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Policy impacts of the Klamath decision

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Overview

In 2001, the Bureau of Reclamation's Operation Plan for the Klamath Project initially provided no irrigation water for its agricultural contractors. This unprecedented action had long been expected by a number of water interests, but the Bureau's water contractors within the Klamath Basin were unprepared when they learned in early April that they could no longer rely on the Bureau to find a way to deliver water. The abruptness and magnitude of the rupture in the traditional relationship between the Reclamation Project operators and contractors signified a reordering of priorities within the basin. Rather than providing water first and without fail to farmers, the interaction of biophysical, historical, and institutional circumstances aligned to place greater emphasis on instream water values. The Bureau had insulated its contractors from climatic variability, institutional fragmentation, historical commitments, and the impacts of the water diversions that irrigated contractors' fields. But long before the 2001 irrigation curtailment, Native Americans experienced a similarly painful deprivation as they watched Upper Klamath Lake transform into a highly eutrophic reservoir, and once-abundant fish populations dwindle as seemingly external pressures crept into the Klamath Basin.

The 2001 curtailment also fueled an ongoing national debate surrounding the application of the Endangered Species Act (ESA). The Interior Department had developed elaborate alternatives[1] to strict ESA compliance in order to mitigate the impacts on economic expectations and avert an expected political backlash. However, the long simmering tensions surrounding the allocation of the basin's water were left unattended as interests on all sides sought injunctive and declarative relief in the courts, culminating in the 2001 cutoff of irrigation water to project contractors.

Does the Klamath decision change the framework of public policy? Specifically, does it stretch the institutional and legal envelope of acceptable events, or is it consistent with the normal patterns of resolution for such issues? We sought to answer these questions in several ways that reflect dynamics internal and external to the Klamath Basin. We evaluated the Klamath decision in light of related judicial interpretations regarding the Endangered Species Act, Tribal powers and water rights, takings, and the specific qualities of those in the Klamath Basin. We compared the institutional basis for conflict resolution in the Klamath with those of other river basins in California. Although the human impact of the Klamath decision is unprecedented in its totality, abruptness, and measurable costs of water reallocation, we conclude that the Klamath decision is consistent with the record of legal interpretation; it is a consequence of historical processes in an arena of exceedingly weak institutional opportunity for resolution. Administrative options existed that were not taken, specifically the Administration's choice not to act preemptively, or to appeal the judicial decision that triggered immediate and total water

[1] We refer to the habitat conservation planning programs outlined in Section 1539 of the ESA.

reallocation. The Klamath decision illuminates particular weaknesses of the current structure that offer opportunities for avoiding similar collisions in the future, in the Klamath and elsewhere.

Social organization of the Klamath River Basin

The impacts of general policy and law depend on the specific character of the social system in which they are applied. Although river basins are hydrologically interdependent systems, their social systems rarely, if ever, display equivalent complimentary or consistent integration. They are divided among groups, interests, and jurisdictions that are influenced by forces unrelated to the basin in which they co-exist. The tension between disparate interests and shared resources is central to understanding the institutional impacts and opportunities in the application of policy and law. Thus, the Central Valley system of California has been building capacities for coordinated action since the establishment of the Flood Commission in the 1880's.[2] A century of growth and diversification of coordinated relations has created the basis for CALFED, the consensus-oriented current stage of coordination. The TVA and Columbia River Basin programs emerged through huge (New Deal) infusions of Federal finance, capacity, and authority. The Eel-Russian Basin Commission evolved through a gradual federation of local, state, and national interests, then spawned two different systems of relationships that could increase the effectiveness of financial and political mobilization. The Klamath displays the diffusion of the Eel a decade ago while facing the additional forces of strong irrigation districts and rising tribal strengths. The issue throughout these basin systems is the balance between capacities for coordination and dispersion of interests and organizations.

The Klamath Basin displays institutional characteristics that are unique for its size. Because of its unique qualities the Klamath has responded to more general trends in extreme ways. By this, we mean that the people and agencies of the basin were forced into an either/or corner that other basins have been able to avoid through negotiation, exchange, and coordination.

The Klamath is extreme in three ways. First, it is socially dispersed and hydrologically divided. Its main tributary, the Trinity, has been substantially diverted to the Central Valley, where it is governed by the macro forces of California water. The separations between the tribes and European-American settlers, between upstream and downstream populations, and between utilitarian and protectionist interests, are both sharp and without much past provocation to overcome them. The distinction between agricultural and nonagricultural populations contains all of these sources of separation.

Second, the density of its population, financial stakes, and intra-basin relations has been extremely low when compared with any other basin of equivalent size on the Pacific western slope.

Third, despite jurisdictional divides between the tribes and the states, among tribes and among states, a compensatory Federal commitment to coordination has been virtually absent, and certainly weaker than in any other comparable basin on the Pacific slope. Instead, Federal commitments until recently have been territorialized in ways that created other fragmenting area jurisdictions rather than compensatory opportunities for negotiation, exchange and coordination.

Into the mix have come more general forces that take on particular strength in this context.

[2] Robert Kelly's book, *Battling the Inland Sea: American political culture, public policy, and the Sacramento Valley, 1850-1986*, provides a vivid account of the emergence of this process.

First is the shift of relative Federal strength from the older comprehensive territorial agencies—the U.S. Forest Service, Bureau of Land Management, Bureau of Reclamation—toward the newer specialized functional agencies—National Marine Fisheries Service, Environmental Protection Agency, U.S. Fish and Wildlife Service, i.e., toward agencies that focus on specific connective relationships and qualities. There is as yet little basis within the Federal government to coordinate the interactions between its territorial and functional agencies.

Second is the long-term shift from Federal to state jurisdiction of water use rights, but relative shift of public trust rights in the opposite direction. Thus, once broad Federal reserved rights have moved substantially to within state water rights systems, while species-habitat protection has enabled the expansion of public trust reserves under Federal authority.

Third is the growing momentum toward recognition and fulfillment of tribal sovereignty. This includes the gradual reduction of tribal dependence on, and control by, the Federal government, as well as the rise of unresolved issues between tribal and state governments.

Although these trends are nationwide, their convergence in the Klamath met little basin capacity to resolve the conflicts they bear with them. Indeed, they provoked basinwide relationships and identities for the first time. These relationships and identities focused, as would be expected, on differences rather than common interests. In combination with law, this helped to create a situation in which the primary issue was not how to overcome conflict through cooperation but which party would end up being forced into a corner. The challenge ahead is to move toward the next phase of institutional development, the growth of compensatory capacities that give strength to common interests in a shared resource.

The institutional fragmentation of a common river

The essential institutional quality of the Klamath River system is the fragmentation of interests and authorities without compensating relationships for the resolution of conflicts. The Klamath is an extreme case in this regard. Although the third largest California river,[3] it displays little of the institutional fabric that has developed for the Sacramento-San Joaquin or Eel-Russian systems. Its major tributary, the Trinity[4], has been managed primarily as an extension of the Central Valley system, subjected to a wholly different and external set of institutional and political dynamics that effectively isolate these hydrologically connected river systems. Although holding senior water rights, the tribes have been isolated from decision processes about the river. The divisions of jurisdiction among Federal, Oregon, California, and tribal sovereignties are largely unresolved, or are perceived as resolved but in highly ambiguous and thus far unimplementable ways. In particular, the extent of Federal deference to state water law, and the extent to which tribal rights depend on the relative balance of Federal to state power, are historical issues that do not, and perhaps may never, display clear resolution.

The April 6 decision focused on a small piece of this fragmented system. Although irrigated agriculture operates in a system including Gerber and Clear lakes, the Lost River, and the Link Canal, as well as a hardrock groundwater basin and upstream watersheds, the decision focused solely on water releases from Upper Klamath Lake. Although these water releases affect threatened and endangered species in wildlife refuges downstream from the irrigation districts, the decision focused on effects on species in the Upper Klamath Lake and the Klamath mainstem. Although tributary flows affect habitat conditions and population dynamics in the

[3] California Water Atlas
[4]

mainstem, these were not included in the focus of the decision. Even the small piece of the system covered by the decision involves the Klamath Tribe and Bureau of Indian Affairs, the Bureau of Reclamation, U.S. Fish and Wildlife Service, National Marine Fisheries Service, at least four irrigation districts, the Bureau of Land Management, the Federal Energy Regulatory Commission, and the National Resource Conservation Service, as well as PacifiCorp, the private operator of the public dam. This fragmentation is a fractal microcosm of the larger system.

The April 6 decision was consistent with law. The Bureau of Reclamation had no option but to comply with the court's judgment. The court's judgment was consistent with the mainstream record of precedent. Although we would argue that preemptive administrative actions were available, what seems clear is that the institutional fragmentation of the basin would not have supported, might have blocked, and indeed may have prevented, effective preemptive efforts. Moreover, it prevented effective articulation of a judicial issue that would have offered the court a broader array of appropriate decisions.

Issues the Klamath decision generates

Our conclusions suggest that an unusually weak and undeveloped institutional context, largely insulated from developments in Western basins of equivalent scale and significance, made the April 6 clash almost inevitable unless, as it had in analogous situations in prior years, the Administration had acted preemptively or chosen to appeal. Nevertheless, the dire drama of the event raises issues that have meaning beyond the Klamath.

To what extent should one group bear the cost of satisfying a public purpose?

This question is common to the literature and judicial record on "takings." Virtually all takings cases have involved the loss of potential future values as a consequence of public actions. What is distinctive about the Klamath case is that the costs were real and measurable rather than potential or speculative. Klamath farmers absorbed the full brunt in immediate terms.

Is the EIS approach sufficient for decisions that must be rendered on the basis of timebound hydrologic information?

While it is possible to criticize the Bureau of Reclamation for not taking required steps of biological review in a timely fashion, or for not developing a viable long-term strategy in the forewarning decade, it is also clear that the procedural path it had to follow did not mesh either with the narrow temporal window for essential hydrologic information, with the time requirements of biological science, or with the absence of an institutional basis for resolution of conflicts among interests. The procedural path is a source of rigidity and brittleness amidst natural and social processes that are largely beyond administrative control.

How do we weigh scientific uncertainty against disproportionate burden with regard to the satisfaction of a public purpose?

Contrary to the prospective, therefore uncertain, losses associated with the judicial record on "takings," the losses to Klamath irrigators were immediate, real, and certain. The certainty of irrigators' losses can be compared with the certainty of the scientific predictions upon which the April 6 decision was based. While this is not a matter of simple balance, it points out the possible need for a more articulated range of legitimate criteria and conclusions that can respond to the character of this balance in different situations. One could imagine, for example, that observable costs would have some higher degree of standing than prospective losses, or that the safeguards

on judgments of scientific certainty would be somewhat stronger or more timely in such circumstances.

What is a legitimate durable basis for the adjudication of Klamath River water distributions?

The current basis for water allocation in the Klamath remains poorly articulated. The most recent and controlling court decision (*U.S. v. Adair* U.S. District Court 478 F. Supp. 336, and on appeal 723 F.2d 1394) allowed the Federal government to set priorities of allocation while deferring to state water law for the actual quantification and allocation of water rights. Unresolved is the extent to which Federal deference places tribal water rights under state law. Oregon adjudication of Klamath waters seems destined for permanent delay. This may be because the state's authorities are too confined for the broader array of sovereign jurisdictions involved. Perhaps the state's capacities lack the support necessary to bring adjudication to a sound conclusion. Tribal rights, although senior, have only begun to be asserted, but tribal claims are gaining momentum through investments in science, law, and the growth of alliances with complementary interests. Public trust rights are expanding through specialized agencies like the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the Environmental Protection Agency, while property-based Federal reserved rights and related claims—through agencies like the Bureau of Land Management, the Bureau of Reclamation and the Forest Service— are weakening relative to new Federal and existing state powers. In this context, the current adjudication process seems incapable of comprehending the power of the complex interests involved.

Why has the Klamath Compact been ineffectual?

The Klamath Compact was created in 1957 as an initial basis for institutional coordination in the basin. Why has it failed? Based on comparative assessments, we suggest that a compact is as effective as the shared purposes and resources of its constituent institutions. The institutional fragmentation of the Klamath has been too severe to support or respond to a basin-wide framework, and governmental support has been too weak to compensate for the disparity between intent and reality. Although a harsh lesson, the April 6 decision should make their interdependence clear to all interests in the basin. If that leads to an effective strategy of institutional development, there should be increasing ability to avoid similar shocks in the future.

Institutional strategy

What are requirements of an effective strategy for an institutional basis that diminishes the chance of future shocks like the Klamath decision?

We suggest several fundamentals.

Sufficient Federal commitment of authority and resources to the basin to overcome the disparate directions of its agencies and to mediate among the interests of Oregon, California and the tribes.

The clashing missions and motives of Federal agencies in the Klamath dissipated the Federal capacity for a constructive role. Such a role would include the capacity for inter-agency coordination, for oversight and finance of a program of scientific and technical studies sufficient for equitable mediation of water allocation among diverse public interests. Some of the problems are legal and procedural: the Klamath is outside the range of conditions for which

general approaches have been developed. Some problems arise from the fragmentation and weakness of political constituencies and the absence of a Klamath voice and claim. Some arise in Federal reluctance to engage state and tribal water interests in a basin with several states and tribes, except in regard to highly specialized and forceful driving assertions of public trust responsibility. The Federal commitment is very unbalanced for the nature of the basin.

State acknowledgement, respect and support for tribal rights.

Although senior rights holders in the Klamath, the tribes continue to be treated as residuals in Oregon and California water allocation processes. This is a permanent call for trouble because it denies normal access to process and encourages extra-process strategies. Although coded in environmental currency for use of the Endangered Species Act, tribal claims have formed the subliminal bass beat in the Klamath situation. The claims are strong and strengthening, so continuing denial perpetuates conflicts that will be argued ever more explicitly in jurisdictional terms.

A governing correlative principle of adaptive water allocation in times of scarcity.

The absoluteness of agricultural water expectations expressed a social dominance for agriculture, a sense of special entitlement, that no longer exists in the Klamath Basin. Other basins have faced this situation at earlier stages, recognizing the need for correlative allocations, institutional processes that form and legitimize them, that accommodate all interests as best possible in times of stress. All or nothing is not a viable stance in a context of interdependence and growing equality among interests.

A harsh lesson

Although the Klamath decision has been argued in terms of environment v. agriculture, the currency is an artifact of the deeper social and political issues that have determined and eroded possibilities for adaptive conciliation. Fragmentation has been indulged for too long to avoid havoc for one or another interest. The costs are huge. The causes are not those interests who are in dispute, but a broader institutional incapacity to create relationships that achieve equitable allocations in scarce times. Despite its scale, the Klamath Basin has been kept at the margins of state and Federal institutions and has remained insulated from adaptations to similar stresses occurring in other basins. One consequence is that it has not informed the broader discussions of public policy and has become an extreme case in policy application. While it has provided lessons about policy flaws, particularly the risks of absolutes of any kind, it has largely demonstrated the need for development of a Klamath institutional fabric that is consistent with the intensity and range of interdependent interests in the basin.

Contextual factors preceding the 2001 Operation Plan for the Klamath Project

The Klamath Project

The Klamath Project is among the oldest projects built and operated by the Bureau of Reclamation. The Secretary of the Interior authorized development of the project on May 15, 1905, under provisions of the Reclamation Act of 1902 (32 Stat. 388). Construction began on the project in 1906 with the building of the main "A" Canal. Project water was first made available

May 22, 1907, to the lands now known as the Main Division. This initial construction was followed by the completion of Clear Lake Dam, the Lost River Diversion Dam and many of the distribution structures, and the Lower Lost River Diversion Dam. Link River Dam, at the outlet of Upper Klamath Lake (UKL), was completed in 1921 and regulates the flows of this once natural lake. Upper Klamath Lake provides the majority of irrigation supplies for project lands. The Malone Diversion Dam on Lost River was built in 1923 to divert water to Langell Valley. The Gerber Dam on Miller Creek was completed in 1925; the Miller Diversion Dam was built in 1924 to divert water released from Gerber Dam. Clear Lake and Gerber Dams provide flood protection and irrigation benefits to Lost River-dependent lands. Irrigation water is delivered through this system to about 220,000 acres in Klamath County in southern Oregon and Modoc and Siskyou counties in northern California (USBR 2001). The project is operated so that flows of the Lost River and Klamath River are completely controlled except in some flood periods.

The focus of the 2001 curtailment is the water in UKL. The lake is fed by the Williamson, Sprague, and Wood rivers. The area of the contributing watershed is about 3,800 mi^2. Average annual inflow is 1.3 million acre-ft (MAF). When the lake is full, the average lake depth is about 8 ft. In a drought average lake depth may be reduced to 3 ft. Storage capacity is 486 thousand acre-ft (TAF), making for 3:1 ratio of average inflow to storage. This limited storage capacity is insufficient to simultaneously provide water for Reclamation project irrigation, other non-project irrigation, and instream needs through a drought year, especially if allocations are based on a normal water year.[5] Average annual diversions to project contractors and the wildlife refuges at the southern end of the project range between 300 and 475 TAF. Within the project, water use efficiency rates are high compared to other arid regions and California at about 2.2 acre-ft per acre. This is in large part due to the configuration of the project. Return flows are reused successively by "downstream" farms, the wildlife refuges, and finally return into the Klamath River.

The three worst droughts on record have occurred in the last 10 years: in 1992 inflows were about 570 TAF, in 1994 about 640 TAF, and in 2001 about 750 TAF (Ryan 2001). In the 1992 and 1994 droughts, competing instream demands for water had not yet attained legally enforceable priority, so farmers were allocated water until supply was exhausted.

Upper Klamath Lake is hypereutrophic and experiences high rates of phosphorous loading from upstream runoff. Logging and ranching activities that accelerate erosion and nutrient leaching in the volcanic soils upstream have been cited as factors contributing to higher nutrient runoff levels. Approximately 40 percent of the phosphorous load is thought to derive from these sources (Kaan 2001). These nutrients become embedded in lake sediments of at least 1 m and become resuspended through wind action. Estimates of the embedded phosphorous range from 60 to 90 percent (Kaan 2001, Todd 2001). Approximately 35,000 acres of former marshland at the upstream end of the lake were converted to farmland in the last century, thereby reducing the capacity of the wetland to filter nutrients as they enter the lake. In recent years about 15,000 acres of these farmlands have been restored to wetlands.

Two fish species that inhabit UKL, the Lost River and shortnose sucker, have been listed as endangered by the U.S. Fish and Wildlife Service (USFWS), and lake conditions have been cited as prime contributing factors in the decline of these populations.

[5] With 50-55 percent of normal water availability there is not sufficient water to meet total demand for ESA species, as determined by USFWS and NMFS. This is evident from a comparison of the Bureau's actual 2001 flow regime with the flows recommended in the NMFS biological Sprague opinion.

The Link River dam withholds UKL's water and marks the hydrologic division between Upper and Lower Klamath basin. Below Link River Dam, the Klamath runs about 260 miles to the Pacific Ocean. The major tributaries along this course are the Shasta, Scott, Salmon, and Trinity rivers. The Klamath ranks third in flow among California rivers. Historically, the Klamath River is known for large runs of coho and chinook salmon. The development of water resources on the tributaries and mainstem have contributed to the loss of spawning habitat and have been implicated as jeopardizing the survival of the coho salmon by the National Marine Fisheries Service (NMFS).

A general adjudication of the Upper Klamath basin was initiated in 1976 under state law. The state action follows the United States' 1975 Federal suit, *U.S. v. Adair* (U.S. District Court 478 F. Supp. 336, and on appeal 723 F.2d 1394), in which the United States sought a declaration of water rights within the Williamson drainage. In large measure the Federal and tribal plaintiffs ultimately prevailed in *Adair* inasmuch as the priority dates of their water rights are superior to the Klamath project and all of its contractors, and that they were allowed to proceed concurrently in a Federal court. But the state adjudication is the venue where the actual quantification of those rights will occur, and that process is ongoing.

The ascendance of Endangered Species Act issues in the Klamath Basin is a parallel process that has also worked through Federal courts. Here also, Federal interests have, for the moment, prevailed. Outside of the basin, the legal issue of takings integrates ESA issues with water allocation decisions. We discuss these themes in greater detail below.

Tribal issues

The Klamath Indian Tribes have treaty-based rights. The exercise of some of these rights is affected by project operations. When the Klamath Project was initiated there were thousands of Native Americans and early settlers actively using the basin's resources. The Modoc and Klamath tribes had hunted, fished, and foraged "since time immemorial" in the upper basin. Most directly pertinent to the 2001 curtailment is the Oregon Klamath tribe's longstanding reliance on indigenous Lost River and shortnose suckers and the Hupa and Yurok tribes' reliance on coho salmon. Both were traditional food sources for the tribes.

In 1864 the Oregon Klamath and Modoc tribes entered into a treaty with the United States. The Klamath tribe relinquished aboriginal claim to about 12 million acres of land in exchange for a reservation of approximately 768,000 acres in the Upper Klamath Basin, above UKL. The treaty specifically protected the Indians' right to pursue their traditional culture and means of livelihood while encouraging them to develop an agricultural mode. This was not a grant of rights to the Indians, or just an implied right deriving from the congressional purpose for the land reservation of 1864, but a reservation of rights already possessed.

In 1887 Congress passed the General Allotment Act that changed the nature of land ownership within the reservation from allowing only communal ownership to allowing individual ownership. The tribal reservation was terminated in 1954 under the Klamath Termination Act. Much of the former reservation was purchased by the United States and the balance of the reservation was placed in a private trust for the remaining tribe members. To complete the Klamath Termination Act the United States condemned most of the tribal land held in trust in 1973. This eliminated tribal title, but many individual tribe members continued to own individual parcels. In addition, the United States held title to much of the former reservation, portions of which became national forest lands and national wildlife refuges. Some lands also fell into non-tribal individual ownership.

In *U.S. v. Adair*, the Federal government sought a declaration of water rights in one of the upstream tributaries to UKL, the Williamson River. They were joined by the Klamath Tribe. (Subsequent to this case the Klamath Tribes were restored as a Federally recognized tribe under the Klamath Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.) In the district court proceedings, the court chose not to decide any question concerning the actual quantification of water rights. Rather, it declared that "actual quantification of the rights to the use of waters of the Williamson River and its tributaries within the litigation area will be left for judicial determination, consistent with the decree in this action, by the State of Oregon under the provisions of 43 U.S.C. § 666 [the McCarran Amendment]." The McCarran Amendment waives the United States' sovereign immunity for the limited purpose of allowing the Government to be joined as a defendant in a state adjudication of water rights. The district court found that the tribe's water rights dated from "time immemorial."

Both sides appealed. The State of Oregon and individual defendants argued, first, that the district court should have dismissed the Federal suit, and second, that the district court erroneously awarded water rights to the tribe and the United States as the tribe's successor. The United States and the tribe argued that the district court erroneously awarded water rights to non-Indian successors of Indian landowners. The questions raised in the initial case fell within three basic categories: (1) whether water rights had been reserved for the use of Klamath reservation lands in the 1864 treaty, (2) whether such rights passed to the government and to private persons who subsequently took fee title to reservation lands, and (3) what priorities should be accorded the water rights of each of the present owners and users of former reservation lands. Although the district court declined to quantify the rights, it agreed to specify the proper method for measuring the reserved water rights originally attached to the reservation.

The question of whether a Federal or state court is the appropriate forum for adjudicating Federal or tribal water rights is significant because the interests of the nation and the state may, and often do, differ. State courts are alleged to favor state interests over Federal and tribal claims because such claims represent competition for scarce water resources in the arid West.[6] The argument could be posed the other way, that Federal courts favor national interests. Nonetheless, no state possesses treaty responsibilities to the tribes comparable to those borne by the Federal government. The issue was addressed by the Supreme Court in *Colorado River Water Conservation District v. United States*, [424 U.S. 800, 96 S. Ct. 1236] in 1976. There, the court found that that the McCarran Amendment allows concurrent state and Federal jurisdiction over water rights disputes, and that the state's jurisdiction extends to Federal reserved water rights, including Indian water rights. The court cited the McCarran amendment and the use of "wise judicial administration, [and] regard to conservation of judicial resources and comprehensive disposition of litigation." The most important factor in favor of Federal dismissal and state oversight was the McCarran Amendment itself, in which the court found expressed a "clear Federal policy" to avoid "piecemeal adjudication of water rights in a river system" where a comprehensive state system for adjudication of water rights was available.[7]

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[6] For a more detailed discussion see "The Supreme Court's New Sovereign Immunity Doctrine and the McMarran Amendment: Toward Ending State Adjudication of Indian Water Rights." Stephen M. Feldman. The Harvard Environmental Law Review. Summer, 1994.

[7] In full the Amendment states that:
(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by

These standards allowed the court in *Adair* to determine whether concurrent proceedings in Federal and state courts or only in the state court were most appropriate. The *Adair* court found that concurrent proceedings were appropriate according to the standards in *Colorado*. This interpretation also allowed the Federal court to determine the priorities among water rights within the upper basin. Had the Oregon Department of Water Resources progressed beyond an administrative investigation (in the 7 years between the adjudication filing and the *Adair* decision) and demonstrated the intent and capacity to adjudicate the basin in a timely manner the Federal role in the basin might have been determined solely at the state level.

Citing *Winters* 207 U.S. 564, (1908), *Cappaert* 426 U.S. 128, 138 (1976), *U.S. v. New Mexico* 438 U.S. 696 (1978), and a host of supporting case law, the *Adair* court established the basis for prioritizing the U.S. and tribal water rights. Since *Winters*, the Supreme Court has consistently held that the Federal government has the power to exempt reserved water for Indian reservations from contrary state prior appropriation law. *United States v. New Mexico*; *Cappaert*; *United States v. District Court for Eagle Country*, 401 U.S. 520, 522-23 (1971); *Arizona v. California*, 373 U.S. 546, 597-600 (1963), decree entered, 376 U.S. 340 (1964).

The *Adair* court also explicated the purposes of those rights and their linkage to reservations and treaties, mindfully not specifying the actual quantity and avoiding any duplication of the judicial effort that is slated to occur in Oregon's eventual adjudication of the upper Klamath. The scope of purposes included the sustenance of game and fish with the flows necessary for their survival. The court articulated how this kind of right differs from the standard requirements of the prior appropriation doctrine. Because the diversion of water is not required to support fish and game, the water right reserved to further the tribe's hunting and fishing purposes is "unusual in that it is basically non-consumptive … Rather, the entitlement consists of *the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies*" (emphasis added). These reserved rights are not unlimited. Although the Indians once had exclusive access to the resources, the constraint the court applied is the amount of water necessary to "provide the Indians with a livelihood—that is to say, a moderate living." *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 99 S. Ct. 3055 citing *Arizona v. U.S.* 373 U.S. 546, 83 S. Ct.1468. The court was also careful to distinguish that treaty rights only apply to members of the tribe and cannot, therefore, be transferred to the non-tribal successors. Specifically, the United States has not acquired water rights of the same type that tribal members enjoy through its reacquisition of reservation lands. Rather it has acquired water rights consistent for the purposes of the reservation to which those lands are attached. In this case forest and refuge purposes.

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exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

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

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

43 U.S.C. § 666 (1976).

Downstream, the Yurok and Hupa Valley tribes have Federal Indian reserved fishing rights to take anadromous fish[8] within their reservations in California (Solicitor Opinion 1993). These rights were secured to the Yurok and Hupa Indians by a series of 19th century executive orders and confirmed to the Yurok and Hupa Tribes by the 1988 Hoopa [sic]-Yurok Settlement Act (HYSA), 25 U.S.C. §13OOi et - seq. The Hupa Valley Reservation is situated on a reach of a major Klamath River tributary, the Trinity River, above the confluence of these two rivers. The Yurok Reservation is situated on the mainstem of the Klamath as it feeds into the Pacific Ocean. In 1855, the President, by Executive Proclamation, established the Klamath Reservation in California. The Hupa Valley Reservation was formally set aside for Indian purposes by executive order in 1876. The HYSA partitioned the reservation into the present Hupa Valley and Yurok Reservations and declared the assets of each reservation held in trust by the United States for the benefit of the respective tribes. 25 U.S.C. 5 1300i-l(b). The Yurok and Hupa Valley Tribes' fishing rights entitle them to take fish for ceremonial, subsistence, and commercial purposes. *United States v. Eberhardt*, 789 F.2d 1353, 1359 (Ninth Cir. 1986). Like the Klamath Tribe, their fishing rights include the right to harvest quantities of fish on their reservations "sufficient to support a moderate standard of living."

The executive orders setting aside what are now the Yurok and Hupa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (Ninth Cir.), cert. denied, 454 U.S. 1092 (1981). As with the Klamath Tribes, the Yurok and Hupa Tribes' water rights include the right to prevent other appropriators from depleting the streams' waters below a protected level.

Reserved rights are an established but pliable standard. The priority of a reserved right dates from when initial use of the resource began or from the date of the reservation and is of a quantity sufficient to fulfill the primary purposes of the reservation. Treaty rights that require water may apply even after the termination of a reservation, but may not be transferred to non-treaty interests. Klamath Basin tribes surrounding the reclamation project undoubtedly possess superior rights to those of the project and its contractors. Unanswered at the time of this writing is the exact quantification of the rights of these parties.

Implications of the Klamath decision on the Tribe-Federal-State-local relations

"Fish is code for tribes among the basin's farm community," we were told by a social worker who had spent 3 weeks retraining farmers in the agricultural communities that rely on Klamath Project waters. Although basis of the tribal claim is broader than fish or the Endangered Species Act, tribally commissioned scientific studies of basin fish populations and use of the ESA support this view. They indicate that tribal interests have been, and are, actively constructing the legal and scientific basis to support the reallocation of water within the Klamath Basin system. The Klamath Basin tribes and tribes around the nation are effectively the most senior appropriators. The assertion of their claims jeopardizes subsequent appropriators and clients of Federal projects in particular.

Judicial opinions fortify the Klamath Basin tribe's legal claim to water, and push the contest into the arena of science. Significantly, Federal courts were allowed to determine

[8] The endangered species listing and underlying science of the coho salmon is discussed in greater detail in a later section on the ESA.

priorities. How much water and what flow regimes are required to support game and fish will be the subject of agency-managed inquiry. Already there are signs that this process will be every bit as contentious as the preceding litigation. Affected project agricultural interests have sought review of Federal agency decision-making and the underlying science. Future agency actions involving science that are unfavorable to one or another interest will likely receive similar attention. In circumstances where states evince capacity and willingness to settle tribal claims, challenges to Federal adjudication may succeed.

The ESA and the issue of takings

Protection of endangered coho salmon in the Klamath River below UKL, and protection of the Lost River and shortnose sucker in UKL, under the Federal Endangered Species Act, were in the forefront of the year 2001 Operations Plan for the Klamath Project. In 1973, Congress enacted the ESA "to provide a program for the conservation of ... endangered and threatened species." 16 U.S.C. § 1531(b). The purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve [these] purposes . . ." Id. § 2(b). The Endangered Species Act requires the "Secretary of the Interior to promulgate regulations listing species of animals that are "threatened" or "endangered" under certain criteria and to designate their "critical habitat." 16 U.S.C. § 1533. The ESA further requires each Federal agency to ensure that any [Federal] agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." Id. § 1536(a)(2). If an agency determines that a proposed action could adversely affect a listed species, it must engage in formal consultation with the appropriate expert agency, i.e., the U.S. Fish and Wildlife Service or the National Marine Fisheries Service. The consulting agency must then provide the action agency (Reclamation in this case) with a "Biological Opinion" explaining how the proposed action will affect the species or its habitat, specifically whether the proposed action will result in "jeopardy" or "no jeopardy." The ESA has had wide-ranging and often controversial impact on natural resource activities, especially so where Federal actions are involved.

In the Klamath Basin the fundamental conflict concerns the allocation of project water for irrigation and ESA requirements that water be left instream. 16 U.S.C.A. § 1536 (2) states that "[each] Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

This passage severely restricts an agency's options. Although the Klamath Project accounts, on average, for only one-third of the available flow into UKL and a far smaller portion of the Klamath's total discharge, it must respond to a basin-scale problem that is only partially of its own creation. Many factors outside the project have contributed to the decline in fish populations, including land use practices upstream that elevate nutrient runoff and stimulate eutrophication in UKL, and development and diversion of water resources in downstream

tributaries that decrease spawning habitat and degrade water quality. While the instigators of those actions have largely not been required to comply with the ESA, Reclamation is forbidden from inflicting any further jeopardy once a species threshold is been reached.

The question of Federal agency culpability and duty has worked its way through the courts in precedent-setting cases outside the basin, notably *TVA v. Hill*, and in several cases within the basin that led to and followed the 2001 Operation Plan, notably *Klamath Water Users Association v. Patterson*, *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation*, and *Kandra et al. v. U.S.* Often the critical issue will be procedural rather than substantive, and since Reclamation projects provide water through contractual arrangements, contract law is also intertwined in the legal wrangling over species conservation (see for example *O'Neill v. U.S.* 1995). Here again we see that the questions could be framed quite differently, for example with an emphasis on contractual relationships and secondary or tertiary concern with Federal conservation law. We now examine these cases to understand the ample warning and deliberation that preceded the 2001 plan, to understand how seemingly external factors came to shape the decision, and to infer how the plan may influence the policy framework.

In *TVA v. Hill* (Decided June 15, 1978) the Supreme Court of the United States examined in great detail the legislative background of the ESA and established Congress' clear and unambiguous intent that species preservation is among the "highest priorities." The ESA requires Federal agencies to avoid jeopardy "whatever the cost."

The case involved the nearly complete Tellico Dam in Tennessee and an endangered species, the snail darter. The snail darter's habitat would suffer total destruction if the newly constructed dam was permitted to be filled. The Secretary of Interior declared that reach of the Little Tennessee River "critical habitat" and environmental groups sued to halt dam construction. The Supreme Court affirmed the Court of Appeals injunction to halt all activities that would destroy or modify critical habitat, even though Congress had expended about $100 million on construction of the dam. Although there were undoubtedly local consequences to the decision, the principal impact was absorbed at the national level. Investment-backed expectations may have been anticipated, but the flow of benefits had not yet begun. These characteristics distinguish the *TVA* case from the Klamath cases, and a recent takings case in California, *Tulare v. U.S*.

Klamath Water Users Association v. Patterson, (U.S. District Court for the District of Oregon, Decided April 24, 1998), is another case that is driven by ESA compliance and impacts from water operations on endangered species. Reclamation proposed water flows of 1,000 cubic feet per second (ft^3/s) from the Link River Dam, the flow-controlling structure on UKL, that addressed sucker and coho needs. However, this level of flow would have violated Pacificorp's FERC license that specified 1,300 ft^3/s in September. The discrepancy in flow standards was resolved by making the Reclamation recommended flow contingent on FERC concurrence. The Klamath Water Users Association (KWUA) sought a temporary restraining order based on their alleged third party beneficiary status. The court denied this as inconsistent with the record, citing *Norse v. Henry Holt & Co.*

Judge Michael R. Hogan explicated the legal relationship between the Bureau of Reclamation, Pacificorp (a hydropower interest), and the KWUA. Judge Hogan also stated that KWUA's contract rights are subservient to senior tribal rights and subsequent legislation such as the ESA. Both Pacificorp and KWUA have a contractual arrangement with Reclamation. KWUA is not, as it had argued, a third party beneficiary under Pacificorp's contract with Reclamation, and therefore cannot legally influence the relationship between Reclamation and Pacificorp, and

specifically, may not veto proposed modifications to the contractual relationship between those parties.

In the appeal of *Klamath Water Users Protective Assoc. v. Patterson* in September of 1999, Judge A. Wallace Tashima found that Federal law controls the interpretation of the contracts. The appelate court looked to *Kennewick I.D. v. U.S.* for guidance and general principles in interpreting these contracts. *A contract must be read as a whole. Contract terms are to be given their ordinary meaning.* The distinction between intended and incidental beneficiaries is explicated. The appeals court affirmed the district court finding (above).

In *Pacific Coast Federation of Fishermen's Ass'n v. Bureau of Reclamation,* N.D. Cal. April 3, 2001, Judge Sandra Brown Armstrong analyzed the procedures mandated under the ESA. In May of 2000, various conservation and fishing interests, including several defendants-interveners in this case, filed a lawsuit challenging Reclamation's 2000 Plan. Plaintiffs alleged that the Bureau of Reclamation violated the ESA by releasing water for irrigation and water flows in the Klamath River prior to consultation with NMFS (in 2000) regarding the Project's effects on threatened coho salmon. Judge Armstrong agreed and issued an injunction. The Bureau of Reclamation was enjoined from sending irrigation deliveries to the Klamath Project area whenever Klamath River flows at Iron Gate Dam drop below the minimum flows recommended in the Hardy Phase I report, until such time as the Bureau completed a plan to guide operations in the new water year [2001], and consultation concerning that plan was completed, either by (1) formal consultation to a "no jeopardy" finding by the NMFS, or (2) the Bureau's final determination, with the written concurrence of the NMFS, that the proposed plan was unlikely to adversely affect the threatened coho salmon. [This compelled the Bureau of Reclamation to act as it did in 2001.]

Pacific Coast Federation of Fishermen's Ass'n grows out of the 1999 and 2000 water operations plans for the Klamath Project. Judge Armstrong writes that "[T]he Secretary of the Interior, through the Bureau of Reclamation, must manage and operate the Klamath Project pursuant to various legal responsibilities. Pursuant to the Reclamation Act of 1902 the Bureau of Reclamation has entered into contracts with various water districts and individual water users to supply water, subject to availability, for irrigation purposes. Two national wildlife refuges, the Lower Klamath and Tule Lake national wildlife refuges, also are dependent on the operations of Klamath Project and have Federal reserved water rights to the amount of water, unreserved at the time of creation of the refuges, necessary to fulfill the primary purpose of the refuges. In addition, the Secretary of the Interior has recognized that a number of Oregon tribes, including the Klamath, Yurok and H[u]pa valley tribes, hold fishing and water treaty rights in the [Klamath] basin." *Klamath Water Users Protective Assoc. v. Patterson*, The Bureau of Reclamation has an obligation to protect tribal trust resources, including the Klamath River coho salmon. It also has an obligation under the ESA not to engage in any action that is likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such a species." [citations ommitted]

As noted above, under the ESA, any Federal agency must consult with the appropriate agency if its actions may impact an endangered species or its habitat. In this instance the Bureau of Reclamation failed to consult. It was ordered to do so and enjoined from releasing more water than allowed by a NMFS commissioned study (the Hardy report) until the Bureau completed a concrete plan. This set the stage for the 2001 water operations plan. Basin water users filed a procedural challenge to the 2001 Operation Plan in *Kandra et al. v. U.S.* [145 F. Supp. 2d 1192; 2001] in the U.S. District Court for the District of Oregon. On April 30, 2001, Judge Ann Aiken

wrote that, as in *TVA v. Hill*, "the ESA requires an agency to avoid jeopardy [to an endangered] species, 'whatever the cost.'"

Stephen Kandra, David Catka, Klamath Irrigation District, Tulelake Irrigation District, Klamath Water Users et al. had sought injunctive relief from implementation of the Bureau of Reclamation's 2001 Ops Plan. Plaintiffs claimed the 2001 plan breached their contracts and was "arbitrary and capricious" under the Administrative Procedures Act (APA) in regards to the National Environmental Policy Act and the ESA.

The opinion identifies the listed endangered (shortnose and Lost River suckerfish) and threatened (coho salmon and bald eagle) species that rely on the waters in the UKL and for which the Bureau of Reclamation is accountable. The opinion also identifies the Bureau of Reclamation's tribal (Klamath and Yurok) responsibilities. Although the tribal issues may be as strong or stronger than the ESA issues, this case is based on ESA considerations, and the tribal responsibility issues are not in the forefront.

Under the National Environmental Policy Act of 1960 [42 U.S.C.A. §§ 4321-61], Federal agencies must issue an Environmental Impact Statement (EIS) if they undertake a "major Federal action." *Kandra* asserted that the operational changes in the 2001 Operation Plan constituted such an action. The court disagreed, noting that if it were to find otherwise, Federal agencies would be preparing EISs perpetually. Even if an EIS were required, the flow of required information (streamflow forecasts from the Natural Resources Conservation Service, Biological opinions from NMFS and USFWS) did not allow the Bureau of Reclamation adequate time to prepare an EIS before management operations began. The court also recognized the need for a long-term operating plan and chastised the Bureau of Reclamation for not issuing one.

After the Bureau of Reclamation initiated formal consultation, both the USFWS and NMFS found that Reclamation's operations jeopardized the species under their purview, suckers and coho, respectively. Both agencies proposed "reasonable and prudent alternatives" (RPAs). Eagles would be harmed, but not jeopardized.

Upon review of the draft biological opinions, Reclamation informed the USFWS and NMFS that the forecasted water supplies for 2001 were not adequate to meet the needs of both RPAs. On April 6, 2001, USFWS and NMFS released their final biological opinions on the effects of the project on the suckers, coho salmon, and bald eagles.

The USFWS and NMFS adjusted the minimum UKL elevations and Klamath River flows to reflect the reduced water available for the 2001 water year. The minimum elevation "reasonable and prudent alternative" (RPA) was intended to increase water quality and the physical habitat for juvenile and adult suckers, and provide for access to spawning areas.

The NMFS proposed a range of minimum instream flows in the Klamath River below Iron Gate Dam from April through September. The river flows were recommended in order to increase riparian habitat for coho salmon. The RPAs in the NMFS biological opinion are limited in duration, because NMFS expects additional information regarding flow and salmon habitat will become available in the near future.

Also on April 6, 2001, Reclamation issued its 2001 Operations Plan, which incorporated the conclusions contained in the biological opinions and implements the RPAs proposed by the USFWS and NMFS. After implementation of the RPAs, the availability of irrigation water was severely limited, and most project lands received no water deliveries.

While Judge Aiken acknowledged that undisputed economic hardship would occur as a result of the plan, she stated "Threats to the continued existence of endangered and threatened species constitute ultimate harm. "*Congress has spoken in the plainest of words, making it*

abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.' Tennessee Valley Authority v. Hill." As recognized by the District Court and the Ninth Circuit, plaintiffs' contract rights to irrigation water are *subservient to ESA* and tribal trust requirements (see *Patterson)*. Therefore, plaintiffs cannot assert breach of contract based on Reclamation's allocation of water to protect the suckers and salmon.

Plaintiffs also suggested that the Bureau of Reclamation protect the project water users against junior water users outside of the project. Under Reclamation law, the Secretary is bound to state law provided such state laws are consistent with Congressional directives (see *California v. U.S.*). The State of Oregon is adjudicating the Klamath Basin and it appeared to the Bureau of Reclamation that until the adjudication was complete, no action against juniors by seniors would be allowed by the State of Oregon.

Under the Administrative Procedures Act, an agency decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council,* 490 U.S. at 378. In other words, a court "may reverse the agency's decision as arbitrary or capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Western Radio Service Co. v. Espy,* 79 F.3d 896, 900 (Ninth Cir. 1996) (citing *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1521 (Ninth Cir. 1995)).

Aiken writes "As an initial matter, plaintiffs' characterization of Reclamation's duty to protect ESA species and tribal resources as a "change in operations" implemented in response to various "demands" is inaccurate. Reclamation "has responsibilities under the ESA as a Federal agency. These responsibilities include taking control of the [Project] when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators." *Patterson*, 204 F.3d at 1213.

Similarly, the United States, as a trustee for the tribes, is obligated to protect the tribes' rights and resources. Water rights for the Klamath Basin Tribes "carry a priority date of time immemorial." *Adair*, 723 F.2d at 1414. These rights "take precedence over any alleged rights of the Irrigators." *Patterson*, 204 F.3d at 1214. Reclamation, therefore, has a responsibility to divert the water and resources needed to fulfill the tribes' rights.

As such, Reclamation's "change in operation" is mandated by law, and the requirements of NEPA do not apply. *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (Ninth Cir. 1995). The ESA requires an agency to avoid jeopardy to species, "whatever the cost" *TVA v. Hill*, in this case that means reallocating irrigation water to provide fish habitat.

Plaintiffs allege that the NMFS and USFWS selectively reported information in the biological opinions and ignored relevant scientific evidence. Plaintiffs would have the court substitute plaintiffs' analysis of the relevant science for that of the expert agencies. However, the court cannot force Reclamation to choose one alternative over another. See *Southwest Center for Biological Diversity v. United States Bureau of Reclamation*, (Ninth Cir. 1998) (the Secretary is

not required to choose the best alternative or to explain why one alternative was chosen over another). Absent a showing that NMFS or USFWS failed to consider relevant, available, scientific data, plaintiffs are unlikely to prevail on this claim. Even if plaintiffs could show a likelihood of success on the merits of their ESA claims, the ESA explicitly prohibits the relief they seek.

[**Note:** Kandra relied on *T.V.A.* and was consistent in its balancing of interests in favor of protection of endangered species over other interests. However, TVA did not involve existing beneficiaries that were accustomed to and expectant of a flow of benefits. In Kandra, we are dealing with just that kind of interest. In this way, Kandra may be understood to expand the scope of the ESA.]

Takings

We now turn to the issue of regulatory takings by examining the defining takings case, *Lucas*, and a recent case that shares characteristics with the situation in the Klamath Basin, the *Tulare* case. The major point of this section is that when regulations deny an owner the use of his or her property a disproportionate burden for a public purpose is placed on the owner. This is a compensable action.

Lucas v. South Carolina Coastal Commission
Decided June 29, 1992
Supreme Court of the United States

"The Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' Agins, supra, at 260."

This is a (if not *the*) leading "takings" case that involves a beachfront property owner with "investment-backed expectations" who is prohibited from developing his property by subsequent state legislation. The principal question posed is whether the owner has been deprived of all economically beneficial use of the land (bundle of rights) as a consequence of regulation. Even where that is the case, it is argued that if "background principles" were in existence that precluded nuisance or other undesirable uses of property, the state may prohibit them without compensation. That is, those uses were never part of the title to begin with.

In defining the boundaries of the Beachfront Management Act, South Carolina imposed the burden of preventing dune erosion on a subset of property owners of which Lucas was a member. The principle of disproportionate burden is implied in the court's verdict, although it is not the focus. In the Klamath instance, this is a key argument. The jurisdiction of the Bureau of Reclamation is a subset of burdened *property* users within a larger context of multiple users and cumulative effect problems. We emphasize property because the water users obtain water through contracts that specifically exclude interruptions in deliveries for a variety of reasons. This fact makes their "taking" claim more difficult, though evidently not beyond reach.

A takings claim has been filed in the Klamath. We have not seen it, but suspect it will follow the formula that prevailed in *Tulare*. There, water contractors went around the water contract, with its specific exclusions, to make the claim against regulatory agencies that issued biological opinions requiring the contracting agency, the California State Water Project, to leave

water that would have been diverted to the contractors in the watercourse for reasons of species and habitat protection.

Tulare v. U.S.
United States Court of Federal Claims, Judge John P. Wiese
Filed April 30, 2001

"This case concerns the delta smelt and the winter-run chinook salmon—two species of fish determined by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to be in jeopardy of extinction. The efforts by those agencies to protect the fish—specifically by restricting water out-flows in California's primary water distribution system—bring together, and arguably into conflict, the Endangered Species Act and Californias century-old regime of private water rights. The intersection of those concerns, and the proper balance between them, lie at the heart of this litigation."

"The Fifth Amendment to the United States Constitution concludes with the phrase: "nor shall private property be taken for public use, without just compensation." The purpose of that clause—as the oft-quoted language from *Armstrong v. United States*, (1960) explains—is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." At issue, then, is not whether the Federal government has the authority to protect the winter-run chinook salmon and delta smelt under the Endangered Species Act, but whether it may impose the costs of their protection solely on plaintiffs."

This case explains the difference between physical and regulatory takings, and finds that the Federal government's actions, through the USFWS and NMFS, comprise a physical taking. By overlooking all state-Federal agreements subsequent to the State Water Resources Control Board's Decision 1485, and focusing solely on that document, Judge Wiese found that "The Federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." Judge Wiese ignored the extensive background principles that Amici Curiae compiled in two briefs. This decision was unusual inasmuch as courts generally defer to the State in in-state water matters and acknowledge the state's expertise. Because there are actual costs, however, other branches of the Federal government (Department of Justice, or the Government Accounting Office, for example) may take a pragmatic and dim view of the judgments against the United States and appeal the ruling on non-ideological grounds.

Filing suit against the USFWS and NMFS is a charted course that the Klamath Water Users Association can readily adopt, with the same legal representation that succeeded in *Tulare*, Marzulla & Marzulla.

A less blunt form of administrative influence lies in whether, and how vigorously, Federal agencies are directed to appeal unfavorable judicial decisions. In *State of Idaho v. United States Forest Service* (Case No. CV01-11-N-EJL, District Court for the District of Idaho, April of 2001) the Justice department conceded that the Forest Service's roadless rule would cause plaintiffs (logging and snow-mobiling interests) irreparable harm, which significantly undermines any defense of the rule. This action was simultaneous with public announcement of administrative support for the roadless rule. This nuanced tactical approach illustrates some of the more subtle forms of influencing resource policy. No direct monetary damage has been alleged against the United States in the *Idaho* case, which should reduce interagency friction over a weak Federal defense. In *Tulare* there are monetary damages. Although the penalty phase has not yet taken place, newspaper reports estimate up to $15 million in compensation is due to

the plaintiff irrigators. By refusing to appeal or by offering a weak appeal, the case that the costs of the ESA are disproportionate to the benefits it provides, or at least inequitably allocated, is advanced. This claim is magnified as attacks on the underlying science, like the National Academy of Science review of the Klamath biological opinions, uncover the inherent uncertainties of conservation science.

Summary

The financial stakes in the Klamath are modest when compared with other basins, like the Columbia and Sacramento-San Joaquin, that also confront ESA issues. Those basins have integrated systems of hydroelectric plants, water storage and conveyance structures for agricultural and municipal use, and navigation enhancements that directly serve tens of millions of people. Those basins have avoided rigid ESA compliance thus far through a variety of alternative arrangements. The costs of rigid ESA compliance in those basins would surely be many times more than those incurred in the Klamath. The fact that similar sets of Federal and state agencies confronting similar conflicts in basins of vastly different political and economic scale implies that the form of ESA implementation varies in accordance with these dimensions. Yet the message of the Klamath decision, that the ESA can inflict extreme cost on traditional resource users, is readily transferable to any ESA-resource use conflict irrespective of scale. Differential enforcement of a national regulation understandably creates a sense of injustice among those affected. However, the source of the injustice appears to lie in the relationship between political-economic integration and the degree of regulatory enforcement, rather than with the regulation itself. When viewed in combination with the *Tulare* court decision, the Klamath water allocation of 2001 may influence "stakeholders," legislators, agencies, and courts confronting claims in the Columbia, Sacramento-San Joaquin, and other river basins to weaken the ESA. Alternatively, these circumstances could motivate fragmented interests to coalesce and build the social fabric that shapes how the ESA is implemented.

The Bureau of Reclamation's Klamath Project, and its dependent contracting irrigators, inherit asymmetric responsibility for the effect of cumulative, basin-scale activities. The Bureau lacks the jurisdictional authority to address many of the sources of the basin's biophysical problems. As suggested in the history and preceding analysis, the pattern of response, both within the basin and outside of it, has often been to relocate stresses to the institutionally weaker parties. This short-run "solution" perpetuates and exacerbates the problem in the longer run.

Conclusion

Our legal and institutional assessment leads to the conclusion that the Klamath decision is consistent with existing law but raises issues in the law to potentially precedent-setting levels. In particular these are issues of (1) the extent of private burden for a public purpose, (2) the relative certainties in weighing the satisfaction of and burden for the public purposes and (3) the reasonable stress between administrative procedures and the natural and social processes in which they are used.

These issues arose in an outcome that was more extreme that any before it. In other words, although the policy was consistent with prevailing law, its application created an outcome that may well be inconsistent with legal intent.

The Federal government is one source of the difficulty: it has yet to seek means to reconcile the divergent directions among its territorial and functional jurisdictions, to seek

compensatory coordination in the Klamath, or to use its capacities to avoid the dire outcomes of the April 6th decision.

A second source of difficulty is the states' continuing tendencies to treat the tribes, the senior rights holders, as residual claimants.

Finally, we note the obvious need to achieve social relations in the basin that will develop and support a governing principle of water allocation that recognizes the legitimacy of everyone's needs.

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Note: Additional citations to be added.

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