

TAKING THE HEART OF THE KLAMATH BASIN: IS IT FREE?

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I. INTRODUCTION

This note will bring together, and arguably into conflict, the Endangered Species Act and a century old regime of private water rights. The intersection and the proper balance between these concerns lie at the heart of the litigation enveloping the Klamath Basin. A fight has been brewing in the Klamath Basin over the most valuable resource in the American West—water. The Endangered Species Act is in effect in the Klamath Basin to save the salmon and sucker fish populations.¹ As a result, in the 2001 growing season, federal agencies prevented farmers from irrigating their fields with any water.²

1. KLAMATH WATER USERS ASS'N, PROTECTING THE BENEFICIAL USES OF WATERS OF UPPER KLAMATH LAKE: A PLAN TO ACCELERATE RECOVERY OF THE LOST RIVER AND SHORTNOSE SUCKERS 1 (2001) [hereinafter KLAMATH WATER USERS].

2. Linda Ashton, *West Faces Worst Drought in a Quarter Century*, L.A. TIMES, Apr. 22, 2001, at A1.

The scope and complexity of water resource management and endangered species issues are virtually unequaled by any other activity presented to Congress, federal and state administrative agencies, as well as the judicial system. This note will evaluate whether the farmers in the Klamath Basin suffered a taking due to the loss of their water, and if so whether the farmers are entitled to just compensation under the Constitution.

II. KLAMATH BASIN HISTORICAL PERSPECTIVE

A. *The Klamath Basin Project*

Congress created the Klamath Basin Project by enacting the Reclamation Act in 1902.³ The Klamath Basin, spanning the Oregon and California border, is a vast, flat area of fertile soil and marshes surrounding the Klamath River.⁴ The Basin encompasses approximately 232,000 acres of fertile farmland producing horseradish, cereal grains, onions, potatoes, sugar beets, alfalfa hay, grass seed, malting barley, and irrigated pastures for beef cattle.⁵ The Klamath Basin is also home to the Lower Klamath National Wildlife Refuge and Tule Lake National Wildlife Refuge.⁶ Water from the Klamath Project also helps maintain the region as one of the most important staging areas for migratory waterfowl.⁷ More than 430 species of wildlife, including bald eagles, depend on diversions of water from the Project.⁸ Consequently, withholding all of the water in order to benefit three species is having a detrimental effect on over 400 other species that depend on the Klamath Basin for their sustenance.⁹

3. See KLAMATH WATER USERS, *supra* note 1, at 3 (stating the Reclamation Act was passed in 1902, and in 1905, the Klamath Project was authorized).

4. See Michael Kelly, *Evicted by Environmentalists*, WASH. POST, July 11, 2001, at A19.

5. Complaint for Just Compensation and Damages ¶ 24, *Klamath Irrigation Dist. v. United States*, No. 01-CV-591 (Ct. Fed. Cl. filed Oct. 11, 2001), *available at* <http://www.kmtg.com/pdfs/KlamathComplaint.pdf> (last visited Jan. 23, 2003) [hereinafter *Complaint*].

6. See KLAMATH WATER USERS, *supra* note 1, at 3 (stating the Klamath Project facilitates water delivery to the Lower Klamath National Wildlife Refuge and Tule Lake National Wildlife Refuge).

7. See Notice of Receipt of Petition for Exemption from the Requirements of Section 7(a)(2) of the Endangered Species Act, 66 Fed. Reg. 37,446, 37,450 (July 18, 2001) [hereinafter *Notice of Receipt*].

8. *Id.* at 37,449.

9. See William D. Kennedy, Editorial, *Fish Protected; Birds Suffer*, OREGONIAN, July 21, 2001, at B8.

Because the Klamath Basin averages only fourteen inches of precipitation per year, irrigation water is necessary and vital for the production of crops and the protection of wildlife and habitat located in the wildlife refuges.¹⁰ The effort to derive the highest use of the water began in 1905 when the state of Oregon passed legislation authorizing the raising and lowering of Klamath Lake for utilization in the Klamath Irrigation Project.¹¹ Established by the Bureau of Reclamation in 1905, the Klamath Project transformed a patch of land largely unsuitable for agriculture into a prosperous farming community.¹² The Federal Government used the Klamath Irrigation Project to lure World War I and World War II veterans to homestead this isolated region in the West.¹³ Pursuant to contracts signed in 1909, farmers agreed to till the high desert area while the Government promised to provide water in perpetuity.¹⁴ “The homesteaders came, worked for generations and built the farms the government wanted them to build, in accord with the values of the nation.”¹⁵ The Government’s explicit promise of permanent water rights for agriculture attracted thousands of farmers to the Klamath Basin, where their descendents have farmed for generations.

B. *Environmental Concerns*

The Klamath Project originally operated to conserve and distribute water for irrigation purposes, but in 1988, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service listed the Shortnose Sucker fish, the Lost River Sucker fish, and the Coho Salmon as endangered species under the Endangered Species Act.¹⁶ The Endangered Species Act was designed to “halt and reverse the trend toward species extinction, *whatever the cost*.”¹⁷ As a result, the U.S. Fish and Wildlife Service scrutinizes utilization of the water in the area to ensure that the Klamath Irrigation Project will not jeopardize endangered species. Therefore, many individuals, especially farmers in the Klamath Basin, view “the Endangered Species Act [as] a weapon to take property rights, in this instance water, from private landowners.”¹⁸

10. See Complaint ¶ 25, *Klamath Irrigation Dist.* (No. 01-CV-591).

11. See *KLAMATH WATER USERS*, *supra* note 1, at 3.

12. See *id.*

13. See Notice of Receipt, 66 Fed. Reg. at 37,447.

14. See Editorial, *People Suck*, *WALL ST. J.*, May 16, 2001, at A22.

15. Kelly, *supra* note 4, at A19.

16. See Notice of Receipt, 66 Fed. Reg. at 37,446-47.

17. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

18. *Endangered Species Act: Special Task Forces on Endangered Species and Wet-*

Section 7(a)(2) of the Endangered Species Act requires federal agencies to consult with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species”¹⁹ The wetlands and other resources upon which these birds depend require a regular supply of water from the Klamath Project. Based on this reality and the Endangered Species Act provisions, the Bureau of Reclamation initiated consultations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to assist in the development of operating plans for the Klamath Project.²⁰ Following these consultations, the Bureau of Reclamation adopted the minimum reservoir elevation endorsed by the U.S. Fish and Wildlife Service’s Biological Opinion in order to protect the sucker fish and salmon.²¹

C. *The Current Battle in the Klamath Basin*

The U.S. Fish and Wildlife Service issued a Biological Opinion concerning the Bureau of Reclamation’s annual operating plan.²² In April of 2001, the Service determined that the proposed 2001 operating plan for the Klamath Project jeopardized the continued existence of the Shortnose and Lost River Sucker fish as well as the Coho Salmon.²³ Pursuant to the Biological Opinions, the Bureau of Reclamation chose to suspend ninety percent of the water deliveries slated for 2001.²⁴ Consequently, water customarily and historically available to water users was no longer available. Halfway through the irrigation season, a small portion of the farmers received a partial delivery of water that lasted for approximately one month.²⁵

lands: Hearing Before the House Comm. on Res., 104th Cong. 77, 87 (1995) (statement of Bob Stallman, President, Texas Farm Bureau).

19. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2003).

20. See Notice of Receipt, 66 Fed. Reg. at 37,447.

21. See *id.*

22. Complaint ¶¶ 27-28, *Klamath Irrigation Dist. V. United States*, No. 01-CV-591 (Ct. Fed. Cl. Filed Oct. 11, 2001), available at <http://www.kmtg.com/pdfs/KlamathComplaint.pdf> (last visited Jan. 23, 2003).

23. *Id.*

24. See Todd Kepple, *Fish & Wildlife, BOR Continue To Wrangle Over Guidelines*, HERALD & NEWS (Klamath Falls, Or.), August 22, 2001, available at <http://www.heraldandnews.com/articles/2001/08/22/news14969.txt>.

25. See *id.*

The Bureau of Reclamation's decision, later upheld by a federal judge, ultimately shut off water to more than 1,400 farms.²⁶ For the first time in the history of the Klamath Project, the Bureau of Reclamation prohibited virtually all water diversions for the irrigation of tens of thousands of acres of farmland.²⁷ Under the constraints imposed by these Biological Opinions, the farmers and wildlife refuges did not receive water for most of 2001 and in the future will not receive water in dry or normal precipitation years.²⁸ This means that in every six or seven years out of ten, the farmers and ranchers will not receive any irrigation water.²⁹ "While some farmers still have state water rights or private wells, and others still get water from two nearby lakes, most farms are so parched their crops have blown away and the soil may be damaged for years."³⁰

Although the Endangered Species Act intended to protect endangered species, the Biological Opinion ultimately endangered private property owners. In the Klamath Basin, more than two thousand jobs have been lost, farms have lost \$74 million in revenue from the cutoff and drought, and the regional economy has suffered losses of \$134 million.³¹ In rural communities surrounded by public land, where the Endangered Species Act has hampered agriculture and resource production, the loss of jobs is not the only concern. Areas are also worried about the disappearance of tax revenues that fund local education and health care.

Even though fish don't vote, they have acquired increased political clout in recent years through the restrictions of the Endangered Species Act. In Southern Oregon's Klamath Basin, fish won the first round over farmers.³²

Facing one of the most extreme droughts in history, the farmers and growers confronted a series of market and economic problems that left many farms facing economic collapse.³³

26. Kelly, *supra* note 4, at A19.

27. *See id.*

28. Complaint, *supra* note 5, at ¶ 29.

29. *Id.* at ¶ 30.

30. Craig Welch, *Both Sides Harden in Oregon Water Dispute*, SEATTLE TIMES, July 9, 2001, at A1.

31. Editorial, *Go Fish*, WALL ST. J., Jan. 8, 2002, at A18 [hereinafter *Go Fish*].

32. Linda Ashton, *supra* note 2, at A1.

33. *See id.*

For now, the biggest impact of the drought is on farmers who irrigate. The agriculture industry feeds us all and provides thousands of jobs. It's a major player in our state's economy, so when it hurts, we all suffer.³⁴

The decision to cut off water caused a financial crisis in the Klamath Area. These regulations caused a loss totaling at least \$200 million in 2001.³⁵ More than one thousand families essentially face forced eviction from land they've farmed for generations.³⁶ Moreover, without the guaranteed irrigation water, most of the fields went unplanted in 2001.³⁷

The contracts concerning irrigation water have been in effect for more than forty years and the United States honored its contractual obligation to deliver water every year, until April 6, 2001.³⁸ Since the Klamath region developed and expanded around these century-old water rights, virtually the entire community relies on receiving its allocation of water from the Klamath Project. This includes the schools, fire departments, grocery stores, hospitals, libraries, and businesses.³⁹ Without water, these various entities cannot survive.

The farmers and communities in the Klamath Basin have committed their livelihoods, their way of life, and the welfare of their families to cultivation of the region's agriculture, based on the water promised to them by the government through the Klamath Project.⁴⁰

One of the major areas of contention surrounding the decision to cut off water to the Klamath Basin water users was the Biological Opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.⁴¹ In order to raise public confidence in the Biological Opinions that shut off water in the Klamath Basin, the Department of Interior requested that the opinions be analyzed by peer review.⁴² The peer review report, conducted by the National Academy of Sciences ("NAS"), concluded in a report that federal resource agen-

34. *Id.* (quoting Washington Governor Gary Locke).

35. *See Go Fish*, *supra* note 31, at A18.

36. *See* Notice of Receipt, 66 Fed. Reg. 37,446, 37,448 (July 18, 2001).

37. *Id.*

38. *See id.*

39. *See id.* at 37,446, 37,449-50.

40. *Id.* at 37,452

41. *See id.* at 37,448.

42. *See* Eric Bailey, *Outside Group to Review Status of 3 Klamath Fish Species*; *Nature*, L.A. TIMES, Oct. 3, 2001, at B7.

cies lacked sufficient proof to warrant cutting irrigation water to 1,200 farmers and 200,000 acres of farmland in the basin.⁴³

The NAS report countered that insufficient science exists to support the biologists' contentions regarding the effect of water levels on the endangered species. "The National Academy of Sciences study said there is 'no sound scientific basis' that high levels of water in the Klamath Lake and Klamath River would protect sucker fish and coho salmon."⁴⁴ The findings of the NAS also determined that "no substantial scientific evidence [existed] to support [any] changes in the operating practices that have produced the levels in Upper Klamath Lake and the main-stem flows over the past 10 years."⁴⁵ Weaknesses revealed by the NAS indicate that there were serious flaws with critical components of the analysis in the Biological Opinions and assessments.⁴⁶

Environmental groups asked the Bush Administration to ignore this critical scientific report and maintain water levels for endangered salmon and sucker fish. Deputy Secretary Griles, however, reasoned:

I am sure all of you would agree that the Federal government should not make decisions of this magnitude, that affect the lives of so many Americans, without a good sound scientific basis for those decisions. Not only do we risk needlessly hurting our fellow citizens, but we erode the confidence of the populace in general in our future decisions and actions.⁴⁷

It appears that the Department of Interior is finally aware of the dramatic impacts the agency can have on American families and is determined to take those impacts into consideration as it carries out its responsibilities under the law.

III. CONTRACTUAL RIGHTS

The Klamath Water User's Association, which represents farmers and other irrigators within the Project, in an effort to recover water, filed suit against

43. See Eric Bailey & Deborah Schoch, *The State Water Debate Focuses on Fish*, L.A. TIMES, Feb. 6, 2002, at B7.

44. Audrey Hudson, *NAS Challenges Water-Ban Reasons*, WASH. TIMES, Feb. 5, 2002, at A3.

45. *Fiscal Year 2003 Budget Requests for the Department of the Interior, the U.S. Forest Service, and the Department of Energy: Hearing Before the Senate Comm. on Energy & Natural Res.*, 107th Cong. 13 (2002) (statement of J. Steven Griles), available at <http://energy.senate.gov/hearings/hearing.cfm> [hereinafter *Fiscal Year 2003 Budget Hearing*].

46. See Hudson, *supra* note 44, A3.

47. *Fiscal Year 2003 Budget Hearing*, *supra* note 45.

the U.S. Department of Interior.⁴⁸ The Water User's Association alleges that the Bureau's annual operating plan breached the Government's contractual obligation to deliver irrigation water.⁴⁹ The Klamath Water User's Association sought a preliminary injunction against the implementation of the plan since the plan called for suspending water deliveries.⁵⁰ District Judge Aiken held, however, that the balance of hardships did not tip in favor of the irrigators and that the irrigators' contractual rights were subservient to the requirements of the Endangered Species Act.⁵¹ Judge Aiken denied the request for preliminary injunction, and in effect the farmers' access to water.⁵²

The Klamath water users urge, however, that deprivation of water constitutes a physical taking of property.⁵³ Under this theory, the water users possessed contract rights, which entitled them to use a certain amount of water. By preventing the utilization of guaranteed water, the water users argue that the Government deprived them of the entire value of their contractual right.⁵⁴

IV. PROPERTY RIGHTS

The right of citizens of the United States to use, enjoy, and reap the economic benefits of private property is regarded as fundamental and guaranteed against undue encroachment by the Constitution. The Federal Government, under the guise of the Endangered Species Act, has done more than just threaten the rights of private property owners. In the Klamath Basin, the Endangered Species Act has eliminated or eradicated those rights all together. The farmers in the Klamath Basin learned first hand the Endangered Species Act is a significant restriction on property enjoyment in the United States. As a result, the Klamath Basin water users filed suit in the U.S. Court of Claims in October of 2001.⁵⁵ Farmers claim the decision to shut off the water resulted in an unconstitutional

48. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1192 (D. Or. 2001).

49. *See id.*

50. *See* Joseph H. Hobson, Jr., *The Endangered Species Act and Water Law*, Address at the American Agricultural Law Association 2001 Conference (Oct. 13, 2001) (transcript available from the American Agricultural Law Association).

51. *Id.*

52. *See Kandra*, 145 F. Supp. 2d at 1211.

53. *See Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 316-17 (2001).

54. *See id.* at 318.

55. Jonathan Brinckman, *Farmers Sue U.S. Over Irrigation Losses*, OREGONIAN, Oct. 12, 2001, at C5.

taking of private property and the farmers are therefore entitled to compensation from the Federal Government.⁵⁶

A. *Fourteenth Amendment*

The U.S. Constitution includes two amendments addressing property rights: the Fifth Amendment and the Fourteenth Amendment.⁵⁷ The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law”⁵⁸ As Justice Harlan maintained in his dissent in the Civil Rights Cases, “the . . . right to . . . inherit, purchase, lease, sell, and convey property . . . [is one of] those fundamental rights which are the essence of civil freedom”⁵⁹

B. *Fifth Amendment*

The Fifth Amendment of the U.S. Constitution mandates, “nor shall private property be taken for public use, without just compensation.”⁶⁰ The purpose of this clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶¹ Whether a government action meets the public use requirement depends on whether the legislature’s purpose is legitimate and whether the means used to achieve that purpose are rational.⁶² Under the Fifth Amendment, a taking may occur if the Government deprives the owner of all economic use of his property.⁶³ The concern is not whether the Government can protect the sucker fish and Coho salmon under the Endangered Species Act, but whether the Government may impose those costs solely on the members of the Klamath Basin community by depriving them of irrigation water.⁶⁴

56. *Id.*

57. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

58. U.S. CONST. amend. XIV, § 1.

59. The Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

60. U.S. CONST. amend. V.

61. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

62. John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853, 860 (1999).

63. *See id.* at 859.

64. *See generally* *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

Constitutional property rights serve an important function in property law especially since courts are frequently required to interpret what those constitutional property rights mean in specific situations.

Constitutional property rules . . . protect property owners from tyranny at the hands of a majority of voting members of the community. Without constitutional limits on property rule making processes, the voting majority of a community could seize and redistribute the property of individuals or small groups in the community.⁶⁵

Unfortunately, judges and legal scholars do not agree on how to interpret constitutional property rights when applying those rights to conflicts between the expectations of a resource owner and the expectations of those who will be affected by the use of the owner's resource.⁶⁶ Case law reveals, however, that the distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."⁶⁷

V. WATER AS A PROPERTY RIGHT

Water rights are the right to use water by diverting it from its natural course.⁶⁸ These water rights are generally exercised by withdrawing water from a pre-existing body of water, using the water, and then returning the water to its source.⁶⁹ "It is laid down by our law writers, that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."⁷⁰ Usufructuary is defined as "a right to use another's property for a time without damaging or diminishing it, although the property might naturally deteriorate over time."⁷¹ In modern civil law, the owner of a usufructuary water right is similar to a life tenant. "Unlike real property rights, usufructuary water rights are limited and uncertain" since natural forces such as snow and rainfall largely

65. Terry W. Frazier, *Protecting Ecological Integrity Within the Balancing Function of Property Law*, 28 ENVTL. L. 53, 74-75 (1998).

66. *Id.* at 75.

67. *United States v. Causby*, 328 U.S. 256, 265 (1946).

68. *See United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 167 (Ct. App. 1986) (defining water rights).

69. Hobson, *supra* note 50.

70. *Eddy v. Simpson*, 3 Cal. 249, 252 (1853).

71. BLACK'S LAW DICTIONARY 1542 (7th ed. 1999).

determine water supply.⁷² It is well established, however, that the right to use water is a compensable property right.⁷³ The general rule in most jurisdictions characterizes water rights as an enforceable right to use and enjoy the benefits of the water to the exclusion of everyone else.⁷⁴ Courts dealing with property rights involving water are not concerned with the ownership of the water, but instead with its use.⁷⁵ Even if the water rights regulation is a mere restriction on use, the right is completely eviscerated since the property owners' sole entitlement is to the utilization of the water.⁷⁶

It is also well established that once the right to use water is acquired, it becomes a vested property right. This means that the right to water cannot be infringed by others or taken by governmental action without due process and just compensation.⁷⁷ Many western states, including California, utilize some form of the prior appropriation doctrine.⁷⁸ Prior appropriation doctrine holds that water is held for the benefit of all the people subject to a permitted right to use, and those "first in time" are "first in right" to take or divert water from a watercourse and apply it to a beneficial use.⁷⁹

The farmers and irrigators of the Klamath Basin represent water users who hold beneficial interests in water rights established in the early 1900s. Under the Reclamation Act of 1902, the Federal Government financed the Klamath Basin irrigation works by requiring the water users of the Project to repay the cost of construction.⁸⁰ The Federal Government offered homesteaders land in the Klamath Basin on this conditional basis.⁸¹ Since these homesteaders paid for the construction of the project and contracted with the United States Government for the delivery of water, the farmers and irrigators now possess vested water rights in perpetuity.⁸²

72. *State Water Res. Control Bd.*, 227 Cal. Rptr. at 170.

73. *Id.* at 168.

74. *See* Hobson, *supra* note 50.

75. *See* *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 560 (Cal. 1938).

76. *See* *Eddy v. Simpson*, 3 Cal. 249, 252-53 (1853) (stating the right of property in water is usufructuary and consists not so much of the fluid itself as the advantage of its use).

77. *See* *Ivanhoe Irrigation Dist. v. All Parties & Pers.*, 306 P.2d 824, 870 (Cal. 1957).

78. *Westland Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1143 n.10 (E.D. Cal. 2001).

79. *See* RONALD A. KAISER, *HANDBOOK OF TEXAS WATER LAW: PROBLEMS AND NEEDS* 43 (1987).

80. *See* Notice of Receipt, 66 Fed. Reg. 37,446, 37,447 (July 18, 2001).

81. *See id.*

82. *See id.* at 37,448.

Based on these water rights and contracts, the farmers are entitled to irrigation water delivered through the Project facilities. The United States has a duty under these contracts and under reclamation law to preserve and protect the water supply in the Klamath Basin for irrigation purposes.⁸³ The right to water is a vested property right even if it is derived from a contract.⁸⁴ By depriving the Klamath Basin farmers and irrigators of their contractually entitled water, the Federal Government effectively violated the terms of the contracts. The Federal Government also violated the Fifth Amendment by taking private property without just compensation to those deprived individuals.⁸⁵

VI. TAKING PROPERTY UNDER THE FIFTH AMENDMENT

A Fifth Amendment taking is generally divided and analyzed under two categories: physical takings or regulatory takings.⁸⁶ “A physical taking occurs when the government’s action amounts to a physical occupation or invasion of the property.”⁸⁷ This can include the functional equivalent of a “practical ouster of [the owner’s] possession.”⁸⁸ Courts have noted that when a property owner suffers a physical invasion of his property, “no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [courts] have required compensation.”⁸⁹ Compensation provides the appearance of equity, since the Takings Clause invokes “images of lonely, weak individuals seeking liberty and enjoyment of the fruits of their honest labor.”⁹⁰

A regulatory taking occurs when a government regulation restricts the use to which an owner may utilize his property.⁹¹ In other words, the regulation prevents the property owner from making particular use of property that would otherwise be permissible.⁹² To determine when a regulatory taking occurs, courts generally apply a three-part test.⁹³ The test requires the court to weigh the cha-

83. *See id.* at 37,447.

84. *See Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001).

85. *See Notice of Receipt*, 66 Fed. Reg. at 37,451.

86. *See Tulare Lake Basin*, 49 Fed. Cl. at 318.

87. *Id.*

88. *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878).

89. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

90. J. Peter Byrne, *Basic Themes For Regulatory Takings Litigation*, 29 ENVTL. L. 811, 812 (1999).

91. *Tulare Lake Basin*, 49 Fed. Cl. at 318.

92. *See Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999).

93. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).

character of the government action, the economic impact of that action, and the reasonableness of the property owner's investment backed expectations.⁹⁴ As Justice Holmes articulated, land use controls may go "too far" and result in a taking of private property for public use without due compensation.⁹⁵ For instance, a taking may occur even though the regulation is designed to achieve the perceived positive public good of assisting endangered animals.⁹⁶

Regulations are considered too restrictive when they deprive property of its entire economically beneficial or productive use and are considered categorical takings.⁹⁷ Categorical takings are equivalent to physical takings because they are not subject to a balancing test.⁹⁸

The water rights possessed by the farmers and irrigators in the Klamath Basin are the subject of a physical taking because the farmers and irrigators possess contract rights entitling them to the use of a specified quantity of water.⁹⁹ By preventing the use of that water, the Government deprived the farmers and irrigators the entire value of their contract right. Because the farmers and irrigators were entitled to use the water and the Government rendered the right to that water valueless, following the Supreme Court's analysis, the result is a complete occupation of property.¹⁰⁰

The distinction between a physical invasion and a governmental regulation that catastrophically impairs the use of property depends on whether the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit [the owner's] exploitation of it."¹⁰¹ Due to dry conditions and the lack of irrigation water, the farmers were unable to use their land for any farming. As a result, the farmer's loss of water can be considered a complete loss under the Takings Doctrine.¹⁰²

94. *Id.*

95. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

96. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (discussing requirement of compensation for takings related to a public purpose).

97. *Id.*

98. *See id.* at 1015-19 (stating that physical takings and categorical takings are subject to compensation "without case-specific inquiry into the public interest advanced in support of the restraint").

99. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001).

100. *See id.* at 319.

101. *Causby v. United States*, 328 U.S. 256, 265 (1946).

102. *See id.* at 265-66 (stating that the character of the invasion and damage determines the taking).

An oft-repeated colloquium of the West is, “whiskey’s for drinking, water’s for fighting about.”¹⁰³ It’s been this way since pioneers first began settling the arid West and the members of the Klamath Basin are experiencing this battle first hand. Although water rights may hold a unique place in the context of property law, it is important to fully realize the impact that restrictions on water use have on ownership. Unlike real property, a mere restriction on the use of a water right “completely eviscerates the right itself since [the owner’s] sole entitlement is to the use of the water.”¹⁰⁴ A restriction on a water right results in the complete extinction of all value for the property appurtenant to that water.¹⁰⁵ “Thus, by limiting [the farmer’s] ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.”¹⁰⁶

The complete deprivation of the farmers’ and irrigators’ water has resulted in a complete occupation of property by the Government. By preventing the individuals of the Klamath Basin from using the water to which they are entitled, the Government has “rendered the usufructuary right to the water valueless.”¹⁰⁷ There is no dispute that the farmers and irrigators possessed contracts that entitled them to the use of water. Since these water contracts conferred on these users a right to the exclusive use of water, their contract rights gave rise to a property interest.¹⁰⁸ In the end, the Government, through the Bureau of Reclamation, effectuated a physical taking of the farmers’ and irrigators’ property. Depriving an owner of the profitable use of his property constitutes a taking; therefore, just compensation should be made.

The Takings Clause does not prohibit the taking of private property. Instead, it places conditions on the exercise of that power. The Takings Clause does not restrict the Government’s right to proceed, but it does require the Government to pay financial compensation as a condition of enforcing a regulation that interferes with the rights of private landowners.¹⁰⁹

103. Kim O’Connell, *Regionalizing Watershed Mangement*, AM. CITY & COUNTY (June 1, 2001), available at http://www.americancityandcounty.com/ar/government_regionalizing_watershed_management.

104. *Tulare Lake Basin*, 49 Fed. Cl. at 319.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.* at 318.

109. *See Echeverria, supra* note 62, at 879.

VII. THE JUST COMPENSATION REQUIREMENT

“The federal government is certainly free to preserve the [sucker fish and salmon]; it must simply pay for the water it takes to do so.”¹¹⁰ As previously mentioned, the Fifth Amendment of the Constitution provides, “[n]or shall private property be taken for public use, without just compensation.”¹¹¹ The provision, “without just compensation”, is also referred to as the Just Compensation Clause and is applicable to state and local governments through the Fourteenth Amendment.¹¹² The Just Compensation Clause is designed to deter the government from forcing individuals to bear public burdens that should be shared by the public as a whole.¹¹³ If a landowner loses the ability to use some of his land for use as sustenance due to the actions of the government, the individual is entitled to compensation to help provide for the sustenance that he has been deprived of by the government.¹¹⁴

The Just Compensation Clause requires compensation when individual property owners are substantially burdened by the Government’s pursuit of a valid public objective.¹¹⁵ Thus, the Government has an obligation to provide compensation to individual landowners when it is the general public that is receiving the benefit.¹¹⁶ Justice Brennan has declared that if a regulation advances a legitimate public purpose, “it is axiomatic that the public receives a benefit while the offending regulation is in effect” and in that situation it would be fair for the public to pay just compensation.¹¹⁷ Justice Breyer has commented that, “at the heart of the [Just Compensation] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes ‘private property’ to serve the ‘public’ good.”¹¹⁸

The Supreme Court has held that a regulation results in a takings claim “where the regulation denies the [property owner] all economically beneficial or

110. *Tulare Lake Basin*, 49 Fed. Cl. at 324.

111. U.S. CONST. amend. V.

112. *See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

113. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

114. *See Frazier, supra* note 65, at 85-86.

115. *See Echeverria, supra* note 62, at 861-62.

116. *Id.* at 862.

117. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting).

118. *E. Enter. v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting).

productive use of land.”¹¹⁹ In order to be considered a taking that requires compensation, a regulation must deny a property owner all or substantially all of the practical use of the property.¹²⁰ The economically beneficial use of the property must be evaluated in light of the entire property.¹²¹ However, a property owner’s other land holdings should not be calculated when determining the extent of the diminution of value.¹²² When a regulation deprives the land of all economically beneficial use, the Government bears the burden of demonstrating that a taking has not occurred.¹²³ The landowner, however, still bears the burden of showing the extent of the damages suffered.¹²⁴

By denying the Klamath Basin water users their contractual right to irrigation water, the Government has created a complete deprivation of their entire land value. In the end, the Klamath Basin water users have been denied the economic viability of their land because there has been no permissible or beneficial use for the property once the Federal Government shut off irrigation water.¹²⁵ Rendering the water right valueless, the Government affected a taking in the Klamath Basin that requires compensation.

The Supreme Court has consistently held that property owners can only recover for a taking if the property owner demonstrates that the property was purchased based on the nonexistence of the currently challenged regulation.¹²⁶ The Supreme Court rejects takings claims involving land that is acquired with knowledge of existing or pending regulations. “There can be no reasonable investment-backed expectation to use the property in a manner that is inconsistent with these provisions that were in effect when the property was purchased.”¹²⁷ Landowners’ expectations must be measured at the time that the property is acquired and not at the time that the regulation is adopted.¹²⁸

119. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

120. Zealy v. City of Waukesha, 548 N.W.2d 528, 531 (Wis. 1996).

121. See Glenn P. Sugameli, Lucas v. South Carolina Coastal Council: *The Categorical and Other “Exceptions” to Liability for Fifth Amendment Takings of Private Property Far Outweigh the “Rule”*, 29 ENVTL. L. 939, 951 (1999) (citing Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1577 n.18 (10th Cir. 1995)).

122. See Bowles v. United States, 31 Fed. Cl. 37, 41 n.4 (1994) (citing *Lucas*, 505 U.S. at 1016-17 n.7).

123. *Lucas*, 505 U.S. at 1046 (Blackmun, J., dissenting).

124. See Weinberg v. Whatcom County, 241 F.3d 746, 751 (9th Cir. 2001).

125. See C. F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974) (stating that “for there to be a taking the landowner must show he has been deprived of all reasonable uses of his land”).

126. See Sugameli, *supra* note 121, at 978.

127. *Id.* at 979.

128. See Good v. United States, 189 F.3d 1355, 1358 (Fed. Cir. 1999) (finding the project

Because Congress created the Klamath Basin Project in 1902,¹²⁹ the water users had no reasonable expectation or knowledge that Biological Opinions would be imposed regarding the disbursement of water they had been promised.¹³⁰ Relying on contracts guaranteeing water in perpetuity, the water users of the Klamath Basin expected to receive the irrigation water required to sustain their property.¹³¹

Even though the Government is required to pay for the privilege of regulating land use, the individual still loses some ability to utilize the land for sustenance and production.¹³² Although the compensation payment would be financially useful to the Klamath Basin water users, these individuals can never be completely compensated for the crops, schools, resources, and members of the community that were ultimately lost or for future losses yet to be incurred.¹³³

VIII. DAMAGES

Damages are constitutionally mandated when a regulation results in an undue interference with the use of a property owner's land.¹³⁴ The water users of the Klamath Basin are both legally and constitutionally entitled to just compensation for the loss of their property without regard to the nature of the owner's initial investment-backed expectations.¹³⁵ Although any investment involves the risk of loss, one of the distinct functions of property law is to minimize that risk so private property owners will add value to their resources.¹³⁶ Regulations and

would not be approved under new regulations).

129. See *KLAMATH WATER USERS*, *supra* note 1, at 3.

130. See Complaint ¶¶ 39-41, *Klamath Irrigation Dist. v. United States*, No. 01-CV-591 (Ct. Fed. Cl. filed Oct. 11, 2001), available at <http://www.kmtg.com/pdfs/KlamathComplaint.pdf> (last visited Jan. 23, 2003) (alleging that the United States agreed not to impair the users' water rights).

131. See Kelly, *supra* note 4, at A19.

132. Frazier, *supra* note 65, at 84-85.

133. See Notice of Receipt, 66 Fed. Reg. 37, 446, 37,446 (July 18, 2001).

134. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320 (1987) (holding that where the government has taken land by regulation, the landowner may recover damages for the time before it is determined that the regulation constitutes a taking).

135. See *Palm Beach Isle Assocs., Inc. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (explaining that when "land use restrictions do not deny the owner of the regulated property all economically viable uses of [the land] . . . [the court has] no doubt that both law and sound constitutional policy entitle the owner to just compensation without regard to the nature of the owner's initial investment-backed expectations").

136. Frazier, *supra* note 65, at 80.

limitations on land use create doubt and uncertainty regarding land titles among members of the community. "Uncertain land titles discourage investment that otherwise could add value to the land and increase social welfare."¹³⁷ The Biological Opinions regarding the Klamath Basin isolated the property owners and the land itself. Shutting off the necessary irrigation water effectively took the property out of commerce and removed it from the market.

It halts improvements. It prevents the land from answering to the needs of growing communities. No homes can be built or towns laid out on land so incumbered, because the land always remains subject to be taken under the option. It is not a matter which affects the rights of individuals only. The entire community is interested. The welfare of the public is at stake.¹³⁸

In determining damages a court may consider the existing use of the land as a measure of reasonable expectation.¹³⁹ A court may also consider whether the land could be sold to someone else for the uses allowed.¹⁴⁰ In this situation, a court would not consider whether the present owner could make a profit, but would instead focus on whether the land itself has value.¹⁴¹

"Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."¹⁴² Allowing a landowner to continue to make use of property does not, by itself, constitute compensation.¹⁴³ Even if the Government were to terminate the regulation, the damages for just compensation would begin to run when the regulations took effect. If the Government does not terminate the regulation, however, then compensation must be provided for a permanent taking.¹⁴⁴ Just compensation also requires that the landowner receive interest from the date of the taking until the date payment finally occurs.¹⁴⁵ Because the Government never provided the

137. *Id.* at 89.

138. *Id.* at 89.

139. *See* Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991).

140. *See id.* (stating that the plaintiffs retain the fundamental right of ownership and only their right to rebuild is diminished).

141. *See id.* (stating that the Supreme Court does not look at diminution in value when determining whether a taking has occurred).

142. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

143. *See* *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987) (holding permit conditions serve the same purpose as a denial of permit requests and do not constitute a taking).

144. *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 613 (11th Cir. 1997).

145. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

Klamath Basin water users with the guaranteed irrigation water, the water users are entitled to compensation for a permanent taking of their private property.

The Government could hardly continue if just compensation was always required and the values of property were not diminished to some degree without paying for every change that occurs in the law.¹⁴⁶ “The more often the government must pay for exercising control over private property, the less control there will be. That is the reality.”¹⁴⁷

IX. CONCLUSION

The idea that property ownership promotes and protects individual liberty is strong in our nation’s history. Owning property has provided citizens with income, sustenance, independence, homes—the list goes on and on. Throughout time, property owners have been entitled to utilize their resources as they wish. Our Constitution does not guarantee rights to sucker fish and salmon, but it does guarantee American citizens the right to own property. As one court observed:

[T]hat government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.¹⁴⁸

The Federal Government should not be permitted to impose unfair burdens, causing financial ruin for farmers and communities simply because an endangered species has decided to visit an individual’s private property. The constitutionally protected rights of landowners should never be relegated to a secondary status behind legislatively contrived rights for plants and animals. As the situation in the Klamath Basin illustrates, it is imperative that while attempting to protect wildlife, the Federal Government and federal agencies also continue to protect private property owners.

146. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

147. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1575 (Fed. Cir. 1994).

148. Wilkinson v. Leland, 27 U.S. 627, 657 (1829).