

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)	
KLAMATH IRRIGATION DISTRICT, <u>et al.</u> ,)	
)	
Plaintiffs,)	No. 01-591L
)	
UNITED STATES OF AMERICA)	Judge Francis M. Allegra
)	
Defendant,)	
)	
and)	
)	
PACIFIC COAST FEDERATION OF)	
FISHERMEN'S ASSOCIATIONS,)	
)	
Defendant-Intervenor.)	
_____)	

MEMORANDUM *AMICUS CURIAE* OF NATURAL RESOURCES DEFENSE COUNCIL IN
SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFFS' CONTRACT CLAIMS

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Natural Resources Defense Council (“NRDC”) respectfully submits this brief *amicus curiae* in support of the United States’ motion for summary judgment as to plaintiffs’ contract claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an effort to assist the Court in resolving this motion, and in order to supplement rather than duplicate the presentation by the United States, this memorandum focuses on three issues. First, NRDC submits that, prior to addressing the sovereign defenses applicable in this case, the Court should address the threshold question of whether plaintiffs have established a *prima facie* case of breach of contract. Approaching the case in this fashion, the contract claims should be dismissed at the threshold on the ground that plaintiffs have failed to establish a *prima facie* breach. On the present record, there are at least two bases for this conclusion: (1) the background principles of Oregon (and California) law governing the scope of the water rights held by the United States, and in turn the scope of the rights the United States conveyed by contract to plaintiffs, bar plaintiffs from claiming an entitlement to the use of water that would destroy public fishery resources, and (2) the contract language, including but not limited to the crucial shortage clauses in the contracts, prevent plaintiffs from claiming an entitlement to the use of water. Beyond these issues, it is likely that the Indian Tribes’ reserved water rights in the Klamath, which are senior to any water rights asserted in this case, also preclude plaintiffs’ claims of entitlement to water in the circumstances of this case.

Second, NRDC submits that, assuming plaintiffs established a *prima facie* case of breach, the claims are barred by one or more of the traditional sovereign defenses. The United States has presented a simple argument, certainly supported by certain Federal Circuit precedents, for why the sovereign acts and/or unmistakability doctrines bar these claims. The United States’

understanding of the applicable law provides a persuasive basis for ruling in favor of the government. However, NRDC submits that the government's presentation offers a somewhat incoherent and confused understanding of the law. Specifically, while the United States contends that the sovereign acts and unmistakability doctrines bar the claims, the United States' brief appears to present these defenses as being so inextricably linked together that they amount to a single defense. NRDC seeks to assist the Court by offering an alternative understanding of the applicable defenses which, we submit, is more consistent with Supreme Court precedent and represents a more logical legal framework. Specifically, NRDC contends that three entirely separate defenses are potentially relevant in this case: the reserved powers doctrine; the sovereign acts doctrine; and the unmistakability doctrine. As we explain below, each of these defenses, properly understood, provides an *independent* basis for granting judgment to the United States.

Finally, this memorandum addresses, in a limited way, the government-financed subsidies enjoyed by Klamath water users. In its August 31, 2005 Order, the Court stated that there are "indications," including various comprehensive analyses prepared by the General Accounting Office, that beneficiaries of Bureau of Reclamation water projects have not fully repaid the real cost to the taxpayers of constructing these projects. Klamath Irr. Dist. v. United States, 67 Fed. Cl. 504, 508 (2005). However, the Court concluded, "[t]he parties [in this case] disagree as to the existence (and, if so, extent) of such a shortfall as to the Klamath Reclamation Project (the Klamath Project)." Id. at 509. NRDC submits that this shortfall most certainly does exist in the case of the Klamath Project. For present purposes, the most significant subsidy derives from the fact that plaintiffs (and their customers) repaid the construction costs of the Project without interest, significantly reducing the "real" cost of the project to the water users.

In addition, as a result of a highly favorable power contract between the Bureau of Reclamation and a private utility, Klamath water users have been the beneficiaries of artificially low power rates. NRDC submits that these enormous subsidies are legally relevant to the resolution of this case in at least two respects: (1) in determining whether or not it is plausible to read the contracts as creating an absolute entitlement to the use of a specific quantity of Project water, and (2) in determining whether the unmistakability doctrine bars the contract claims.

This memorandum will, in the first section, describe select empirical evidence supporting the conclusion that there is indeed a significant “gap” between the actual costs to the taxpayers of constructing the Klamath Project and the real dollar amounts repaid by Klamath water users, and also demonstrate that Klamath water users have been the long-term beneficiaries of large electrical power subsidies. Then, turning to the legal issues, the memorandum will address, in section two, why plaintiffs cannot establish a prima facie breach of contract and, in section three, why, in any event, plaintiffs’ claims are barred based on a proper understanding of the applicable sovereign defenses.

ARGUMENT

I. PLAINTIFFS HAVE BEEN THE BENEFICIARIES OF MASSIVE PUBLIC SUBSIDIES RELATED TO THE KLAMATH PROJECT.

Numerous publications have documented the many different, substantial subsidies enjoyed by Bureau of Reclamation water customers. See, e.g., U.S. General Accounting Office, “Bureau of Reclamation: Information on Allocation and Repayment of Costs of Constructing Water Projects” (July 1996) (GAO/RCED-96-108) (hereafter “1996 GAO Report”); Democratic Staff Report, Subcommittee on Oversight and Investigations, Committee on Natural Resources, “Taking from the Taxpayer: Public Subsidies and Natural Resources Development” (1994)

(available at <http://www.nplnews.com/toolbox/fedreports/takingfromtaxpayer.htm>). NRDC has not sought to catalogue, much less quantify, all of the various subsidies involved in the Klamath Project. Instead, NRDC has adopted the far more modest aim of resolving, for the purpose of this litigation, the question of whether Klamath water users have in fact been the beneficiaries of subsidies and whether those subsidies have been extensive. For this modest purpose, we focused exclusively on two subsidies: project construction cost subsidies, and electrical power subsidies, discussed below.

Project Construction Cost Subsidies. Plaintiffs have repeatedly asserted in this litigation that they repaid the U.S. government for the costs incurred by the Bureau of Reclamation in constructing the Klamath Project. Significantly, however, the plaintiffs' contracts with the Bureau provided for repayment *without interest*. As a result, the plaintiffs have repaid only a small fraction of the real cost to the public of constructing the facility. The amount not repaid represents a pure subsidy.

The Klamath Project was authorized in 1905 pursuant to the Reclamation Act of 1902. See generally Kandra v. United States, 145 F. Supp. 2d 1192, 1196 (D.Or. 2001). The United States proceeded to appropriate all available water in the Klamath basin and to construct a series of dams, reservoirs, irrigation canals, pumping stations and other water diversion projects serving over 200,000 acres of land. According to the General Accounting Office, the total cost to the U.S. taxpayer of constructing the Klamath Project was \$53 million. See 1996 GAO Report, Appendix IV.

In accordance with the usual practice with Bureau of Reclamation projects, see 1996 GAO Report at 10, the beneficiaries of the Klamath Project repaid their allocated shares of the construction costs without interest. The Klamath Project contracts vary a good deal, with the

repayment period varying from as little as 15 years¹ to as much as 40 years². The result of these extended no-interest payment schedules has been that plaintiffs gained, and the public lost, the substantial time value of the monies due. As explained in the Declaration of Richard W. Wahl, PhD, attached as Amicus Appendix A to this memorandum, an estimate of the magnitude of these subsidies can be derived by applying a long-term borrowing rate to the schedule of payments under each contract with the Bureau. These calculations, set forth in the Declaration of Dr. Wahl, yield estimates of the implicit “no interest” subsidy ranging from 1.92% to 48.54% of the total amount of the construction costs allocated to each district.

Importantly, this calculation only begins to describe the extent of the subsidies implicit in the repayment schedules because it does not account for the fact that the districts’ obligation to commence repayments may have been deferred well beyond the actual date of completion of the Project. See 1996 GAO Report, at 16. In addition, districts that did not come into the Project after completion of construction may have received the additional benefit of an allocated repayment obligation based on original construction costs. See 1996 GAO Report, at 19.

In addition, the government has simply relieved the Klamath irrigators of their obligations to make repayments in various instances including, for example, limited moratoriums on repayment obligations, see Bureau of Reclamation, U.S. Department of the Interior, Repayment of Reclamation Projects, at 199 (1972) (attached as Amicus Appendix B), or determinations not to enforce various delinquency payments. See, e.g., Klamath Irrigation District contract Art. 3, at 3; Klamath Drainage District 1942 contract ¶ 12, at 110. In addition,

¹ See, e.g., Pine Grove Irrigation District contract, Art. 7, at 250; Enterprise Irrigation District contract, Art. 7, at 245; Malin Irrigation District contract, ¶ 15(a), at 237.

² See, e.g., Tulelake Irrigation District contract, ¶ 3(b), at 44; Malin Irrigation District contract, ¶ 15(a), at 237; Shasta View Irrigation District 1972 contract, ¶10(b), at 318.

Klamath Project irrigators have received a number of direct subsidies, including \$413,000 in “irrigation assistance,” paid to the irrigators from the Project’s other resources with the justification that the irrigators’ obligations were “determined to exceed their ability to pay.” 1996 GAO Report at 58 and 64. Finally, Klamath Project irrigators also received close to a million dollars in “charge-offs,” legislatively provided debt forgiveness, see GAO Report at 66, as well as \$2.4 million in discounted government loans. See GAO Report at 36. All of these various payments and deferrals of payment obligations expanded the actual subsidies beyond those implicit in the contract repayment schedules.

Subsidized power rates. Klamath water users also have been the beneficiaries of a special, extremely valuable power rate subsidy. In 1917, as part of the overall effort to develop the Klamath Project, the Bureau of Reclamation entered into a contract with the California and Oregon Power Company (the successor of which is now PacificCorp) under which the utility would construct the Link River Dam and convey it to the United States. See generally Klamath Water Users Protective Association v. Patterson, 191 F.3d 1115, 1118 (9th Cir. 1999). In return, the Bureau and the utility entered into a 50-year contract that gave the utility the right to operate the dam for hydroelectric generating purposes, effectively delegating to the utility the Bureau’s authority, granted by 1905 Oregon legislation, to control river flows and lake levels in the Klamath Basin. See Klamath Irr. Dist. v. United States, 67 Fed.Cl. 504, 523 (2005) (discussing the Oregon legislation). An additional feature of this contract, subsequently reaffirmed and extended when the Federal Energy Regulatory Commission issued a license for the Link River Dam in 1954, was a commitment by the utility to supply electricity to Klamath Project water users at low, fixed rates for the duration of the utility’s contract. See Letter from Klamath Water Users Association to FERC Regarding Klamath Hydroelectric Project, FERC No. 2082-027

(available at <http://www.kwua.org/power/plettrtoferc072104.htm>) (describing the terms of the FERC licensing order).

Over time, as utility rates have increased for the rest of the region, irrigators in the Klamath Basin have paid an increasingly small fraction – currently about one-tenth – of the rates paid by other utility customers. *Id.* (explaining that, as of 2004, “the KWUA members and other Upper Klamath Basin irrigators currently pay either 6 or 7.5 cents per kilowatt hour, depending on whether they are inside or outside of the Klamath Irrigation Project. PacificCorp’s current tariff rate for irrigation customers is nearly 57 cents per kilowatt hour in Oregon and over 63 cents per kilowatt hour in California”). A report published by an Oregon environmental advocacy organization estimates the size of the electric rate subsidy enjoyed by Klamath Project irrigators, at the expense of rate-payers, stockholders, and general taxpayers, at an average of nearly \$10,000,000 per year in the 1990’s. *See* Oregon Natural Resources Council, *Ratepayer Rip-Off* (2002) (available at www.klamathbasin.info/RatePayerRipoff.pdf).

II. PLAINTIFFS’ CONTRACT CLAIMS SHOULD BE REJECTED BECAUSE BACKGROUND PRINCIPLES OF STATE WATER LAW AND THE LANGUAGE OF THE CONTRACTS PRECLUDE A FINDING OF A BREACH.

Prior to addressing the government contract defenses, the threshold question is whether there has been a *prima facie* demonstration of a breach. *See, e.g., Franconia Associates v. United States*, 61 Fed.Cl. 718, 729 (2004); *Cuyahoga Metr. Housing Auth. v. United States*, 57 Fed.Cl. 751, 759 (2003). As the Court explained in its August 31, 2005 Order, “the applicability of the sovereign acts doctrine ... should be decided only in the context of determining whether, in fact, a breach of the various water contracts here occurred in 2001.” *Klamath*, 67 Fed.Cl. at 537. Accordingly, parting ways with the United States, NRDC submits that the Court should *not* step past the issue of breach and proceed directly to the merits of the government contract

defenses. Instead, the Court should determine whether there has been a prima facie breach, and *then* proceed to the government contract defenses. Of course, the Court may address both of these questions seriatim as alternative grounds for entering judgment for the United States. In NRDC's view, plaintiffs cannot establish a prima facie breach and, in addition, the contract claims are barred by the applicable sovereign defenses.

As we explain below, plaintiffs cannot establish a prima facie case for two reasons. First, background principles of Oregon (and California) water law preclude plaintiffs from claiming an entitlement to exploit the water interests conveyed to them by contract by the United States in the circumstances of this case. Second, the language of the contracts themselves, including but not limited to the key shortage clauses, bars plaintiffs from claiming an entitlement to the water they claim. Accordingly, the Bureau's temporary reduction in water deliveries in 2001 did not breach plaintiffs' contract rights.

A. Background Principles of State Water Law

The plaintiffs' water rights cannot be greater than the rights the United States possessed and was capable of conveying to plaintiffs via contract. See Defendant's Memorandum In Support of Its Motion for Summary Judgment as to Plaintiffs' Contract Claims, at 3 (“[T]he government cannot give that which it does not have[.]”). See also Klamath, 67 Fed.Cl. at 535 (referring to the “venerable maxim” *nemo dat qui non habet*, “one who does not have cannot give.”). The Court has resolved that the water rights at issue in this case are held by the United States, and that determination was recently endorsed in the Klamath Basin Adjudication. See Interim Order, Case No. 003 (Jan. 12, 2006) The rights held by the United States in Klamath basin water are, at least absent any express congressional directive to the contrary, subject to all

of the inherent limitations to which state appropriative water rights are normally subject. See generally California v. United States, 438 U.S. 645 (1978).

Plaintiffs cannot establish a prima facie breach because the United States never acquired a vested right – and therefore never had the ability to convey any such right to anyone else -- to utilize the water of the Klamath basin in a fashion that is contrary to applicable background principles of Oregon law. Cf. Tulare Lake Basin Storage Dist. v. United States, 49 Fed.Cl. 313, 324 (2001) (acknowledging that the Tulare District’s asserted contract rights were subject to the same background limitations that applied to the water rights granted by the state water board to the Department of Water Resources, which subsequently conveyed the rights by contract to Tulare District).³ Under Oregon law, the endangered fish threatened by over-exploitation of water in this case represent an essential feature of the public trust in Oregon’s water resources. See Oregon Shores Conservation Coalition v. Oregon Fish & Wildlife Comm., 662 P.2d 356, 364, 62 Or.App. 481, 493 (1983) (the State acts “as a trustee for the people, bear[ing] the responsibility of preserving and protecting the right of the public to the use of the waters for [navigation, fishing and recreation]”). Regulatory measures designed to enforce public trust rights cannot be said to impinge on any protected private interests and, therefore, cannot support a breach of contract claim. See generally Michael C. Blumm & Lucas Ritchie, “Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses,” 29 Harv. Entl. L. Rev. 321 (2005). In addition, the State of Oregon owns all wildlife animals,

³ The Court in Tulare Lake went on to rule that, even though plaintiff’s contract rights were subject to background principles of California law, it, qua federal court, as opposed to a California court or the State water board, could not enforce those limitations. As NRDC explained at length in an earlier filing in this case, see Status Report of Amicus Natural Resources Defense Council, that ruling disregarded the fundamental responsibility of a federal court to approach the resolution of a state law issue in a case properly before it on the same basis that a state court would. See Erie v. Tompkins, 304 U.S. 64 (1938).

including wild fisheries, in its sovereign capacity for the benefit of all the citizens of the State. See generally Cook v. State, 74 P.2d 199, 201-202 (Wash. 1937) (“The laws of practically all of our States are founded upon the common law of England by virtue of which all property rights in ‘ferae naturae’ were in the sovereign.”). Because any private activity harming the public wildlife’s represents a trespass upon public rights, the right to engage in any such activity is a “boon or privilege granted, either expressly or impliedly, by the sovereign authority.” Field v. Wilson, 186 Or 491, 499, 207 P.2d 153 (1949). If the privilege either is not granted or is subsequently withdrawn, “nothing is taken from the individual, and his constitutional rights are not infringed.” Id. at 500. See generally John D. Echeverria & Julie Lurman, “‘Perfectly Astounding’ Public Rights: Wildlife Protection and the Takings Clause,” 16 Tul. Envtl. L.J. 331, 355 (2003). Thus, the longstanding doctrine of public ownership of wildlife represents an independent background principle of Oregon water law that limits the rights plaintiffs are entitled to assert under their contracts.

To the extent relevant in this case,⁴ parallel elements of California water law likewise limit the scope of the rights plaintiffs can claim based on these contracts. The applicable principles include the public trust doctrine, see Nat’l Audubon Soc. v. Superior Court of Alpine County, 33 Cal.3d 419, 425 (1983), the reasonable use doctrine, see Environmental Def. Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 194 (1980), and the doctrine of public ownership of wildlife, see People v. Truckee Lumber, 116 Cal. 397, 399-400 (1897). California courts have repeatedly recognized that a right to use water does not create a right to exploit water resources

⁴ So far as NRDC can determine, it remains ambiguous to what extent the water rights at issue in this case may be governed by California law. Most, but perhaps not all, of plaintiffs’ diversions occur in Oregon, apparently making Oregon law the source of binding water principles for the purpose of this case. However, the Tulelake Irrigation District’s contract states that it is made pursuant to the laws of California. See Tulelake Irrigation District Contract, whereas clause PACE 0042 and Article 33(a).

(which ultimately belong to the public) in violation of these background principles of California law. See, e.g., Nat'l Audubon, 33 Cal.3d at 437. Accordingly, regulatory measures paralleling these common law limitations on California water rights cannot support valid claims of breach of contract.

Finally, plaintiffs' contract-based water rights are subordinate to the water rights of the Indian Tribes, which have "a priority date of time immemorial." United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983). The federal courts, in prior litigation involving the Klamath Project and some of the plaintiffs here, held that "the United States, as a trustee for the Tribes, is obligated to protect the Tribes' rights and resources," Kandra v. United States, 145 F. Supp. 2d 1192, 1204 (D.Or. 2001), and that those rights "take precedence over any alleged rights of the Irrigators." Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1214 (9th Cir. 2000). Insofar as the Bureau's restrictions likely served to protect the Tribes' reserved rights, the restrictions probably did not impinge on the rights of any inferior water rights holder. For this additional reason, the Bureau's actions to preserve threatened and endangered fish species probably did not violate the plaintiffs' contract-based water rights.

B. The Language of the Contracts.

Apart from background legal principles that need to be read into these contracts, plaintiffs' contracts with the Bureau, by their terms, did not convey a protected right to the delivery of water in the circumstances of this case. First, contrary to plaintiffs' allegations, see Second Amended Compl, ¶ 47, the Bureau contracts generally do not identify a specific quantity of water to be delivered.⁵ Rather, they generally state in the declaratory paragraphs that the

⁵ The only apparent exceptions are the contracts with the Van Brimmer Ditch Company and the Pine Grove Irrigation District. Each of these contracts provides for the delivery of a specific quantity of water. For the reasons discussed above, background principles of Oregon water law limit the rights plaintiffs can claim under either of these two contracts. Moreover, the

Bureau has or will build a reclamation project and that there will be “variable water available,” “additional water” or “extra” water available from that project. See, e.g., Poe Valley Improvement District 1953 contract, at 131, whereas clause; Sunnyside Irrigation District 1922 contract, at 158, ¶ 2; Klamath Irrigation District 1905 contract, ¶ 3. The intent behind such language is most explicitly expressed in the Midland contract, which states that the government “has available a supply of water in variable and indefinite quantities which, when available, may be utilized” by the district. Midland Irrigation District Improvement Company contract, whereas clause, at 218. By and large, the contracts simply do not commit to the delivery of a specific quantity of water.

Second, virtually all of the contracts include an express “shortage clause” that bars plaintiffs from claiming that reductions in water deliveries interfered with their contract rights.⁶

A typical Klamath contract shortage clause reads as follows:

On account of drought or other causes, there may occur at times a shortage in the quantity of water available in Project reservoirs and, while the United States will use all reasonable means to guard against such shortage, in no event shall any liability accrue against the United States ... for any damage, direct or indirect, arising therefrom

Pine Grove Irrigation District contract, formed pursuant to the Warren Act, has a lower priority water right than other non-Warren Act contractors.

⁶ The Van Brimmer Ditch Co. contract includes no shortage provision. But Van Brimmer water is supplied by the Klamath Irrigation District, and the Klamath Irrigation District does include a shortages clause. In addition, the contracts with Poe Valley Irrigation District, Enterprise Irrigation District, and Midland Irrigation District do not contain shortage clauses referring to “other causes.” However they each expressly provide that water will be supplied from “available” or “excess” supplies.

See Klamath Irrigation District contract, ¶ 26. Other contracts contain identical or virtually identical language See, e.g., Tulelake Irrigation District contract, ¶ 26; Shasta View Irrigation District 1948 Contract, ¶ 18.

This broad language plainly bars plaintiffs from seeking contract recovery based on shortages brought about by the Bureau's legal obligation to comply with the Endangered Species Act. As the Court previously observed, "[t]he plain language of these provisions expressly absolves the United States from liability for all types of water shortages-not only the hydrologic causes, as claimed by plaintiffs, but also any other cause that impacts the availability of water through the system." Klamath, 67 Fed.Cl. at 535. In the same vein, Professor Brian Gray has explained, "The Klamath project water contracts ... expressly absolve the United States of liability for all types of water shortages – hydrologic, regulatory, or hybrid – that may occur within the system.... The United States therefore has not breached its contract obligations, nor has it taken property without just compensation." "The Property Right in Water," 9 Hastings W.Nw J. Envtl. L. Policy & Thought 1, 26 (2002).

Significantly, the precise issue of whether the Klamath contracts create an enforceable right to the delivery of water has already been resolved by other courts in other cases arising out the same basic controversy and involving many of the same parties in this case. Specifically, in Klamath Water Users Assn. v. Patterson, 15 F. Supp. 2d 990 (D. Or. 1998), aff'd, 220 F.3d 1206 (9th Cir 1995), the court concluded, based on an examination of the specific shortage language at issue in this case, that the irrigators lacked an enforceable right under the contracts to the delivery of water without regard to the threat to endangered species. Likewise, in Pacific Coast Federation of Fishermens' Associations v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228 (N.D.Cal. 2001), the court ruled that the Bureau's year 2000 operating plan violated the ESA and

issued an injunction restricting water deliveries to irrigators. The court rejected the argument advanced by the irrigators–intervenor (again, many of the same parties as in this case) that the curtailed deliveries breached their contract rights. See also Kandra v. United States, 145 F. Supp. 2d 1192 (D.Or., 2002) (again reaching the same conclusion)

These rulings in cases arising from the Klamath basin are consistent with the rulings by other courts in similar cases involving other river basins. In O’Neill v. United States, 50 F.3d 677 (9th Cir. 1995), the Ninth Circuit faced a similar situation in which the Bureau had been compelled to reduce water deliveries to irrigators to comply with the ESA. The plaintiffs claimed that the shortage clauses in Bureau contracts did not bar their breach of contract claim. But the court rejected that claim, stating that “‘any other causes’ is a catchall phrase that does not ‘explicitly’ include *any* particular causes,” and that the “contract’s liability limitation is unambiguous and ... an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of ‘any other causes.’” See also Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1130-1131 (10th Cir. 2003), vacated on other grounds, 355 F.3d 1215 (10th Cir. 2004) (ruling that shortage language precluded argument that Bureau’s contractual commitments barred implementation of the Endangered Species Act); Barcellos & Wolfsen, Inc. v. Westlands Water Dist., 849 F. Supp. 717, 723-24 (E.D.Cal.1993) (“express language of [the shortage clause] negates any absolute contract right ... to the unqualified delivery of irrigation water.”).

Finally, the conclusion that the shortage clauses preclude plaintiffs’ breach of contract claim is supported by the fact that it would be unfair and irrational, in view of the massive public subsidies for the Klamath Project, to treat these contracts as creating an *absolute* contractual commitment to the delivery of every gallon of water that the water users might demand. To the

extent there is any ambiguity in these contracts, the contracts should be interpreted to produce a reasonable result. See Sutter Ins. Co. v. Applied Systems, Inc., 393 F.3d 722, 726 (7th Cir 2004) (Posner, J.) (“Commercial reasonableness is a useful guide to the interpretation of an ambiguous contract.”). See also Consumers Ice Co. v. United States, 475 F.2d 1161, 1167 (Ct. Cl. 1973) (stating that “where the contract terms are as ambiguous as these terms, the court is free to examine the reasonableness of the business transaction in order to determine which of several competing interpretations is most reasonable and likely under the total circumstances...”)

Applying the standard of reasonableness, in view of the massive public subsidies to Klamath water users, it is reasonable to read the contracts as affirmatively providing room for the government to deal with pressing public needs and priorities. On the other hand, plaintiffs’ preferred reading of the contracts should be rejected because it leads to grossly different benefits on each side of the bargain. See Sutter Ins. Co., 393 F.3d at 726. (“Generally the contract price is roughly equivalent to the value of the contractual performance An enormous disparity between price and value is a clue that something may be amiss.”)

III. PLAINTIFFS’ CONTRACT CLAIMS SHOULD BE REJECTED ON THE BASIS OF THE SOVEREIGN DEFENSES.

The United States has submitted a motion and accompanying memorandum arguing that plaintiffs’ contract claims should be rejected on the basis of the sovereign acts and unmistakability doctrines. The Court need go no further than the presentation by the United States, which has respectable support in the precedents of this Court and of the Federal Circuit. NRDC observes, however, that the presentation by the United States appears to reflect some of the deep confusion that infects this field of law. In particular, while the United States ostensibly advances two distinct defenses (the sovereign acts and unmistakability doctrines), its explanation of these defenses appears to meld them into a single doctrine. NRDC seeks to assist the Court

by examining the doctrinal foundations for the sovereign defenses and discussing whether and to what degree the various sovereign defenses are (or are not) distinguishable one from the other. NRDC offers an alternative understanding of the defenses that we believe is more consistent with Supreme Court precedent and represents a more logical framework for analysis. Specifically, NRDC submits that there are three entirely separate government defenses potentially relevant in this case: the reserved powers doctrine; the sovereign acts doctrine; and the unmistakability doctrine. As we explain below, each of these defenses, properly understood, should provide an *independent* basis for granting judgment to the United States.

The United States can hardly be faulted for failing to make a fully coherent legal presentation. Most fundamentally, the entire legal basis for the notion that Congress or other branches of the federal government can restrict future government decision making remains problematic. The U.S. Constitution includes the Contracts Clause, but that clause only applies to the states, not the national government. See Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 732, n. 9 (1984). Thus a textualist approach to constitutional interpretation strongly suggests that the types of constraints imposed by the Contract Clause should not apply to the national government, or at least not unless some other constitutional provision (such as the Takings Clause or the Due Process Clause) independently imposes such a constraint. Nonetheless, the Supreme Court has frequently suggested that Contract Clause principles apply to the national government, though, as Justice Souter candidly acknowledged, “The extent of [the] capacity[of the national government to bind itself through contract], to be sure, remains somewhat obscure.” United States v. Winstar Corp., 518 U.S. 839, 876 (1996). It is fair to say that the basic doctrines of government liability in contract, even after all these years, remain in infancy.

In addition, the Supreme Court in Winstar famously left lower courts and litigants at sea by failing to assemble a majority Court opinion. To make matters more confusing, Justice Souter’s plurality opinion is widely viewed as probably not expressing the implicit majority viewpoint on the Court in Winstar on several key issues. See, e.g., Centex Corp. v. U.S., 395 F.3d 1283, 1307 (Fed. Cir. 2005) (discussing Winstar). Furthermore, as recently observed by one Judge on the Federal Circuit, in the decade since the Winstar decision, “the issues have only become murkier and the decisions less predictable.” Franklin Federal Savings Bank v. United States, 431 F.3d 1360, 1374 (Fed. Cir., 2005) (Rader J., dissenting).⁷ One of the most confusing questions has been whether the several sovereign defenses referred to in the various Winstar opinions represent distinct defenses or whether instead, as the brief for the United States appears to suggest, and as some post-Winstar decisions also suggest, at least some of the defenses collapse into one another.

NRDC submits that, at least pending further guidance from the Supreme Court, each of the four defenses referred to in Winstar should be regarded as separate and distinct defenses, including the reserved powers doctrine, the sovereign act doctrine, the unmistakability doctrine, and the express delegation doctrine. After all, no clear majority emerged in the Supreme Court for repudiating any one of these defenses, and each has support in longstanding Supreme Court precedent. Moreover, understandable, meaningful lines can be drawn between and among these various doctrines.

⁷ The Supreme Court has not revisited the sovereign defenses in the years following Winstar. In Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000), the Court ruled that a congressional enactment breached offshore leasing agreements with an oil company. However, as the Court pointedly observed, the government did not raise any of the sovereign defenses in that case, see id. at 619-620, and therefore the decision provides no guidance on the applicability or scope of those defenses.

The essence of the reserved power doctrine appears to be the notion that certain issues are so central to the process of governing that the government cannot limit its ability to address such issues through a contract with a private party, regardless of the nature or terms of the contract. The sovereign act doctrine is based on the ideas that the government always retains the ability to address public issues in a general fashion, and that the incidental effects of such measures on contractual arrangements cannot give rise to contract liability. Under NRDC's understanding of this doctrine, because the focus is on the character of the alleged "breaching event," the specific nature of the "promising event" should be beside the point, including whether the government can be viewed as having made an "unmistakable" commitment not to alter the contract. If the government is neither exercising a reserved power nor engaging in a general and public act, then the unmistakability doctrine may still provide an independent defense. Under this defense, the presumption in favor of the sovereign's freedom to act is still respected. But because the balance between the public nature of the government action and the contracting party's legitimate reliance interests shifts, the parties can defeat the presumption and create an enforceable commitment by using "unmistakable" words. Furthermore, certain types of contracts, such as in Winstar itself, are so clearly focused on the issue of future government treatment that an unmistakable commitment will be inferred, and no explicit "second promise" by the government is required. Finally, under the express delegation doctrine, where a contract purports to extinguish the government's power to act, "both [the contract's] existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." Home Telephone & Telegraph Co. v. Los Angeles, 211 U.S. 265, 273 (1908).⁸

⁸ The sovereign defenses do not render contracts with the government illusory. As an initial matter, a single allegedly illusory term does not make a contract meaningless so long it

As NRDC explains below, the reserved powers doctrine, the sovereign acts doctrine, and the unmistakability doctrine each provides a separate and independent ground for rejecting plaintiffs' contract claims.⁹

A. The Justifications for the Sovereign Defenses.

Before setting out in greater detail our understanding of the various defenses and how they apply in this case, it will be useful at the outset to articulate what appear to be the larger constitutional and political process concerns that underlie the sovereign defenses. See generally Joshua I. Schwartz, "Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law," 64 Geo. Wash. L.Rev. 633 (1996); Alan R. Burch, "Purchasing the Right to Govern: Winstar and the Need to Reconceptualize the Law of Regulatory Agreements," 88 Ky. L.J. 245 (2000); David Dana & Susan P. Koniak, "Bargaining in the Shadow of Democracy," 148 U. Pa. L. Rev. 473 (1999).

The sovereign defenses are based in part on a concern about preservation of the law-making function within our representative system of government. Under our system, the basic lawmaking responsibility is vested with the state legislatures and, at the federal level, in the U.S. Congress. See U.S. Const., art. I, § 1. In the now familiar story, early cases took the extreme

contains other enforceable promises. See E. Allan Farnsworth, Contracts §2.13 (4th ed. 2004). Furthermore, a promise is not illusory if it is binding in some circumstances. See Id. As the Federal Circuit has observed, "[u]nder Winstar, a promise for a regulatory waiver until regulatory changes occurs is plainly sufficient consideration." Franklin Federal Sav. Bank v. United States, 431 F.3d 1360, 1370 (Fed. Cir. 2005). In addition, regardless of the possible effects of government actions on a government contract, the contract continues to grant private parties rights as against third parties. See Michael W. Graf, "The Determination of Property Rights in Public Contracts After Winstar v. United States: Where Has the Supreme Court Left Us?," 38 Nat. Resources J. 197, 241 (1998) Finally, the risk of an illusory agreement is mitigated by the fact that, "[u]nder each contract it enters, the government has implied duties of good faith and fair dealing." Renda Marine Inc. v. U.S., 66 Fed. Cl. 639, 648 (2005).

⁹ This memorandum does not address the potential applicability of the express delegation doctrine.

position that the Contracts Clause categorically barred a state legislature from voiding its agreements. See Fletcher v. Peck, 6 Cranch 87, 3 L.Ed. 162 (1810). But “it soon became apparent that [legislative contracts binding successor legislatures] could become a threat to the sovereign responsibilities....” Winstar, 518 U.S. at 874 (Souter, J.). In response, the courts rapidly developed the reserved powers and unmistakability doctrines. Winstar, 518 U.S. at 874. Now, as then, courts frown upon legislative entrenchment. See Lockhart v. United States, 126 S.Ct. 699, 703 (2005) (Scalia, J., concurring) (“our cases have uniformly endorsed [the] principle [that there can be no irrevocable law].” (citations omitted)). These doctrines not only ensure that legislators can be responsive to their current constituencies but also guard against the risk that past policy choices may have severe short-term political agendas at the expense of the long-term public welfare. See Bryan D. Jones, Reconceiving Decision-Making in Democratic Politics: Attention, Choice and Public Policy, (1994).

The constitutional concerns become even more serious where the executive branch has purportedly limited the range of discretion available to the legislature. In that circumstance, there is the concern, as with legislature seeking to bind future legislatures, that the dead hand of history may be constraining the legislature’s range of discretion. But, in addition, there is the separation of powers concern that the executive branch may have encroached on the legislature’s province by unilaterally entering into a contract that constrains legislative choices. See Burch, supra at 333; Dana & Koniak, supra at 539-542. Furthermore, to the extent private parties are negotiating the terms of contracts with the government, there is the concern that private firms or individuals may be gaining control over the legislative process through the back-door, potentially producing unfair outcomes and corroding the political process. See Richard E. Spiedel, “Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case,” 2001

Wis. L. Rev. 795 at 805; Graf, supra at 197. Concerns about “agency capture” are endemic to the administrative state and long-term contracts exacerbate the concerns by creating a means of solidifying capture. These concerns will be at a height when relatively *ad hoc* and invisible agency contracting arrangements come into conflict with significant policy initiatives of the legislative branch.

One recurring, if fallacious, theme has been that government contract liability does not threaten the ability of government to function because contract claims do not directly aim to enjoin government from acting. See, e.g., Winstar, 518 U.S. at 880-885 (Souter, J.). In reality, the prospect of contract liability can be a very significant deterrent to government action. In the takings context, we have long ago rejected the argument that takings claims do not implicate sovereign power because they “merely” require the government to pay as a condition of proceeding with an action. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”) The exact same concern arises in the arena of government contracting. See Burch, supra at 248 (observing that an expansive government contracts theory is equivalent to an expansive theory of regulatory takings) See also Dana & Koniak, supra at 538 (same).

Another recurring issue has been whether the government will be perceived as an unreliable partner if it is allowed to escape contract liability too freely. See, e.g., Winstar, 518 U.S. at 913 (Breyer, J., concurring) The expressed concern has been that the government might find itself unable to locate willing contracting partners, undermining the government’s ability to function. This concern is certainly overblown in the sense that the federal government, with its vast resources and significant demands for goods and services, will never be short of firms and

individuals seeking government contracts. Cf. Winstar, 518 U.S. at 929 (Rehnquist, dissent) (“The Government's contracting authority has survived from the beginning of the Nation with no diminution in bidders ... without the curtailment of the unmistakability doctrine....”) More fundamentally, the tension this concern identifies does not appear to be one that courts are either competent or authorized to resolve. It seems intuitively obvious there is a potential trade-off between safeguarding government’s ability to override pre-existing contracts to implement new policies and the amount the government might have to pay in order to contract for various goods and services. However, striking the right balance between these competing considerations largely represents a policy choice, one properly made by elected officials, perhaps differently at different times and under different facts and circumstances, rather than an issue that requires some fixed judicial resolution.

B. The Reserved Powers Doctrine

The reserved powers doctrine holds that certain types of essential sovereign powers cannot be limited by contract and that contracts that purport to do so are void *ab initio*. United States v. Winstar Corp., 518 U.S. 839, 888 (1996). Under this doctrine, which principally developed in the context of Contract Clause litigation, “the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community ... can neither be abdicated nor bargained away, and is inalienable even by express grant.” Winstar, 518 U.S. at 888, citing Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558 (1914). In perhaps its most articulate statement of the doctrine, the Supreme Court stated:

“[T]he state ... continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end ‘has the result of

modifying or abrogating contracts already in effect.’ ... [T]he reservation of essential attributes of sovereign power is ... read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, - a government which retains adequate authority to secure the peace and good order of society.”

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 435 (1934).

Although originally developed in State Contract Clause cases, the reserved powers doctrine has been specifically applied to the federal government. In Winstar, both Justice Souter in his plurality opinion and Justice Scalia in his concurring opinion identified the reserved powers doctrine as a potentially applicable defense. See 518 U.S. at 839 (Souter, J.) (‘[T]he power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community ... can neither be abdicated nor bargained away, and is inalienable even by express grant’); Id. at 922 (Scalia, J.) (the reserved powers doctrine “seems to stand principally for the proposition that certain core governmental powers cannot be surrendered”). In the same vein, as this Court recognized in one post-*Winstar* case, “federal contracts may be abrogated when ‘the action falls within the federal police power or some other paramount power.’” Cuyahoga Metr. Housing Auth. v. United States, 57 Fed.Cl. 751, 766 (2003).

The reserved powers doctrine is confined to “essential” attributes of sovereignty. United States Trust v. New Jersey, 431 U.S. 1, 23 (1977). The doctrine reflects the idea that a relatively small set of government powers are so important or so central to the governing process that they simply cannot be contracted away. Moreover, in light of the nature of the government powers at

stake, no person contracting with the government can reasonably expect these powers not to have been reserved. The doctrine has been held to apply to government acts that address “public health or public morals,” “are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community,” as well as such specific powers as the eminent domain power. See Stone v. Mississippi, 101 U.S. 814 (1880); Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548 (1914); West River Bridge Co. v. Dix, 12 L.Ed. 535 (1848). See generally Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 434-441 (1934) (discussing various cases).

Regulating activities that threaten the existence of endangered species represents the kind of essential government action that warrants application of the reserved powers doctrine. In the Endangered Species Act, Congress declared that it sought to protect and preserve “species of fish, wildlife, and plants [which] are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” § 16 USC 1531. In Tennessee Valley Authority v. Hill, 437 U.S. 153, 185 (1978), the Supreme Court declared that the ESA was designed to “halt and reverse the trend toward species extinction, whatever the cost.” Under the reserved powers doctrine, the Bureau could not enter into contracts that impeded the government’s goal of safeguarding species from extinction.

C. The Sovereign Acts Doctrine.

The sovereign acts doctrine, like the reserved powers doctrine, seeks to identify a set of government actions that should generally be immune from contract claims. The focus, however, is less on the substantive purpose of the action, and more on the character of the action, specifically whether the government action is general in nature and whether the impact on specific contracts is merely incidental to the accomplishment of a public purpose. Under this

doctrine, “[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.” Horowitz v. United States, 267 U.S. 458 (1925). The reasoning underlying the doctrine is that government would be severely impaired if the incidental effects of general government actions gave rise to contract liabilities, and that the generality of the government action provides a significant assurance that the government is addressing a genuine public concern rather than merely seeking to undo an ill-advised contract. Cf. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1071-1072 (1992) (“This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the “mischiefs of faction.” quoting Federalist No. 10). The sovereign acts doctrine also serves to put the government, as contracting party, on a par with private parties *vis a vis* qualifying governmental actions. See, e.g., Allegre Villa v. United States, 60 Fed.Cl. 11, 16 (2004). “Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements.” United States Trust Co., 431 U.S. at 22.

The sovereign acts doctrine is based on the theory that the government’s sovereign actions cannot properly be attributed to the government in its capacity as a party to a contract. Courts have recognized that, as a practical matter, a public and general act may affect the government’s ability to implement contracts. Horowitz, 267 U.S. at 458 (an enactment “performed for the general good may work injury to some private contractors...”). See also O’Neill v. United States, 231 Ct.Cl. 823, 826 (1982) (the sovereign acts doctrine recognizes that “the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts”). But the government’s act “will not be held against the Government

for purposes of the [sovereign acts doctrine] so long as the action's impact upon public contracts is ... merely incidental to the accomplishment of a broader governmental objective.” Winstar, 518 U.S. at 898. Stating the point differently, the courts have said that it would be “grave error” to treat general enactments of Congress as evasions of a plaintiff’s particular contract. Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1575 (Fed.Cir.1997), citing Deming v. United States, 1 Ct.Cl. 190 (1865).

The Federal Circuit has described the “purpose of the doctrine [as] balanc[ing] the government’s need for freedom to legislate with its obligation to honor its contracts.” Allegre Villa, 60 Fed.Cl. at 16. This balance is not amenable to a hard and fast rule, but requires a “case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts.” Yankee Atomic Elec. Co., 112 F.3d at 1575. Compare Yankee Atomic (congressional imposition of uranium clean up costs on utilities held to be “a general exercise of ... power for the purpose of addressing a societal problem,” even though the legislation substantially impacted a large set of utilities that had purchased uranium enrichment services from the government under fixed price contracts) with Centex Corp. v. United States, 395 F.3d 1283, 1308 (Fed.Cir.2005) (enactment precluding specific tax deductions for entities acquiring banks “was not generally applicable legislation in form or substance, but was specifically targeted at appropriating the benefits of a government contract”).¹⁰

¹⁰ In his plurality opinion in Winstar, Justice Souter suggested, as a bright-line rule, that a government action should not be regarded as “public and general” whenever “it has the substantial effect of releasing the Government from its contractual obligations.” Winstar, 518 U.S. at 899 (Significantly, perhaps, Justice O’Connor did not join in this portion of Justice Souter’s plurality opinion). Some courts have invoked the Souter language with apparent approval. See e.g. United States v. Westlands Water Dist., 134 F.Supp.2d 1111, 1151 (E.D.Cal. 2001). However, the Federal Circuit has rejected the view that a government action no longer qualifies as “public and general” simply because it may have a “substantial effect” on a

Properly understood, the applicability of the sovereign acts doctrine should not depend on whether the government, in its initial contract, made an “unmistakable commitment” not to take action that might impair implementation of the agreement.¹¹ The doctrine focuses on whether the government action alleged to constitute the breach was public and general, and for that purpose it should be irrelevant whether or not a specific pre-existing contract contained some unmistakable promise. The sovereign acts doctrine is rooted in fundamental concerns about protecting legislative authority and preserving separation of powers. In view of the weighty constitutional values at stake, the ability of Congress to enact general and public legislation cannot logically depend, for example, on whether a GS-14 in some executive branch agency negotiated a contract that purports to bind the government for all time.

Furthermore, there is no substance to the viewpoint that a finding of a general and public sovereign act is simply the prelude to a determination whether the government is excused from liability based on a traditional impracticability (aka impossibility) contract defense. See Winstar, 518 U.S. at 904 (Souter, J.).¹² Although the impracticability defense has long been an established element of common law contract law, see Farnsworth, Contracts §9.15, none of the seminal sovereign acts cases incorporates an impracticability analysis. Rather, consistent with the sovereign acts doctrine’s rationale, they focus exclusively on the sovereign nature of the government action. See, e.g., Deming v. United States, 1 Ct.Cl. 190 (1865) (passage of Legal

government contract. See Centex Corp., 395 at 1307; Yankee Atomic Elec. Co., 112 F.3d at 1577.

¹¹ Of course, if NRDC is mistaken on this point, and the plaintiffs could overcome the sovereign acts defense by showing that the contracts contain an unmistakable commitment, the government should still prevail because these contracts unquestionably do not contain any such unmistakable commitment.

¹² None of the other Justices writing separately in Winstar joined in this aspect of Justice Souter’s plurality opinion.

Tender Act); Jones v. United States, 1 Ct.Cl. 383 (1865) (removal of troops from Indian territory); Horowitz v. United States, 267 U.S. 458 (1925) (embargo on silk deliveries). Furthermore, apart from the plurality opinion in Winstar, there is no Supreme Court authority for treating satisfaction of the sovereign acts doctrine as merely the prelude to application of the doctrine of impracticability. Finally, as a matter of first principles, the approach taken in the Winstar plurality opinion is nonsensical because it ignores the special considerations that justify granting government broad latitude to take action that may incidentally affect the government's contract obligations and that supported creation of the sovereign defenses in the first place.

Applying the sovereign acts doctrine to the facts of this case, the enactment and implementation of the Endangered Species Act unquestionably qualify as a sovereign act, largely for the reasons cogently and persuasively explained by the United States in its memorandum. The ESA is comprehensive legislation designed “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species...” § 16 U.S.C.A. § 1531. It is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978), and applies to any action that may affect a listed species, including actions by the government as well as “any person subject to the jurisdiction of the United States.” § 16 U.S.C.A. § 1538. The ESA certainly does not target government contracts generally, much less the specific contracts at issue in this case. Accordingly, this and other courts have repeatedly and consistently held that the ESA is a public and general act for the purpose of the sovereign acts doctrine. See, e.g., Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206,1213 (9th Cir. 1999); Madera Irr. Dist. v. Hancock, 985 F.2d 1397, 1406-07 (9th Cir.1993); O'Neill v.

United States, 50 F.3d 677, 687 (9th Cir.1995); Precision Pine & Timber, Inc. v. United States, 50 Fed.Cl. 35, 72-73 (2001).

D. The Unmistakability Doctrine

The final sovereign defense applicable in this case is the unmistakability doctrine. As *Winstar* summed up the doctrine: “[A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act..., nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.” Winstar, 518 U.S. at 878. When it applies, the unmistakability doctrine serves as a default rule: Absent a clear statement to the contrary, the risk of government regulation or lawmaking is assigned to the private party. See Joshua I. Schwartz, "The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of *Winstar*: An Interim Report", 51 Ala. L. Rev. 1177, 1178 (2000).

In NRDC’s view, the unmistakability doctrine is separate and distinct from both the reserved powers or sovereign acts doctrines. The unmistakability doctrine provides an independent basis for rejecting a contract claim, even when the government action does not involve a central government function, and even when it does not represent a public and general act. Consistent with the Supreme Court’s instruction that "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority," the unmistakability doctrine begins with the presumption that the risk of a sovereign act is borne by the private party. See Bowen v. Public Agencies Opposed To Social Sec. Entrapment, 477 U.S. 51, 52-53 (1986). The parties can defeat this presumption, however, by binding the government through an unmistakable promise, placing the risk of liability on the government in the event of a change in policies. Under this understanding, the unmistakability doctrine rests on the judgment that,

outside the types of government actions covered by reserved powers and sovereign acts doctrines, sovereign authority can, in effect, be bargained away, and there is no sound reason for the courts to interfere with such bargains. In political process terms, although encroachment on the legislative function and separation of powers are still concerns, they are less salient in this context and more powerfully countered by the possibility of self-interested government behavior.

The conclusion that the unmistakability doctrine can appropriately be applied in cases not involving the types of public and general acts covered by the sovereign acts doctrine is supported by numerous precedents. See e.g., Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 9 L.Ed. 773 (1837) (doctrine applied when government granted toll bridge charter and subsequently permitted directly competing bridge to be built); Rogers Park Water Co. v. Fergus, 18 U.S. 624 (1901) (doctrine applied when government granted water company charter based on water rates and subsequently lowered the maximum rates); Covington v. Kentucky, 173 U.S. 231 (1899) (doctrine applied when government granted general tax exemption and subsequently imposed property tax); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116 (1883) (doctrine applied when government granted bridge charter and subsequently permitted nearby construction of a train bridge).

In certain cases, depending upon the actual contract language at issue, the courts have effectively inferred an unmistakable promise from the nature of the contract itself. See Cuyahoga, 57 Fed. Cl. at 770 (observing that “[e]ach of [the Winstar] opinions ... intimates that the application of the unmistakability doctrine turns on the nature of the legislation or other action”). Under some agreements, government acceptance of the risk of some subsequent government action repudiating the bargain is inherent in the nature of the contract. Thus, in

Winstar the Justices expressed concern that that an enactment cannot destroy “the very right that [the] sovereign explicitly granted by contract,” id. at 917 (Breyer, J., concurring), or that the government not abrogate a “statute authorizing the payment of money pursuant to a contractual agreement,” id. at 933 (Rehnquist, C.J., dissenting). Consistent with this approach, the courts have held that a promise of specific regulatory treatment is, in substance, a promise not to change the regulations (Winstar, Centex), and that a promise to borrow money on the government’s credit is the same as promising not to compromise that credit (Lynch v. United States, 292 U.S. 571, 580 (1934); Perry v. United States, 294 U.S. 330 (1935)). In other words, when the contract promises a specific regulatory treatment, continuation of that treatment is the essence of the agreement and unmistakability doctrine does not require “the Government’s promise to keep its promise.” Winstar, 518 U.S. at 922 (Scalia, concurring). See also Lynch, 292 U.S. at 580 (“To abrogate contracts, in the attempt to lessen governmental expenditure, would be not the practice of economy, but an act of repudiation”)

Applying the unmistakability doctrine to the facts this case, the doctrine provides yet one more ground for rejecting plaintiffs’ contract claims. In the first place, these contracts do not involve an explicit promise concerning regulatory treatment, or the undertaking of a financial obligation. They are simply contracts for the delivery of water, subject to all of the various terms of the agreements. Thus, in order to shift the risk of future government action to the United States, these contracts would have had to include an “unmistakable” promise not to affect these bargains through future action. The contracts contain no such unmistakable promise.

The presumption of the unmistakability doctrine cannot be dispelled by contractual silence, ambiguity or inference. See Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569 (Fed.Cir.1997); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 9 L.Ed.

773 (1837) (“in grants by the public, nothing passes by implication”). In other words, express language is needed to *reverse* the presumption. On the other hand, express language is gratuitous to *apply* the presumption. Compare Rogers Park Water Co. v. Fergus, 180 U. S. 624 (1901) (utility charter silence on power of city to change rates meant that the city could change rate without liability) with Los Angeles v. Los Angeles City Water Co. 177 U. S. 558 (1900) (utility charter included an explicit promise that city would not lower rates and thus city liable for change).

Furthermore, in view of the massive subsidies granted to Klamath irrigators, plaintiffs face an unusually steep climb to establish an unmistakable commitment. When a private party has paid fair consideration in exchange for a government commitment, it is more reasonable to assume that the private party has a legitimate expectation to receive the benefit of the bargain. See Winstar, 518 U.S. at 863 (“Although one can imagine cases in which the potential gain might induce a party to assume a substantial risk that the gain might be wiped out by a change in the law, it would have been irrational in this case for Glendale to stake its very existence upon continuation of current policies without seeking to embody those policies in some sort of contractual commitment.”). By contrast, where a government contract is in large part a gift on the part of the government, it is far more appropriate for the private party to anticipate that the government, because of new policy priorities or other reasons, may not be capable of being perfectly punctilious in carrying out its side of the agreement.

The Court should conclude that the unmistakability doctrine applies and precludes a finding of breach of contract. None of the plaintiffs’ contracts contains any express language allocating the risk of future policy change to the government. Indeed, if anything, the shortage

clauses and the other provisions of the contracts discussed above indicate that the parties intended to place the risk of future policy changes on the water users.

This conclusion is supported by numerous other decisions holding that Bureau water contractors are subject to subsequent legislative mandates, including the Endangered Species Act. Most immediately relevant is the decision of the U.S. Court of Appeals for the Ninth Circuit in Klamath Water User Protective Association v. Patterson, 204 F.3d 1206 (9th Cir. 2000), in which the court invoked the unmistakability doctrine to reject the argument that the ESA did not govern Klamath Project operations:

It is well settled that contractual arrangements can be altered by subsequent Congressional legislation.... Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity. Therefore, when an agency, such as Reclamation, decides to take action, the ESA generally applies to the contract.

Id. at 1213. Likewise in O’Neill v. United States, 50 F.3d 677 (9th Cir. 1995), the Ninth Circuit rejected the argument that Bureau water supply contracts prevented the Bureau from reducing water deliveries in order to comply with the ESA and other laws. Unless the contracts surrendered government power in “unmistakable terms,” the court said, implementation of the ESA was entirely consistent with the water users’ contractual rights. See also e.g., Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003), vacated on other grounds, 355 F.3d 1215 (10th Cir. 2004) (holding, based in part on the unmistakability doctrine, that Bureau water delivery contracts did not represent an obstacle to the implementation of the ESA).¹³

¹³ In its memorandum, the United States observes that the Tenth Circuit’s discussion in Silvery Minnow of the unmistakability doctrine appeared in a concurring opinion by one of the

CONCLUSION

For the foregoing reasons, and for the reasons stated in the memorandum filed by the United States, the Court should grant the United States' motion for summary judgment as to the plaintiffs' contract claims.

Respectfully submitted,

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three judges. See Defendant's Memorandum, at 28 n.24. However, the author of the opinion for the Court joined in the concurring opinion, see 333 F.3d at 1138, meaning that the concurring opinion had the support of a majority of the panel and represented just as authoritative an expression of the panel's reasoning as the opinion for the court. In addition, it is irrelevant that no party directly raised the unmistakability doctrine in that suit, which was not an action alleging a breach of contract. The unmistakability doctrine was surely highly relevant in considering the United States' (unsuccessful) argument that Bureau water delivery contracts so tied the hands of the United States that it was powerless to invoke the ESA in order to protect the silvery minnow from extinction.