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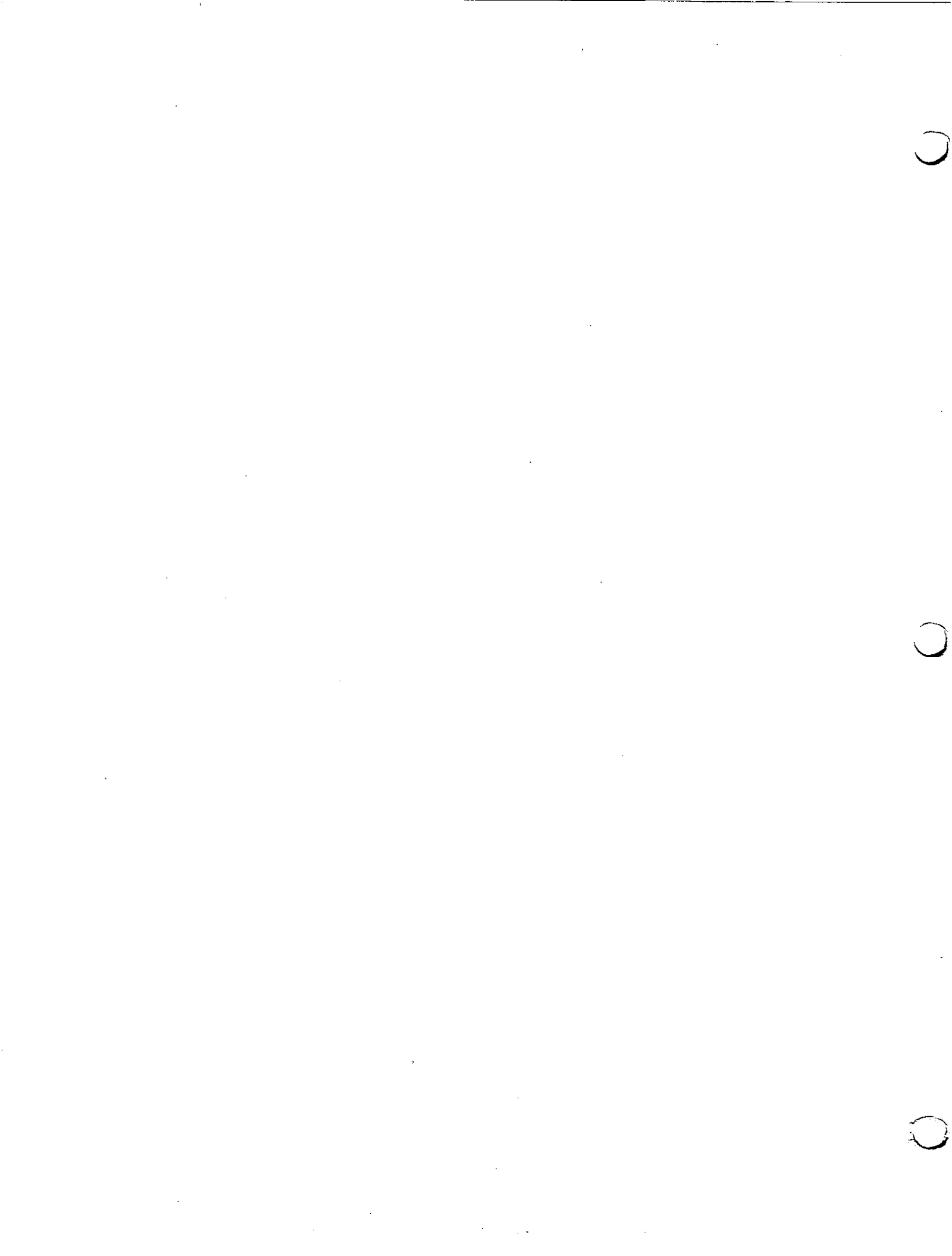
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**WATER RIGHTS, CONTRACT RIGHTS, AND
THE ENDANGERED SPECIES ACT**

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I. CHARLES WILKINSON AS PROPHET: THE ENDANGERED SPECIES ACT AND THE FEDERALIZATION OF WATER RESOURCES MANAGEMENT.

A. Section 9 and Water Rights.

1. *United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992).

- a. The entrainment of winter-run chinook salmon in irrigation diversion pumps is a "taking" in violation of section 9.
- b. The exercise of water rights is subject to the requirements of the Endangered Species Act.

"[T]he District argues that state water law rights should prevail over the Endangered Species Act. The Act provides that federal agencies should cooperate with state and local authorities to resolve water resource issues regarding the conservation of endangered species. 16 U.S.C. § 1531(c)(2). This provision does not require, however, that state water rights should prevail over the restrictions set forth in the Act. Such an interpretation would render the Act a nullity. The Act provides no exemption from compliance to persons possessing state water rights, and thus the District's state water rights do not provide it with a special privilege to ignore the Endangered Species Act."

2. 50 C.F.R. § 17.3 (upheld in *Sweet Home Communities for a Greater Oregon v. Babbitt*, 115 S. Ct. 2407 (1995)).

- a. "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."
- b. Water diversions and impoundments that significantly alter flows may violate section 9.
- c. Questions of foreseeability and proximate causation. *See, e.g., Sweet Home* (O'Connor, J., concurring):

“Proximate causation is not a concept susceptible of precise definition. It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle. We have recently said that proximate causation “normally eliminates the bizarre,” and have noted its “functionally equivalent” alternative characterizations in terms of foreseeability, and duty. Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts. But I note, at the least, that proximate cause principles inject a foreseeability element into the statute, and hence, the regulation, that would appear to alleviate some of the problems noted by the dissent. *See, e.g.*, [Scalia, J. dissenting] (describing “a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby [injures] protected fish”).

“In my view, then, the “harm” regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the Endangered Species Act. Pursuant to my interpretation, *Palila II* [852 F.2d 1106 (9th Cir. 1988)]—under which the Court of Appeals held that a state agency committed a “taking” by permitting feral sheep to eat mamane-naio seedlings that, when full-grown, might have fed and sheltered endangered palila—was wrongly decided according to the regulation’s own terms. Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds.”

B. Section 7 and Federal Reclamation Contracts.

1. *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996).
 - a. Biological opinion for the operation of the Klamath River project to protect the lost river and shortnose suckers requires maintenance of minimum reservoir levels, which diminishes water supply to project contractors.

- b. Plaintiff ranchers and irrigation districts do not have standing to challenge the biological opinion or the designation of critical habitat, because they do not assert an interest in the protection of species and therefore fall outside the zone of interests protected by the Endangered Species Act.
 - c. Does the zone of interests test apply to claims brought under the citizen suit provisions of the federal environmental laws, such as section 11(g) of the Endangered Species Act?
 - d. If so, are economic interests affected by a critical habitat designation or the reoperation of a water supply project pursuant to the recommendations of a biological opinion within the zone of interests protected by the Endangered Species Act?
2. *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).
- a. Reduction in water service to users within San Luis Unit of the Central Valley Project to protect winter-run chinook salmon and Delta smelt as directed by the biological opinions for the operation of the Central Valley Project does not violate the users' contract rights.
 - b. Federal reclamation contracts are subject to the "sovereign acts" doctrine as articulated in prior cases such as *Peterson v. Department of the Interior*, 899 F.2d 799 (9th Cir. 1990), *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

C. Groundwater and the Endangered Species Act.

1. Groundwater pumping that lowers the groundwater table below the level required to support listed species of plants or critical vegetative habitat for listed animal species may violate section 9.
2. Several listings in California identify groundwater pumping as a potential threat to endangered or threatened species.
 - a. 60 Fed. Reg. 10694 (1995) (Southern Willow Flycatcher).
 - b. 59 Fed. Reg. 5494 (1994) (Tidewater Goby).
 - c. 59 Fed. Reg. 14378 (1994) (Parish's Alkali Grass).

II. WATER RIGHTS AND ECOSYSTEM MANAGEMENT

A. Endangered Species Act § 2(b):

“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved

B. Examples of the Endangered Species Act as a Unifying and Integrative Force in Water Resources Management.

1. Columbia and Snake River System.

- a. *Pacific Northwest Generating Cooperative v. National Marine Fisheries Service*, 38 F.3d 1058 (9th Cir. 1994).
- b. *Northwest Resource Information Center v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994).
- c. Henry B. Lacey, *New Hope for Salmon?*, 2 West • Northwest 97 (1995).
- d. John M. Volkman & Willis E. McConnah, *Through a Glass Darkly: Columbia River Salmon, the Endangered Species Act, and Adaptive Management*, 23 *Envtl. L.* 1249 (1993).

2. Platte River System.

Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992).

3. Sacramento-San Joaquin River System and Bay-Delta Estuary.

- a. *Principles for Agreement on Bay/Delta Standards Between the State of California and the federal Government*, 2 West • Northwest 97 (1995).
- b. Environmental Protection Agency, *Water Quality Standards for Surface Waters of the Sacramento and San Joaquin Rivers and San Francisco Bay and Delta, Final Rule*, 60 *Fed. Reg.* 4664 (1995).
- c. California State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay/ Sacramento-San Joaquin Delta Estuary*, WR 95-1 (1995).

III. "TAKINGS" AND TAKINGS: WATER RIGHTS, WATER CONTRACTS, AND THE ENDANGERED SPECIES ACT.

A. The Endangered Species Act and Federal Reclamation Contract Rights: *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

1. Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, 106 Stat. 4706, § 3406(b):

"The Secretary [of the Interior], immediately upon enactment of this title, shall operate the Central valley Project to meet all obligations under state and federal law, including but not limited to the federal Endangered Species Act . . . and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project. The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and directed to:

* * *

(2) upon enactment of this title dedicate and manage 800,000 acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by [the Act]; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under state or federal law following the date of enactment of this title, including but not limited to additional obligations under the federal Endangered Species Act."

2. The Endangered Species Act:

"[The Bureau of] Reclamation's declaration of available supplies for water year 1993 is as follows:

CONTRACTORS	PERCENT SUPPLY
Agricultural contractors north of the Delta	100
Agricultural contractors south of the Delta	50
Urban contractors south of the Delta	100
Urban contractors south of the Delta	75*
Wildlife refuges north of the Delta	100
Wildlife refuges south of the Delta	75
Fish and Wildlife	100
Sacramento River water rights holders and San Joaquin River exchange contractors	100

* Percentage of historic use.

"The forecasted operations meet Endangered Species Act requirements and the requirements of Public Law 102-575 (the Central Valley Project Improvement Act). Two conditions influencing the availability of water for CVP contractors are the cumulative effects of 6 previous years of dry conditions and the practical and regulatory limits of moving water to CVP facilities south of the Delta under the current conditions."

3. Westlands Contract:

Article 3(f): "The right to the beneficial use of water furnished to the District pursuant to the terms of this contract and any renewal hereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any such renewal."

Article 11(a): "There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes. . . ."

Article 26: "In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, Articles 23, 24, and 25 of this contract will no longer be of any force or effect, and, *in the event that Congress amends the excess-land provisions or other provisions of the Federal reclamation laws, the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such repeal or amendment.*"

4. The Litigation.

- a. Individual water users within the Westlands Water District claimed that the United States breached the Westlands' water service contract in violation of the Fifth Amendment by operating the Central Valley Project to comply with the Central Valley Project Improvement Act and the Endangered Species Act.

b. The Ninth Circuit held:

"Article 11(a) of the water service contract provides that the government shall not be held liable for "any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes." The government contends this language is broad and unambiguous and that shortages stemming from mandatory compliance with ESA and CVPIA are shortages resulting from "any other cause." Therefore, the government concludes, it is not liable for its failure to deliver the full contractual amount of water to Area I. Area I maintains that the contract language is ambiguous, and limits the government's liability for water delivery only in the event of a "temporary emergency" such as a "rare time[] of severe drought."

"* * * On its face, Article 11(a) unambiguously disclaims any liability for damages in the event the United States is unable to supply water in times of shortage. Clearly captioned "United States Not Liable for Water Shortage," Article 11 explicitly recognizes that "[t]here may occur at times during any year a shortage in the quantity of water available for furnishing to the District" and provides that "in no event shall any liability accrue against the United States . . . for any damages . . . arising from a shortage on account of errors in operation, drought, or any other causes." (emphasis added). As the district court duly noted, there are no enumerated exceptions to this provision: "Westlands, as the contracting party, did not include any language of limitation in the contract." *Barcellos and Wolfson, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 723 (E.D. Cal.1993).

"Area I claims that other provisions of the contract render the language "shortage on account of . . . any other causes" ambiguous. * * * Area I contends that because Article 26 and the contract preamble explicitly reference statutes, whereas the phrase "any other causes" does not explicitly include the effects of subsequently enacted statutes, the scope of "any other causes" is ambiguous. "[A]ny other causes" is a catchall phrase that does not "explicitly" include any particular causes.

"Contrary to Area I's position, the specific reference to reclamation law in Article 26 is not at all inconsistent with the notion that "any other causes" broadly and unambiguously contemplates the effects of subsequent Congressional mandates. Consistently with this court's prior interpretation of identical language, in the event that reclamation law is amended, Article 26 gives the water districts "a choice between renegotiating their contracts to bring them into conformity with the new law or withdrawing from the reclamation program." *Peterson v. Dept. of Interior*, 899 F.2d 799, 812 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990). Relieving the government from liability for delivering Westlands' full contractual amount of water where a reduction is mandated by statute, including by amendments to reclamation law, is not incompatible with giving Westlands an option to renegotiate its contract to conform to changes in reclamation law. Article 26 does not, therefore, render

ambiguous the scope of "any other causes."

Even if the water service contract did obligate the government to supply, without exception, 900,000 acre-feet of water, the district court correctly held that Area I would still not be entitled to prevail as the contract is not immune from subsequently enacted statutes. 849 F. Supp. at 730. The Supreme Court has held that Congress's power to exercise sovereign authority "will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52, 106 S. Ct. 2390, 2397, 91 L.Ed.2d 35 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S. Ct. 894, 907, 71 L.Ed.2d 21 (1982)). "[C]ontractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Id.* (quoting *Merrion*, 455 U.S. at 147, 102 S. Ct. at 907).

Nothing in the 1963 contract surrenders in "unmistakable terms" Congress's sovereign power to enact legislation. Rather, the contract was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto. 1963 Contract Preamble. *See Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1407 (9th Cir.) (Hall, J., concurring), *cert. denied*, 114 S. Ct. 59 (1993). The contract contemplates future changes in reclamation laws in Article 26, and Article 11 limits the government's liability for shortages due to any causes. As Area I recognized in its oral argument, CVPIA marks a shift in reclamation law modifying the priority of water uses. There is nothing in the contract that precludes such a shift.

5. *Stockton East Water District v. Department of the Interior*, No. CIV-F-93-5896-OWW (E.D. Cal. filed Sept. 22, 1995).

a. Contract Shortage Provision:

"In its operation of the Project, *the United States will use all reasonable means to guard against a condition of shortage in the quantity of water available to the Contractor pursuant to this contract. Nevertheless, if a shortage does occur during any year on account of drought, or other causes which, in the opinion of the Contracting Officer are beyond the control of the United States, no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom*"

b. In *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 849 F. Supp. 717 (E.D. Cal.1993), Judge Oliver Wanger denied the United States' motion to dismiss breach of contract and Fifth Amendment claims based on identical contract language.

6. *Winstar v. United States*, 64 F.3d 1531 (Fed. Cir. 1995), *cert. granted*, 116 S. Ct. 806 (1996).

B. The Endangered Species Act and Water Rights.

1. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992):

“Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner” estate shows that the proscribed use interests were not part of his title to begin with.”

2. Reasonable Use, Beneficial Use, the Public Trust, and Other Limitations that “Inhere in the Title.”

- a. Joseph L. Sax, *The Constitution, Property Rights, and the future of Water Law*, 61 U. Colo. L. Rev. 257 (1990).
- b. Brian E. Gray, “*In Search of Bigfoot*”: *The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 Hastings Con. L.Q. 225 (1989).
- c. Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

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