provision of full water service to SWP contractors would have jeopardized the existence of the Winter-Run Chinook Salmon and the Delta Smelt—and therefore the water supply limitations imposed by the biological opinions were necessary to protect the species—unless the court concludes that the reasonable and prudent alternatives set forth in the biological opinions were not supported by the record or were arbitrary and capricious.

The unique characteristics of the property right in water thus add layers of complexity to the analysis of water rights takings cases that go far beyond takings cases involving land or other types of property. In most takings cases, the existence of the property right is uncontroversial—the government restricts the use or development of a fee interest in real property (or possessory interest in personal property) and the litigation quickly focuses on the question whether the restriction is a taking. By comparison, in water rights takings cases the plaintiff has the burden of first proving that it had the right to appropriate water (or, as in Tulare Lake, the right to water service) under the conditions that gave rise to the government regulation. In California, at least, the laws that define the water right—including the reasonable use doctrine and the public trust—render this aspect of the plaintiff's case far from certain.

Yet, just as the assertion of a water right does not satisfy the plaintiff's burden of proving the existence of "property" capable of being taken by the government regulation in question, the counter-assertion that the

64. Id. at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365. 
66. Judicial review of agency decisions under section 7 of the Endangered Species Act is authorized by section 702 of the Administrative Procedure Act, 5 U.S.C.A. § 702 (1996). Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998). "A court may set aside an agency action under [the APA] if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if it was found to be 'without observance of procedure required by law.'" Id. (quoting 5 U.S.C.A. § 706(2)(A) & (D)).
plaintiff's exercise of its water rights would have been unreasonable or contrary to the public trust does not necessarily negate the takings claim.

First, the decision whether the use of water restricted by the regulation would have been unreasonable in light of the competing needs of the protected species is heavily dependent on the facts of each case. In Tulare Lake, these facts would include the following: a determination of the quantity of water required to protect the Winter-Run Chinook Salmon and the Delta Smelt (including the water flows, pumping restrictions, and other changes in project operations needed to ensure that the delivery of SWP water to the plaintiffs would not be likely to jeopardize the existence of the two species); an assessment of the quantity of water used by the plaintiffs to irrigate their crops (perhaps with a comparison of the water that would be needed if alternative crops were grown or more efficient irrigation practices employed); and an evaluation of the availability and cost of alternative supplies (from water transfers and additional pumping of groundwater).

Second, the legal standards used to evaluate the factual evidence will vary greatly among jurisdictions. Although water rights in most states are subject to the requirement of reasonable or beneficial use, each state has its own definition of what these principles mean in practice. Even in California—which has perhaps the most expansive concept of reasonable use—the Supreme Court has questioned whether the “test of unreasonable use . . . refer[s] only to inordinate and wasteful use of water or to any use less than the optimum allocation of water.” Moreover, most other western states have not integrated the public trust into their water rights systems.

In these states, analysis of the property right


Beyond these basic principles, however, the definition of the property right in water varies widely among jurisdictions. The Utah Supreme Court, for example, has construed the statutory mandate of beneficial use as including a reasonable use requirement. Thus, in In re Water Rights of the Escalante Valley Drainage Area, 10 Utah 2d 77, 82, 348 P.2d 679, 682 (1960), the court held that “the use of water must not only be beneficial to the lands of the appropriators, but it must also be reasonable in relation to the reasonable requirements of subsequent appropriators, and the Court has the power to order improved methods of conveying, measuring and diverting water so as to assure the greatest possible use of the natural resource.”

The Washington Supreme Court also has held that water rights are limited by reasonable use and that a senior appropriator may be required to use water in a “reasonably efficient” manner. Although “local custom and the relative efficiency of irrigation systems in common use are important elements,” they “must be considered in connection with other statutorily mandated factors, such as the costs and benefits of improvements to irrigation systems, includ-

In contrast, the Nevada Supreme Court has stated that water rights are “regarded and protected as real property” — Town of Eureka v. State Engineer, 108 Nev. 163, 167, 826 P.2d 948, 951 (1991) (quoting Carson City v. Estate of Lompa, 88 Nev. 541, 542, 501 P.2d 662, 662 (1972)). Although water rights are subject to the requirement of beneficial use and may be regulated according to the general police power, they are not governed by the principle of reasonable use.


In contrast, the Arizona Supreme Court has held unconstitutional a statute in which the Arizona Legislature declared that the “public trust is not an element of a water
in water would focus only on the terms and conditions set forth in the water right, applicable statutory law, and the doctrine of reasonable use.

Third, there may be temporal problems associated with the reasonable use or public trust argument. The Supreme Court has held that property rights "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Yet, the Court also has cautioned that, while the law that governs private property may change over time, the takings clause imposes limits on the state's power to redefine property rights. In Webb's Fabulous Pharmacies, Inc. v. Beckwith, for example, the Court declared that "a state by ipse dixit may not transform private property into public property without compensation. This is the very kind of thing that the Taking Clause . . . was meant to prevent." The application of the reasonable use and public trust doctrines to limit the exercise of water rights for the benefit of endangered species and other environmental uses thus presents its own taking question: When the government restricts the impoundment or diversion of water to prevent unreasonable use or to protect the public trust, is it simply asserting a public servitude (or some other type of limitation) that inheres in the water right, or is it effectively changing the definition of the property right in water to impose a new limitation on the exercise of that right?

The California reasonable use and public trust cases vividly illustrate this concern. As described above, the California law of reasonable use is a dynamic and utilitarian construct. The property right in water is dependent on the user's exercise of the right in manner that is consistent with public policies that include a variety of factors that extend well beyond the water right holder's purpose and efficiency of use. These factors include competing demands for the available water and the effects of the appropriation on third parties and the environment.

Moreover, the definition of reasonable use may change over time. The California Court of Appeal stated this principle most forcefully in its review of the Sacramento-San Joaquin Delta Water Quality Control Plan and Decision 1485. After observing that the SWRCB had "determined that changed circumstances revealed in new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards," the court concluded that the state "had the authority to modify the projects' permits to curtail their use of water on the ground that the projects' use and diversion of the water had become unreasonable." The Court emphasized the flexibility of the reasonable use inquiry. It reiterated that the SWRCB and the courts have the power to decide that "particular methods of use have become unreasonable by their deleterious effects upon water quality" and concluded that "some accommodation must be reached concerning the major public interests at stake: the quality of valuable water resources and transport of adequate supplies for needs southward. The decision is essentially a policy judgment including non-navigable surface waters and groundwater. In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000). Relying both on the Hawaii Constitution and Auldion, the court also held that "the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust." Id. at 136, 9 P.3d at 448.

70. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
72. Id. at 164.
73. See cases cited in notes 49 & 50 supra.
requiring a balancing of the competing public interests.”

It is certainly within California’s (or any other state’s) authority to define the reasonable use doctrine in whatever way it believes best serves the public interest in promoting the fair, efficient, and socially beneficial use of its scarce water resources. Yet, by defining reasonable use—and hence the property right in water—in this flexible and evolving manner, California runs the risk that a court in a water rights takings case will conclude that the state’s negation of a water right on the ground that the use “had become unreasonable” is an ex post facto definition of the property right.

The public trust doctrine presents similar concerns. In the Tulare Lake case, for example, the water rights permits for the State Water Project were granted in 1967. Yet, the California Supreme Court did not hold that the interests protected by the public trust doctrine include environmental quality and resource preservation until 1971. And it was not until its 1983 decision in National Audubon Society v. Superior Court that the court held that the public trust may limit the exercise of California water rights. Thus, application of the public trust to determine the plaintiffs’ rights to water service in Tulare Lake also appears to involve a retroactive definition of the property right in water.

The key to this conundrum lies in the intricacies of California water rights law. For the Tulare Lake plaintiffs, the answer is simple. The water rights permits for the SWP create only contingent property rights. A permit is valid only “for such time as the water actually appropriated under it is used for a useful and beneficial purpose,” and the court of appeal has ruled that the SWP permits are subject to modification to comply with ambient water quality standards, to fulfill the requirements of reasonable use, to protect fish and wildlife, and to promote the public trust. Limitations on storage and diversion rights or other changes in project operations to achieve these purposes—even if imposed after the SWP permits were granted—do not abridge the water rights of the SWP, its contractors, or project water users. As the California Supreme Court held more than a quarter century before the SWP permits were issued, until an appropriator fulfills all conditions set forth in its permit, and the permit is converted into a license, the appropriator “acquires no property right or any other right against the state.”

In other contexts, the question whether application of contemporary concepts of rea-

75. Id.

76. See id. at 106, 227 Cal. Rptr. at 172.

77. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). The California Supreme Court observed that the public trust doctrine traditionally was “defined in terms of navigation, commerce and fisheries.” Id. at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796. It observed, however, that the trust is sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.


79. In addition, the public trust presents the same flexible allocation questions that arise under the reasonable use doctrine. As the California Supreme Court held in National Audubon, in deciding whether a particular use of water complies with the public trust, a court must determine inter alia whether the challenged appropriation outweighs the uses protected by the trust—i.e., “whether some lesser taking would better balance the diverse interests.” Id. at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.


82. East Bay Municipal Utility District v. Department of Public Works, 1 Cal. 2d 476, 480-81, 35 P.2d 1027, 1029 (1935). Indeed, to underscore that the permittees hold only a contingent interest in the appropriated water, the California Water Code declares the interest to be noncompensable.
reasonable use and the public trust to define existing water rights is a taking of property is more difficult to resolve. The answer will depend on the courts’ historical analysis of the doctrine of reasonable use itself. Do the cases that articulate a dynamic and utilitarian reasonable use doctrine as a tool of environmental protection represent a “fundamental departure from stare decisis and . . . traditional rules of property”

Or, has California always defined water rights in a manner that allows the state continually to reevaluate both the exercise of the right and the property right in water based on evolving and contemporary judgments of what is reasonable under the circumstances?

Although a detailed analysis would extend well beyond the scope of this article, the

Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division, or for any rights granted or acquired under the provisions of this division, in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division . . . .


83. The California Supreme Court has held that the determination whether a particular diversion or use of water is consistent with the public trust ultimately comes back to the question of reasonable use. As noted in the text, the court declared in Audubon that “[a]ll uses of water, including public trust uses, must . . . conform to the standard of reasonable use.” 33 Cal. 3d at 443, 658 P.2d at 725. 189 Cal. Rptr. at 362. This means that the government may reallocate water to serve public trust uses only if protection of the public trust is reasonable under the circumstances—i.e., taking into account the consumptive users and the environmental needs, alternative sources of supply (both for the consumptive use and the public trust), potential conservation measures, and other relevant factors. Stated differently, water may be reallocated from a consumptive use to public trust purposes only if continuation of the consumptive use would be unreasonable inter alia because of the harm it causes to the public trust. Thus, for the purpose of defining the property right in water, the public trust is subsumed within the doctrine of reasonable use.


85. Brian E. Gray, In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution, 17 Hastings Const. L.Q. 225 (1989). This article traces the history of the reasonable use doctrine from the earliest common law water rights cases through the enactment of Article X, Section 2 of the California Constitution in 1928, to the modern environmental applications of the doctrine. I later summarized my interpretation of this history as follows:

86. See, e.g., Town of Antioch v. Williams Irrigation District, 188 Cal. 451, 205 P. 688 (1922); Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1933); Joslin, 67 Cal.2d 132, 429 P.2d 889, 60 Cal. Rptr. 377.
quality, navigation, fisheries, and other in situ uses. 87

The historical understanding of the reasonable use doctrine—and its influence on the definition of the property right in water—will be developed in future water rights takings cases. For our purposes, it is adequate simply to emphasize that this historical analysis must take place. If it does not—if the courts compel the government to compensate water users when the government acts to prevent an unreasonable use that is not part of the water right—then water users will receive a windfall. For without a valid water right—a right that may be exercised consistently with the inherent requirement of reasonable use—there can never be a taking of property.

IV. Water Contracts.

"Congress can change federal policy, but it cannot write on a blank slate. The old policies deposit a moraine of contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of old policies. When Congress changes course, its flexibility is limited by those interests created under the old policies which enjoy legal protection. Fairness toward those who relied on continuation of past policies cuts toward protection. Flexibility, so that government can adapt to changing conditions and changing majority preferences cuts against. Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment. Those based only on economic and political predictions, not property rights, are not protected."

—Judge Andrew Kleinfeld, writing for the Ninth Circuit in Madera Irrigation District v. Hancock, 985 F.2d 1397, 1400 (9th Cir. 1993).

Property rights in water also come in the form of government contracts for water service. Cities and farms that receive their water from the federal reclamation system have contract rights—or are the beneficiaries of water contracts—with the United States Bureau of Reclamation. In addition, water is delivered by contract in a number of states. The California State Water Project is a notable example.

The takings law applicable to government contracts is cleaner in many respects than the principles that govern alleged regulatory takings of water rights. In the federal reclamation system, for example, the water user's rights vis-à-vis the United States are defined by the terms of the contract, and if the Government violates those contract rights it is obligated to compensate the user independent of the Fifth Amendment law of takings. If the government regulation does not breach the terms of the contract, however, there is no liability. In either case, it is unnecessary for the court to engage in the complex investigation into the nature of water rights described in the preceding section.

As with the water rights takings cases, the most prominent litigation in which water contractors (or contract beneficiaries) have claimed that implementation of the modern environmental laws has abridged their property rights arose out of the application of the Endangered Species Act to reduce water service to agricultural users in the California's San Joaquin Valley. In O'Neill v. United States, 88 a group of landowners within the Westlands Water District claimed that the United States breached its contract obligations to provide water service from the Central Valley Project when it delivered only fifty percent of stated contract supplies during the 1993 water year. 89 California had suffered from six years of drought, and storage within the CVP was severely depleted. Moreover, the Bureau of Reclamation was constrained by several laws to allocate a portion of project water supplies to environmental and other nonconsumptive


88. 50 F.3d 677 (9th Cir. 1995).

89. The Westlands Water Service Contract, which was executed in 1963 for a term of 40 years, authorizes the district to receive 900,000 acre feet of project water each year from the CVP's Delta pumping facilities. See id. at 680.
uses. Decision 1485 required the Bureau to release sufficient water from project reservoirs to comply with the ambient water quality standards set forth in the Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh; and the biological opinions for the Sacramento River Winter-Run Chinook Salmon and the Delta Smelt directed it to curtail pumping and to alter project operations as necessary to protect the two species. The Bureau also was subject to a new law, the Central Valley Project Improvement Act of 1992, which added “fish and wildlife mitigation, protection, and restoration” to the list of authorized purposes of the project and ordered the Bureau to undertake a variety of specific measures to mitigate the damage to fish, wildlife, riparian habitat, wetlands, stream flows, water quality, and other environmental values caused by CVP operations over the past fifty years. The most important of these measures (and the one that gave rise to the O’Neill litigation) was the directive that, upon enactment of the CVPIA, the Bureau shall “dedicate and manage annually 800,000 acre feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by [the Act].”

These laws combined to create what the CVP contractors characterized as a “regulatory drought.” In other words, the legal requirements that the Bureau of Reclamation release project water (or limit diversions) to provide additional water to fish and other environmental uses create water shortages within the system that would not otherwise exist. The fifty percent supply deficiency that spawned the O’Neill case occurred in a 120 percent of average water year, for example, and CVP contractors worried that regulatory shortages would become a permanent feature of project operations.

The plaintiffs in O’Neill alleged that the Bureau’s failure to provide full water service to them as beneficiaries of the Westlands contract was a breach of that contract. The plaintiffs did not sue for damages. Rather, they requested specific performance of the contract and asked the court to enforce a 1986 stipulated judgment in which the United States agreed that the Westlands contract was valid. Although the O’Neill litigation therefore was not a conventional takings case, it nonetheless illustrates how the property right in water supplied under contract is determined. For the court to decide whether to enforce the Westlands contract, it must first find that the contract conferred on the plaintiffs the rights they claimed—viz. full water service despite the contrary mandates of the Endangered Species Act and the CVPIA. As the Ninth Circuit held in an earlier takings case based on the alleged impairment of CVP contracts, “the first step in both due process and taking analyses is to determine whether there is a property right that is protected by the Constitution.”

The district court and the court of appeals rejected the plaintiffs’ claim that the United States breached its obligations under the Westlands contract. The Ninth Circuit

---

90. Id. at 681.
92. Id. § 3406.
93. Id. § 3406(b)(2).
94. This concern was prescient. In water year 1998, which produced approximately 160 percent of average precipitation statewide (170% of average in the Sacramento River basin), the Bureau delivered only 85 percent of stated contract supplies to CVP agricultural contractors located south of the Delta. See Glenn Martin, El Niño’s Gift to Irrigation Dependent State is a Huge Snowpack, S.F. Chronicle, Apr. 1, 1998, at A15. For water year 2002—which the Bureau has classified as a “dry” year—the latest water allocation for these contractors is 60 percent. United States Bureau of Reclamation, Mid-Pacific Region, Reclamation Announces an Increase in CVP Water Supply Allocation for Water Year 2002 (May 16, 2002).


96. Barcellos & Wolsen v. Westlands Water District, 849 F. Supp. 717 (E.D. Cal. 1993), aff’d sub nom. O’Neill v. United States, 50 F.3d 677 (9th Cir. 1995). In the companion case of Westlands Water District v. United States, 850 F. Supp. 1388 (E.D. Cal. 1994), Judge Oliver Wanger also ruled that the United States did not breach the Westlands contract when it reduced water service to the district in water year 1993. The Westlands case was a multifaceted attack on
based its decision on three grounds. First, the court held that the Westlands contract does not confer on the district (or its members) the right to full water service when there is insufficient water to enable the Bureau of Reclamation to fulfill both its contract obligations and the in situ water requirements established by state and federal environmental laws. Article 11 of the Westlands contract—which is titled “United States Not Liable for Water Shortage”—states that “[t]here may occur at times during any year a shortage in the quantity of water available for furnishing to the District . . . but in no event shall any liability accrue against the United States . . . for any damages . . . arising from a shortage on account of errors in operation, drought, or any other causes.”97 In the Ninth Circuit’s opinion, the highlighted phrase encompasses water shortages that arise from any cause, and the contract therefore “unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate.”98

Second, the court rejected the plaintiffs’ contention that this exclusion from liability is ambiguous in light of a different article of the contract that, in the plaintiffs’ view, protected them from legal changes that might reduce their water supplies during the term of the contract. Article 26 provides that “[i]n the event that the Congress of the United States . . . amends . . . provisions of the Federal rec-

the CVPIA and included the claim that the implementation of the Endangered Species Act and the CVPIA was a taking of the district’s contract rights. After Judge Oliver Wangler decided against Westlands, he permitted the O’Neill plaintiffs—who were landowners within the “Area I” region of the Westlands Water District—to intervene for the purpose of appealing the decision. The takings claim is now before the Ninth Circuit in Orff v. United States, No. 00-16922 (appeal pending).

97. See O’Neill, 50 F.3d at 682 n.2 (quoting Westlands Water Service Contract art. 11(a)) (emphasis added). Article 11 also provides that if “in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article . . . less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year . . . To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under

the District the right to the use of any of the water supply provided for herein.” Id. (quoting Westlands Water Service Contract art. 11(b)) (emphasis added).

98. Id. at 689.

99. See id. at 683 (quoting Westlands Water Service Contract art. 26).

100. Id. at 684.

101. Id. at 683-84 (quoting Peterson v. Department of the Interior, 899 F.2d 799, 812 (9th Cir. 1990)).


103. Peterson v. Department of the Interior, 899 F.2d 799, 812 (9th Cir. 1990). The plaintiffs in Peterson included most of the CVP contractors, as well as other beneficiaries of water supplied by the project. They alleged that the United States breached their water service contracts by changing both the price of project water and the eligibility requirements to participate in the federal reclamation program during the term of their contracts. The Ninth Circuit
Third, the court of appeals concluded that, even if the Westlands contract "did obligate the government to supply, without exception, 900,000 acre-feet of water," the plaintiffs "would still not be entitled to prevail as the contract is not immune from subsequently enacted statutes."104 The court relied on a series of United States Supreme Court opinions that articulate special rules of interpretation that apply to contracts to which the federal government is a party. These rules recognize that the United States acts in both a proprietary capacity and as a sovereign government:

While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Therefore, contractual arrangements, including those to which a sovereign itself is party, "remain subject to subsequent legislation" by the sovereign.105

According to the Ninth Circuit, there is nothing in the Westlands contract that "surrenders in 'unmistakable terms' Congress' sovereign power" to enact new laws such as the Endangered Species Act and the CVPIA and to direct federal agencies such as NMFS, USFWS, and the Bureau of Reclamation to apply those laws to existing water service contracts. Nor do the contracts purport to exempt Westlands (or its water users) from the effects of these laws.106 Rather, the contract "contemplates future changes in reclamation laws in Article 26, and Article 11 limits the government's liability for shortages due to any causes."107 The court concluded that the Endangered Species Act and the CVPIA "mark[ed] a shift in reclamation law modifying the priority of water uses" and there is "nothing in the contract that precludes such a shift."108

The Ninth Circuit's opinion in O'Neill illustrates the elements of the plaintiff's case in a breach of contract action against the United States. A water contractor (or contract beneficiary) must prove that the contract grants it the right to full water service under conditions of hydrologic and regulatory drought; and the contract (or underlying legislation) must expressly and unmistakably protect the plaintiff from the effects of new laws that alter the terms of the contract or render full performance of the contract illegal.

Since the decision in O'Neill, the law of government contracts has changed in one significant respect. In United States v. Winstar Corp.,109 the Supreme Court held that the United States may be liable for damages for breach of a contract to which the Government is a party when Congress amends the law to eliminate (or to diminish) the rights of the contractor in violation of an express provision of the contract in which the Government assumed the risk of such regulatory change.110

104. O'Neill, 50 F.3d at 686.
106. O'Neill, 50 F.3d at 686.
107. Id.
108. Id.

110. In Winstar, the Supreme Court held that the United States was liable for damages for breach of contract for Congress' enactment, and the Office of Thrift Supervision's implementation, of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The litigation arose out of contracts between the Federal Bank Board (the predecessor of OTS) and three savings and loan institutions that the Board and the Federal Savings and Loan Insurance Corporation ("FSLIC") had encouraged to acquire insolvent savings and loan companies. One of
Justice Souter’s plurality opinion carefully stated that the contracts at issue in *Winstar* did not purport to bind the Congress from enacting regulatory measures, and respondents do not ask the courts to infer from silence any such limit on sovereign power as would violate the holdings of *Merrion* and *Cherokee Nation*. The contracts have been read as solely risk-shifting agreements and respondents seek nothing more than the benefit of promises by the Government to insure them against any losses arising from future regulatory change. They seek no injunction against application of the law to them, as the plaintiffs did in *Bowen* and *Merrion*, and they acknowledge that the [contracting federal agencies] could not bind Congress (and possibly could not even bind their future selves) not to change regulatory policy.

Nor do the damages respondents seek amount to exemption from the new law, in the manner of the compensation sought in *Bowen*. Once general jurisdiction to make an award against the Government is conceded, a requirement to pay money supposes no surrender of sovereign power by a sovereign with the power to contract. 111

The decision in *Winstar* thus amends the elements of a breach of contract case against the United States: a plaintiff may recover damages for breach of its federal contract if the contract confers the right that is allegedly impaired by the government regulation, and the contract anticipates the enactment and implementation of the new law that authorized the regulation by expressly assigning financial liability for such regulatory change to the United States. If the plaintiff is suing to enjoin the application of the new law, however, the analysis remains the same as set forth in *O’Neill*. A federal contract does not insulate the contractor from the effects of subsequent congressional action to alter the terms of the contract (or to modify its performance) unless the contract contains an “unmistakable waiver” of that sovereign power. As Justice Souter stated in his plurality opinion in *Winstar*, “a contract with a sovereign government will not be read to include

the Bank Board’s duties was to establish minimum capital reserve requirements for all thrift institutions. Because the acquisition by a “healthy” S&L of an insolvent institution could push the acquiring thrift’s net assets below the minimum capital reserve requirements (or, in some cases, even into insolvency), the Bank Board agreed to use a special accounting method for these “supervisory mergers.” The Bank Board promised that the acquiring S&L could treat the difference between the failed S&L’s assets and liabilities (in all cases a negative number) as an asset, rather than as a liability. The Bank Board called this fictitious asset “supervisory goodwill” and promised the acquiring thrifts that they could amortize the supervisory goodwill over a period of 25 to 40 years. Id. at 847-51.

In *FIRREA*, Congress amended the law to make performance of these two promises illegal. The statute required each thrift to maintain “core capital” reserves of not less than three percent of the S&L’s total assets, and it defined “core capital” to exclude “unidentified intangible assets” such as goodwill. Id. at 856-58. Congress thus took away precisely what the Bank Board had promised the three plaintiff institutions as an essential inducement to them to acquire failed thrifts. In response to the enactment of *FIRREA*, the OTS (as successor to the Bank Board) promptly issued new regulations that eliminated the concept of supervisory goodwill. This action in turn caused each of the plaintiff S&L’s to fall below the core capital reserve requirements set forth in *FIRREA*.” Id. The enactment and application of *FIRREA* thus breached the express terms of the contracts to which the United States was a party and rendered the contracting thrifts “insolvent” according to the newly defined capital standards.

In concluding that the United States was liable for damages for breach of contract, the Supreme Court accepted two findings of the Court of Federal Claims and the Court of Appeals for the Federal Circuit. First, the United States promised that the special accounting principles used to measure minimum capital requirements would remain in effect for the duration of the amortization period applicable to such capital assets. See id. at 862-64 (plurality opinion); id. at 919 (Scalia, J., concurring in the judgment). Second, “when the law as to capital requirements changed [because of the enactment of *FIRREA*] . . . the Government was unable to perform its promise and, therefore, became liable for breach.” Id. at 870 (plurality opinion). Under these circumstances, although Congress retained its sovereign power to change the law and thereby to bar “the Government from specifically honoring its agreements, we hold that the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable in damages for breach.” Id. at 843 (plurality opinion); see id. at 919 (Scalia, J., concurring in the judgment).

111. Id. at 881; see id. at 920-21 (Scalia, J., concurring in the judgment).
an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power."

The O'Neill plaintiffs have renewed their breach of contract claim against the United States and are now seeking damages instead of equitable enforcement of the contract. Winstar will not affect the analysis of the Westlands water service contract set forth in O'Neill, however, for two reasons. First, (before and after Winstar) the plaintiffs must establish that the Westlands contract grants them the right to full water service notwithstanding the mandates of the Endangered Species Act and the CVPIA. But the Ninth Circuit has interpreted the contract as not conferring such a right, because Article 11 "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." Second, as with the contracts in Winstar, the Westlands water service contract contains "risk-shifting" language. Unlike those contracts, however, the Westlands contract expressly assigns the financial risk of future regulatory changes to the contractors, rather than placing liability for that risk on the United States. Article 26 "contemplates future changes in reclamation laws" and provides that in the event of such changes the contractors have no rights to water service in violation of the amended law or to damages for water shortages caused by the Bureau of Reclamation's compliance with the new law. Rather, the contractor's only right in response to such regulatory changes is the choice of "renegotiating their contracts to bring them into conformity with the new law or withdrawing from the reclamation program."

O'Neill suggests the difficulty that federal water contractors and project water users may have in establishing a claim for breach of contract for water shortages caused by the Bureau of Reclamation's compliance with the Endangered Species Act and other contemporary environmental laws. Yet, as with the water rights cases discussed in part III, it is impossible to reach generalized conclusions because the federal reclamation contracts vary from project-to-project and sometimes differ among contractors in the same project. A brief look at the Klamath Basin takings litigation, however, will illustrate how

112. Id. at 878 (plurality opinion).

113. The breach of contract claim, along with an array of statutory, administrative law, and common law challenges to the application of the Endangered Species Act and the CVPIA are now pending before the Ninth Circuit. Orf v. United States, No. 00-16922 (appeal pending). The district court granted summary judgment in favor of the Government after concluding that the plaintiffs were not third-party beneficiaries of the Westlands water service contract. The court based this decision on Klamath Water Users Protective Association v. Patterson, 204 F.3d 1206 (9th Cir. 1999), which held that recipients of water from the Klamath Project have no rights to sue under the provisions of a contract between the Bureau of Reclamation and the California-Oregon Power Company that governs the operation of the Link River Dam.

114. O'Neill, 50 F.3d at 686.

115. Id. at 683-84 (quoting Peterson v. Department of the Interior, 899 F.2d 799, 812 (9th Cir. 1990)).

116. In the Central Valley Project, for example, the "Exchange Contract" between the Bureau of Reclamation and four San Joaquin Valley agricultural water agencies contains a significantly different shortage provision than those set forth in the CVP water service contracts and does not include any provision that resembles article 26 of the Westlands contract (a provision that is common to the other CVP water service contracts). These differences are based on the type of water supply provided to the contractor. The "exchange contractors" had pre-project water rights to the flow of the San Joaquin River that were destroyed by the construction and operation of Friant Dam, and their contract reflects this fact. The United States agreed to provide Sacramento River water to these users from the CVP Delta pumping facilities in exchange for the contractors' forbearance of their pre-project water rights in the San Joaquin River. In contrast, most of the CVP water service contracts authorize the delivery of project water to users who either did not have pre-project water rights or did not give up any water rights as a condition of receiving water service from the CVP. See Westlands Water District v. United States, 153 F. Supp. 2d 1133 (E.D. Cal. 2001).

the principles of O'Neill and Winstar apply in other contexts.117

In April 2001, the Bureau of Reclamation announced that it would deliver only about ten percent of the water that it normally supplies to 1,200 farms in the Klamath Basin. Farmers in nineteen of the twenty-one irrigation districts served by the Bureau would receive no water at all. As in the SWP and CVP cases, this acute water shortage was the result of hybrid drought. The previous winter’s snowpack and spring rains were among the lowest in recorded history, and the Bureau classified water year 2001 as a “critical dry” year. After consultations with USFWS and NMFS under section 7 of the Endangered Species Act, the Bureau announced that only 70,000 acre feet of Klamath Project Water would be available for irrigation uses served by two of the reservoirs in the southern part of the basin. The balance of the water in the system, including all of the water impounded by the largest facility, Upper Klamath Lake, would be kept in the reservoirs to support two species of suckerfish—the Lost River and Shortnose Suckers—or released for the benefit of migrating Coho Salmon.118

Headgates were closed on April 7, 2001. Water users brought suit in federal court in Eugene to enjoin the Bureau from withholding irrigation water, but Judge Ann Aiken denied their request. She concluded: “While the court sympathizes with plaintiffs and their plight, I am bound by oath to uphold the law. The law requires the protection of suckers and salmon as endangered and threatened species and as tribal trust resources, even if plaintiffs disagree with the manner in which the fish are protected or believe that they inequitably bear the burden of such protection.”119

As fields were fallowed, and the farmlands and wetlands in the basin began to dry out over the summer, the Klamath Basin became the epicenter of the national debate over the Endangered Species Act. Although the Bureau later released 75,000 acre feet from Upper Klamath Lake, the water was too late for many farmers and ran out in less than a month. In October, thirteen irrigation districts and twelve individual water users filed suit against the United States in the Court of Federal Claims, alleging that the reductions in water service caused by the Bureau of Reclamation’s compliance with the Endangered Species Act constituted a taking of their water rights without just compensation in violation of the Fifth Amendment. The plaintiffs asked the Court to certify the case as a class action, and they have claimed damages in excess of $1 billion.120

It is not surprising that the Klamath Project contractors and water users would file a takings claim seeking compensation for the economic losses they have suffered. Although there have been increasing conflicts between agricultural demands and the needs of fish for more than a decade, the events of 2001—complete elimination of water service to most of the farms in the basin—was unprecedented. What is striking about the Klamath takings claim, however, is that the plaintiffs have misstated the nature of their property rights to the water supplied by the Klamath Project. The complaint asserts that the reduction in water service for 2001 was a taking of their water rights without just compensation in violation of the Fifth Amendment.121 The problem with this allegation is that it ignores the document that defines the plaintiffs’ rights vis-à-vis the United States—their federal reclamation contracts.


121. Id. at 13. The complaint alleges that “under the constraints imposed by [the] biological opinions, plaintiffs will not receive water in dry or normal years, i.e., six to seven years out of 10” and that farming in the Klamath Ba-
The complaint states that each of the plaintiffs "is either a landowner or a legal representative of landowners who possess appurtenant water rights" and that they receive their irrigation water from the Klamath Project. Even if this allegation is true, it misses the point. The action that the plaintiffs allege was a taking was the Bureau of Reclamation's failure to deliver project water, and the plaintiffs' rights to receive water from the Klamath Project are defined by their contracts, not by any pre-project water rights they might possess. The plaintiffs' takings claim therefore will stand or fall on the terms of their contracts.

In the contracts for the Klamath Project, the Bureau of Reclamation agreed to supply water from the project to irrigation districts and other water agencies in the Klamath Basin. The contracts do not enumerate a fixed quantity of water that the districts are entitled to receive each year. Rather, they identify the lands within the districts that will receive project water. Until recently, the Bureau's practice has been simply to deliver water to each contractor as needed to irrigate these lands. As with the CVP water service contracts, however, the Klamath contracts contain a provision titled: "United States Not Liable for Water Shortage." The wording of this article differs slightly from the shortage provision of the Westlands water service contract analyzed in O'Neill. Article 26 of the Klamath contracts provides:

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 . . . .

Article 27 then declares that neither party "shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable force." The contracts define the term "uncontrollable force" to mean "any cause beyond the control of the party affected, including but not limited to . . . restraint by court or public authority, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid." These contract terms will determine whether the plaintiffs have the property rights they claim in the takings litigation—the right to receive project water under conditions of drought when the release of water for the benefit of the contractors (in the judgment of NMFS and USFWS) would be likely to jeopardize the existence of the three species of fish protected under the Endangered Species Act. The principles of contract interpretation set forth in O'Neill, Winstar, and the other cases described above suggest that it will be difficult for the plaintiffs to establish this right.

The Klamath contracts acknowledge that water shortages periodically will occur within the project, and the contracts expressly exempt the United States from liability for such shortages. As with the CVP supply deficiencies adjudicated in O'Neill, the 2001 Klamath shortages were caused by a combination of low precipitation and storage in the basin and the directives of the Endangered Species Act. Article 26 of the Klamath contracts stipulates that "in no event shall any liability accrue against the United States" for water shortages that are the result of "drought or other causes." The Ninth Circuit's interpreta-

122. Id. at 11.
123. See, e.g., Amendatory Contract Between the United States of America and the Klamath Irrigation District at 26 (Nov. 29, 1954); Contract Between the United States and the Tulelake Irrigation District at 31 (Sep. 10, 1956).
124. Id.
125. Id. Other examples of uncontrollable forces are: "failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, [and] sabotage." Id.
tion of "other causes" in O'Neill to include "shortage[s] caused by statutory mandate" should serve alone to dispose of the plaintiffs' contention that the United States has breached its contract obligations.

Unlike the Westlands contract, however, the Klamath shortage provisions also contain the caveat that "the United States will use all reasonable means to guard against such shortage." The plaintiffs might argue that the Government has violated this clause by enacting and implementing the Endangered Species Act, which created (or at least exacerbated) the supply deficiencies within the project. However, this argument would neglect the placement of the clause in Article 26. The "reasonable efforts" reference appears just before the absolute exemption from liability embodied in the statement that "in no event shall any liability accrue against the United States . . . for any damage" arising from water shortages. Read in context, the Government's promise to "use all reasonable means to guard against such shortage[s]" may create an enforceable duty to protect against supply deficiencies (for example, by not contracting for the sale of water beyond the firm yield of the project), but it does not give the contractors a right to compensation for the Government's failure in this regard.

Nor could this clause be interpreted to prevent the United States from enforcing the mandates of the Endangered Species Act without violating the Supreme Court's admonition that "sovereign power . . . is an enduring presence that governs all contracts . . . and will remain in effect unless surrendered in unmistakable terms." The Government's promise to use reasonable efforts to protect against water shortages is hardly an unmistakable waiver of Congress' sovereign authority to enact and to implement new laws that govern the Klamath Project. A more plausible interpretation of the clause would distinguish between the United States' role as proprietor of the water supplied by the project and the United States as a sovereign government. Under this construction, the Bureau of Reclamation would be required to use reasonable means to guard against water shortages in its management and operation of the project, but would not be constrained by contract from complying with the directives of all laws—including new laws enacted by Congress in its sovereign capacity—that govern project operations.

Indeed, the Ninth Circuit has already reached this conclusion. In Klamath Water Users Protective Association v. Patterson, project water users argued that the Bureau had no authority to order the California Oregon Power Company, which manages the Link River Dam under contract with the United States, to operate the dam in compliance with the biological opinions for the Coho Salmon and the two protected species of suckerfish. The court of appeals rejected this contention:

It is well settled that contractual arrangements can be altered by subsequent Congressional legislation . . . . Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity. Therefore, when an agency, such as Reclamation, decides to take action, the ESA generally applies to the contract. The court therefore held that performance of the Klamath Project contract at issue was subject to the mandates of the Endangered Species Act.

Finally, under Winstar, there is nothing in the Klamath contracts that expressly assigns financial responsibility for changes in the law governing project operations to the United States. In fact, the contracts provide to the contrary. As discussed above, article 26 declares that "in no event" shall the United States be liable for water shortages that re-

127. 204 F.3d 1206 (9th Cir. 1999).
128. Id. at 1213 (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982); O'Neill v. United States, 50 F.3d 677, 686 (9th Cir. 1995); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998)).
result from drought or other causes. And article 27 reinforces this admonition by declaring neither party to be in default of its contract obligations "if prevented from fulfilling such obligation by reason of uncontrollable force . . . including, but not limited to . . . restraint by court or public authority." The parties thus have anticipated that outside forces—including actions based on legal mandates—might limit performance of the contract at some point in the future. The operating constraints that reduced project water deliveries in 2001 were imposed by public authorities—NMFS and USFWS. Indeed, the consultations that preceded the biological opinions were themselves the result of a court order.129

The Klamath Project water contracts thus expressly absolve the United States of liability for all types of water shortages—hydrologic, regulatory, or hybrid—that may occur within the system. As such, the contractors and beneficiaries have no "property" right to receive project water in violation of the directives of the Endangered Species Acts or other laws that govern project operations. The United States therefore has not breached its contract obligations, nor has it taken property without just compensation.

V. Conclusion.

"There remains, finally, the question that has loomed ominously in the background, awaiting its turn to cause mischief. If lawmakers do wield the power to redefine private water rights, is there any limit to how far they can go? Can they redefine property rights into oblivion? Is there a usable distinction between redefinition and confiscation?"


The cases analyzed in this article suggest that the plaintiffs' burden of establishing compensable property rights is a difficult one, because both the water rights law and the contracts at issue in these cases confer broad and adaptive regulatory powers on the government and concomitantly limit the plaintiffs' rights to appropriate or to receive water under conditions that conflict with statutory mandates to protect endangered species, water quality, and other environmental interests. Yet these examples should not detract from the article's central thesis—that the statutes, constitutional law, judicial decisions, and contract terms that define the property right in water must be carefully studied in every case to determine whether the plaintiff has "private property" capable of being taken by the government regulation in question.

In states such as California that—by constitutional mandate, statutory directive, and common law doctrine—have conferred only a conditional and fragile property right in water, few water rights takings cases are likely to succeed. In other states—which have not recognized the public trust as a potential restraint on water rights and where the doctrines of reasonable and beneficial use have only narrow application—claims for just compensation for regulatory impairments of "vested" water rights stand a much better chance. Similarly, the rights of water contractors in the federal reclamation system depend entirely on the terms and conditions of their contracts. Users whose rights to project water are based on agreements that resemble the Westlands and Klamath contracts are unlikely to prevail on breach of contract claims. Federal reclamation contractors whose contracts do not include broad shortage provisions and express exemption of government liability may present viable claims that the United States is responsible for "regulatory water shortages" caused by water supply and operational restrictions imposed under the Endangered Species Act or other environmental laws.

Moreover, even in situations where the water right or contract is defined in a manner that preserves broad regulatory authority to limit the right to protect environmental interests, the government must have a lawful rea-

son to reallocate water from the consumptive uses embodied in the water or contract right to the instream uses it is acting to protect. In the Klamath Basin, for example, a research committee appointed by the National Academy of Sciences has tentatively concluded that “there is no substantial scientific foundation at this time” to support the principal change in project operations set forth in the 2001 biological opinions for the Coho Salmon and Lost River and Shortnose Suckers. The committee specifically found that there was no evidence to support the Fish and Wildlife Service’s findings that the suckerfish would benefit from maintenance of higher water levels in the Upper Klamath Reservoir that existed during water years 1990 through 2000. It also tentatively concluded that retention of water in the reservoir for later release to support migrating salmon, as directed by NMFS, actually could harm the salmon by increasing the temperature of the water in the main stem of the Klamath River below the reservoir.

The committee’s Klamath Basin study will not be completed for at least another year, and the committee’s final conclusions in any event will not carry the force of law. The investigation into the science behind the biological opinions, however, illustrates the potential interplay between judicial review of agency decisions on the merits and judicial analysis of takings claims. If a takings plaintiff can prove that there was no lawful justification for the regulatory decision that caused (or exacerbated) the water shortages for which the plaintiff seeks compensation, the government should be held liable. Although water rights (and contract rights) are limited forms of property, they are nonetheless property. If the government cannot defend the actions that led it to restrict the exercise of the plaintiff’s water rights (or to reduce water service to its contractors), it acts beyond the scope of the limitations embodied in the plaintiff’s property rights in water.

With this caveat, takings claims based on water rights and water contracts will stand or fall on the court’s determination of the plaintiffs’ property rights vis-à-vis the government. Indeed, in many situations, the property rights inquiry will be an all or nothing decision. In the water contract cases, if the parties have assigned financial responsibility for water shortages caused by the enactment and enforcement of new environmental laws to the government, and a water shortage occurs because performance of the contract is limited by the implementation of such a law, then the government will be liable for damages for breach of contract. If the contract is silent on this question, or expressly exempts the government from liability for water shortages, the courts may not find a breach of


131. Id. at 2-3. The committee also stated, however, that “there is no scientific basis for operating the lake at mean minimum levels below the recent historical ones (1990-2000),” as the Bureau of Reclamation had proposed before consultation with NMFS and USFWS, because “lower lake levels would require acceptance of undocumented risk to suckers.” Id. at 3.


It is possible, of course, that the terms of some water contracts might preclude liability even where the government cannot defend the factual or scientific basis for the water shortage that resulted from regulatory action. For example, the Westlands contract excuses the United States from liability for water shortages that are caused by “errors in operation.” See O’Neill v. United States, 50 F.3d 677, 682 n.2 (quoting Westlands Water Service Contract art. 11(a)). And the Klamath contracts state that “in no event shall any liability accrue against the United States” for water shortages. In the only judicial opinion on this point, Judge Wanger held that the shortage provision of the Westlands contract would not absolve the United States from liability if the plaintiffs could prove either “that there was no CVP water shortage” or that the Bureau’s implementation of the Endangered Species Act and the CVPIA “were unlawful or unreasonable in light of the Bureau’s contractual duties.” Orf v. United States, No. CV-F-93-5327 OWW SMS. Memorandum Opinion and Order (E.D. Cal. 1997), at 64-65, appeal pending, No. 00-16922 (9th Cir.).
contract based on the government’s enactment and implementation of new laws that alter the other terms of the contract. In either case, the contract claims will be decided by the terms of the contract, and the general law of takings will have no applicability.

Many water rights takings cases also will be decided by the court’s analysis of the plaintiff’s water rights, as limited by the doctrine of reasonable and beneficial use (and in some jurisdictions by statutory and common law restrictions on the right to appropriate and use water, as well). Indeed, if other courts follow Judge Wiese’s lead and apply a categorical takings standard, the determination vel non of the property right in water will be conclusive in water rights takings cases.\(^{133}\)

If the government’s creation of a regulatory water shortage infringes on the plaintiff’s water rights—i.e., if the plaintiff would have had the right to appropriate or use water in the absence of the regulatory limitation on the exercise of the right—then there is a taking per se. If not, the plaintiff does not have “private property” on which to base a takings claim, and therefore the claim must fail.\(^{134}\)

---

133. In Tulare Lake, the court concluded that, “by limiting plaintiffs’ ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.” 49 Fed. Cl. at 319. According to the court, this “complete occupation of property—an exclusive possession of plaintiffs’ water-use rights for preservation of the fish”—is a categorical taking. Id.

Although detailed analysis goes beyond the scope of this article, the application of a per se takings rule to water rights cases is questionable. On the one hand, the reallocation of water from SWP contractors to endangered species uses does not at all resemble the type of action that gave rise to the categorical rule on which the court based its decisions—the permanent physical occupation of real property by (or authorized by) the government. See, e.g., Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982); United States v. Causby, 328 U.S. 256 (1946); Pumpeley v. Green Bay Co., 13 Wall. 166 (1872). On the other hand, the decision to make additional water available for the benefit of endangered and threatened species of fish by preventing SWP contractors from making full use of their water supplies does resemble the action that the Supreme Court concluded was a taking in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)—the conscription of private property for public use.

134. For an analysis of the takings issues in Tulare Lake, see Melinda Harm Benson, supra note 18, at 577-86.