

Claims Court Rules that Giving Farmers' Water to Fish Requires Just Compensation

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I. INTRODUCTION

In a case pitting the federal Endangered Species Act ("ESA") against California's century-old regime of private water rights, a federal court, perhaps for the first time, has held that the federal government violated the Fifth Amendment's takings clause by taking water away from farmers and giving it to fish.

On April 30, 2001, the United States Court of Federal Claims ruled that reductions in deliveries of State Water Project ("SWP") water to water contractors caused by fish protection measures imposed by the National Marine Fisheries Service ("NMFS") and U.S. Fish & Wildlife Service ("FWS") pursuant to the ESA constituted a physical taking of private property, without just compensation.¹

Citing the purpose of the Fifth Amendment's taking clause as "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," the court held that "[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."²

Although the *Tulare Lake* decision is directly relevant to the farmers and cities that depend upon the State Water Project for all or part of their water supply, the decision is important to anyone with a water right in California, providing a federal constitutional limit on restriction of water rights. The decision also has broader implications for property owners and regulators nationwide, providing guidance for determining whether a government action effects a physical or regulatory taking and for determining whether background principles of state real property law provide a defense to a takings claim.

II. CHANGING SOCIAL VALUES ABOUT THE USE OF WATER IN AN ARID REGION

The case arose after NMFS and the FWS issued biological opinions restricting operation of the federal Central Valley Project ("CVP") and California's State Water Project ("SWP") to avoid jeopardizing the continued existence of Sacramento River winter-run chinook salmon and delta smelt, two fish species that are protected under the ESA.³

The ESA was enacted in 1973.⁴ Section 7 of the ESA requires each federal agency to consult with the either the

Secretary of Interior or Secretary of Commerce to ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.⁵ The FWS performs the consultation function for the Interior Secretary, addressing potential impacts on fish and wildlife, including delta smelt. NMFS performs the consultation function for the Commerce Secretary, addressing potential impacts on anadromous fish, including winter-run chinook salmon.

The result of the consultation process is a biological opinion.⁶ An opinion concluding that the proposed federal agency action would jeopardize protected species (a "jeopardy opinion") prescribes reasonable and prudent alternatives to the agency action to avoid jeopardy.⁷ An opinion concluding that the proposed action would not jeopardize a species (a "no-jeopardy opinion"), but would incidentally take, or harm, individual species members or harm their critical habitat, prescribes reasonable and prudent measures to minimize the harm.⁸

Although the *Tulare Lake* case was directly triggered by the NMFS and USFWS biological opinions, in a more general sense the case arose because social values about the use of water and other natural resources have changed since California's water projects were planned and built. The biological opinions, and the 1973 federal environmental law requiring them, are a manifestation of this change, which puts new demands on a water supply system that already struggles to satisfy the growing needs of urban and agricultural contractors.

Both the SWP and federal CVP use large, man-made reservoirs in the mountains around Northern California's Sacramento Valley to store water from winter rains and snow for delivery to cities and farms during California's long dry season. Many of these cities and farms are located in the San Joaquin Valley, the southern half of California's Great Central Valley. Water released from the northern reservoirs, like the CVP's Lake Shasta and the SWP's Lake Oroville, flows south down the Sacramento River to its confluence with the San Joaquin River, where it enters the maze of islands and sloughs called the Sacramento-San Joaquin Delta. Water not diverted by Delta farmers and cities flows westward into San Francisco Bay or is diverted by two sets of massive pumps—one for the SWP and one for the CVP—that lift the water into great

aqueducts built to provide water to the San Joaquin Valley and Southern California, among other places.

The U.S. Bureau of Reclamation ("Bureau") operates the CVP, and the Department of Water Resources ("DWR") operates the SWP pursuant to water right permits and licenses issued by California's State Water Resources Control Board ("SWRCB" or "Board").⁹ The Board has ultimate authority for controlling, appropriating, using and distributing state waters.¹⁰ These permits and licenses confer appropriative water rights authorizing the Bureau and DWR to divert, store and deliver specified amounts of water to particular geographical areas for specified end uses (*i.e.*, agricultural irrigation, municipal and industrial use).

In California, an appropriative water right is a "usufructuary" interest conferring only the right to *use* water, and title to water always rests in the state.¹¹ Water diverted and stored by the CVP and SWP is delivered to end users pursuant to contracts. Contractors are generally districts formed under state law for the purpose of providing water to their constituents. Contracts with DWR provide that the state shall not be liable for shortages of SWP water due to drought or other causes beyond DWR's control.¹² Contractors pay the costs of operating and maintaining the SWP regardless of whether they actually receive all the water to which they are entitled under their contracts.¹³

Conceived in the 1920s and largely completed by the 1960s, California's great water projects were "born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind."¹⁴ However, societal attitudes toward use of natural resources, like water, changed.

The ESA was enacted in 1973 to "halt and reverse the trend toward species extinction, *whatever the cost*."¹⁵ Under the ESA, federal agencies, like the Bureau, must consult with NMFS and/or the FWS 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."¹⁶

By agreement and pursuant to federal statute, operation of the CVP is coordinated with operation of the SWP,¹⁷ so both projects are regulated under the ESA's consultation requirements to avoid jeopardizing protected species. Pursuant to these requirements, the Bureau and DWR annually consult with NMFS and the FWS to determine the impact of operating the CVP and SWP on fish species protected by the ESA.

As a result of these consultations, NMFS issued biological opinions which, starting in 1992, concluded that annual CVP-SWP operations would jeopardize Sacramento winter-run chinook salmon, and prescribed mitigation (reasonable and prudent alternatives, or "RPAs") to prevent jeopardy. In 1993, the FWS issued a biological opinion concluding that operation

of the projects would jeopardize delta smelt and prescribing RPAs. The RPAs imposed by all these biological opinions were designed to protect fish by restricting the time and manner of pumping water from the Delta. Recognizing that the CVP and SWP could not comply both with the RPAs and with certain water quality-related conditions of their water right permits, the SWRCB concluded that the Endangered Species Act controlled and waived the permit conditions.

As a result of the Bureau's and DWR's compliance with the pumping restrictions imposed by the RPAs in 1992, 1993 and 1994, "water that would otherwise have been available for distribution by the water projects was made unavailable."¹⁸ Three SWP contractors and four of their customers filed a lawsuit claiming that the federal government, through NMFS and the FWS, violated the takings clause of the Fifth Amendment by taking for the benefit of fish more than 490,000 acre feet of SWP water worth more than \$33.5 million between 1992 and 1994 without paying just compensation.¹⁹ The plaintiff contractors claimed that they were legally entitled to the water that had been given to the fish. The plaintiffs and federal government both moved for summary judgment. On April 30, 2001, the Claims Court granted the plaintiffs' motion and denied the defendants' motion.

III. THREE LEGAL QUESTIONS DROVE THE COURT'S DECISION

The court described the fundamental legal question as "not whether the federal government has the authority to protect the winter-run chinook salmon and delta smelt under the Endangered Species Act, but whether it may impose the costs of their protection solely on plaintiffs."²⁰ The court's analysis of this question focused on three primary questions:

- (1) Was the alleged taking in the nature of a physical taking or one by regulation?
- (2) Did the biological opinions do no more than restrict plaintiffs' property right to an extent that background principles of state law would require anyway?
- (3) Did the RPAs in the NMFS and FWS biological opinions merely frustrate the purpose of the plaintiffs' SWP water delivery contracts and, under *Omnia Commercial Co. v. United States*,²¹ therefore not effect a taking?²²

A. Physical or Regulatory Taking?

The federal government argued that the pumping restrictions required by their biological opinions should be analyzed as a potential regulatory taking and that, under such an analysis, no unconstitutional taking had occurred. The plaintiffs contended that the taking was physical.²³

A regulatory takings analysis generally involves an *ad hoc* balancing of three primary factors set forth in *Penn Central Transp. Co. v. New York*:²⁴ the character of the government action; the economic impact of that action; and the reasonableness of the property owner's investment-backed expectations. Although certain facts give rise to so-called "categorical" regulatory takings that do not require this multi-factor balancing—as when a regulation denies all economically viable use of property²⁵—the *Penn Central* approach to takings analysis is *ad hoc* and complex, making predicted outcomes uncertain.

The outcome of a taking classified as physical is certain. A physical taking occurs when the government's action "amounts to a physical occupation or invasion of the property, including the functional equivalent of a practical ouster of [the owner's] possession."²⁶ When a physical invasion of property is found, courts have held that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."²⁷

The Claims Court decided that turning off pumps to redirect water away from the plaintiffs so that it could be used by fish was a physical taking.²⁸ The court held that in the "unusual situation" of water rights, "a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the *use* of the water."²⁹

The court reasoned that the distinction between a physical taking and a regulatory activity that merely impairs the use of 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."³⁰ Based on this, the court held that "where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value."³¹ Thus, the court concluded that the "exclusive possession of plaintiffs' water-use rights for preservation of the fish" effects a physical taking.³²

B. Limits on Plaintiffs' Property Interest Based on Contract and Background Principles of State Law

The federal government also argued that both the terms of the plaintiffs' contracts with DWR and background principles of state law impose limits on plaintiffs' property interest in SWP water, making their loss of water noncompensable.³³

1. Contractual language as limit

The first theory was based on a provision in DWR's water service contracts providing that neither the state nor its agencies may be held liable for "any damage, direct or indirect, arising from shortages in the amount of water to be made available for delivery to the Agency under this contract caused

by drought, operation of area of origin statutes, or any other cause beyond its control."³⁴ The federal government argued that the plaintiffs had a right to receive water only to the extent that water is available to DWR, that the biological opinions made water unavailable to DWR for reasons beyond DWR's control, the plaintiffs had no remedy against DWR for the resulting shortage, and that, therefore, the plaintiffs had no compensable property interest in the lost water.³⁵

The Claims Court rejected the theory, holding that DWR's contract protected *DWR* (*i.e.*, the state of California) from liability for shortages beyond its control, but that this contractual shield did not protect the federal government from the plaintiffs' takings claim.³⁶

2. Background principles of state law as limit

The second argument arose from what is sometimes referred to as the "nuisance defense" discussed by the Supreme Court in *Lucas*.³⁷ There, the Supreme Court held that a regulatory taking claim could be defeated if "an objectively reasonable application of relevant precedents" showed that the challenged property use restriction "could have been achieved" by applying background principles of state nuisance and property law.³⁸ The Court concluded that this determination "is one of state law to be dealt with on remand" to the state courts.³⁹

The background principles at issue in *Tulare Lake* arise from the public trust doctrine first applied to California water rights in the landmark California Supreme Court decision *National Audubon Society v. Alpine County*,⁴⁰ and from the state constitutional limitation that use of water must be reasonable.⁴¹ Whether a particular use of surface water is unreasonable or violative of the public trust is a question committed concurrently to the SWRCB and to the California courts.⁴²

Citing *Lucas*, the federal government argued that there was no taking because the public trust and reasonable use doctrines required reduced pumping to avoid jeopardizing winter-run salmon and delta smelt, just as the biological opinions required. By acting within the zone of restrictions authorized by state law, the federal government argued, the biological opinions did no more than to impose pumping restrictions that *could* have been imposed under background principles of state law protecting the same fish and wildlife interests.⁴³

The Claims Court rejected this argument, holding that a 1978 SWRCB decision, issued after 11 months of hearings, had approved DWR's water rights as part of an overall allocation of water taking into account all competing interests, including fish, wildlife and other users of water in the Delta.⁴⁴ Although the SWRCB waived certain water-quality-related terms of DWR's water right permits to allow compliance with conflicting requirements of the federal government's biological opinions, the court found that the SWRCB had not restricted DWR's water rights to protect winter-run salmon or delta

smelt.⁴⁵ In the absence of an affirmative restriction by the SWRCB or a determination by the California courts that DWR's use of water is illegal, the SWRCB's 1978 decision "defines the scope of plaintiffs' contract rights."⁴⁶

The court reasoned that "[t]he public trust and reasonable use doctrines each require a complex balancing of interests—an exercise of discretion for which this court is not suited and with which it is not charged."⁴⁷ Moreover:

To the extent that water allocation in California is a policy judgment—one specifically committed to the SWRCB and the California courts—a finding of unreasonableness by this court would be tantamount to our *making* California law rather than merely applying it. . . . While we are often asked to interpret state or federal statutes or regulations to determine the scope of a property interest under a takings claim, those determinations do not extend to matters of discretion committed to the authority of the state.⁴⁸

Thus, the court concluded that in the absence of any SWRCB action or state court decision restricting DWR's pumping in the manner required by the biological opinions, the federal government's nuisance defense failed.

C. *Omnia*: Frustration of Contract or Taking of Property?

The federal government argued that under the Supreme Court's 1923 *Omnia* decision, the government may not be held liable under the Fifth Amendment's takings clause for lawful actions that frustrate the performance of a contract. In *Omnia*, the Court held that the federal government's requisition of one year's production of steel from a manufacturer did not effect a taking even though the requisition prevented the manufacturer from delivering any steel pursuant to its contract with the plaintiff.⁴⁹ The *Omnia* Court rejected the plaintiff's claim that its contractual right to the steel had been taken. The Court found that the plaintiff never had title to the steel and that the contract had not been "appropriated" but simply ended.⁵⁰

In *Tulare Lake*, the federal government argued that the pumping restrictions imposed by its biological opinions were a lawful exercise of federal authority that frustrated the plaintiffs' water delivery contracts with DWR but did not "appropriate" any contractual rights.⁵¹ The Claims Court rejected the argument, concluding that the relationship between the DWR contract and SWP water is different from the relationship between the contract in *Omnia* and steel. The court held that *Omnia* only applies where the contract right is separate and distinct from the property that is the subject of the contract and that SWP water is not separate and distinct from the plaintiffs' DWR contracts:⁵²

Unlike the situation in *Omnia*, where the plaintiff could claim only a contract expectancy but not an ownership right in the steel, our plaintiffs can claim an identifiable interest in a stipulated volume of water. While under California law the title to water always remains with the state, the right to the water's use is transferred first by permit to DWR, and then by contract to end-users, such as the plaintiffs.⁵³

Thus, the court concluded, the plaintiffs' contract rights in the water's use are "a property interest sufficiently matured to take it out of the realm of an *Omnia* analysis."⁵⁴

IV. IMPLICATIONS FOR FUTURE REGULATION AND LITIGATION

A. Case Status

Having decided that the federal government is liable for taking the plaintiffs' SWP water, the next phase of the *Tulare Lake* litigation will move to damages, unless the federal government seeks an interlocutory appeal of the liability decision. As of November 27, 2001, no request for an appeal had been filed, and the plaintiffs had requested a June 2002 trial date on damages.

B. Implications

Tulare Lake holds that where a federal agency invokes the ESA to restrict contractual deliveries of SWP water, so that water otherwise available is made unavailable, there is a physical taking requiring just compensation, unless either the SWRCB or a California court has previously decided that the restricted use of water is unreasonable or violates the public trust. The major components of this holding have independent significance for future regulation and litigation.

First, all governmental restrictions on the use of water for environmental purposes should be analyzed as possible physical takings. This means there is no *ad hoc*, multi-factored balancing of the regulation's character, its economic impact and the extent to which it interferes with reasonable investment-backed expectations.⁵⁵ Each of these factors provides governmental defendants with numerous ways to defeat a takings challenge. Once a taking is deemed to be physical, however, there is a *per se* taking, and the only practical defense lies in showing that the plaintiff's right, or title, is limited in some way that allows the challenged restriction. As a result, the government may not successfully defend a takings challenge by arguing that the claimant lost only some of its water and enjoyed an economically viable use of the remaining amount. Thus, the *Tulare Lake* decision makes it easier to win a takings claim involving restrictions on use of water.

Second, the physical takings analysis applies to restrictions not just on contractual rights to SWP water, but on the exercise of any valid water right, including riparian rights, pre-1914 appropriative rights, post-1914 appropriative rights, and rights in percolating groundwater. Moreover, the physical takings analysis should apply to restrictions on any contractual rights to water, so long as the governmental defendant is not protected by a contractual waiver of liability for shortages caused by the challenged regulation.⁵⁶

Third, the so-called nuisance defense may only be invoked where the SWRCB or a California court has previously decided to restrict the exercise of a water right in the same manner and for the same purpose as the governmental action giving rise to the takings claim. Restrictions imposed under the federal ESA are not presumed to be coextensive with limits on title arising from background principles of state real property, nuisance or water law. Governmental defendants cannot avoid takings liability simply by arguing that their challenged restriction *could* have been imposed under state law. In the water rights context, this limit on the nuisance defense applies to regulatory restrictions imposed by any governmental agency other than the SWRCB or a California court. For example, if the California Department of Fish and Game ("DFG") restricts the exercise of a water right in a manner going beyond prior restrictions imposed by the SWRCB or a state court, DFG would have no nuisance defense against a takings claim.

One practical effect of this third component of the decision may be to elevate the role of the SWRCB in reviewing the scientific basis for water use restrictions proposed by fish and wildlife agencies, like NMFS, FWS and DFG. Using the SWRCB's quasi-adjudicatory process to publicly review the science underlying proposed water use restrictions would help to ensure that any restrictions ultimately imposed by the SWRCB are justified by more than a biologist's hunch that more water is always better for the environment, regardless of the impact on California's water supply. Where an agency seeks to restrict the exercise of a water right through the state courts, the Water Code's reference procedure provides a means by which a backlogged court lacking in-house technical expertise to sort out complex engineering and biological issues may refer restrictions requested by the plaintiff regulatory agency to the SWRCB for evaluation and determination.⁵⁷

V. NEW TAKINGS DECISION WOULD EXTEND TULARE LAKE DECISION

Federal enforcement of the Endangered Species Act has spawned another Fifth Amendment takings lawsuit that could extend the holding in the *Tulare Lake* takings decision to water rights arising from an interstate compact.

A new takings lawsuit has emerged from the federal government's decision under the Endangered Species Act last summer to protect two kinds of sucker fish and coho salmon by halting deliveries of irrigation water to nearly 200,000 acres

of land in the Klamath Basin straddling the California-Oregon border.

In October 2001, some twenty farmers and water districts filed a lawsuit in the United States Court of Federal Claims seeking \$1 billion in just compensation for the alleged taking of their irrigation water. The lawsuit follows a parched summer of withering crops, threatened livelihoods and civil disobedience after the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) ordered the United States Bureau of Reclamation to stop delivering irrigation water from the federally owned and operated Klamath River Project.

According to the FWS, water deliveries had to be stopped to maintain high reservoir levels for the Shortnose and Lost River Sucker fish. According to NMFS, irrigation deliveries had to be stopped to ensure there would be enough water in Klamath Project reservoirs to maintain adequate downstream river flows needed by coho salmon in the fall, after the irrigation season. Reservoir water released in the summer for irrigation would not be available for release in the fall for Klamath River coho salmon.

The complaint alleges that the federal government's decision to stop delivering irrigation water by closing gates on Klamath Project dams took the plaintiffs' water for a public purpose in violation of the 1957 Klamath Basin Compact, under which the "United States agreed not to impair, without payment of just compensation, water rights for domestic or irrigation uses."⁵⁸

Under the reasoning of the Claims Court's recent takings decision in the *Tulare Lake* case, the taking here would apparently be analyzed as a *per se* physical taking under the theory that the federal government's closing water release gates at its dams to stop irrigation deliveries impaired a Fifth Amendment property interest defined by the Klamath Basin Compact and California and Oregon water rights law.⁵⁹

VI. CONCLUSION

The *Tulare Lake* decision stands as an important reminder that governmental reallocation of resources upon which tremendous private investments have been made may only go so far. Because the United States Constitution bars 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," California water rights are now a little more secure. Exactly how much more secure will become evident as federal and state regulators internalize the *Tulare Lake* decision and modify their regulatory approaches.

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ENDNOTES

- 1 *Tulare Lake Basin Water Storage District v. United States*, 49 Fed.Cl. 313 (2001) [hereinafter "*Tulare Lake*"].
- 2 *Tulare Lake*, 49 Fed.Cl. at 316 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).
- 3 16 U.S.C. § 1531 *et seq.*
- 4 P.L. 93-205, 87 Stat. 884.
- 5 16 U.S.C. § 1536.
- 6 16 U.S.C. § 1536.
- 7 16 U.S.C. § 1536(b)(3)(A).
- 8 16 U.S.C. § 1536(b)(4).
- 9 *Tulare Lake*, 49 Fed.Cl. at 314-315.
- 10 *See id.* (citing *California v. United States*, 438 U.S. 645 (1978)).
- 11 *See id.* at 318, 319 (citing Cal. Water Code § 102, *Eddy v. Simpson*, 3 Cal. 249, 252-253 (1853)).
- 12 *Id.* at 320.
- 13 *Id.* at 315.
- 14 *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 280 (1958).
- 15 *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) (enjoining construction of virtually completed Tellico Dam to protect snail-darter fish) (emphasis added).
- 16 16 U.S.C. § 1532(a)(2).
- 17 *Tulare Lake*, 49 Fed.Cl. at 315, n.1.
- 18 *Id.* at 315.
- 19 The Plaintiffs' complaint alleged that the federal government took 138,010 acre feet of SWP water worth more than \$9.38 million in 1992, 26,000 acre feet of SWP water worth at least \$1.77 million in 1993, and 326,050 acre feet of SWP water worth nearly \$22.2 million in 1994. Complaint for Taking of State Water Project Water (U.S. Court of Federal Claims, No. 98 01 L, filed February 6, 1998).
- 20 *Tulare Lake*, 49 Fed.Cl. at 316.
- 21 261 U.S. 502 (1923) [hereinafter "*Omnia*"].
- 22 *Tulare Lake*, 49 Fed.Cl. at 316-317.
- 23 *Id.* at 318.
- 24 438 U.S. 104, 124-125 (1978).
- 25 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992).
- 26 *Tulare Lake*, 49 Fed.Cl. at 318 (citation and quotation omitted).
- 27 *Id.* (citing *Lucas, supra*, 505 U.S. at 1015).
- 28 *Id.* at 319.
- 29 *Id.* (emphasis added).
- 30 *Id.* (internal citations and quotations omitted).
- 31 *Id.*
- 32 *Id.*
- 33 *Id.* at 320.
- 34 *Id.*
- 35 *Id.*
- 36 *Id.* at 320-321.
- 37 *Lucas, supra*, 505 U.S. at 1027-1032.
- 38 *Id.* at 1029, 1031.
- 39 *Id.* at 1031.
- 40 33 Cal.3d 419 (1983).
- 41 Cal. Const. Art. X, § 2.
- 42 *National Audubon*, 33 Cal.3d at 451-452.
- 43 *Tulare Lake*, 49 Fed.Cl. at 322.
- 44 *See id.* at 321-323 (citing SWRCB Decision 1485 (1978)).
- 45 *Id.* at 322.
- 46 *Id.*
- 47 *Id.* at 323-324.
- 48 *Id.* at 324.
- 49 *Omnia, supra*, 261 U.S. at 508-511.
- 50 *Id.* at 511.
- 51 *Tulare Lake*, 49 Fed.Cl. at 316-317.
- 52 *Id.* at 317-318.
- 53 *Id.* at 318.
- 54 *Id.*
- 55 *See Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978) (describing three factor test for analyzing regulatory takings challenges).
- 56 *See O'Neill v. United States*, 50 F.3d 677, 683-684 (9th Cir. 1995) (holding CVP water contract shortage provision shields federal government from liability).
- 57 *See* Cal. Water Code § 2000 *et seq.* (establishing procedure for court to refer water right issues to SWRCB for resolution).
- 58 Complaint, para. 26, 39.
- 59 A copy of the complaint can be downloaded as a PDF file from the Northern California Natural Resources Subsection's website: <http://www.kmtg.com/brownbagSem.htm>. The complaint, and a separate downloadable history of Klamath Basin water and endangered species issues, are available on the web page for the November 30, 2001, Brown Bag titled: "The Klamath River: Fish Farmers, Tribes and Takings."