NOTE

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Does First In Time Really Mean First In Right? Exploring Water Rights in the Context of *Klamath Irrigation District v. United States*

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INTRODUCTION

On April 6, 2001, the United States Bureau of Reclamation (BOR) made the decision to not release water from the Klamath River to farmers within the Klamath Basin.[1] The BOR's decision was made in response to several reports, issued by other federal agencies, which concluded that if water from the Klamath River were to be diverted from the river system, the action would reduce the flow of water in the river to a level that would likely negatively impact several endangered species living in the river in violation of the Endangered Species Act[2] (ESA).[3]

Believing that if it released water from the River it would violate the ESA, the Bureau of Reclamation refrained from diverting water to

1 *See* Klamath Irrigation Dist. v. United States (Klamath I), 67 Fed. Cl. 504, 512–13 (2005).

2 16 U.S.C.A. § 1531 (West 2012) (known as the Endangered Species Act of 1973).

3 *See* Klamath I, 67 Fed.Cl. at 512–13.

irrigators.[4] This action reduced the amount of water that was eligible for delivery to irrigators by ninety percent, and resulted in rendering "approximately fourteen-hundred farmers who relied on [water diverted from the Klamath River] either unable to plant or [facing] severe losses on roughly 210,000 acres [of farmland]."[5] BOR's decision "triggered violence, protests, and political [responses] that reverberated throughout the West" during the summer and fall of 2001.[6]

In response to BOR's action, the affected irrigators filed a complaint against the BOR.[7] Within their complaint, the irrigators claimed that BOR's actions were illegal, in breach of the BOR's contracts with the irrigators, and constituted an unconstitutional taking in violation of the Fifth Amendment of the United States Constitution.[8]

While the irrigators later conceded that the BOR's actions were in fact within the authority of the agency and legal, the remaining contract and takings claims challenge both the boundaries of American water law and the authority of the federal government to regulate surface water within the United States. The Federal Court of Appeals and the Oregon Supreme Court have both considered the issues presented by the irrigators. Yet, after a decade of litigation, the issues presented by the irrigators have yet to be resolved.

The complexity and nature of American water law may be partly to blame for the delay in the resolution of the case's issues. However, the complexity of water law is not solely to blame for the slow progress of the *Klamath Irrigation Dist. v. U.S.*[9] litigation. The courts

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4 *See id*. In 1997, Coho salmon, native to the Klamath River System, were added to the United States's list of threatened species. *See* HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS 103–07 (2008). This listing assigned the Coho additional protection in accordance with the Endangered Species Act. *Id.* At that time, the Coho joined the two species of fish living in Upper Klamath Lake, Lost River Sucker and the Shortnose Sucker, which had been listed since the 1980s. *Id*. The listing of Coho salmon was important because the decline in national salmon populations had recently gained national attention. *Id*.

5 DOREMUS & TARLOCK, *supra* note 4, at 2.

6 *Id.*

7 *Id.*; *see also* Klamath I, 67 Fed. Cl. 504, 512–13 (2005).

8 *See generally* Klamath I, 67 Fed. Cl. at 512–13.

9 Klamath Irrigation Dist. v. United States (Klamath II), 635 F.3d 505 (Fed. Cir. 2011); Klamath I, 67 Fed. Cl. at 504.

are by no means strangers to challenges relating to water rights.[10] Instead, it is likely that the issues have not been resolved because of the weight of the central issue that lurks in irrigators's claims against the BOR—an issue of first impression in the United States. Specifically, *Klamath* is the first case to ask the courts to determine exactly what rights from the proverbial "bundle of rights" a person holds when he or she is granted a right to appropriate water from his or her government.[11]

On its face, the case presents a pair of fairly straightforward questions. First, *Klamath* asks the courts to determine whether BOR breached its contracts with the irrigators by refusing to divert water in accordance with the BOR's existing contracts with the irrigators; this issue relates to contractually defined "appropriative rights"[12] and is fairly well defined by Court precedent. What is more worrisome is the second question presented by the irrigators—did the BOR's actions constitute a taking without just compensation in violation of the Fifth Amendment?[13]

Both questions presented by the irrigators relate to well established legal doctrines—breach of contract and unconstitutional government takings of private property. Typically, claims involving a breach of contract or government takings are easily resolved using legal precedent in the courts of the United States.[14] The problem is, no

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10 *See* California v. United States, 438 U.S. 645, 648–52 (1978) (discussing the history of the application of the Reclamation Act of 1902 in the American West, the heart of the issues presented by the irrigators in Klamath); *see also* United States v. Gerlach Live Stock Co., 339 U.S. 725, 736–37 (1950) (citing the holdings from United States v. Appalachian Elec. Power Co., 311 U.S. 377, 424 (1940) which states, "[t]he flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable,'" citing the Court's earlier holding from United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913)). Together, these holdings outline the history of the Supreme Court's examination of the Reclamation Act of 1902, the property interest in flowing water within a stream, and the contractual rights existing between BOR and those parties to whom the agency diverts water to from its irrigation projects located throughout the West.

11 *See* Klamath I, 67 Fed. Cl. at 514.

12 The term "appropriative right" is associated with a person's control of water in jurisdictions that apply some form of the prior appropriation allocation system. *See* OR. REV. STAT. § 537.120 (2013) (an example of a western state's use of the term "appropriative rights"). However, in this Note, "appropriative rights" refers to any situation where a person has the authority to appropriate water from a watercourse for his or her own use.

13 *See* Klamath I, 67 Fed. Cl. at 514.

14 Note, however, that the discussion of contractual rights and property rights is quite contentious in the Court, and there is much confusion around how these rights apply in the

American court has ever established what an appropriative right is in the context of property law.[15] Therefore, if the irrigator's claims cannot be settled under contract law, the court must attempt to determine whether an appropriative right may rise to the level of a property right, and if it can, whether an irrigator's expectation interest in water can vest a property right in the irrigator.

The issues presented by the irrigators in *Klamath I and II*[16] seem fairly straightforward. The media paints the *Klamath* litigation as a case of two interests competing for a single resource–a case of farmer versus fish. On the surface, the case may be this simple. A group of irrigators assert that they were harmed by a government action intended to protect species of threatened and endangered fish. However, these facts only brush the surface of the issues at play in the litigation.

Such categorization entirely overlooks the nexus of the dispute. Yes, it is true that *Klamath* involves a fight between farmers and parties looking to preserve fish habitat in the Klamath River, *but* these facts mask the real source and significance of the dispute—a dispute that runs far deeper than the protection of the habitat of a few endangered species of fish. *Klamath* is important because it is a dispute about the future of the use of water in the West, not because it relates to the preservation of a few endangered species. Irrigators are

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context of the Reclamation Act of 1902. *See generally* California v. United States, 438 U.S. 645 (1978) (discussing contract rights and takings claims in association with the Reclamation Act of 1902, 43 U.S.C.A §§ 372, 383 (West 2012)); *see also id.* (White, J., dissenting) (noting the complexity of the issues raised by the BOR's application of the Reclamation Act in the context of California's water laws, and the questions that still remain in the context of the Court's interpretation of the Reclamation Act generally, and the Act's application by federal agencies generally).

15 While there is much case law on property rights associated with water flowing in a stream, namely in the context of owners of riparian property, there is little case law discussing the rights of owners of appropriative rights. In *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 at 69, the Court explicitly states that owning flowing water is something that is incomprehensible under American water law. However, in the next paragraph the Court asserts that,"[w]hatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes." *Id.* This statement indicates that when a right to use a stream is granted by the government, that right is somewhat more secure than a normal right to use the stream.

16 *See generally* Klamath II, 635 F.3d 505 (Fed. Cir. 2011); Klamath I, 67 Fed. Cl. 504 (2005).

asking the court to determine whether they can continue farming as they always have.

The *Klamath* litigation highlights the ongoing cultural war that is waging in the American West. It showcases the battle between the status quo of the irrigation culture and the changes in demand that have occurred in response to the booming populations of western cities. Effectively, the courts are being asked to determine whether the rights irrigators hold in the water they are promised through state issued appropriation rights are similar to property interests as cognizable under the Fifth Amendment, or if they are more akin to Due Process property interests as cognizable under the Fourteenth Amendment. This is a question of federalism, of science, and most importantly, it is a question of cultural identity. In short, *Klamath* is not a case of farmer versus fish; it is a case of farmer versus change.

One way or another, this case will forever change the way Americans look at water. The repercussions of any decision on this matter will be far reaching and will likely herald a new era of development in the West. If the irrigators are not held to hold property interests in the water they have rights to appropriate, the court will have established that appropriative rights are not property rights and, therefore may be subject to greater regulation. This situation would allow the government to reserve more water for public use and protection.

On the other hand, if the irrigators win, then the court will have established that appropriative rights constitute property interests and are protected from government interference by the takings limitation of the Fifth Amendment of the U.S. Constitution. This decision would leave the government with a greatly reduced ability to regulate the quality and quantity of water because the decision would require the government to compensate owners of appropriative rights when its actions interfered with the owner's use of his or her appropriative rights. This situation would not only deteriorate the public's interest in water as a shared common, but would also move fresh water into the commodities sphere.

This Note argues that the Court of Claims should adopt Justice Douglas's position in *United States v. Gerlach Live Stock*,[17] that appropriators are not entitled to compensation as a matter of Constitutional right,[18] and find that the expectation interests that the

17 United States v. Gerlach Live Stock Co., 339 U.S. 725, 756–57 (1950).

18 *Id*. at 756.

irrigators of Klamath River Basin developed via appropriation rights do not constitute property interests in the water of the river. In accordance with this finding, the court should rule in favor of the BOR, finding that the actions of BOR did not constitute a taking because appropriative rights do not rise to the level of property rights as cognizable under the Fifth Amendment. This determination would resolve a long-standing question of law and advance the goals of efficiency and equity by clearly defining the property interests that are transferred to diverters of water through appropriative rights.

To support this argument, this Note will discuss the history of the *Klamath* litigation, the claims asserted by the parties, and the likely repercussions of this litigation. In conclusion, this Note will argue that unless the irrigators can establish that the BOR somehow breached its contracts with the irrigators, the Court of Claims should *not* rule in favor of the irrigators. This Note will support this assertion by establishing that there is no legal basis for finding that an appropriative right is a property interest as contemplated by the Fifth Amendment.

I
BACKGROUND

Klamath is a complicated case. A number of federal, state, and environmental factors make it possible for the BOR to divert water to irrigators in the Klamath Basin. If one of these factors were to change, the BOR would be unable to function. This is what happened in 2001. In 2001, the environmental and federal factors interacted in a way that made it impossible for the BOR to function as it always had, and the result was the BOR's decision not to divert water from the Klamath for irrigation.

In the following paragraphs, this Note will attempt to shed some light on the factors that led to the BOR's shut off of irrigation water in 2001. To do this, this Note will discuss in detail (A) the history of appropriative rights in the Klamath Basin; (B) what happened in the Klamath Basin that led to the litigation; and finally, (C) the claims before the Court of Claims.

A. Appropriative Rights in the Klamath Basin

The Klamath Basin is located in an arid region of the West that straddles portions of southern Oregon and northern California.[19] Like most western states, California and Oregon have very few sources of surface water.[20] The shortage of water made the application of traditional systems of water appropriation difficult for both states.[21] In the beginning, California and Oregon attempted to apply the traditional systems of water appropriation.[22] However, it soon became clear that traditional systems of appropriation, which tied appropriative rights in water to land ownership, were unsuitable within their territories and left the states unable to meet their residents' demand for water.[23]

Faced with exploding populations brought west by promises of gold and cheap land, the states were forced to reevaluate the way they supplied their residents with water.[24] To meet the growing demand for fresh water, both states took steps to implement systems of water appropriation that were uniquely tailored to their own circumstances.[25] These new systems of appropriation were developed in a manner that allowed the state to put what little water it had to use.[26] Based on the custom of prior appropriation, the systems for appropriation adopted by California and Oregon revolutionized the use and accessibility of water within their borders by severing the right of use from land ownership.[27] Without these systems, neither Oregon nor California would have been able to support their population centers, or expansive farming operations.

Whether or not we agree with these systems today is inconsequential. The fact of the matter is, the states adopted new

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19 *See* Klamath I, 67 Fed. Cl. 504, 512–13 (2005); *see also* Russ Rymer, *Reuniting a River*, NATIONAL GEOGRAPHIC MAGAZINE, Dec. 2008, *available at* http://ngm.nationalgeographic.com/print/2008/12/klamath-river/rymer-text.

20 JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 7–10 (4th ed. 2006).

21 DOREMUS & TARLOCK, *supra* note 4, at 37–39.

22 *Id*. at 38–40.

23 *Id*. at 40–43.

24 *Id*. at 39–41.

25 *Id*. at 42–43.

26 *See generally* DOREMUS & TARLOCK, *supra* note 4, at 41–46; SAX ET AL., *supra* note 20, at 29–33; *Western States Water Laws: Water Appropriation Systems*, U.S. BUREAU OF LAND MGMT., http://archive.org/details/westernstateswat4002heco (last visited Sept. 1, 2013) (discussing the differences between appropriative and riparian rights to water).

27 *See generally* DOREMUS & TARLOCK, *supra* note 4, at 41–46; SAX ET AL., *supra* note 20, 29–33; U.S. BUREAU OF LAND MGMT., *supra* note 26.

systems of appropriation for the purpose of developing the West.[28] Using the draw of cheap land, and subsidizing that land with an inexpensive supply of water, enabled the states to secure political and economic security.[29] If Oregon and California had not supplied their settlers with water, their land would not have been developed, and the states would look very different than they do today.

The problem is, when the states adopted their appropriation systems, states did not define what rights they were transferring to appropriators through the issuance of private appropriative rights. Without a clear articulation of what rights were transferred along with an appropriative right, the courts are left with the daunting task of determining what rights irrigators in the Klamath Basin can expect to attach to their appropriative rights.

To shed light on what rights could be vested in an irrigator through an appropriative right, this Note will attempt to clarify (1) what an appropriative right is generally; and (2) what rights were transferred to appropriators in the Klamath Basin.

1. The History of Appropriative Rights in the United States

An appropriative right to water is simply a person's authority to divert and control water from a specific body of water for his or her own use.[30] From a historical perspective, people have always had a right to divert water from a watercourse for his or her personal use. Traditionally, this right was rarely challenged because water has historically been viewed as a shared common. However, over the course of the last several hundred years, population changes and the development of less than optimal environments have forced governments to reexamine the traditional view of water. In response to these changes, water law has to evolve to address society's increasing demand for water. In the following paragraphs this Note will discuss the evolution of water appropriation from the ancient doctrine of natural flow to the modern doctrine of prior appropriation, an evolution that developed the ancient common into a modern commodity.

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28 *See generally* SAX ET AL., *supra* note 20, at 29–33.

29 *See generally id*.

30 U.S. BUREAU OF LAND MGMT., *supra* note 26 (discussing the differences between appropriative and riparian rights in regard to the appropriation of water resources).

a. Appropriation Under Traditional Common Law Doctrines

When the United States was first settled, British settlers brought with them a system of water appropriation based on the English common law doctrine of natural flow.[31] Under this doctrine, only owners of riparian land, land abutting a watercourse, could use the water from the watercourse. Additionally, any use of water was restricted to the riparian land. This doctrine tied an appropriative right to land ownership. A right to use the waters of a watercourse vested in all landowners whose property touched that watercourse.[32] The right to use water of the stream was attached to the property rights associated with ownership of the riparian land and could be transferred only with the land.[33] Under this traditional system of appropriation, the only restriction on an appropriator's use of the water in an abutting stream was to leave the waters of the stream "undiminished in quantity and quality."[34]

This English system valued water in its natural course, largely ignoring its value as a commodity.[35] While the system did allow riparian owners to use water on track, those uses were required to leave the stream in its natural condition.[36] The basic premise of the system was to highlight water's quality as a shared resource. Owners of land were entitled to use any abutting stream simply because use of such water flowed from ownership of riparian land. Each landowner was entitled to his or her share of an undiminished stream. From this sense of entitlement flowed a sense of ownership that mimicked land ownership. However, the doctrine placed an important restriction on such use—a riparian owner's use of a stream could not frustrate a downstream owner's use. Under the common law, any property interest held by the landowner in the water was considered a shared right of use not an exclusive property right that could be used to exclude others from using that landowner's water.

b. Appropriation Under the American System

The natural flow doctrine was unanimously followed by courts in the United States until fairly recently in the country's history. For

31 SAX ET AL., *supra* note 20, at 29–33.

32 *Id*.

33 *Id*.

34 *Id*.

35 *Id*.

36 *Id*.

over two hundred years the doctrine worked well in the eastern regions of the United States.[37] However, expansion and development during the industrial revolution, starting in the second-half of the nineteenth century, began to undermine the usefulness of the rule in an era of rapid industrial growth.[38]

For the first time in history, water was needed for consumptive uses, and the natural flow doctrine specifically forbids such uses because they require depletion of the quantity and / or the quality of water in shared watercourses.[39] In an attempt to address the developing needs of industry, American courts dismissed traditional doctrines of appropriation in favor of a riparian doctrine that applied a "reasonable use" standard to uses.[40] Under the new American reasonable use doctrine, water could, for the first time in history, be diverted from a watercourse for consumptive uses that diminished the quality and quantity of the flow in order to promote the development of industry.[41]

c. Appropriation and Western Expansion

Under the American system of appropriation, a person could divert water from a watercourse for a consumptive use, a use that would deplete the quantity or quality of water in a watercourse. This allowed for riparian owners to apply water to consumptive uses. The problem was, the American doctrine still required that appropriators be riparian landowners. A requirement that made development of the expansive states in the western United States extremely difficult.

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37 *See* SAX ET AL., *supra* note 20, at 37.

38 *See id*. at 37–39.

39 *See id*. at 39.

40 *Id*. at 43; Snow v. Parsons, 28 Vt. 459, 462 (1856) ("There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below.").

41 *See Snow*, 28 Vt. at 459. The Supreme Court of Vermont explicitly rejects the traditional natural flow doctrine in favor of a doctrine that allowed riparian land owners to make reasonable withdraws from streams for industrial purposes. *Id*. In *Snow*, the court explicitly notes that "[w]ithin reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others." *Id*. at 462. Therefore, the reasonableness of the use became the key to determining whether or not an appropriation of the stream was proper: a direct departure from earlier standards forbidding uses that harmed the natural state of a stream at all. *See generally id*. at 464–65.

In the East, most people live within a few acres of a stream, and rainfall is both abundant and regular.[42] This situation makes developing farmland in the East fairly easy because farmers can depend on annual rainfall and easy access to streams, rivers, and springs to irrigate their crops. In contrast, most western regions receive substantially less rainfall than the regions in the eastern half of the United States, and the only thing western regions can count on in terms of rainfall is that any rain will be irregular and sporadic.[43] Exasperating the minimal levels of annual precipitation is the fact that streams are few and far between.[44]

This situation limited western development and expansion because under the American doctrine riparian owners could only use water on land that abutted the watercourse from which the water was being diverted.[45] The riparian requirement that required water to stay on the riparian tract of land prevented vast areas of western states from being developed.[46] Therefore, in order to develop their lands, western states were forced to adopt a new system of appropriation tailored to their unique environments.[47] This new system, known as prior appropriation, severed water rights from ownership of land and allowed the public to divert water for use on non-riparian land.[48]

Under the system of prior appropriation, the first person to divert water from a watercourse and put that water to beneficial use established a right to use the water he or she diverted.[49] Additionally, the earlier that a person diverted water and put that water to a beneficial use, the greater that person's right to the water.[50] As applied, the system allowed diverters to take as much water as they needed from a watercourse and continue to take that water every year, as long as the diverter could establish that he or she was actually putting water to some beneficial use.[51] The only way to divest such a

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42 *See* SAX ET AL., *supra* note 20, at 6–8, 10 (describing the levels of annual precipitation and water supplies of the different regions of the United States).

43 *See id*.

44 *Id*.

45 *See generally id*. at 27–33.

46 U.S. BUREAU OF LAND MGMT., *supra* note 26 (discussing the differences between appropriative and riparian rights to water).

47 DOREMUS & TARLOCK, *supra* note 4, at 38–39.

48 *Id*.

49 *See generally* SAX ET AL., *supra* note 20, at 124–26.

50 *Id*.

51 *Id*.

right was to establish that the diverter was not using the full amount of water diverting.[52]

Under the system of prior appropriation, the right to use water from a watercourse was severed from the traditional riparian ownership requirement.[53] Instead, an appropriative right based on prior appropriation was established as an expectancy interest developed in the water of the stream itself.[54] The idea being that if there is water in the stream, and a diverter has the superior right to that water, that diverter may reasonably expect that he or she would be able to divert that water for his or her use.[55]

The problem is states applying this doctrine have never clearly articulated what rights they are transferring to diverters. Under the earlier systems of allocation, landowners understood that they had a shared right to the water in the watercourse and that the right was tied to their ownership of land. Under the doctrine of prior appropriation, the severance of water from land ownership has undermined the "shared" quality of the resource.

This begs the question of whether an appropriative right established through a system of prior appropriation transfers more rights than the water rights associated with earlier systems of allocation. States have taken steps to document appropriative rights, even issuing permits for diverters that specifically outline when an appropriator may divert water from a watercourse and how much water he or she may divert. However, states have failed to identify what rights in the water an appropriator may expect to acquire through these permits. Diverters generally understand the concept that those among them who established appropriative rights first, have greater rights to the water in the stream than those diverters who established their rights later.

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52 State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1051–55 (Wash. 1993).

53 *See generally* SAX ET AL., *supra* note 20, at 124–26; U.S. BUREAU OF LAND MGMT., *supra* note 26 (discussing the differences between appropriative and riparian rights to water).

54 DOREMUS & TARLOCK, *supra* note 4, at 38–39; SAX ET AL., *supra* note 20, at 152–153; U.S. BUREAU OF LAND MGMT., *supra* note 26 (discussing the differences between appropriative and riparian rights to water).

55 DOREMUS & TARLOCK, *supra* note 4, at 38–39; SAX, *supra* note 20, at 152–53; U.S. BUREAU OF LAND MGMT., *supra* note 26 (discussing the differences between appropriative and riparian rights to water).

The problem is, states have never established what "first in time, first in right" actually means in the context of actual property rights. Under earlier systems, a right to use water was one right in the bundle held by owners of real property. This is not the case for diverters who have state issued rights based on the system of prior appropriation. Therefore, it is important for appropriators to determine which rights the states actually transferred within the appropriative right in order to understand which rights to the water have vested through the appropriative right.

2. Appropriative Rights in the Klamath Basin

The big question imputed through the *Klamath* litigation is which rights vested in the irrigators through their appropriative rights. To answer this question, the court must determine which rights are attached to an appropriative right. Once the court ascertains what the bundle of rights associated with an appropriative right actually entails, it can then attempt to determine whether those rights constitute a property right to water.

In the context of *Klamath*, California and Oregon instituted their own unique systems for allocating water. The states were able to implement their own system of allocation because water law is traditionally an area of law reserved for the states. This regulatory authority is based on English common law traditions that were adopted by the United States at its founding. Understanding the basis and rationale for the traditional authority of state water regulation will help to clarify which rights to water are held by the federal government, the states, and private parties.

a. The Foundation of Federal Regulatory Authority

As discussed above, the first American settlers applied English common law doctrines to water allocation.[56] During that period of American history, the English Crown held title to all navigable water and lands within the American territory.[57] However, after the Revolutionary War, title to this property transferred to the federal government of the United States.[58] At that time, the United States

56 *See* Martin v. Waddell's Lessee, 41 U.S. 367, 409–10 (1842) ("According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative.").

57 SAX ET AL., *supra* note 20, at 523; *Martin*, 41 U.S. at 410.

58 SAX ET AL., *supra* note 20, at 523.

government became the successor in interest to the waters and lands of the United States once held by the English Crown.[59]

b. The Foundation of State Regulatory Authority

In order to divest itself of this property, and grow revenue, the U.S. federal government began to transfer title to this property to the states.[60] In accordance with the Equal Footing Doctrine, when a state was added to the Union, the federal government would grant that state title to the lands and waters included within the territory of the state.[61] However, as Justice Field articled in *Illinois Central Railroad Co. v. Illinois*,[62] the federal government did not grant the states absolute title to the resources transferred to the state pursuant to the Equal Footing Doctrine.[63]

The idea behind the Equal Footing Doctrine is that each state, upon admittance to the Union, is granted an equal trust in the lands and waters of its territory.[64] The Doctrine applies at the time states are inducted into the Union and is intended to ensure that all states are admitted on an equal basis.[65] What the Doctrine does not do is admit

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59 *Id*.; *Martin* at 409–10.

60 SAX ET AL., *supra* note 20, at 523.

61 *Id.*

62 *Ill. Cent. R.R. Co.*, 146 U.S. 434, 452 (1892).

63 *See id.* (noting that while all states are inducted into the Union on an equal footing with all other states, that the title to land transferred at that time "is different from the title which the United States hold in the public lands . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."). In *Illinois Central Railroad Company*, Congress along with the City of Chicago passed legislation granting the Railroad an exclusive right to develop the Chicago harbor, a parcel of land located below the navigable waters of Lake Michigan. *Id*. at 439–42. The state of Illinois filed suit against the Railroad claiming that the State had an exclusive right to develop submerged lands below navigable bodies of water within it borders. *Id*. The Court held in favor of the State, finding that

> [t]he ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they [the lands and waters of the state] are held . . . is governmental, and cannot be alienated, except . . . when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

Id. at 455–56.

64 SAX ET AL., *supra* note 20, at 523; 146 U.S. at 434–35.

65 Or. *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 373 (1977) (recognizing that "new States would be admitted 'upon an equal footing, in all respects' . . . with the original States." The Court cites *Martin v. Weddell's Lessee*, noting that the

states into the Union on an equal footing with the federal government.[66]

It is clear that the Equal Footing Doctrine grants states title to the lands of their territories, including submerged land below navigable waters.[67] What is unclear is whether the Doctrine grants states title to the water that flows in the states' navigable waterways.[68] Because title to water is not expressly or impliedly granted at statehood, and the federal government retains a right to impede on a state's authority to control the water flowing in watercourses in which states hold title to the submerged lands, there is a question as to whether water was ever intended to be subject to title.

In light of the traditional view of water as a shared common for which the Crown had full authority to control, it seems apparent that the founders intended water to be reserved for the federal sovereign to control, and not the states. The Equal Footing Doctrine provides that all land and submerged lands will be conveyed to the states upon statehood. However, the Doctrine is silent as to whether the states will receive the water in the watercourses as well. From a traditional perspective, one could argue that the Doctrine, by conveying riparian land to the states, conveyed the appropriative rights associated with riparian land ownership to the states.

The problem is, states normally did not receive title to *all* riparian land upon statehood. The federal government, previous private land grants, and Indian tribes in many instances maintained ownership of riparian parcels after statehood. This leaves the states and the federal government trying to figure out which entity holds title to the water.

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original States held the "absolute right to all their navigable waters, and the soils under them for their own common use, subject only" to rights to in land and waters that were not "surrendered by the Constitution.") (internal quotations omitted).

66 *See generally id*. at 373–74. The Court explains that the Equal Footing Doctrine is a Constitutional conveyance of title in all land in a state's territory to the state government. While, the Court notes that this conveyance may not be "defeated" by an act of Congress or its grant of such lands to a third party, the Court's precedent does not articulate what title in water is granted to the states. *See id*. However, the Court does indicate that the conveyance of title pursuant to the Equal Footing Doctrine is subject to the Congress's enumerated powers as dictated by the Constitution. *See id*. at 374–75.

67 *Id*.

68 *Id*. at 374 n.5 (citing Pollard v. Hagan, 44 U.S. 212, 229–30 (1845) (the U.S. Supreme Court found that the Equal Footing Doctrine did not limit Congress's authority to regulate commerce on navigable waters within Alabama's territory)).

c. The Desert Land Act of 1877

During the second-half of the nineteenth century, Congress became increasingly aware of the constraints that the West's hydrology placed on western expansion. By the 1860s, the federal government had acquired hundreds of thousands of acres of land in the western United States. However, in most instances that land was not riparian and was typically located far away from a water source.

In an attempt to overcome this limitation, Congress passed the Desert Land Act in 1877.[69] The purpose of the Desert Land Act was to promote western expansion of the United States through the settlement of the West.[70] To fulfill this purpose, the Desert Land Act severed riparian rights from federal land in the West and conveyed parcels of that land to Americans who agreed to settle the West.[71] The Act held that "all water not actually appropriated 'shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing . . . .'"[72] While the Desert Land Act was important for the settlement of the West, it is most known for its effect on American water law.

The effect of the Act was to explicitly exclude the recipients of federal land grants, settlers, from obtaining traditional riparian water rights, the right to appropriate water from watercourses abutting their land.[73] States interpreted the language of the Act as Congress's express severance of all public rights in water in acquiescence of the adoption of state appropriation systems.[74] The Act seems to accomplish this goal by severing the riparian rights that would typically be enjoyed by the settlers who received riparian parcels of federal land through the Desert Land Act.[75] By excluding riparian rights from the rights transferred through federal land grants, Congress enabled states to institute their own systems of water

69 Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377 (codified as amended at 43 U.S.C.A. § 321 (West 2012)). The purpose of the Act was "to facilitate the reclamation of [desert land] by private entrymen." United States v. Hanson, 167 F. 881, 883 (9th Cir. 1909).

70 *See* 43 U.S.C.A. § 321 (West 2012).

71 *Id*.

72 DOREMUS & TARLOCK, *supra* note 4, at 39 (quoting 43 U.S.C. § 321).

73 Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155–56 (1935).

74 DOREMUS & TARLOCK, *supra* note 4, at 39.

75 *Cal. Or. Power Co.*, 295 U.S. at 155–56; DOREMUS & TARLOCK, *supra* note 4, at 39.

allocation,[76] thereby enabling new western states to institute systems of water appropriation that could maximize the use of the resource.[77]

In response, most western states have, because of their limited supplies of surface water, implemented systems of appropriation that reflect some form of the doctrine of prior appropriation.[78] Under this system,

> [t]he person holding the most senior (oldest) right is entitled to have his or her entitlement fully satisfied before the next most senior person receives water, and so on. Thus, in times of shortage, the most senior right holder is entitled to insist that junior users curtail their use in order that the senior have sufficient water to satisfy his senior right.[79]

Accordingly, in 1909, the Oregon legislature adopted Title 45, known as the Water Rights Act of 1909.[80] The Water Rights Act codifies Oregon's system of prior appropriation.[81] Under the Oregon system, to establish a right an appropriator must divert water from a watercourse and put it to a beneficial use.[82] However, in a revolutionary move, Oregon required that all appropriators register

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76 *Cal. Or. Power Co.*, 295 U.S. at 164; *see also* SAX ET AL., *supra* note 20, at 351. The Desert Land Act allowed settlers to claim up to 640 acres of public land. *Id.* Settlers of these tracts of public land "were entitled only to as much water as was actually appropriated and necessarily used for irrigation on [that land]." *Id.* All "surplus" water, water that was not necessary for irrigation of a specific tract of land, was "held free for the appropriation and use of the public for" other beneficial purposes that had existing rights. *Id.* at 351–52. In the Act, Congress does not explicitly suggest that western states must implement a specific system of appropriation, but in *Cal. Or. Power Co.*, the Court interprets this silence as Congress "sanction[ing] . . . state and local doctrine[s] of appropriation." *See Cal. Or. Power Co.*, 295 U.S. at 164. Therefore, the effect of the Act is to enable states to adopt their own systems of appropriation free from the "impediment" of common law riparianism. *Id.*

77 SAX ET AL., *supra* note 20, at 325; DOREMUS & TARLOCK, *supra* note 4, at 39.

78 *See* SAX ET AL., *supra* note 20, at 325–26.

79 *See* Klamath I, *supra* note 1.

80 OR. REV. STAT. § 537.120 (2009).

81 *Id.* (The statute holds that, "all waters within the state may be appropriated for beneficial use, as provided by the Water Rights Act.").

82 OR. REV. STAT. § 539.240 (Pursuant to the Oregon system of prior appropriation, all water rights vested prior to 1909 must be registered so that the state may determine whether the claimed water was diverted and put to a beneficial use in accordance with Oregon's system of prior appropriation. However, after the Water Rights Act was enacted in 1909, appropriators could only acquire water rights by obtaining a permit from the state in accordance with OR. REV. STAT. § 537.120.). *See* OR. REV. STAT. § 537.120; United States v. Or. Water Res. Dep't., 44 F.3d 758, 764 (Or. 1994).

their rights with the state before a private water right would vest.[83] This action worked to divest any holders of a riparian right of that appropriative right if the holder did not register with the state, thereby turning riparian rights into rights to appropriate under prior appropriation.[84]

B. Introduction to the Dispute: Klamath Irrigation District v. United States

1. The Facts: What's Really Going On in the Klamath Basin

The issue at the root of the conflict is simple: which materially adverse interest group should dictate the use of the Klamath? However, understanding the source of the conflict only illuminates one small part of the dispute. Arguing that the dispute is between fish and farmers oversimplifies the conflict. Instead, the fight surrounding the Klamath involves much more entrenched issues that can only be understood when read in context. In the following paragraphs, this Note will clarify the conflict by further discussing (a) the unique system of the Klamath River; (b) the Klamath Project; (c) the impact of the Endangered Species Act (ESA) on the Klamath Project; and finally, (d) the situation that led to the BOR's refusal to divert water from the Klamath for irrigators in the Klamath Basin.

a. The Klamath River

The Klamath River runs through some of the most inhospitable and remote country in the continental United States.[85] Draining a vast region, encompassing portions of south central Oregon and northern California, the Klamath River encompasses around "12,000 square miles, an area roughly the size of Maryland and bigger than eight other U.S. states."[86]

Officially, the Klamath River's headwaters begin in Lake Ewauna, near Klamath Falls; however, those who have visited the headwaters can easily see that the river is fed by snowmelt from the Cascade

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83 *See* OR. REV. STAT. § 537.120; United States v. Or. Water Res. Dep't, 44 F.3d 758, 764 (Or. 1994).

84 DOREMUS & TARLOCK, *supra* note 4, at 40.

85 Rymer, *supra* note 19.

86 DOREMUS & TARLOCK, *supra* note 4, at 23.

Mountains stored in Upper Klamath Lake.[87] Fed by snow melt in the "Upper Basin," the river is augmented by the Scott, Shasta, Salmon, and Trinity rivers as it runs through California on its way to the Pacific Ocean.[88] However, it is this 263-mile procession that makes the river unique.

In most watersheds, rivers start in the wettest, steepest region of their watersheds and end in the driest and flattest region. This is not the case for the Klamath. Unlike most rivers, the Klamath grows wetter, wilder, and more rugged as it descends to the California Coast.[89] Therefore, the Klamath's "unusual topography plays an important role in its water problems."[90]

In most watersheds in the West, the upstream regions of a watershed are home to geological formations that allow water storage to occur upstream of agriculture.[91] Typically, the upstream regions of a watershed will receive more precipitation and will be home to geological diversity (defined by "steep canyons and deep valleys").[92] Having these kinds of geological features upstream of agricultural projects allows irrigators to build large water storage projects in the form of deep reservoirs that allow them to store large amounts of water upstream of the flatter, more arid regions where their agricultural uses occur.[93]

This is not the case in the Klamath Basin. Instead, the "Lower Basin," the region closest to the California Coast, receives more precipitation and is geologically diverse, while the "Upper Basin," the region near Klamath Falls, is arid and fairly flat.[94] This topography makes large storage projects nearly impossible in the Upper Basin where water is most desperately needed for agriculture. Therefore, the best water storage projects on the river can only occur downstream of the river's agricultural projects.[95] This means that in dry years the river is more susceptible to water issues than most rivers simply because there is no way to store more water upriver from the agricultural center.

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87 *Id.*

88 *Id.*

89 Rymer, *supra* note 19.

90 DOREMUS & TARLOCK, *supra* note 4, at 25.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 DOREMUS & TARLOCK, *supra* note 4, at 25.

Water shortages in the Klamath Basin are exasperated by the fact that the agricultural center which applies water from the river is located in a region where "precipitation is highly variable from year to year," a region where "[p]eriodic droughts are the norm" not the exception, and "[a]gricultural water demand exceeds supply in about seven out of every ten years."[96]

The Upper Basin lies at the foot of a volcanic mountain range extending from California to Washington. This proximity to recently active volcanoes makes the region's soil especially fertile.[97] However, when settlers first entered the Upper Basin, the high, cold, and dry country made farming extremely difficult.[98] This difficult situation was exasperated by the region's frequent droughts, frosts, and a short growing season. This combination of environmental conditions left the Klamath Basin relatively undeveloped until late into the nineteenth century. The implementation of a government sponsored irrigation project has allowed for the development of a strong agricultural industry in the Upper Basin.

b. The Era of Reclamation

In 1902, Congress enacted the Reclamation Act.[99] The Reclamation Act attempted to promote western expansion by making water more accessible to homesteaders developing government land grants throughout the West.[100] The program was created to help fund and develop large water storage projects that could hold and disperse enough water to support farming projects in agricultural areas throughout the West.[101] Through the Reclamation Act, the federal government funded the construction and operation of numerous large water storage projects developed to divert water for irrigation.[102] The Act created the United States Bureau of Reclamation (BOR), a federal

96 *Id.* at 26.

97 *See id*.

98 *See id*. at 37.

99 Pub. L. No. 57-161, 32 Stat. 388 (1902) (codified as amended in scattered sections of 43 U.S.C.A. § 371 (West 2012)).

100 *See* SAX ET AL., *supra* note 20, at 746–47.

101 *Id.* at 747.

102 *See id.*

agency created to oversee the dispersal of water from the storage projects.[103]

The BOR had two responsibilities under the Act.[104] First, the BOR was responsible for constructing and maintaining the large water projects.[105] Once constructed, the BOR was then responsible for contracting with local irrigators in order to disperse the waters collected in the project.[106] The main rationale for the projects was to promote permanent settlement in the West, and, by issuing water to irrigators.[107] The federal government believed this would encourage such settlement.[108]

These projects, it should be noted, were not self-sustaining.[109] The contracts that the BOR entered into with contractors did not cover the cost of the projects; instead, they simply ensured that irrigators would receive subsidized water from the projects in accordance with the doctrine of prior appropriation.[110] In accordance with these contracts, the Bureau of Reclamation released water to the irrigators.[111]

In 1939, Congress amended the Reclamation Act through the enactment of the Reclamation Project Act.[112] The Reclamation Project Act was created to amend the Reclamation Act in a manner that would allow the BOR to deliver water to irrigators at rates that the BOR found appropriate.[113] Additionally, the terms of the Reclamation Act clarified the law that the Bureau had to follow when supplying water to irrigators.[114] The amendment established that the BOR was required to follow state law when distributing water unless the state law was inconsistent with a *clear* Congressional directive.[115]

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103 *See id.*

104 *See id.*

105 *See id*.

106 DOREMUS & TARLOCK, *supra* note 4, at 44.

107 *Id*.

108 *Id*.

109 SAX ET AL., *supra* note 20, at 747.

110 *Id.*

111 *Id.*

112 Reclamation Project Act of 1939, 43 U.S.C.A. § 485 (West 2012), 53 Stat. 1187, § 9.

113 *See* SAX ET AL., *supra* note 20, at 748.

114 *See id*. at 746–47.

115 California v. United States, 438 U.S. 645, 665–66 (1978). Discusses the meaning of § 8 of the Reclamation Act which states that "nothing in this Act shall be construed as affecting or . . . interfer[ing] with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." 53 Stat. 1187, § 8, 43 U.S.C.A. § 383 (West 2012); "Under the clear language

c. Reclamation in the Klamath Basin

In 1905, the Bureau of Reclamation (BOR) authorized one of the first reclamation projects in the United States. This project–the Klamath Project–consisted of a system of dams and was intended to supply homesteaders in the Klamath Basin with water for irrigation purposes.[116] The legislation permitting the construction of the project specifically authorized the

> Secretary of the Interior [to] carry[] out any irrigation project . . . to raise or lower the level of the lakes and rivers of the Klamath River Basin as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof.[117]

The Klamath Project was an enormous endeavor because it required the BOR to provide irrigators with enough to water to support 240,000 acres of farmland and several wildlife refuges.[118] The problem was, and still is, that the Project is located in a geological region that is not conducive to water storage projects.[119] Completed in the 1960s, the Klamath project provides water to irrigators in the Upper Klamath Basin.[120] "Today, the project diverts about 1,345,000 acre-feet" of water annually to irrigate farmland in both California and Oregon.[121] Most of this water goes to the production of alfalfa, hay, and potatoes.[122] However, the amount of potatoes produced in the project area has been greatly reduced in recent years due to the amount of water necessary for potato production.[123]

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of § 8 and in light of its legislative history, a State may impose any condition on 'control, appropriation, use or distribution of water' in a federal reclamation project that is not inconsistent with clear congressional directives respecting the project." *California*, 438 U.S. at 645.

116 Klamath I, 67 Fed. Cl. 504, 509–10 (2005); DOREMUS & TARLOCK, *supra* note 4, at 47–48, 50.

117 Klamath I, 67 Fed. Cl. at 509–10 (quoting Act of February 9, 1905, ch. 567, 33 Stat. 714 (codified at 43 U.S.C.A § 601 (West 2012))).

118 Klamath I, 67 Fed. Cl. at 509–10.

119 DOREMUS & TARLOCK, *supra* note 4, at 53 (noting that the Klamath Project uses gravity to distribute water to irrigators in the Klamath Basin). According to Doremus, the Project is prone to water disputes because the Project is unable to store large amounts of water. This means that in wet years, the Project cannot retain and store extra water for delivery in dry years. *Id.*

120 *Id*. at 50.

121 *Id*.

122 *Id.*

123 *Id*.

Although irrigation of the Klamath Basin's most water-consuming crop, potatoes, has decreased in recent years, irrigation in the Klamath Basin remains terribly inefficient.[124] According to a study conducted by the Western Water Policy Review Advisory Commission, only 54% of the water diverted from the Klamath Project for irrigation was "consumed by crops."[125] This statistic underscores the problems facing the Klamath Project in the Klamath Basin; in short, the irrigation practices enlisted in the Basin are antiquated and are "inefficient by western irrigation standards."[126] According to Western Water Policy Review's study, for every acre-foot of water actually consumed by crops in the Klamath Basin, two acre-feet were lost to evaporation.[127]

These wasteful irrigation practices, the rapid development of the environmental movement, and the growing influence of Indian interests on the Klamath River have for years undermined the popularity of the Klamath Project both in the Klamath Basin and on a national scale. However, the status quo of waste and agricultural centric economies remained relatively unchallenged in the basin until coho salmon, a species of salmon native to the Klamath River, were listed as an endangered species under the Endangered Species Act in 1997.[128]

d. The Impact of the Endangered Species Act on the Klamath Project

The Endangered Species Act[129] (ESA) was passed in 1973. The purpose of the ESA is to protect species of wildlife that are threatened with extinction.[130] The ESA accomplishes this goal by attaching heightened standards of protection to individual species, instead of attempting to preserve entire ecosystems.[131] In the United States, the Department of the Interior's Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service are responsible for ensuring that threatened and endangered species listed

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124 *Id.*

125 SALE KIRKPATRICK, DWELLERS IN THE LAND: THE BIOREGIONAL VISION 41 (1985).

126 DOREMUS & TARLOCK, *supra* note 4, at 50.

127 *Id*.

128 Klamath I, 67 Fed Cl. 504, 509–10 (2005).

129 16 U.S.C.A § 1536 (West 2012).

130 DOREMUS & TARLOCK, *supra* note 4, at 90.

131 *Id*.

under the ESA are protected from public and private actions that could harm the species.[132]

When species protected under the ESA live in aquatic habitats, they are typically harmed by the quality and quantity of the water flowing through the habitat.[133] This factor makes protection of aquatic species more difficult because in aquatic habitats, unlike situations with terrestrial species who are typically harmed by a specific action intended to harm a member of the species, harm to listed species is often incidental, resulting from actions that have substantial economic value associated with the river system and not the individual species.[134] Therefore, it is hard to point a finger at any specific action as being the direct result of the harm to the listed species.[135]

In such cases, the Fish and Wildlife Service or the National Marine Fisheries Service call for federal and state agencies to implement limitations regarding the amount and timing of water being diverted from watercourses.[136] These limitations, in many circumstances, impede on state and federal water rights, as well as privately held appropriative rights.[137]

The problem is, while "Congress has repeatedly indicated a vague intent to give some deference to state authority over water allocation," it has never attempted to exclude authority to regulate water from federally created environmental legislation.[138] Congress's reluctance to exclude water from federal regulation has left states and private appropriators in a confusing situation in which state authority to regulate water is subject to federal regulation.[139] However, there is no clear Congressional directive explicitly stating that state law is intended to supersede federal regulation.[140]

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132 *Id*.

133 *Id*. at 95.

134 *Id*. at 107.

135 *See id*.

136 DOREMUS & TARLOCK, *supra* note 4, at 95.

137 *Id*.

138 *Id*. at 96.

139 *Id*. (commenting on the fact that while Congress has indicated that states are supposed to control water allocation, it has refused to guarantee states the sole authority in the regulation of water).

140 *Id*.

e. Why the Bureau of Reclamation Refused to Divert Water

The BOR was operating under this uncertainty in 2001 when all forecasts indicated that the Klamath Basin was rearing up for a summer to be defined by severe drought. As a federal agency, the BOR is obligated to comply with the ESA. Therefore, in light of the drought conditions present in the Klamath Basin in 2001, the BOR was obligated to take steps to protect any listed species that would be impacted by its actions within the Klamath Basin. In 2001, that meant the BOR was forced to choose between diverting water in compliance with its contracts with irrigators and refusing to divert water in order to maintain flow levels in the Klamath River sufficient for the protection of three listed species.[141]

In April of 2001, after extensive study, the BOR concluded that the ESA required it to refrain from diverting water for irrigation in order to maintain minimum flow levels within the Klamath River system.[142] That spring, the BOR shut water off to irrigation projects because it believed that the ESA required it to take this action.[143] Had the BOR refused to comply with the ESA, and instead allowed for diversions from the Klamath for irrigation, the BOR believed it would have been subject to litigation for non-compliance with the ESA.[144] Therefore, the BOR refused to divert water for irrigation in order to comply with the ESA.[145]

As a result of the BOR's decision, irrigators sustained economic damages resulting from the BOR's refusal to release water from the Klamath River for irrigation purposes.[146] In response to these economic damages, the irrigators filed claims in the Court of Federal Claims on October 11, 2001.[147]

2. The Claims: What Must the Court Decide?

In the irrigators' second amended complaint, they asserted three claims against the BOR. The irrigators' alleged that the BOR's actions (a) constituted a taking in violation of the Fifth Amendment of the U.S. Constitution; (b) violated the Klamath Basin Compact; and

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141 Klamath II, 635 F.3d 505, 509–10 (Fed. Cir. 2011).

142 DOREMUS & TARLOCK, *supra* note 4, at 103.

143 *Id*. at 99–100.

144 *Id*. at 100–01; *see* Klamath II, 635 F.3d at 509.

145 Klamath II, 635 F.3d at 509.

146 *See id*. at 509–10.

147 *Id*. at 509.

finally, (c) breached the BOR's water service contracts with the irrigators.[148] In the following paragraphs this Note will discuss the basis and rationale behind the claims presented by the Klamath irrigators.

a. The Irrigators' Takings Claim

The irrigators' first claim is that the BOR's refusal to divert water for irrigation constitutes a taking because the action involved a government agency taking private property for public use without just compensation.[149] It is well established that the federal government may take private property for government activities through its power of eminent domain.[150] The only limitations on this power are found within the Fifth Amendment of the Constitution.[151] Specifically, the Fifth Amendment requires the federal government to refrain from taking private unless the property is taken for public benefit and the government pays the property's owner just compensation for the property.[152] This clause ensures that the federal government cannot confiscate private property unless the confiscation is for the benefit of the public *and* the property's owner is compensated for the confiscated property.[153] While there is no definitive test for determining what government actions constitute takings in violation of the Fifth Amendment, there are several elements that may be balanced in order to make a reasonable determination about the existence of a taking.[154]

Typically, government takings are divided into two categories: regulatory and possessory takings.[155] The latter form of government takings relate to the traditional concept of a taking and are fairly

148 *Id*. at 510.

149 *Id*.

150 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 639 (3d ed. 2006).

151 *Id*. at 640.

152 *Id*. "The Fifth Amendment states 'nor shall private property be taken for public use without just compensation.'" *Id.*

153 *Id*. The clause is intended to prevent the government from forcing a few people to bear burdens imposed by the public, or for the public good. The idea being that it is in the interest of fairness and justice that the costs of public interests "should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

154 *See generally* CHEMERINSKY, *supra* note 150, at 640–41.

155 *Id*. at 641.

straightforward. According to Erwin Chemerinsky, "[a] 'possessory' [taking] occurs when the government confiscates or physically occupies property."[156] In a situation where the government actually takes control of private property, courts will always find that the government's action constitutes a taking.[157]

However, the concept of government takings has changed over time. In the twentieth century, the federal government began to introduce regulations that impacted private property. In some instances, these regulations prevented private parties from exercising control over their private property.[158] Finding that the government's actions could prevent private parties from exercising control over their property, the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[159] According to Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*, while the government must be allowed to regulate property, when a regulation limits the control that the property owner has over his or her property by "mak[ing] it commercially impracticable" to use the property, the regulation "has nearly the same effect for constitutional purposes as appropriating or destroying" the property.[160]

This new form of government taking, known as a regulatory taking, is much harder to identify than the traditional possessory taking.[161] The Court has never reduced the concept "to a formula or rules"; instead, it has identified regulatory takings on a case-by-case basis.[162] However, "[t]he Court has articulated general criteria" for evaluating when a regulation rises to the level of a regulatory taking.[163] To aid in the identification of regulatory takings, the Court uses "three factors which have 'particular significance': (1) the

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156 *Id.*

157 *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982), where the Supreme Court "declared: '[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking'").

158 *See* CHEMERINSKY, *supra* note 150, at 646 (citing Justice Holmes' declaration in Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922)).

159 *Pa. Coal*, 260 U.S. at 415. Justice Holmes noted that while the federal government must have room to regulate property, there must be some limit to the control that the federal government can exercise over property through regulation. *Id.*

160 CHEMERINSKY, *supra* note 150, at 646 (quoting *Pa. Coal*, 260 U.S. at 414).

161 *Id.*

162 *Id.*

163 *Id.* at 647.

economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-back expectations; and (3) the character of the governmental action."[164]

As previously noted, the Court has never identified a specific test for determining when a government regulation is a taking, but when the Court's decisions are compared a major principle of regulatory takings law emerges. This principle is that the existence of a regulatory taking is highly reliant on the expectations of the property owner for his or her property.[165] The idea is that when a government regulation leaves a property owner with no *reasonable* economically viable use of his or her property, that regulation constitutes a regulatory taking.[166] These cases establish that the Court has determined that if a property owner (a) expected to use their property for a purpose; but (b) a government regulation enacted after his or her purchase of the property makes that purpose economically unviable; and (c) there is no other economically viable purpose for the property, that regulation constitutes a regulatory taking.[167]

The rationale behind this doctrine is that the government may legally exercise regulatory control over private property, but there is a limit to this control, and when the regulatory control the government exercises devalues property in a manner that rises to the level of possessory control over a piece of property, that regulation acts like, and is, a taking.

In the present case, the United States Court of Appeals determined that in order to make a finding in regard to the irrigators' takings claim, it had to first carry out a two-part test.[168] The first step that the court determined it needed to take was to determine whether the irrigators identified a "cognizable Fifth Amendment property interest" when they asserted the "subject of the taking."[169] The court then

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164 *Id.* (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986)).

165 CHEMERINSKY, *supra* note 150, at 647–48 (comparing Penn Cent. Transp. Co. v. City of N.Y.C., 438 U.S. 104 (1978) with Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)). Chemerinsky cites Justice Scalia's determination that that when a regulation "denies all economically beneficial or productive use of land," that regulation constitutes a government taking unless the property was purchased at a time when the regulation was already impacting the land. *See* Lucas, 505 U.S. at 1015.

166 CHEMERINSKY, *supra* note 150 at 647–48.

167 *Id*. at 647–48.

168 Klamath II, 635 F.3d 505, 511 (Fed. Cir. 2011).

169 *Id*.

declared that if it found that the irrigators' had asserted a cognizable property interest, it would then determine whether the "government's action amounted to a compensable taking of" the irrigators' property interest.[170]

The Klamath irrigators claim that they held a cognizable property interest in the water of the Klamath and that the BOR's refusal to release water from the Klamath Project amounted to a compensable taking of that property interest.[171] The basic premise of the irrigators' argument is that their appropriation rights are equitable or beneficial property interests cognizable under the Fifth Amendment.[172] Therefore, the irrigators argue that by declining to release water as required by the irrigator's appropriative rights, the BOR took control of their private rights to appropriate water in order to fulfill a public purpose without justly compensating them for the loss of their right to appropriate water.[173]

The irrigators' takings claim rests on their assumption that their appropriative rights are property interests cognizable under the Fifth Amendment.[174] In *California Oregon Power Co. v. Beaver Portland Cement Co*.,[175] the United States Supreme Court established that states alone have the authority to appropriate and distribute water within their borders.[176] In 1978, the Court clarified this authority regarding water in its opinion delivered in *California v. United States*.[177] The Court's determination in *California* established that states may impose conditions on water held in federal reclamation projects so long as the conditions imposed by state law are not inconsistent with any clear "congressional directives" relating to the federal project.[178]

Read together, *Beaver Portland Cement* and *California* indicate that the Court interprets the Reclamation Act to assign to state law the authority to determine the appropriate control and distribution of

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170 *Id*.

171 *Id*. at 510.

172 *Id*. at 511; Klamath I, 67 Fed. Cl. 504, 507, 540 (2005).

173 Klamath II, 635 F.3d at 510–11.

174 *Id*.; *see* Klamath I, 67 Fed. Cl. at 516, 540.

175 Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

176 *Id.* at 163–65.

177 California v. United States, 438 U.S. 645 (1978).

178 *Id.* at 674–75.

water.[179] Therefore, the main question presented by the irrigators in *Klamath I* and *II* is whether, under Oregon law, appropriative rights are property rights cognizable under the Fifth Amendment.[180] The Oregon Supreme Court holds that appropriative rights can constitute property interests in Oregon.[181] In its *en banc* certified decision, the court did not explicitly outline what elements elevate an appropriative right to a property interest.[182] What the court's opinion does is establish under Oregon law that a private party may establish an equitable or beneficial property interests in an appropriative right.[183] However, the court does not specify what an equitable or beneficial property interest is, or clarify how such interests are developed.[184] The only concrete answer provided by the court relating to the status of equitable or beneficial property interests in water under Oregon law is that the application of water to a beneficial use is necessary for establishing a property interest in water, but this application alone will not establish a property interest.[185] Instead, the court articulated that there are three factors that, when read together, are necessary for the establishment of a property interest under Oregon law. These factors include the following actions: (1) whether the water right was appurtenant to the land–whether water from a federal project was applied to a party's land for a beneficial use; (2) a determination regarding the relationship between the federal government and the party; and finally, (3) the impact of any contractual agreements

179 *See generally* Klamath I, 67 Fed. Cl. at 519 (discussing the idea that any property interest related to water is determined by state law, as established by Justice Rehnquist in his opinion delivered in California v. United States, 438 U.S. 645, 667 (1978)).

180 *See* Klamath I, 67 Fed Cl. at 518–19 (citing the U.S. Supreme Court's holding that state water law controls the appropriation and distribution of water).

181 Klamath Irrigation Dist. v. United States (Certification Decision), 227 P.3d 1145, 1161 (Or. 2010).

182 *Id*. at 1169–70. Justice Walters notes in a concurring opinion that the Oregon Supreme Court's decision does not elaborate on what the concept of equitable title is for the purpose of a takings claim. *Id*. The concurring opinion stresses that while the Oregon Supreme Court has established that an appropriative right may constitute a property interest, the court has not resolved the difficult legal questions: what is an equitable or beneficial property interests in the context of the Fifth Amendment's concept of "property," and how are such interests established? *Id*. at 1171. Additionally, the Oregon Justice argues that while the Oregon Supreme Court has recognized the property interest can exist in Oregon, the court has not articulated how or why it exists. *Id*. at 62.

183 Klamath II, 635 F.3d 505, 516 (Fed. Cir. 2011).

184 *See* Certification Decision, 227 P.3d at 1162–63.

185 *Id*. at 1162.

between the party and the federal government.[186] The court argues that when these factors are weighed together they will enable a court to determine whether an appropriative right is a property interest protected by the Fifth Amendment.[187]

In the present case, the irrigators assert that they put the water they received through their appropriative rights to beneficial use on their land and have therefore developed equitable title, or an equitable property interest, in the waters of the Klamath–water held in legal title by the BOR.[188] Therefore, they are asking the courts, the Federal Court of Claims, the Court of Appeals, and the Oregon Supreme Court, to determine whether their use of their appropriative rights have developed their rights into private property interests.

b. The Irrigators' Violation of Compact Claim

The irrigators' second claim relates to the BOR's violation of the interstate compact relating to the Klamath River that exists between California, Oregon, and the BOR.[189] The irrigators argue that the federal government's interference with the water distribution promised under the compact constituted a taking.

c. The Irrigators' Breach of Contract Claim

The irrigator's final claim relates to the individual contracts that they entered into with the BOR.[190] In support of their breach of contract claims, the irrigators argue that the BOR had a contractual duty to provide water to their irrigation projects in accordance with their contracts.[191] Therefore, they allege that through the BOR's refusal to fulfill its duty by making its contractual deliveries of water, the BOR breached its contracts with the irrigators.

3. What Is Happening with the Case?

On February 17, 2011, the United States Court of Appeals remanded *Klamath II* back down to the Federal Court of Claims for further litigation.[192] In its opinion, the Court of Appeals instructed the

186 *See id*. at 1163–65.
187 *Id*. at 1163.
188 Klamath II, 635 F.3d at 516–18.
189 *Id*.
190 *Id*.
191 *Id*.
192 *Id*. at 519.

Court of Claims to make further determinations regarding the irrigators' taking claims based on the Certification Decision issued by the Oregon Supreme Court in 2010.[193] Additionally, the Court of Appeals instructed the Court of Claims to make a case-by-case determination regarding each of the surviving compact and takings claims.[194] Finally, the Court of Appeals instructed the Court of Claims to determine whether it was impossible for the federal government to carry out its contractual obligations relating to the Klamath Project's water deliveries.[195]

II
DISCUSSION

The *Klamath* litigation has been remanded back to the Court of Federal Claims for further determination relating to the takings and contract claims presented by the irrigators. The Court of Federal Claims must now evaluate the irrigator's claims in light of the Oregon Supreme Court's certification decision, and determine (1) whether the irrigators' appropriative rights are property rights cognizable under the Fifth Amendment; (2) whether the BOR's action took or impaired those rights; and finally, (3) whether the BOR breached its contractual obligations owed to the irrigators.

In the following paragraphs, this Note will discuss the claims presented by the irrigators and argue that if the Court of Federal Claims is forced to make a finding regarding the irrigators' takings claim, it should find that the expectation interests that the irrigators in Klamath River Basin developed via appropriation rights do not constitute property interests cognizable under the Fifth Amendment.

A. Step One: The Irrigators' Contract Claims

The Court of Federal Claims should first attempt to resolve the contract claims presented by the irrigators. By resolving the irrigators' complaint on a basis of contract law, the Court of Claims would not only be able to quickly resolve the dispute, but would also avoid the larger constitutional question presented by the parties.

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193 *Id*.

194 Klamath II, 635 F.3d at 519.

195 *Id*. at 522.

1. The Avoidance Doctrine

The avoidance doctrine is a prudential tool intended to preserve judicial restraint.[196] Traditionally, the United States Supreme Court refused to make determinations on issues based on questions of constitutional law when the case could be resolved on non-constitutional grounds.[197] Today, the Court's application of the doctrine is less stringent, and, as a result, it has decided to rule on an increasing number of constitutional issues. This willingness to hear and rule on sweeping constitutional issues is especially important for cases like *Klamath* where disputes of law are complicated and have long and conflicting histories.

Legal scholars argue that the rationale behind the avoidance doctrine is that it allows the Court to let constitutional issues "simmer" until the Court believes that the public is ready to accept a decision on the issue.[198] If this is the case, then the conflict in the Klamath Basin provides the Court with an exceptional example of the crossroads that has emerged in water law in the United States. *Klamath* is a case that pits the status quo of western water politics against the demands of the twenty-first century. While there may be a rationale for avoiding the constitutional issues implicated by *Klamath* and resolving the case on a contract basis, the Court may view *Klamath* as an opportunity to clarify and develop the relationship between states and the federal government in regard to water allocation.

The avoidance doctrine is based on a collection of judicially created rules for handling constitutional issues that appear in cases.[199] The doctrine has a long and tumultuous history.[200] First described by

196 *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004–05 (1994).

197 *Id*. at 1004–07.

198 *Id*. at 1043–44.

199 *Id*. at 1016–17.

200 *See id.* at 1004. In 1833, John Marshall urged courts to avoid reviewing unnecessary constitutional issues. *Id.* This general idea that the only time a court should rule on a constitutional issue is when there is no other avenue for resolution was the first articulation of the general doctrine of avoidance. *Id.* However, since 1833 courts have not always adhered to the idea that if a constitutional issue can be avoided it should be avoided at all costs. *See id*. at 1007–08. For instance, the modern Court has on several occasions tackled constitutional issues even though the particular cases could have been resolved without resorting to making a determination on the constitutional grounds. *See id*.; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1(1993); Romer v. Evans, 57 U.S. 620 (1996).

Justice Brandeis in 1936,[201] the doctrine has been applied by courts throughout the United States in an attempt to limit the instances of courts unnecessarily ruling on constitutional issues. Using this doctrine, courts are able to resolve disputes on grounds that do not implicate the U.S. Constitution, even though constitutional grounds for resolution are properly before the court.[202]

The doctrine enables courts to refrain from making sweeping determinations regarding constitutional questions every time a constitutional question may be implicated in a dispute it is charged with resolving.[203] This ability to refrain from determining constitutional instances is a major justification for the doctrine of avoidance because it solidifies the ability of judges to use restraint when ruling on issues that may implicate separation of powers issues.[204] Therefore, the doctrine "furthers principles of separation of powers by essentially showing greater respect for the coordinate branches of government – particularly the legislature."[205] By avoiding the constitutional question, courts attempt to start a dialogue between the branches of government.[206] The goal of this exercise is to put the other branches of government on notice of the constitutional issues regarding a specific regulation.[207] The Court believes that by putting the branches on notice, they will have an opportunity to correct any

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201 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936). In his concurring opinion, Justice Brandeis argues that "[t]he Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon . . . the constitutional questions pressed upon it for decision." *Id.*

202 *Id*. at 347.

203 *Id*.

204 Kloppenberg, *supra* note 196, at 1013; Michelle R. Slack, *Avoiding Campaign Finance Reform: Examining the Doctrine of Constitutional Avoidance in Campaign Finance Reform Law in Light of Citizens United v. Federal Election Commission* 16 NEXCJLP 153, 157 (2010–2011).

205 Slack, *supra* note 204, at 153. The idea being that Congress is sworn to uphold the laws of the United States, namely the Constitution. Therefore, the Court should attempt to interpret the law that is questioned as being unconstitutional in a manner that is constitutional. The idea seems to be that the judiciary branch should give the legislature the benefit of the doubt, and just clarify what the legislature "meant" to say when creating the law—even if the court's interpretation is explicitly contradictory to the legislative intent of the law. *Id.*

206 *Id*. at 157.

207 *Id*.

inconsistencies between their regulations and the Constitution, thereby, preserving the power of their branch.[208]

Justice Brandeis' rationale for his belief that courts should avoid ruling on constitutional issues was the fact that he felt that, "judicial review of the constitutionality of legislative acts [constitutes] a grave and delicate power for use by fallible, human judges only when its use cannot conscientiously be avoided."[209] To help courts better understand the doctrine of avoidance, he created a list of seven rules that courts should follow when determining whether a constitutional issue is right for court review.[210]

Historically, courts have followed Justice Brandeis' rules for passing on constitutional issues. Justice Brandeis' rules are as follows: (1) Courts will not make a determination of the constitutionality of legislation in a "friendly, non-adversary, proceeding" because such questions are only legitimately before the court as a "last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals."[211] (2) "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it . . . [i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'"[212] (3) "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[213] (4) "The Court will not pass upon a constitutional question although properly presented by the record, ***if*** there is also present some other ground upon which the case may be disposed of."[214] (5) Courts will not determine the validity of a statute unless the claimant is actually injured by its operation.[215] (6) "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."[216] (7) Even if there is a "serious doubt" about the constitutionality of an action of

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208 *Id*.; Ashwander v. Tenn. Valley Auth., 297 U.S. at 346–47. Justice Brandeis argues that the Court should only pass on a constitutional question as a last resort. *Id.*

209 Kloppenberg, *supra* note 196, at 1015.

210 *Id*. at 1016.

211 *Ashwander*, 297 U.S. at 346; Kloppenberg, *supra* note 196, at 1016.

212 *Ashwander*, 297 U.S. at 346–47; Kloppenberg, *supra* note 196, at 1017.

213 *Ashwander*, 297 U.S. at 347; Kloppenberg, *supra* note 196, at 1017.

214 *Ashwander*, 297 U.S. at 347 (emphasis added); Kloppenberg, *supra* note 196, at 1017.

215 *Ashwander*, 297 U.S. at 347; Kloppenberg, *supra* note 196, at 1017.

216 *Ashwander*, 297 U.S. at 348; Kloppenberg, *supra* note 196, at 1017.

the legislature, "it is a cardinal principle that" the courts should first ascertain whether the court can find a construction of the statute that may avoid the question of constitutionality of the statute.[217]

To avoid making decisions that implicate substantial constitutional questions, courts most commonly use Justice Brandeis' *Ashwander* avoidance rule.[218] Courts use this rule in order to refrain from striking down statutes entirely.[219] Instead, by applying Brandeis' *Ashwander* rule from the avoidance doctrine, courts are able to "give[] effect to congressional intent" instead of simply subverting it by striking down the statute altogether.[220] By using avoidance to read congressional action in a light that does not annoy the Constitution, courts force legislators to consider the constitutional implications of their actions prior to enacting legislation that may fly against "constitutional norms."[221]

2. If the Court Finds that BOR Did Breach Its Contract(s)

If, after reviewing the contracts existing between the irrigators and the BOR, the Court of Federal Claims finds that the BOR violated its contractual duties, the court could resolve *Klamath* on a contract law basis. This action would enable the court to avoid the politically charged constitutional issues implicated in the case. While this action would not alleviate the confusion surrounding water rights in Oregon, it would follow the traditional doctrine of avoidance, and allow the court to reserve resolution of the highly charged issues relating to the status of allocation rights as property until a later date. This decision could reserve a ruling on the status of allocation rights for the finalization of the pending adjudication of the Klamath watershed.

3. The Likely Outcome of This Decision

Because the opinion issued by the Court of Federal Claims reveals little about the actual contracts existing between the BOR and the irrigators, it is hard to say what the likely outcome of the court's

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217 *Ashwander*, 297 U.S. at 348; Kloppenberg, *supra* note 196, at 1017.

218 Gilbert Lee, *How Many Avoidance Cannons are there After Clark v. Martinez?*, 10 U. PA. J. CONST. L. 193, 194 (2007).

219 *See id.* at 195.

220 *Id.* at 198–99.

221 *See id.* at 199–200.

decision would be. However, a determination based on contract law would be the simplest resolution for this case.

This form of resolution is attractive in this instance because it would allow the court to make case-by-case determinations regarding the existence of a breach of contract instead of making sweeping determinations about a status of appropriative rights. Additionally, this form of resolution would allow more time for Oregon as a state to come to a determination about the status of appropriative rights within its jurisdiction–a task that the Court has explicitly attributed to state regulatory authority.[222] However, the impact of such a resolution could be far reaching.

In the alternative, a decision based on contract law could be less attractive because it would leave a number of important questions regarding appropriative rights unanswered. *Klamath* provides the courts with an opportunity to address specific questions relating to appropriative rights that have remained unanswered for over a century. While there is a strong argument for avoiding the constitutional questions at the heart of the litigation, there is arguably an even more compelling rationale for choosing to forgo avoidance and answer the long-standing questions head on.

However, depending on the outcome of the Court of Claims review of the contracts existing between the BOR and the irrigators, the argument for avoiding the constitutional question may simply be moot. If there is no contractual basis for resolving the dispute, the court will be required to tackle the irrigators' primary claim that the BOR's action constitutes a taking.

B. Step Two: The Irrigators' Takings Claim

As discussed earlier, to successfully establish that the BOR's action constitutes a taking, the irrigators must prove that their appropriative rights are cognizable property interests under the Fifth Amendment *and* that the BOR's action either took or unreasonably interfered with the use of that property interest.[223]

To make this determination, the Court of Claims must first determine whether the irrigators' appropriation rights constitute equitable or beneficial property interests under Oregon law. After making this determination, the court will then need to determine

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222 *See generally* California v. United States, 438 U.S. 645, 672 (1978).

223 *See generally* CHEMERINSKY, *supra*, note 150.

whether such property interests constitute cognizable property interests under the Fifth Amendment. Finally, if the court determines that the property interests held by the irrigators in the appropriative rights are property interests cognizable under the Fifth Amendment, the court will need to determine whether the BOR's actions interfered with the property interest in a manner that constituted a taking.[224]

1. An Appropriative Right as a Beneficial Property Interest

The Oregon Supreme Court has held that appropriative rights can become property interests.[225] The court explained that the relationship and contractual obligations that exist between an appropriator and the federal government can establish expectations in water delivery from the federal government that rise to the level of a beneficial or equitable property interest.[226] However, the court refrained from making a firm determination about the question of title to water prior to the issuance of a determination based on the currently pending Klamath Basin adjudication, a project attempting to determine what parties hold firm rights to water in the Klamath Basin.[227]

The court's reluctance to make a firm determination about rights relating to water in the Klamath Basin indicates that the court was unwilling to either define or classify what an appropriative right is in the context of property. Because the court did not define these rights, holders of appropriative rights in Oregon may hold equitable or beneficial property interests in their promised diversions of water, in the form of a paper appropriation right, but they do not know what such interests are in the context of property law.

This means that even if an appropriator were found to possess an equitable or beneficial interest, it is unlikely that a court would be able to confidently determine what that interest amounts to in the context of the property clause of the Fifth Amendment. This situation raises important questions about the law governing water allocation in Oregon and the law governing water allocation throughout the West. Specifically, the situation begs the question of what character of government action and interference constitute a taking when the

224 *See generally* Certification Decision, 227 P.3d at 58–60; Klamath II, 635 F.3d at 519.

225 Certification Decision, 227 P.3d, at 44–45.

226 *See generally id*. at 57–58, 62.

227 *Id*. at 57.

availability of the property, in this case, water, is dependent on natural systems over which the government has no control.

2. Water Rights and the Fifth Amendment

The appropriation rights at issue in *Klamath* are derived from Oregon's system of prior appropriation.[228] This means that in Oregon, "the rights of the prior users of water [are protected] against the rights of subsequent users."[229] These rights are typically viewed as "usufructuary," which means that the rights associated with the right are related to use and not ownership.[230] In the context of the Klamath River, this means that owners of an appropriative right have the right to put a defined quantity of water to beneficial use every year, and from that use they are entitled to enjoyment and economic benefit.[231] The right of a holder of an appropriative right to exercise his or her rights to divert water is limited by the requirements inherent in the doctrine of prior appropriation and the state's interests in regulating water.[232]

Specifically, the Supreme Court established in *Hinderliner v. La Plata River & Cherry Creek Ditch Co.* [233] that states possess an equitable interest in water and can only grant appropriative rights in accordance with their own equitable share of the watercourse.[234] This decision indicates that states may not grant rights to water that are greater than the equitable share that the state possesses.[235] Therefore, when a state grants an appropriative right based on a state adopted system of prior appropriation, it is unlikely that the grant authorizes the transfer of any rights beyond those held by the state.

Using this rationale as a basis for understanding the rights transferred from the federal government to the states through the

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228 *See* Klamath II, 635 F.3d at 511-14.

229 James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur?* 9 U. DENV. WATER. L. REV. 1, 31 (2005).

230 *Id.* at 32.

231 *See id*.

232 *See id.*

233 Hinderliner v. La Plata River & Cherry Creek Ditch Co, 304 U.S. 92 (1938).

234 *Id.* at 102.

235 *Id*. at 108–09 (noting that "as Colorado possessed the right only to an equitable share of the water in the stream, [Colorado's] decree . . . did not award to the [appropriative right holder] any right greater than the equitable share. Hence the apportionment made by the [government action] cannot have taken from the [holder of the appropriative right] any vested right . . . .").

Equal Footing Doctrine, this Note argues that the federal government did not likely transfer more rights to appropriators in the Klamath Basin than it transferred to the states via the Equal Footing Doctrine. Instead, it seems clear that rights associated with water are less defined and less exclusive than those associated with traditional property protected from government invasion by the Fifth Amendment.

If the Court of Federal Claims attempts to determine whether the BOR's actions constitute a taking, it will need to conduct a fact-based analysis of the government's action.[236] This analysis will need to balance the reasonableness of the irrigators' investment-backed expectation to receive water from the Klamath Project against the reasonableness of the governments action–basically the court will need to conduct a balancing test that weighs the reasonableness of the public action against the harm that it caused the irrigator's private property interests.[237] Through this process the court will need to determine the reasonableness of the irrigators' expectation to receive water during years of drought.[238] From there, the court would evaluate whether the action of the BOR deprived the owners of property of the economic use of that property.[239] Basically, the court will need to determine whether the irrigators' expectation that they would receive water for irrigation in 2001 was reasonable, and if it was, whether the regulation singled out a specific group to bear the burden of the regulation.[240]

If the court finds that the irrigators had a property interest, that the property interest held by the irrigators was protected under the Fifth Amendment, and that BOR's action required the irrigators to bear the economic burden of an action directed at protecting the public as a whole, the court will find that the BOR's action constituted a taking. If the court finds that the BOR committed a taking, it will require the BOR to compensate the irrigators for the temporary destruction of their appropriative rights.

This resolution will compensate irrigators who were impacted by a federal regulation, but will not resolve water distribution problems in

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236 *See generally* Davenport & Bell, *supra* note 230, at 10–15.

237 *See id*. 12–13.

238 *Id.*

239 *Id*. at 14.

240 *Id*.

the West. Instead, this Note argues that this resolution will only further cloud the status of water in the West. By turning allocation rights into property rights protected by the Fifth Amendment, the court would make it virtually impossible for the government to regulate water quantities and qualities in the West because of the cost of such regulation. Such elevation of appropriative rights would increase the value of appropriative rights by establishing them as a commodity and requiring the government to compensate owners for any impairments caused by federal regulation intended to promote environmental integrity in hydrological systems.

CONCLUSION

Elevating water rights to the status of a Fifth Amendment property interest would upset the ancient understanding of water as a common shared resource, would undermine the requirements for commerce dictated in the Constitution, and would forever restrict the public's access to water. This situation would compensate irrigators with unrealistic expectations for water deliveries and elevate their rights above the rights of the general public. A decision that elevates appropriative rights to property rights would also further entrench wasteful agricultural practices that preserve the status quo, by alleviating any incentive for irrigators to reduce their diversions from struggling hydrological systems instead of encouraging more sustainable practices.

Prior appropriation explicitly protects the rights of senior appropriators over the rights of more junior appropriators. The United States government is the most senior appropriator in the West. While it severed water rights from its land grants in 1877, it did not destroy its own riparian rights to the water. It instead possesses the most senior right to the water of the west, and it has entrusted the states to share in its duty by granting them the authority to distribute water in a manner that is most beneficial to the public. If the rights to appropriate water issued by the states instead granted a person an absolute right to appropriate water at the expense of the public as a whole, then water would no longer be a shared common resource in the United States; instead, it will be forever viewed as a commodity that is only available to the highest bidder, a situation that is inconsistent with both the federal government's constitutional requirements and the states' public trust doctrine requirements.