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## Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (Fed. Cl. 2005)

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Ellsworth's expert regarding the number of acres that could be legally irrigated under the certificates. Ellsworth's expert employed different terminology in his oral testimony than his prior report; during his oral testimony, he referred to acreage with a water right as "sole-supply acreage" and acreage with no water right as "supplemental supply acreage." The court found that the altered terminology did not amount to a material change from the expert report and could not have reasonably surprised Tuttle. In holding that the expert testimony did not prejudice the jury, the court noted that Tuttle had the opportunity to challenge Ellsworth's experts at trial. The court held any error in admitted the expert testimony was harmless.

Tuttle further argued the trial court erred by excluding Tuttle's evidence regarding Ellsworth's failure to mitigate damages. Tuttle claimed Ellsworth had a duty to challenge the State Engineer's determination of water rights under the appropriation certificates, either through an appeal or an equitable estoppel claim. Ellsworth responded that an equitable estoppel claim would be unlikely to succeed and that Ellsworth should not be required to pay for frivolous and expensive litigation, after already paying a substantial amount for the land. The court held Tuttle's mitigation theory was too speculative to impose a duty upon on Ellsworth, and therefore, the district court's exclusion of these issues was proper.

The court upheld the district court rulings on all counts, finding Tuttle fraudulently misrepresented the appurtenant water rights to the acreage bought by Ellsworth. Consequently, the court held Tuttle also breached the warranty, breached the contract, and was liable for the tort of conversion.

*Amy M. Petri*

#### UNITED STATES COURT OF FEDERAL CLAIMS

**Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (Fed. Cl. 2005)** (holding that landowners' and districts' claims were contract issues, not takings, and that their claims are subject to the terms of their contract, including limitations imposed by the Endangered Species Act).

The Department of Interior's Bureau of Reclamation ("Bureau") operates the Klamath Project, which provides water to 240,000 acres of irrigable land and several national wildlife refuges in the semi-arid Klamath River Basin of northern California and southern Oregon. In operating the Klamath Project, the Bureau must comply with the Endangered Species Act ("ESA") and ensure that its project operations are not likely to jeopardize the continued existence of any endangered species. In 2001, water levels in the basin were so low that they threat-

ened three endangered species including the coho salmon, short nose suckerfish, and Lost River suckerfish. This forced the Bureau to terminate the delivery of irrigation water to Klamath water users. Subsequently, thirteen agricultural landowners ("landowners") and fourteen water, drainage or irrigation districts ("districts"), who either directly or indirectly receive water from the Bureau's irrigation works, brought this case seeking just compensation under the Fifth Amendment and damages for breach of contract.

The landowners and districts brought this case against the United States in the United States Court of Federal Claims. The landowners sought just compensation both as beneficiaries of district contracts with the United States and as independent owners of Klamath Project water rights. The districts sought damages for breach of contract and damages on behalf of their members - the beneficiaries of the district contracts and those whom the Bureau's reduction in water deliveries affected in 2001. Although the districts' contracts with the Bureau supersede many of the individual water users' contracts with the Bureau, several landowners and districts claim other sources of property rights in Klamath Project water, such as patent deeds, water rights permits, or treaties. This includes a number of Oregon tribes, including the Klamath and Yurok, who hold fishing and water rights in the Klamath Project water under treaties, statutes, and executive orders.

In their initial complaint, the landowners and districts presented a claim for just compensation for their water rights, as well as another claim for just compensation for the impairment of their water rights. In a subsequent amended complaint, the landowners and districts added a claim for breach of contract. The landowners and districts filed a cross-motion for summary judgment on the issues of the nature and scope of their property interest and whether the United States was liable to pay just compensation for the taking of that interest.

The court began its analysis by reiterating that water belongs to the public and is generally held in trust by the states. The court stated that this is true for Oregon and California, but that this case also involves usufructuary rights, which are the rights to use the water for a particular purpose and with specified limitations and priorities. Based on these principles, the court looked to three possible sources for such rights: federal law apart from the Constitution; Oregon and California law; and potentially, contract law.

The court reviewed the landowners' and districts' assertion that their property interests in the Klamath water arose from federal law, specifically, the Reclamation Act of 1902. The court found this argument to be lacking because although the Reclamation Act indicates that the right to the use of certain water shall be appurtenant to the land irrigated, this language refers only to the water acquired under the provisions of the Act. In fact, the provisions of the Reclamation Act require the claimant to obtain those rights in accordance with state

law. The Reclamation Act does not independently define who owns interests in the water of Bureau projects. Thus, the court held that state law, and not the Reclamation Act, controls who owns interests in the water of the Bureau projects.

Next, the court considered state law in determining whether the landowners and districts have property rights in the waters of the Klamath Project. The United States claimed it owned controlling rights in the Klamath Project water based on the Act of February 22, 1905 by the Oregon legislature, which provided that when the proper officers of the United States filed a written notice, filed plans, and received authorization from the United States such rights were acquired. In contrast, the landowners and districts cite a 1950 Oregon Attorney General opinion which held that by filing its notice under the 1905 Act, the United States acquired the unappropriated water of the Klamath Basin reasonably necessary to the Klamath Project only to the extent that that United States put those waters to beneficial use. Unmoved by this argument, the court maintained that when the Bureau posted notices of appropriation in 1905, those notices triggered the provisions of the 1905 Oregon legislation, thereby vesting in the United States the appropriative water rights associated with the Klamath Project that were unappropriated as of the date of the filing. In arriving at its decision, the court recognized that other state courts construing state law provisions identical to the Oregon law have similarly concluded that the United States obtained all available appropriative water rights in given reclamation water simply by filing an appropriate notice. Thus, the court concluded that, pursuant to the 1905 Oregon law, the United States obtained rights to the unappropriated water of the Klamath Basin and associated tributaries.

The court held that the individuals who own patent deeds and water permits have interests in the Klamath Project. However, the court stated that even if these patent deeds and water permits reflect perfected interests in water, they cannot give rise to interests that cannot be taken or infringed upon. This is so because although Congress consented to the Klamath River Basin Compact (the "Compact"), the United States was not a party to it and therefore could not have conveyed its interests. The Compact states that nothing in it shall be deemed to impair or affect any rights, powers or jurisdictions in the United States, its agencies or those acting by or under its authority, in, over, and to the waters of the Klamath River Basin. The Ninth Circuit construed this language in accordance with its plain meaning as preserving all federal rights, powers and jurisdiction except as explicitly conceded. Therefore, nothing in the Compact enhances the rights of any of the landowners and districts against the United States.

In conclusion, the court returned to fundamental principles of contract law and statutory interpretation and held that although there was the potential for contractual recovery, landowners could not ex-

pect more property rights against the United States than they actually obtained and possess. This is because, despite the landowners' expectations and needs, water rights are subject to the same rules that govern all forms of property.

The court granted in part and denied in part the parties' cross-motions for partial summary judgment. On or before October 4, 2005, the parties are to file a joint status report indicating how this case should proceed.

*Kathleen Potter*

**City of Gettysburg v. United States, 64 Fed. Cl. 429 (Fed. Cl. 2005)**

(holding that damage to the City of Gettysburg's water delivery system was not a taking due to the release language in the easement and permit granted by the U.S. Corps of Engineers in spite of the absence of the city's signature on both documents).

In the 1960s, the City of Gettysburg, South Dakota ("City") contracted with the U.S. Army Corps of Engineers ("Corps") to construct a system to transport water from the Oahe Reservoir to the city. In 1972, the City requested a right-of-way easement from the Corps to build and maintain portions of the water transport system on government property. In 1973, the Corps forwarded a proposed easement to the City. That same year, the City received a Section 10 permit under the Rivers and Harbors Appropriation Act of 1899, allowing the City to maintain the water intake structure, lay an intake line, and construct a pumphouse on the Reservoir. After completing the project in 1975, the City informed the Corps that it had not yet issued the requested easement. The Corps proceeded to send four different easement proposals over the next three years, but it was not until March 7, 1978 that the Corps formally granted and issued an easement to the City. The easement contained boilerplate release language to the effect that the United States would not be liable for any damages to property or injuries to persons which arose from or were incidental to the use and occupation of the property ("hold harmless clause"). On that same date, the Corps also issued a license as a corollary to the easement, giving the City right-of-use of a nearby strip of land for a period of two years as a temporary work site. The City did not sign the easement or the license, and it contended that it therefore did not accept the terms of either document, in particular the hold harmless clause. Beginning in 1995, periodic landslides on the Reservoir's slope caused damage to the intake structure, pumphouse and underground transmission lines. By 1997, the damage had become so severe that the City had to abandon the water supply system in its entirety.

In this dispute, the City contended that the damage to the water supply system resulted from the Corps' construction, management and