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exempted nonpoint source pollution from antidegradation review; and (2) the EPA properly approved Montana's mixing zone policies and procedures, which exempted areas within the mixing zone from antidegradation review.

Dealing with the threshold issue of the appropriate standard of review, the appellate court disagreed with American Wildlands' assertions that the EPA's determinations involved purely legal questions and that the court should not defer to the EPA. According to the appellate court, Congress had clearly delegated authority to the EPA to make determinations as to when water quality standards were consistent with the Act. As such, the appellate court invoked the two-step approach to judicial review of agency interpretations of congressional acts announced in *Chevron v. Natural Resources Defense Council*. Under that approach, if the statute is clear and unambiguous, the plain language controls. However, if the statute is silent or ambiguous on the issue, the court must decide whether the agency's interpretation is based on a permissible construction of the statute. According to the appellate court, the Act was silent on the specific questions raised by the case. Thus, the appellate court deferred to the EPA's determinations, and asked only if such determinations were permissible constructions of the Act.

Turning to the EPA's approval of Montana's standard exempting nonpoint source pollution from antidegradation review, the appellate court agreed with the district court and concluded that nothing in the Act demanded a state adopt a regulatory system for nonpoint sources, or gave the EPA the authority to regulate such sources. Thus, the appellate court found that the EPA's approval of this standard was a permissible construction of the Act. Second, regarding the EPA's approval of Montana's policies and procedures exempting areas within the mixing zone from antidegradation review, the appellate court noted that the use of mixing zones was a practical necessity for meeting water quality criteria at a discharge pipe and was a widespread practice. The appellate court agreed with the EPA that the Act's antidegradation requirements applied to the waterbody as a whole, and not specifically to the mixing zone. Therefore, the appellate court found the EPA's approval of Montana's mixing zone policies and procedures a permissible construction of the Act.

Matthew J. Costinett

FEDERAL CLAIMS COURT

Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (holding that water restrictions imposed pursuant to the Endangered Species Act amounted to a physical taking under the Fifth Amendment and were compensable).

The United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively “the government”) determined that delta smelt and winter-run chinook salmon were in danger of extinction. In fulfillment of their duties under the Endangered Species Act, the government issued biological opinions that the proposed operations of the State Water Project (“SWP”) and the Central Valley Project (“CVP”) were likely to jeopardize the continued existence of these species. The opinions included Reasonable and Prudent Alternatives (“RPAs”) that limited the amount of water available for distribution to users.

The SWP and CVP capture water from the Feather and Sacramento Rivers and distribute it through canals to users in southern California. The State Water Resources Control Board (“SWRCB”) grants water use permits to the managers of the SWP and CVP. One of the managers, the Department of Water Resources (“DWR”), in turn, contracts with county water districts for the right to withdraw prescribed quantities of water. The water use restrictions impaired contracts held by Tulare Lake Basin Water Storage District (“Tulare”). Consequently, Tulare sued for compensation under Article V of the Constitution for loss of their water rights.

The government offered three lines of defense. First, the implementation of the RPAs merely frustrated the contract’s purpose and did not effectuate a taking. Second, the restrictions did not meet the criteria for a regulatory taking. Third, the government cannot be held liable for a taking when it does no more than impose a limit on Tulare’s title that background principles of state law would otherwise require.

The United States Court of Federal Claims felt the government misapplied the legal authority supporting their first argument, *Omnia Commercial Co. v. United States*. The court distinguished *Omnia* on the basis that *Omnia* could claim only a contract expectancy, not ownership, while Tulare had an identifiable right to a stipulated volume of water. Thus, while under California law, the title to water remained with the state; the contracts in question created a property interest sufficiently mature to remove it from the realm of an *Omnia* analysis.

Next, the government argued the water use restrictions did not meet the criteria of a regulatory taking. Applying the *Penn Central* balancing test, Tulare’s claim must fail because regulatory concern over fish and the de minimis economic loss limited Tulare’s reasonable contract expectations. However, Tulare argued the action was a physical taking. Under that theory, Tulare possessed contract rights to a specified amount of water, which the government prevented them from using and thereby deprived them of the entire value of their contract right. The court agreed with Tulare, describing water rights as a special form of property where the mere restriction of use eviscerated the right itself since the sole entitlement was to the use of the water. Thus, the court held that the government’s denial of the right to use all the water to which Tulare was entitled accomplished a

complete extinction of all value and effectuated a physical taking.

The government's third argument insisted that both the terms of Tulare's contract and the background principles of state law imposed limits on Tulare's titles that rendered their water loss non-compensable. The government contended that Tulare's contracts entitled them to only the amount of water made available to the DWR. Because the water was not available to the DWR, Tulare had no claim to the foregone flow. However, the court dismissed the government's legal authority as inapposite. The court pointed out the government lacked the contractual immunity from liability they relied on in their arguments.

Finally, the government offered a common law justification for limiting the scope of Tulare's property right. Specifically, Tulare could not have a vested right in a use or method of diverting water that was unreasonable or violated the public trust. The court rejected the government's assertion. The SWRCB defined a comprehensive scheme that balanced and allocated water rights among users in the decision D-1484 ("decision"). Once the SWRCB made an allocation under the decision, that determination defined the scope of Tulare's property and contract rights. Therefore, the decision protected Tulare's right to divert water, notwithstanding the SWRCB's compliance with the RPAs.

Thus, the court held that the federal government was free to preserve fish; however, it must pay for the water it takes to do so.

John A. Helfrich

Klump v. United States, 50 Fed. Cl. 268 (2001) (holding the United States Bureau of Land Management asserted water rights through the same legal channels applicable to individuals, and thus it did not violate the Fifth Amendment takings clause).

Luther Klump ("Klump") alleged the United States violated the Fifth Amendment by taking his property without providing just compensation. Klump made various earlier claims, which the United States Court of Federal Claims addressed in prior orders. Klump's loss of water rights remained the only issue, on which the United States moved for summary judgment.

Klump had water rights associated with cattle grazing permits on land in southeastern Arizona owned by the United States Bureau of Land Management ("BLM"). During the term of the permits, Klump and the BLM disputed over Klump's alleged failure to comply with some of the inherent conditions, such as allowing his cattle to graze in prohibited areas. As a result, the BLM cancelled Klump's permit, ordered him to remove his cattle from the land, and impounded some of his cattle. These legal developments prompted the Arizona