

(WHEN) DOES A CONTRACT CLAIM TRUMP A TAKINGS CLAIM? LESSONS FROM THE WATER WARS

David W. Spohr*

Abstract: As in other river basins, the disparity in the Columbia is growing between ever-expanding water demands and ever-shrinking water availability. Looming near the forefront of decisions on how to manage such waters is the potential liability the government faces if it reduces water distributions to further environmental objectives. While recent cases raise fascinating takings and contract issues, the most interesting issue may be the intersection of the available remedies. Does the contractual relationship between an aggrieved water user and the government preclude a takings claim, even where the contract claim ultimately fails? On one end of the spectrum, courts have held that a takings claim is available even if the contract terms expressly allowed the governmental action alleged to be the taking. Conversely, courts have held that a contract completely subsumes any takings claim even if the government breached the contract but escaped contract liability. This article suggests a middle ground: the availability of a takings claim should depend on why the contract claim failed.

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* J.D., University of Virginia; A.B., Bowdoin College. The author is a mediator, hearing examiner, and the land use ombudsman for King County, Washington, where he works to investigate, provide an impartial perspective on, and resolve citizens' complaints regarding county regulatory actions. He previously served as a property rights ombudsman for the State of Utah, after spending six years as a trial attorney on the "Takings Team" within the U.S. Department of Justice, where he was lead counsel for some portions of the *Casitas* and *Hage* cases discussed below. The views expressed herein do not reflect the views of his current or former employers. The author would like to thank Claire Newman for her research assistance. The author can be reached at david.spohr@gmail.com.

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I. INTRODUCTION

Federal decisions apportioning water between the competing demands of private water users and environmental interests have been at the epicenter of the recent water wars. In a trio of major cases moving through the trial and appellate courts, *Casitas Municipal Water District v. United States*, *Stockton East Water District v. United States* and *Klamath Irrigation District v. United States* (together, “the water trio”), the federal government reduced water distribution in response to environmental concerns and water users sued for breach of contract and inverse condemnation (takings).¹ The resolution of these cases may dramatically impact future water management decisions.

These cases raise a myriad of fascinating takings issues. Can the government successfully assert a background-limitation defense regarding claimants’ asserted property interests, such as an inherent limitation in water rights,²

1. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746 (2006), 76 Fed. Cl. 100 (2007), *aff’d in part, rev’d in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009), *on remand* 102 Fed. Cl. 443 (2011) (collectively “*Casitas*”); *Stockton East Water Dist. v. United States*, 75 Fed. Cl. 321 (2007), *modified in part*, 76 Fed. Cl. 497 (2007), *aff’d in part, rev’d in part, vacated in part*, 583 F.3d 1344 (Fed. Cir. 2009), *on reh’g in part*, 638 F.3d 781 (Fed. Cir. 2011) (collectively “*Stockton East*”); *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005), 75 Fed. Cl. 677 (2007), *questions certified*, 532 F.3d 1376 (Fed. Cir. 2008), *questions accepted*, 202 P.3d 159 (Ore. 2009), *questions answered*, 227 P.3d 1145 (Ore. 2010), *trial court judgment vacated and remanded*, 635 F.3d 505 (Fed. Cir. 2011) (collectively “*Klamath*”).

2. Compare Scott Andrew Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation & Ecological Protection in the Western Water Law Context*, 17 N.Y.U. ENVTL. L.J. 1063, 1097, 1099 (2009) (arguing that water rights are genuine property rights to the flow of water, and as such, compensation must be provided for any state exercise of eminent domain) with Brian Gray, *Takings and Water Rights*, 48 ROCKY MT. MIN. L. INST. 23-1, 23-7, 23-44 (2002) (noting that water rights may be limited by the common nature of the resource, hydrologic uncertainty, variability and priority, tensions between privatization and state ownership and other express limitations on property rights in water, and that certain states “have conferred only a conditional and fragile property right in water”). See also *Kobobel v. State Dept. of Nat. Res.*, 249 P.3d 1127, 1135 (Colo. 2011) (“one’s property right in water [is] uncertain in nature”).

application of the “public trust doctrine,”³ or some type of beneficial use/reasonable use/nuisance defense?⁴ Will a court apply the government-friendly regulatory takings analysis,⁵ the plaintiff-friendly physical takings analysis⁶ or the more neutral exactions analysis?⁷ Do the mechanics of how the water is restricted or diverted affect which standard the court will apply?⁸

These takings questions, however, are only important where

3. Compare *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 445–47 (1976) (California’s public trust doctrine “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust”) with *Rettkowski v. Department of Ecology*, 122 Wash. 2d 219, 232, 858 P.2d 232, 239–40 (Wash. 1993) (Washington’s public trust doctrine is limited to “the public’s right of access” and does not “extend to non-navigable waters or groundwater”). Compare also IDAHO CODE § 58-1203(2)(b) (1996) (expressly excluding water rights from the public trust doctrine’s reach, overruling *Idaho Cons. League, Inc. v. State*, 911 P.2d 748, 750 (Idaho 1995)) with *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (declaring legislative attempt to expressly exclude public trust values from water right adjudications unconstitutional).

4. Compare *People ex. rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743 (1976) (the definition of reasonable and beneficial may evolve as circumstances change over time) with *Shepard*, *supra* note 2, at 1100 (if states can redefine beneficial use they can essentially “reclaim water rights merely by redefining them out of existence”). See also *State Dept. of Ecology v. Grimes*, 121 Wash.2d 459, 471–72, 852 P.2d 1044, 1051–52 (Wash. 1993) (discussing beneficial use); Douglas Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1376 (2006) (no western court has ruled on “whether the noncallous exercise of a water right would be a nuisance if it harms fish”).

5. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (regulatory takings analysis looks at the regulation’s economic impact on the claimant, its interference with claimant’s investment-backed expectations and its character).

6. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 434–35 (1982) (permanent physical occupation is a taking regardless of public benefit or minimal economic impact).

7. *Dolan v. City of Tigard*, 512 U.S. 374, 386, 390–91 (1994) (government must show an “essential nexus” between the state interest and the required dedication and must make an “individualized determination” that the required dedication is roughly proportional to the proposed development’s impact).

8. As discussed below, *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1295–96 (Fed. Cir. 2008), reversed the trial court’s selection of a regulatory takings analysis, but the panel based its opinion on the mechanics of the restriction, which required Casitas to physically divert water to a fish ladder. The panel left open whether the choice of takings analysis would be different if the government had simply required Casitas to leave water in the stream. *Id.* at 1295 & n.16. See also *Estate of Hage v. United States*, 82 Fed. Cl. 202, 211–12 (2008) (government fencing preventing cattle from accessing water caused a *physical* taking of certain water rights while government restricting plaintiff’s ability to clear and maintain channels and ditches, which the court found resulted in plaintiff losing water, created a *regulatory* taking of other water rights).

the claimant makes it to the takings starting gate. This article considers the threshold question of whether the existence of a contractual relationship between the plaintiff and the government (as exists in the water trio) makes a case purely a contract dispute and eliminates any takings claim. The opinions agree on deferring the takings claim until after the contract claim has been decided and that a plaintiff prevailing on a contract claim cannot recover for that same loss under a takings theory.⁹ But courts diverge significantly regarding whether a plaintiff who loses on a contract claim may proceed with a takings claim for the same government action.¹⁰

To provide a framework for resolving that discrepancy, Part II.A begins with a brief background for, and then analysis of, the water trio. Part II.B describes the two very distinct ways a government can successfully defend against a contract claim. The first is a reflection of normal contract law, applying the same rules that govern private party contracts. The second is a “government-only” affirmative defense known as the “sovereign acts doctrine,” which provides that if the government undertakes a genuinely public and general act only incidentally falling upon the contract, and if that act makes the government’s performance of the contract impossible, the government can escape contract liability even where a private party could not.¹¹ Part II.B.1 examines the “public and general” component of the doctrine through the lens of the water trio, while Part II.B.2 does the same for impossibility.

With this foundation, Part III first explains how the water trio has answered divergently the question of whether a plaintiff losing on a contract claim may proceed with a takings claim. This section then offers a solution: when the contract claim fails, whether or not a plaintiff may bring a takings claim should turn on *why* the contract claim fails. Part III.A expounds on why, if the right at issue was created by contract,

9. See, e.g., *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1368–69 (Fed. Cir. 2009), *on reh’g*, 638 F.3d 781 (Fed. Cir. 2011); *Hughes Commc’ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001); *Henry Housing Ltd. v. United States*, 95 Fed. Cl. 250, 256 (2010).

10. Compare *Stockton East*, 583 F.3d at 1369 (where contract claim fails on merits, plaintiff can pursue taking claim) with *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008) (where contract claim fails on merits, plaintiff cannot pursue takings claim).

11. *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 521 (Fed. Cir. 2011).

and a court determines that the government did not actually breach the contract, no takings claim should follow where: (1) plaintiffs have retained the remedies any contracting party has; (2) the government was acting in its proprietary capacity and can only cause a taking in its sovereign capacity;¹² (3) the contract terms are an inherent limitation in plaintiffs' property interests; (4) basic symmetry requires this outcome; and (5) the alternative outcome would violate the teaching that the Takings Clause has "limited applicability" to contracts with the government. Part III.B describes how the five rationales reverse in a plaintiff's favor where the government breaches the contract but is able to successfully assert a "sovereign acts" defense. In such a scenario, this article argues, a plaintiff *should* be allowed to assert a takings claim. Finally, III.C provides a summation and then explains the feature of the water cases (the complex assortment of underlying contract and other property interests) that complicates application of the above principles.

II. BACKGROUND

A. *Fifth Amendment Water Rights Cases*

While the current trio of water takings cases looks to an earlier triad of Supreme Court opinions issued from 1931 to 1963, none of those earlier cases involved potentially-abridged contract rights. In *International Paper Company v. United States*, the government had no existing contractual relationship with either the power company that provided water for electrical output, nor with the paper company who had lost the use of water it had been receiving from the power company's diversion.¹³ In *United States v. Gerlach Live Stock Company*, the government diverted water *in favor of* contract water rights holders. The plaintiffs were riparian grassland owners who had historically survived on natural spring peak

12. As opposed to the government's more typical "sovereign" or regulatory capacity, the government acts in a "proprietary" or commercial capacity when it "steps off the throne" and engages in transactions "individuals and corporations engage in among themselves." *Stovall v. United States*, 71 Fed. Cl. 696, 698 (2006) (quoting *Kania v. United States*, 650 F.2d 264, 268-69 (Fed. Cir. 1981)).

13. *Int'l Paper Co. v. United States*, 282 U.S. 399, 405 (1931). There was a contractual relationship in play, but that between the power company and the paper company. *Id.* at 404-05, 407.

flows—flows the government ended to provide for contract holders.¹⁴ Similarly, in *Dugan v. Rank*, the government again benefitted contract water rights holders at the expense of downstream owners cut off by the government action.¹⁵

A more closely analogous case to the three presently being litigated is *Tulare Lake Basin Water Storage District v. United States*, in which plaintiff claimed that the federal government's Endangered Species Act-based restrictions constituted a taking of their contractually-conferred rights to use project water.¹⁶ Rejecting the government's argument that it had merely frustrated, rather than appropriated, plaintiffs' rights in water, the trial court determined that the government had "essentially substituted itself as the beneficiary of the contract rights," causing a "complete occupation" and a physical taking.¹⁷ But the court analyzed the contract—one with the state, not the federal government—only to determine the scope of the plaintiff's water right vis-à-vis the takings claim.¹⁸ Plaintiffs did not allege that the government breached any federal contract and the government did not raise a defense that the plaintiff-federal contractual relationship trumped the takings claim.¹⁹

Tulare and the current trio share much of the same basic fact pattern. The federal government enters into contracts with local interests to construct and operate a large water project. Later, concerns over the harm these projects cause to fish boils over. An environmental agency, the National Marine Fisheries Service or the United States Fish and Wildlife Service, issues a biological opinion that protects fish by restricting the amount of water the agency administering the project, the Bureau of Reclamation (Reclamation), may make available to users.²⁰

14. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 730 (1950).

15. *Dugan v. Rank*, 372 U.S. 609, 621 (1963). The irrigation districts were, in fact, originally defendants. *Id.* at 615.

16. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 314 (2001).

17. *Id.* at 319.

18. *Id.* at 320–21.

19. *Tulare* involved contracts between private parties and both the state and the Reclamation, but the court discussed only the state contract in its takings analysis. *Id.* at 315, 321.

20. *Stockton East* did not involve a biological opinion, though the environmental agency may have "dictated" how much water Reclamation could release. *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1356, 1367 & n.39 (Fed. Cir. 2009).

Water user interests then sue the federal government in the United States Court of Federal Claims, alleging both contract and takings claims. A thumbnail sketch of the pertinent trial and appellate decisions in *Casitas*, *Stockton East*, and *Klamath* (in the order the Federal Circuit eventually weighed in) follows. Details of how each court handled the relevant issues of whether the government breached the terms of the contract or successfully asserted a sovereign acts defense, as well as the intersection of the contract and takings claims, are reserved for later discussion.

In *Casitas*, the parties developed plans for a fish passage structure in response to an environmental group's threatened suit based on Endangered Species Act (ESA) violations.²¹ The subsequent biological opinion concluded the passage structure would avoid species jeopardy.²² Plaintiffs constructed the fish passage structure and ran water through it, then filed takings and breach of contract claims.²³ *Casitas I* addressed the contract claims, concluding that the sovereign acts doctrine provided a valid defense for any water loss.²⁴ *Casitas II* addressed the takings claims and determined that intervening Supreme Court doctrine compelled application of a regulatory, not physical, takings analysis to the water loss.²⁵ Because plaintiffs had earlier admitted they could not succeed under a regulatory taking analysis, the court granted defendant's motion for partial summary judgment.²⁶ Plaintiffs appealed.²⁷

21. *Casitas Mun. Water Dist. v. United States (Casitas I)*, 72 Fed. Cl. 746, 748–49 (2006).

22. *Id.*

23. *Id.*

24. *Id.* at 752, 755. The court does not seem to have reached a decision on whether the water diversion actually breached the terms of the contract. *Id.* at 752–53 (discussing, but apparently not resolving, the issue before turning to the sovereign acts doctrine). In addition to the water loss, Plaintiffs brought another contract claim related to whether the cost of constructing the fish ladder itself should have, per the terms of the contract, been borne by plaintiffs or the government. *Id.* at 748, 750–52. The trial court determined that such costs were properly chargeable to plaintiffs, and the Federal Circuit affirmed on this point. *Id.* at 752, *aff'd in relevant part*, 543 F.3d 1276, 1288 (Fed. Cir. 2008), *reh'g and reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009). Because plaintiffs never claimed that the imposition of the fish ladder costs worked a taking, *see Casitas Mun. Water Dist. v. United States (Casitas II)*, 76 Fed. Cl. 100, 104–06 (2007), the fish ladder cost issue will not be discussed further in this article.

25. *Casitas II*, 76 Fed. Cl. at 106 (*citing* Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Council, 535 U.S. 302 (2002)).

26. *Id.* at 104, 106.

In *Casitas III*, the Federal Circuit affirmed on the contract claim.²⁸ The panel concluded that the water diversions *did* breach the terms of the contract, but that the sovereign acts doctrine provided a defense.²⁹ The panel reversed on the takings claim, finding that the government “did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the [project].”³⁰ The court held that a physical takings analysis was applicable.³¹ The panel and *en banc* Circuit denied rehearing.³²

Finally, on remand, the trial court found that certain background principles of state law (such as beneficial use) imposed limitations on plaintiff’s water right, but balanced and rejected the government’s nuisance, reasonable use, public trust doctrine, and state statutory defenses.³³ The court determined the government had not yet actually encroached on plaintiff’s beneficial use or reduced their actual water deliveries.³⁴ The court dismissed plaintiff’s takings claim as unripe.³⁵

In *Stockton East Water District v. United States*, Reclamation completed construction of the project and signed contracts that specified maximum and minimum acre-feet Reclamation would make available.³⁶ The state had mandated certain annual releases for fishery and wildlife, but Congress later raised the required fish/wildlife/habitat water releases.³⁷ Accordingly, Reclamation began restricting releases to water users.³⁸ Plaintiffs thereafter brought takings and breach of contract claims.³⁹ In *Stockton East I*, the trial court ruled that

27. *Casitas Mun. Water Dist. v. United States (Casitas III)*, 543 F.3d 1276, 1283 (Fed. Cir. 2008).

28. *Id.* at 1283–88.

29. *Id.* at 1288.

30. *Id.* at 1291.

31. *Id.* at 1294.

32. *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329 (Fed. Cir. 2009).

33. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 454–65 (Fed. Cir. 2011).

34. *Id.* at 471.

35. *Id.* at 478.

36. *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1349–51 (Fed. Cir. 2009), *on reh’g*, 638 F.3d 781 (Fed. Cir. 2011).

37. *Id.* at 1351–52.

38. *Id.* at 1352–53.

39. *Stockton East Water Dist. v. United States*, 62 Fed. Cl. 379 (2004).

the government had not proved a sovereign acts defense, but nonetheless the contract's terms were not breached.⁴⁰ In addition, because there was a contract and the government was acting in its commercial capacity, there could not be a separate takings claim.⁴¹ Plaintiffs moved for rehearing and the government asked for an amended sovereign acts analysis.⁴² *Stockton East II* confirmed both that the shortage provision in the contract applied and that the government had not proved its sovereign acts defense.⁴³

On appeal, *Stockton East III* mostly reversed on the contract claims, noting that at the time of the contracts, the relevant law gave high priority to consumptive uses like irrigation.⁴⁴ Congress subsequently added fish and wildlife to the project's purpose, prioritizing them on the level with irrigation.⁴⁵ It rejected a defense that contracts are "inherently" subject to changes in the sovereign's own (federal) law, found a breach of the contract for all but two years, and concluded that the government failed to prove a sovereign acts defense.⁴⁶ For those two years that plaintiffs failed to show a breach, the panel vacated the takings claim dismissal, allowing plaintiffs to proceed with those claims.⁴⁷

Finally, in *Klamath Irrigation District v. United States*, pursuant to a biological opinion that project operations would harm endangered fish, Reclamation completely terminated water delivery during critically dry spells.⁴⁸ Plaintiffs, individual agriculture landowners plus drainage and irrigation districts, brought contract and takings claims. In *Klamath I*, the trial court determined that the plaintiffs' claims were properly "sound in contract, not takings."⁴⁹ The takings claims

40. *Stockton East Water Dist. v. United States (Stockton East I)*, 75 Fed. Cl. 321, 373–75 (2007) (the "contracts were not breached, according to their terms").

41. *Id.* at 373–74.

42. *Stockton East Water Dist. v. United States (Stockton East II)*, 76 Fed. Cl. 497, 499, 508 (2007).

43. *Id.* at 500–12.

44. *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1351, 1355–56 (Fed. Cir. 2009), *on reh'g*, 638 F.3d 781 (Fed. Cir. 2011).

45. *Id.*

46. *Id.* at 1365–68.

47. *Id.* at 1368–69.

48. *Klamath Irrigation Dist. v. United States (Klamath I)*, 67 Fed. Cl. 504, 534 (2005).

49. *Id.*

were “entirely subsumed within the contract claim,” and the court dismissed the takings claims.⁵⁰ In *Klamath II*, the trial court turned to the contracts.⁵¹ It did not attempt to apply the shortage clause or other breach criteria because it determined that any breach was immunized by the sovereign acts doctrine.⁵²

On appeal, the Federal Circuit certified three state-law questions to the Oregon Supreme Court, and Oregon accepted.⁵³ In *Klamath III*, Oregon determined, *inter alia*, that Oregon law did not preclude a person putting water to beneficial use from acquiring a beneficial or equitable property interest in the water right to which the United States held legal title.⁵⁴

Finally, based on Oregon’s pronouncements, in *Klamath IV* the Federal Circuit vacated the trial court judgment and remanded.⁵⁵ For the takings claims, the court remanded for further proceedings consistent with the state decision and with the instruction to determine whether the contractual relationship altered the picture such that plaintiffs had no cognizable property interests to form the basis of their takings claims.⁵⁶ For the contract claims, the court remanded for a determination of whether the government can establish “impossibility” for purposes of its sovereign acts defense, and whether it breached the contracts.⁵⁷

B. *Contract Claims and the Sovereign Acts Doctrine*

As the current trio illustrates, there are at least two basic ways a government can successfully defend against a contract claim: as a matter of straight contract law or *via* the sovereign acts doctrine.

50. *Id.* at 535.

51. *Klamath Irrigation Dist. v. United States (Klamath II)*, 75 Fed. Cl. 677 (2007).

52. *Id.* at 685.

53. *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376 (Fed. Cir. 2008); *questions accepted*, 202 P.3d 159 (Ore. 2009).

54. *Klamath Irrigation Dist. v. United States (Klamath III)*, 227 P.3d 1145, 1169 (Ore. 2010).

55. *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505 (Fed. Cir. 2011).

56. *Id.* at 507, 519–20. In addition, plaintiff pressed claims of a violation of the Klamath Basin Compact, *id.* at 510, 519, an issue beyond this article’s scope.

57. *Id.* at 507–08.

The first avenue turns on the terms of the contract and applies the same rules of contract law that apply to private parties. For example, in the paradigmatic federal water project scenario, private interests have long-standing contract rights to use water from that project. Those contracts typically contain some type of exculpatory “shortages” clause expressly eliminating government liability in certain circumstances. Pursuant to environmental statutes (often passed after the contracts were entered) the government restricts (or there is a dispute over whether the government should restrict) such historic water uses subsequently determined to harm fish. One question is whether that exculpatory clause applies.

In *O’Neil v. United States*, the government entered into a contract with a water district to construct a project and furnish plaintiffs with water.⁵⁸ The contract expressly stated that the government was not liable “for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought or any other cause.”⁵⁹ Congress later enacted the Endangered Species Act (ESA) and the Central Valley Project Improvement Act (CVPIA).⁶⁰ To avoid jeopardizing certain fish species, the government reduced water distributions.⁶¹ The Ninth Circuit found that the “shortage” clause was unambiguous and contained no enumerated exceptions, and that the ESA and the CVPIA (even if enacted post-contract) were “other causes,” precluding liability.⁶² The exculpatory clause thus excused the government from full performance, and no contract breach occurred.⁶³

In contrast, the Federal Circuit in *Stockton East III* handled a similar dispute also involving the Central Valley Project, but there the relevant contract contained a less sweeping exculpatory clause, excusing shortages traceable to “drought, or other causes . . . beyond the control of the United States.”⁶⁴ The panel reasoned that, unlike drought or something like an

58. *O’Neil v. United States*, 50 F.3d 677, 680 (9th Cir. 1995).

59. *Id.* at 681.

60. *Id.* (citing 16 U.S.C. § 1531 *et. seq.* (ESA); Pub.L. No. 102-575, 106 Stat. 4706 *et. seq.* (CVPIA)).

61. *Id.*

62. *Id.* at 683–84.

63. *Id.* at 687.

64. *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1361 (Fed. Cir. 2009), *on reh’g*, 638 F.3d 781 (Fed. Cir. 2011).

earthquake or sabotage, changes in federal law and policy that sparked the pertinent restrictions were well within the government's control.⁶⁵ Under the "beyond the control of the United States" language, (which was narrower than the "any other cause" language in *O'Neil*) the panel agreed that the government was immunized by the exculpatory clause for two of the years, but not for the other five.⁶⁶

This article will not further analyze the language of various contracts or discuss when particular exculpatory clauses are robust enough to provide a defense in the scenario where the government withholds water deliveries for environmental reasons. It suffices that in certain scenarios, applying the specific terms of the contract to a specific fact pattern, the government will be adjudged to have acted within the rights spelled out in the contracts, while in other scenarios the government's conduct, absent some affirmative defense, will be adjudged a breach.

The second avenue by which the government can defeat a contract claim turns on the special, only-available-to-the-government affirmative defense provided by the sovereign acts doctrine.⁶⁷ The sovereign acts doctrine recognizes that the government wears two hats—a proprietary hat, acting as a party to a contract, and a sovereign hat, acting as a regulator. In water rights clashes, the government acts both as a contractor (Reclamation wearing its proprietary hat, administering a contract involving distribution of water) and as a regulator (the environmental agency like the National Marine Fisheries Service or the United States Fish and Wildlife Service wearing the sovereign hat, ordering parties to do or not do something in furtherance of some environmental end). In the paradigmatic example, the environmental agency orders Reclamation to take steps to preserve fish, steps that may make it impossible for Reclamation to meet its contractual obligations.

The general rule from contract law is that a contracting party cannot discharge her contract duties when her own actions have made contract performance impossible.⁶⁸

65. *Id.* at 1362.

66. *Id.* at 1363–64.

67. The sovereign acts defense is an affirmative one. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008).

68. *See Carabetta Enters. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007).

Ordinarily, then, the United States would be liable for breach where one of its own agencies makes it impossible for Reclamation to perform. The sovereign acts doctrine provides an exception to this rule, an escape clause (where applicable) for the government.⁶⁹ The basic test comes from the plurality opinion of *United States v. Winstar Corporation*.⁷⁰ As the Federal Circuit most recently framed it, the test asks:

whether the sovereign act is properly attributable to the Government as contractor. That is, is the act simply one designed to relieve the Government of its contract duties, or is it a genuinely public and general act that only incidentally falls upon the contract? If the answer is that the act is a genuine public and general act, the second part of the test asks whether that act would otherwise release the Government from liability under ordinary principles of contract law. This second question turns on what is known in contract law as the impossibility (sometimes impracticability) defense.⁷¹

This article next turns to these two components, public and general/incidental impact and impossibility/impracticability. They have been considered by the trial and appellate courts in *Casitas*, *Stockton East*, and *Klamath*, with disparate results.

1. *Public and General Acts Only Incidentally Falling Upon Contracts*

Where the sovereign act is specifically targeted at nullifying contract rights, the government fails the “public and general act only incidentally falling upon a contract” (hereinafter “public and general”) test.⁷² For example, in *United States v. Westlands Water District*, the government had contracted for water and for drainage service.⁷³ Those contract terms later became economically disadvantageous to the government. In response Congress “abrogated” the rates and required that the

69. *Id.*

70. See *United States v. Winstar Corp.*, 518 U.S. 839, 839–40, 904 (1996).

71. *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505, 521 (Fed. Cir. 2011) (quotations and citations omitted).

72. See *Conner Bros. Constr.*, 550 F.3d at 1374, 1376. (“[T]he sovereign acts defense is unavailable where the governmental action is specifically directed at nullifying contract rights.”).

73. See *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1142 (E.D. Cal. 2001).

agency charge its “full cost” to plaintiff.⁷⁴ The court had little trouble rejecting the sovereign acts defense.⁷⁵ The government was, in a sense, trying to rig the system to remove unpalatable contract terms, an end-around the court was not about to allow.

Turning to the trio of cases, and in dramatic contrast to *Westlands*, the government’s application of the ESA in *Casitas* and *Klamath* easily passed the public and general test. As *Casitas I* explained, an ESA-based restriction is *not* a “form of governmental self-help,” or “suspect” as being in the government’s “self interest,” or designed to accrue “economic advantage” but is “public and general in its reach.”⁷⁶ As *Klamath II* phrased it, the ESA was not “tainted by governmental object of self-relief” and not passed to benefit the government as a contractor.⁷⁷

The Central Valley Project Improvement Act (CVPIA) involved in *Stockton East* is somewhere between the ESA and the statute applied in *Westlands*. The CVPIA was not the naked money grab of *Westlands*, yet one CVPIA purpose was to bring “basic economic reforms to narrow the gap between the cost to the taxpayer of supplying CVP water and the prices paid for the water by CVP water users,”⁷⁸ perhaps sliding it more to the *Westlands* end of the spectrum. And the CVPIA is not so public and general in reach as the ESA; unlike the ESA, which applies to a broad swath of public and private actions involving federal contracts and non-contractual scenarios alike, the CVPIA is limited to CVP project decisions, the majority of which will involve government contracts. Yet the CVPIA explicitly protects, restores and enhances habitat and attempts to achieve a “reasonable balance” among competing demands for project water,⁷⁹ sliding it away from the *Westlands* end of the spectrum. In short, the “essential

74. *Id.* at 1144.

75. *Id.* at 1153–54.

76. *Casitas Mun. Water Dist. v. United States (Casitas I)*, 72 Fed. Cl. 746, 753–55 (2006), *aff’d in relevant part*, 543 F.3d 1276, 1287–88 (Fed. Cir. 2008) (*Casitas III*), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

77. *Klamath Irrigation Dist. v. United States (Klamath II)*, 75 Fed. Cl. 677, 685 (2007) (internal quotations omitted).

78. Carl Boronkay & Timothy Quinn, *The Central Valley Project Improvement Act: An Urban Perspective*, 3 SAN JOAQUIN AGRIC. L. REV. 57, 57–58 (1993).

79. *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1351 (Fed. Cir. 2009), *on reh’g*, 638 F.3d 781 (Fed. Cir. 2011).

characteristic”⁸⁰ of the CVPIA may be open to interpretation. *Stockton East III* could have avoided doing violence to the sovereign acts doctrine had it distinguished the CVPIA from the ESA and then found that the government failed to meet the public and general test on this ground.

Unfortunately, *Stockton East III* found targeting not based on any difference between the CVPIA versus the ESA, but because Reclamation’s “operational decisions” negatively affected only plaintiffs and thus were “directly aimed” at the contracts.⁸¹ Given that narrow definition, the government failed the test.⁸² But so would almost any agency applying any statutory restriction to any party. For laws to impact a government contract, at some point some agency must take some step. And where it does, the agency is almost by definition “targeting” something or someone. *Stockton East III* cannot be correct on this point, as such an approach would virtually eliminate the doctrine’s application. “Applying” any statute, even the ESA, to any particular case “targets” the limited set of parties involved in that case, in that sense of the word “target.”

Stockton East III’s shortcoming was not due to focusing on administrative versus congressional action. Indeed, *Casitas I* deemed it appropriate to focus on agency actions under the ESA, instead of on the ESA itself, and *Casitas III* seemed to affirm this focus.⁸³ One could certainly envision a targeting scenario at the agency level. Revisit the *Westlands* scenario, where the government contracted for water and for drainage service and discovered that those contract terms had become economically unpalatable.⁸⁴ Suppose that, instead of Congress stepping in and abrogating the contract rates in favor of recouping Reclamation’s full costs, Congress stayed silent.⁸⁵ Reclamation could have attempted to cut its costs by creating

80. *Cf.* United States Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1576 (Fed. Cir. 1997).

81. *Stockton East III*, 583 F.3d at 1367.

82. *Id.* at 1367–68.

83. *See* *Casitas Mun. Water Dist. v. United States (Casitas I)*, 72 Fed. Cl. 746, 754 (2006), *aff’d*, 543 F.3d 1276, 1287 (Fed. Cir. 2008) (*Casitas III*), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

84. *See* United States v. Westlands Water Dist. 134 F. Supp. 2d 1111, 1142–44 (E.D. Cal. 2001).

85. *Contra id.* at 1144.

an environmental roadblock to limit the amount of water deliveries (and thus limit the volume of losing transactions). That would be the type of “targeting” the courts disfavor.⁸⁶

Stockton East III did not point to any evidence of any such self-dealing.⁸⁷ In direct contrast to the hypothetical in the preceding paragraph, Reclamation typically *resists* applications of an environmental statute that would curb water deliveries in a particular project until a court orders otherwise.⁸⁸ Reclamation simply applying an environmental statute to a specific party is not “targeting” *per* the sovereign acts doctrine. As *Conner Brothers Construction Company v. United States* explained the Federal Circuit’s rule, where government action is “relatively free of Government self-interest” and is not “tainted by a government objective of self-relief,” it is a public and general act.⁸⁹ Government actions “affecting a single contractor can be shielded by the sovereign acts doctrine,” simply because the government has to make “case-specific determinations” does not “convert an otherwise public and general act into a nongeneral one.”⁹⁰ *Stockton East III* could not override *Conner Brothers*.⁹¹

The other Circuit water opinions are more consistent with the accepted approach. *Casitas III* had no trouble finding Reclamation’s act a public and general one (notwithstanding

86. See, e.g., *United States Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575, 1577 (Fed. Cir. 1997) (“Targeting” looks at the “purpose” of the government’s action, whether, “on balance” the government focused on something like retroactive price increases or abrogating contract “for reasons of the economy.”); *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 734 (2004) (discussing government action motivated by a “desire to correct what it perceives to be an overly generous deal”).

87. Conversely, *Casitas I* flatly rejected the argument that the agency was attempting to relieve itself from contractual responsibilities or act in its economic self-interest. 72 Fed. Cl. at 754–55.

88. See, e.g., *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505, 508 (Fed. Cir. 2011) (citing *Klamath Water Users Protective Ass’n. v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999)); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1113–14, 1138 (10th Cir. 2003) (Reclamation unsuccessfully argued to the district and appellate courts that it had no discretion to reduce water deliveries in the face of ESA-mandated restriction.), *vacated by* 355 F.3d 1215, 1218 (10th Cir. 2004) (dismissing the appeal as moot). See also *Casitas I*, 72 Fed. Cl. at 748–49 (Reclamation acted only after environmental group threatened suit).

89. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1373 (Fed. Cir. 2008) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) as controlling authority).

90. *Id.* at 1376.

91. *Hernandez-Garcia v. Nicholson*, 485 F.3d 651, 653 (Fed. Cir. 2007) (panel bound by previous, precedential decision, absent Supreme Court or *en banc* intervention).

that it applied only to Casitas).⁹² And *Klamath IV* agreed that halting water deliveries in response to a biological assessment was a “genuine” public and general act that “only incidentally fell upon” the relevant contracts.⁹³ In short, the public-and-general inquiry is unlikely to be a serious hurdle for the government in the scenario where the government restricts water deliveries in furtherance of some environmental end.

2. *Impossibility (Impracticability)*

Instead, the second component, applying the “impossibility” (or more accurately “commercial impracticability,” not “actual or literal impossibility”)⁹⁴ portion of the sovereign acts doctrine where an agency applies an environmental statute to restrict consumption water uses, provides the far more interesting challenge. The trial and appellate panels have offered vastly differing inquiries in the water trio.

Klamath II did not undertake the impossibility component of the sovereign acts doctrine.⁹⁵ At the time *Klamath II* was decided, the Federal Circuit had not yet adopted the impossibility requirement from *United States v. Winstar*.⁹⁶ *Winstar* had no clear majority, instead featuring a “fragmented set of opinions” that made it “simply not possible to reconcile the various views expressed by the Justices in *Winstar*.”⁹⁷ After *Klamath II*, however, the Federal Circuit definitively determined that impossibility was an “additional requirement” of a successful sovereign acts defense.⁹⁸ It would soon adopt the *Winstar* plurality as setting forth the “core principles

92. See *Casitas Mun. Water Dist. v. United States (Casitas III)*, 543 F.3d 1276, 1287–88 (Fed. Cir. 2008), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

93. *Klamath IV*, 635 F.3d at 521.

94. *Id.* at 522 (quoting with approval *Seaboard Lumber v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (only “a showing of commercial impracticability,” not “actual or literal impossibility,” is required)).

95. *Klamath Irrigation Dist. v. United States (Klamath II)*, 75 Fed. Cl. 677, 688–89 (2007). See also *Klamath IV*, 635 F.3d at 522 (trial court failed to undertake the impossibility component of the sovereign acts defense).

96. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996).

97. *General Dynamics Corp. v. United States*, 47 Fed. Cl. 514, 540 n.9 (2000) (quotations and citations omitted).

98. *Carabetta Enters. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007). *Klamath II* was issued March 16, just prior to *Carabetta*’s April 4 publication. See *Klamath II*, 75 Fed. Cl. at 677.

underlying the sovereign acts doctrine.”⁹⁹

Yet even removing the low-hanging fruit and recognizing that impossibility is part of the sovereign acts inquiry, the remaining opinions offer materially different approaches on how exactly to apply the concept. Some variations seem relatively easy for the government to meet, others less so. The article starts with the other trial courts and moves to the Federal Circuit.

Casitas I rejected plaintiff’s argument that because other options were available to the government to protect the steelhead while allowing *Casitas* to retain the water supply (such as fish trapping and trucking), the government’s obligation to “honor” *Casitas*’ rights was not rendered impossible by the ESA.¹⁰⁰ Whether Congress had directly imposed the restriction, or whether the implementing details were left for administrative determination, the governmental action was sovereign in character and provided a defense.¹⁰¹ Simply because the agency could have ensured fish passage by other means did not alter the sovereign character of the act or create liability.¹⁰²

Conversely, *Stockton East I and II* expressed concern that, without a “means to dampen the exuberance of the sovereign acts doctrine,” the door would be too open to “wide-ranging immunity for non-performance” by the government.¹⁰³ The doctrine of impossibility, or at least “partial impossibility,” offered that damper.¹⁰⁴ Thus, a court *should* consider whether operational decisions could have been made to fulfill the ESA without impacting contractual rights,¹⁰⁵ or whether sufficient water remained to allow full allocations to plaintiffs.¹⁰⁶ The

99. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1374 (Fed. Cir. 2008).

100. *Casitas Mun. Water Dist. v. United States (Casitas I)*, 72 Fed. Cl. 746, 755 (2006), *aff’d*, 543 F.3d 1276, 1287 (Fed. Cir. 2008) (*Casitas III*), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

101. *Id.* at 755. The court had already rejected the argument that the agency was attempting to relieve itself from contractual responsibilities or act in its economic self-interest. *Id.* at 754–55.

102. *Id.* at 755.

103. *Stockton East Water Dist. v. United States (Stockton East II)*, 76 Fed. Cl. 497, 512 (2007).

104. *See id.* at 509.

105. *Stockton East Water Dist. v. United States (Stockton East I)*, 75 Fed. Cl. 321, 373 (2007).

106. *Stockton East II*, 76 Fed. Cl. at 510.

government was not entitled to a sovereign acts defense because the government did not prove performance was impossible or commercially impracticable.¹⁰⁷

At the Federal Circuit, *Casitas III* determined that “performance by the government is excused under the sovereign acts defense only when the sovereign act renders the government’s performance impossible,”¹⁰⁸ which on the surface appears plaintiff-friendly. But the panel rejected *Casitas*’s argument that because the agency could have chosen an alternative method to meet the ESA (such as fish trapping and trucking), the ESA had not made it impossible for the government to perform its contractual obligation.¹⁰⁹ It did not matter that Congress had left the implementing details to the discretion of the agency; the biological opinion was part of the sovereign act, making it impossible for Reclamation to perform its contractual duties.¹¹⁰

Stockton East III agreed with the trial court that the government failed to show that the agencies’ discretionary implementation of the CVPIA made it impossible to deliver the full amount of water to claimants.¹¹¹ The Federal Circuit left open whether the sovereign act at issue was the CVPIA itself or the discretionary, operational decision by the federal agencies.¹¹²

Because the *Klamath* trial court had determined that impossibility was not a component of the sovereign acts doctrine, the Federal Circuit in *Klamath IV* had little opportunity to analyze the precise confines of impossibility, beyond noting that the trial court had erred in holding that impossibility was not a factor to consider.¹¹³ The panel remanded to allow the government to establish that its performance was impossible.¹¹⁴ The panel did confirm that

107. *Stockton East I*, 75 Fed. Cl. at 373.

108. *Casitas Mun. Water Dist. v. United States (Casitas III)*, 543 F.3d 1276, 1287 (Fed. Cir. 2008), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

109. *Id.* at 1287–88.

110. *Id.*

111. *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1367 (Fed. Cir. 2009), *reh’g denied*, 638 F.3d 781 (Fed. Cir. 2011).

112. *Id.*

113. *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505, 522 (Fed. Cir. 2011).

114. *Id.* at 522.

only “a showing of commercial impracticability,” not “actual or literal impossibility” was the standard.¹¹⁵

This article will not hazard a guess at precisely how impossibility will play out in the scenario where the government withholds water deliveries for environmental reasons. Parallel to the above analysis of contract language and exculpatory clauses, it suffices that there will be some scenarios where it will be impracticable for the government to provide all the acre-feet of water all the claimants would otherwise have been entitled to under the contract and still meet an environmental mandate. The sovereign acts doctrine is robust enough that in a not insignificant portion of cases where an environmental restriction prevents the government from meeting its contract obligations, the government will have a viable sovereign acts defense for at least a portion of the contract breach. And that sets the stage for the intersection of the Takings Clause and contracts.

III. ARE TAKINGS CLAIMS TRUMPED BY CONTRACT CLAIMS?

The above analysis provides the context for the crucial (and divergently answered) question of whether, assuming a party has (or is a third-party beneficiary to) a contract with the government and the government takes some adverse action, the party has both a contract claim *and* a takings claim. It is axiomatic that rights arising out of a contract with the government are “protected by the Fifth Amendment.”¹¹⁶ However, it is also aphoristic that where rights are voluntarily created by contract, a takings theory has “limited application”; if the government interferes with such contractual rights it “generally” gives rise only to a breach of contract claim, not a takings claim.¹¹⁷

The cases discussed in this article are in accord in that a court may defer the takings issue until after it addresses the contract claim, and if a claimant is successful on that contract

115. *Id.* (quoting with approval *Seaboard Lumber v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002)).

116. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

117. *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008); *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1034 (Fed. Cir. 1992); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978).

claim, she cannot also recover on a takings theory.¹¹⁸ The rub, instead, is whether a takings claim is available where a claimant *loses* a particular contract claim. That is, does a contract claim have to be merely available or actually viable before a court will dismiss the takings claim? Starting with the trial courts and moving onto the Circuit, the water cases have answered that differently. This article next recaps how each court handled the intersection of the contract and takings claims.

Casitas I raised, but then did not seem to answer, whether the water diversion actually breached the terms of the contract.¹¹⁹ Instead, it determined that the sovereign acts doctrine provided a valid defense.¹²⁰ Having dismissed the contract claims on the basis of the sovereign acts doctrine, the trial court turned, in *Casitas II*, to the takings claim, analyzing the takings issue on its merits.¹²¹

Stockton East I and *II* rejected the government's sovereign act defense to plaintiffs' contract claims.¹²² However, the trial court found that the government did not breach the terms of the contract, determining that the government's water restrictions fit within the parameters of the contracts' exculpatory clause.¹²³ As to the takings claims, the court ruled that because the "government acted primarily in its commercial capacity . . . not its sovereign capacity," plaintiffs could not assert a takings claim even after they lost the contract claim.¹²⁴ Thus the court dismissed the takings claim without ruling on its merits.¹²⁵

Klamath I held that the "availability of contract remedies is sufficient to vitiate a takings claim, even if it ultimately is

118. See *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1369 (Fed. Cir. 2009), *reh'g denied*, 638 F.3d 781 (Fed. Cir. 2011); *Castle v. United States*, 301 F.3d 1328, 1341–42 (Fed. Cir. 2002); *Hughes Commc'ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001).

119. *Casitas Mun. Water Dist. v. United States (Casitas I)*, 72 Fed. Cl. 746, 752–53 (2006).

120. *Id.* at 755.

121. *Casitas Mun. Water Dist. v. United States (Casitas II)*, 76 Fed. Cl. 100, 101 (2007).

122. *Stockton East Water Dist. v. United States (Stockton East I)*, 75 Fed. Cl. 321, 372–73 (2007), *modified in part*, 76 Fed. Cl. 497, 508–12 (2007) (*Stockton East II*).

123. *Stockton East I*, 75 Fed. Cl. at 363–64.

124. *Id.* at 373–74.

125. *Id.*

determined that no breach occurred.”¹²⁶ Because the contracts gave rise to the private property rights in question, for those parties with contracts or in privity of contract (*i.e.* third-party beneficiaries) “the proper remedy for the alleged infringement lies in a contract claim, not one for a takings.”¹²⁷ Plaintiffs’ takings claim was “entirely subsumed within the contract claim,” even where the government defeated the contract claim under a sovereign acts defense.¹²⁸ The court dismissed the takings claim in *Klamath I* even before turning to the contract claim in *Klamath II*.¹²⁹

Moving to the Federal Circuit, *Casitas III* affirmed the contract claim dismissal, but only after determining that the water diversions actually breached the terms of the contract (an issue the trial court in *Casitas I* had seemingly not answered).¹³⁰ The panel agreed with *Casitas I* that the sovereign acts doctrine provided the government a defense.¹³¹ The panel then proceeded (as had *Casitas II*) to address the merits of the takings claim, though the panel reversed on which (physical versus regulatory) takings analysis was the correct one.¹³²

Stockton East III agreed with the trial court that the government could not show a sovereign act defense for any of the years at issue.¹³³ For five of the seven years at issue, the panel reversed the trial court as a matter of straight contract law: the shortages clause did not apply in those years and the government breached the contract.¹³⁴ However, for the two years it agreed there was no contract breach, the panel vacated the takings claim dismissal.¹³⁵ It reasoned that a court may

126. *Klamath Irrigation Dist. v. United States (Klamath I)*, 67 Fed. Cl. 504, 532 (2005).

127. *Id.* at 532.

128. *Id.* at 535.

129. *Klamath Irrigation Dist. v. United States (Klamath II)*, 75 Fed. Cl. 677, 678 (2005) (citing *Klamath I*, 67 Fed. Cl. at 539–40).

130. *Casitas Mun. Water Dist. v. United States (Casitas I)*, 72 Fed. Cl. 746, 752–55 (2006), *aff’d on other grounds*, 543 F.3d 1276, 1286–88 (Fed. Cir. 2008) (*Casitas III*), *reh’g and reh’g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

131. *Casitas I*, 72 Fed. Cl. at 753–55, *aff’d*, *Casitas III*, 543 F.3d at 1287–88.

132. *Id.* at 1295–96.

133. *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1363–64 (Fed. Cir. 2009), *reh’g denied*, 638 F.3d 781 (Fed. Cir. 2011).

134. *Id.* at 1364.

135. *Id.* at 1369. The panel did not explicitly state that the takings claim dismissal

defer the takings issue until after addressing the contract claim, but it cannot deny a contract claim and then find the takings claim precluded.¹³⁶ Judge Gajarsa dissented.¹³⁷ When the court denied rehearing, Judge Gajarsa again dissented, disagreeing with “the majority’s conclusion that a party to a contract with the United States, having failed to establish damages in a contract action, may proceed with a Fifth Amendment takings action.”¹³⁸

Finally, *Klamath IV* also reversed the trial court, allowing both the takings and contracts claims to proceed on remand.¹³⁹ But, as analyzed below, *Klamath IV* involved a complex variety of plaintiffs, contracts, patents, and other rights. Additionally, the court was reviewing a trial court decision that barred the takings claim from proceeding, despite the fact that the government had prevailed on a sovereign acts defense. Even Judge Gajarsa, having emphatically dissented in *Stockton East III* and again on rehearing, concurred in the judgment in *Klamath IV*, noting that his view differed by only a “limited degree” with the majority and agreeing that remand was appropriate.¹⁴⁰ Thus *Klamath IV* did not take a definitive stand on the question this article analyzes.

This article next turns to the outliers—and opposite extremes—of *Stockton East III* and *Klamath I*. The analysis first covers why no takings claim should be available where the government does not breach the terms of the contract and then why a takings claim should be available where the government commits what would otherwise be a contract breach but escapes liability under a sovereign acts defense.¹⁴¹

was to be vacated for only the two non-breach years, but given its acknowledgement that “when a plaintiff is awarded recovery for the alleged wrong under one theory, there is no reason to address the other theories,” the scope of its vacation seems fairly certain. *Id.* at 1368.

136. *Id.* at 1368–69.

137. *Id.* at 1369.

138. *Stockton East Water Dist. v. United States*, 638 F.3d 781, 785 (Fed. Cir. 2011) (Gajarsa, J., dissenting).

139. *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505, 522 (Fed. Cir. 2011).

140. *Id.* at 525 (Gajarsa, J., concurring).

141. See Kevin R. Garden, *Fifth Amendment Takings of Rights Arising from Agreements with the Federal Government*, 29 PUB. CONT. L.J. 187, 202 (2000) (If the government is acting in its proprietary capacity, “any resulting interference with the contract will be subject to a potential breach-of-contract claim, but not a takings claim,” but if the government invokes the sovereign acts defense, “its interference may

A. *No Breach, No Taking*

Where a government contracts with a party, and the government takes an action in accordance with rights provided to it by the contract, the contracting party (or a third party beneficiary) unhappy with the government's act should not be able to claim that the act worked as a taking. The party's claim should solely be one for breach of contract; there should be no second "bite at the apple"¹⁴² through a takings claim. First, Plaintiff retained all the remedies any contracting party was entitled to. Second, the government did no more than it was allowed to do under the contract, acting in its proprietary (rather than sovereign) capacity,¹⁴³ and the government can only cause a taking when acting in its sovereign capacity. Third, the contract terms were inherent limitations in plaintiff's property interest, and thus plaintiff had no cognizable property right to take. Fourth, basic symmetry of contract rights and responsibilities necessitates such an outcome. And fifth, allowing a takings claim to proceed violates the maxim that the Takings Clause has "limited applicability" to contracts with the government.

First, where the contract says the government can do X and the government does X, the government has not rescinded any remedy the plaintiff possessed. A contract is a promise from the government "either to regulate. . . consistently with the contract's terms, or to pay damages for breach."¹⁴⁴ Thus any "remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights."¹⁴⁵ Where a plaintiff retains the range of contract remedies accorded any contracting party, a contract claim is generally the proper remedy.¹⁴⁶ That she lost the contract

be subject to a takings claim.").

142. *Cf. Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 900 (Fed. Cir. 1984).

143. As opposed to the government's more typical "sovereign" or regulatory capacity, the government acts in a "proprietary" or commercial capacity when it "steps off the throne" and engages in transactions "individuals and corporations engage in among themselves." *Stovall v. United States*, 71 Fed. Cl. 696, 698 (2006) (quoting *Kania v. United States*, 650 F.2d 264, 268-69 (Fed. Cir. 1981)).

144. *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002).

145. *See, e.g., Hughes Commc'ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citations omitted).

146. *Env'tl. Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 100 (2010) (The

claim is a function of straight contract law.

Some courts have tried to restrict the “limited applicability” concept to only the scenario where the plaintiff actually wins the contract claim.¹⁴⁷ These courts reason that contract remedies need not only be available, they must be viable (*i.e.* plaintiff must actually win) to warrant dismissing the takings claim.¹⁴⁸ But making the answer to whether a takings claim is available dependent on the result of plaintiff’s contract claim flies in the face of most doctrines of contract and takings law, where it is the *availability* of a claim, not the result, that matters.

For example, in the contracts arena, the economic loss doctrine bars recovery in tort of purely pecuniary losses caused by a breach of contractual duty.¹⁴⁹ The doctrine prohibits tort claims for economic losses to which entitlement flows from a contract¹⁵⁰ and keeps contract law from “drown[ing] in a sea of tort.”¹⁵¹ The crucial element, for purposes of this article, is that the economic loss doctrine bars certain tort claims even where the contract claim itself fails.¹⁵² It is the availability of the contract claim, and not the success of the claim, that determines whether an alternative form of relief is allowed.

Staying within the contracts arena, the Contracts Clause does not bar a state or municipality from breaching a contract, so long as plaintiff retains the contract remedy.¹⁵³ The analysis turns on the “availability” of a contract damages remedy,¹⁵⁴ not

court concluded that the government acted in its proprietary capacity when it terminated the contracts, and “any remedy plaintiffs have is a remedy arising under their contracts with the government, not under the Takings Clause.”)

147. *Henry Housing Ltd. v. United States*, 95 Fed. Cl. 250, 256 (2010).

148. *See, e.g., id.*; *Consumers Energy Co. v. United States*, 84 Fed. Cl. 152, 158 (2008); *System Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172–73 (2005); *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 301 (2003).

149. *Dubinsky v. Mermart, LLC*, 595 F.3d 812, 819 (8th Cir. 2010).

150. *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir. 1963) (Where the complained-of “tort” is based entirely upon the government’s breach of its contract promise, the “claim is in substance a breach of contract claim.”).

151. *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866 (1986).

152. *See, e.g., Rochester-Genesee Regional Transp. Auth. v. Cummins Inc.*, No. 09-CV-6370-MAT, 2010 WL 2998768, at *9, *11 (W.D.N.Y. July 28, 2010); *Aslani v. Country Creek Homes, Inc.*, No. 2007AP503, 2008 WL 220714, at *1, *5 (Wisc. App. 2008).

153. *Redondo Constr. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011).

154. *TM Park Ave. Assocs. v. Pataki*, 214 F.3d 344, 349 (2d Cir. 2000).

plaintiff's ultimate success. Even where the plaintiff loses on the contract claim, if her "failure to recover" is due to application of the "bargained-for provisions" of the contract, the government has only prevented a damages remedy "through the valid operation" of the terms of the contract itself,¹⁵⁵ not through a Contract Clause-violating impairment of the contract remedy. Again, it is the availability of the contract remedy, not the outcome, that matters.¹⁵⁶

Moving to the takings arena, a claimant typically may not, in prosecuting a takings claim, attack the validity of the government's decisions where she had the *opportunity* to directly challenge that validity.¹⁵⁷ That she pursued such a claim and lost on the merits, or would now be time-barred from pursuing that challenge, does not permit her to litigate that claim in a takings action.¹⁵⁸ The availability of the challenge, not the success is what matters. Similarly, equitable relief is typically not available to enjoin an alleged taking when a plaintiff can instead sue the sovereign for compensation.¹⁵⁹ The rule does not depend on whether a particular claimant actually wins or loses that compensation suit.

The result is the same where the plaintiff loses the contract claim on statute of limitations grounds. The plaintiff may have had a protected contract right that was breached, yet no remedy will be forthcoming. That a plaintiff has forgone a remedy does not change the equation. The plaintiff still retained the unfettered *ability* to enforce the contract according to its terms,¹⁶⁰ the "right to *try* to establish their contract damages."¹⁶¹ She simply failed to timely exercise that right. Thus the court in *Tamerlane v. United States* dismissed the contract claims as time-barred and then concluded that the plaintiffs' failure to timely sue extinguished their claim for breach of contract and consequently there was no taking

155. *Id.*

156. *Id.* See also *Pitsch Recycling & Disposal, Inc. v. County of Ionia*, 386 F. Supp. 2d 938, 941 (W.D. Mich. 2005).

157. *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001).

158. *Id.*

159. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

160. *Janicki Logging Co., v. United States*, 36 Fed. Cl. 338, 346 (1996), *aff'd*, No. 97-5006, 1997 WL 468285 (Fed. Cir. 1997).

161. *Home Sav. of America, F.S.B. v. United States*, 51 Fed. Cl. 487, 495 (2002) (emphasis added).

either.¹⁶²

The second ground rests on the distinction between the government acting in a proprietary or a sovereign capacity. Only sovereign acts are subject to the Takings Clause.¹⁶³ “Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity.”¹⁶⁴ A plaintiff’s claim against a government acting solely in its proprietary capacity is for breach of contract.¹⁶⁵ Where the government acts “pursuant to and consistent with the terms of the contract,” then “rather than acting as a sovereign and taking plaintiff’s property,” the government is acting as a party to the contract and exercising rights for which it has bargained.¹⁶⁶ Such a dispute raises no constitutional issues and is “nothing more than a garden variety contract dispute.”¹⁶⁷ The claim is for breach of contract and “the Fifth Amendment does not apply.”¹⁶⁸

Third, turning to basic property rights principles, the threshold test in a takings analysis is whether the claimant has established a property interest for purposes of the Fifth Amendment. Where a claimant “fails to demonstrate the existence of a legally cognizable property interest, the court’s task is at an end.”¹⁶⁹ The analysis is not simply whether a claimant possesses some compensable right, but whether the

162. *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724, 738 (2008) (“[I]t was plaintiffs’ inaction in failing to [timely] sue on their claims for breach of contract . . . that extinguished Plaintiffs’ breach of contract claims. No taking lies upon these facts.”), *aff’d*, 550 F.3d 1135 (Fed. Cir. 2008).

163. *E.g.*, *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008); *Textainer Equip. Mgmt. Ltd. v. United States*, 99 Fed. Cl. 211, 218 (2011); *Env’tl. Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 100 (2010); *Nwogu v. United States*, 94 Fed. Cl. 637, 661 (2010).

164. *Hughes Commc’ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citations omitted). *But see* *Henry Housing Ltd. v. United States*, 95 Fed. Cl. 250, 255 (2010) (The distinction between sovereign and proprietary acts is “not necessarily meaningful” in all contexts and “does not materially advance the analysis of either a breach of contract or a takings claim.”).

165. *Hughes Commc’ns.*, 271 F.3d at 1070.

166. *Janicki Logging v. United States*, 36 Fed. Cl. 338, 346 (1996), *aff’d*, 124 F.3d 226 (Fed. Cir. 1997).

167. *Id.*

168. *Id.*

169. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

particular “use interest proscribed by the governmental action was part of the owner’s title to begin with, *i.e.* whether the . . . use interest was a stick in the bundle of property rights acquired by the owner.”¹⁷⁰ Where the government can show that a limitation inhered in the title itself, no taking can occur.¹⁷¹

This inherent limitation in title is what transpired for the two relevant years in *Stockton East*. All the judges examining the conflict agreed that for those two years the claimants had no right, under the relevant conditions and per the four corners of the contract, to more water than they actually received.¹⁷² The terms of the contract itself created an inherent limitation in title: plaintiffs simply had no compensable rights for the government to take.¹⁷³ And that lack of a specific, compensable stick in the bundle ends a takings claim prior to any liability analysis.¹⁷⁴ If “a contract theory does not yield a recovery, [it] does not give life to a takings theory. If the contract remedy does not produce a recovery, it is because the contract did not give a right to recovery.”¹⁷⁵ A mere “failure of proof” on the contract claims does not allow a takings claim to proceed.¹⁷⁶

It would be counter-intuitive if the takings clause protected as a compensable right something that the relevant contract does not. A contract “right” may exist when, for instance, “the need to obtain government approvals so qualified the likely future enjoyment of [those] rights that the contract, in practice, amounted primarily to an *opportunity* to try to obtain” certain rights.¹⁷⁷ Yet such a “right” would likely not

170. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1210–11 (Fed. Cir. 2005) (citation omitted).

171. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–30 (1992). Specifically in the water context, a takings claim will “ultimately rest on the scope of [plaintiffs] right to use [the] decreed water rights.” *Kobobel v. Colorado, Dep’t. of Natural Res.*, 249 P.3d 1127, 1132 (Colo. 2011).

172. *Stockton East Water Dist. v. United States (Stockton East I)*, 75 Fed. Cl. 321, 363–64 (2007), *modified*, 76 Fed. Cl. 497 (2007), *aff’d in part, rev’d in part*, 583 F.3d 1344, 1364 (Fed. Cir. 2009), *on reh’g in part*, 638 F.3d 781, 783–84 (Fed. Cir. 2011).

173. *Cf. Gray*, *supra* note 2, at § 23-41 (A water project’s “contract terms will determine whether plaintiff have the property rights they claim in the takings litigation.”).

174. *See Placer Mining Co., v. United States*, 98 Fed. Cl. 681, 686 (2011).

175. *Home Sav. of America, F.S.B. v. United States*, 51 Fed. Cl. 487, 495–96 (2002).

176. *Id.* at 495.

177. *Mobil Oil Exploration & Producing Se., Inc.*, 530 U.S. 604, 620 (2000).

qualify as a sufficient property interest for purposes of a takings analysis.¹⁷⁸

Fourth, holding otherwise creates a pro-plaintiff asymmetry in contract law, making every scenario a “Heads I win, tails you pay me to lose” proposition. If the private party exercises its rights under the terms of the contract and the government suffers, the party need not pay the government for exercising her contract rights. Yet if the government does the same, it need not pay contract damages but it risks a takings claim for just compensation. Or, framed from the perspective of the government agency administering the contract, if the agency takes some action and the action is later determined not to accord with the contract, the contracting party may file a breach claim. If the action is later determined to be in accordance with the contract, the contracting party may file a takings claim. That is not a symmetrical playing field.

Fifth and finally, to allow a plaintiff to advance a takings claim when she loses her contract claim violates the Federal Circuit’s oft-repeated rule that the takings concept has limited application where rights are voluntarily created by contract and the teaching that taking claims “rarely arise under government contract.”¹⁷⁹ It would functionally change “limited application” to “general application” and change “rarely arise” to “arise whenever the plaintiff loses the contract claim.”

Returning to *Stockton East III*, there should not have been any takings claims to remand. For those five years where the panel found a breach and no sovereign acts defense, the plaintiff was entitled to contract damages. When a plaintiff recovers under one theory, there is no need to address the other theories.¹⁸⁰ And for the two years the government did not breach the contract, the government did no more than it was explicitly allowed to do under the contract, acting as a contracting party, not as a coercive sovereign.¹⁸¹ The sovereign

178. See, e.g., *Conti v. United States*, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (A swordfishing permit fell “short of conferring a cognizable property interest” under the Takings Clause even though plaintiff had already used it to obtain fish for over a decade.).

179. *Hughes Commc’ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citing *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978)).

180. *Stockton East Water Dist. v. United States (Stockton East III)*, 583 F.3d 1344, 1368–69 (Fed. Cir. 2009), *reh’g granted in part*, 638 F.3d 781 (Fed. Cir. 2011).

181. *Id.* at 1363–64.

arm (the environmental agency) may have pushed the proprietary arm (Reclamation) to act, but only to act within the rights the contract already accorded Reclamation. Plaintiffs retained their full range of contract remedies. Plaintiffs simply had no right, per the limitations inherent in the contract's terms, to that forgone water. The panel should not have concluded that in such a scenario plaintiffs retained a justiciable takings claim.

B. *The Answer Reverses When the Government Successfully Asserts a Sovereign Acts Defense*

Conversely, the idea that the Takings Clause is inapplicable even if the government breached the contract but escapes contract liability by asserting a sovereign acts defense¹⁸² overreaches in the opposite direction. None of the five rationales described above for why the Takings Clause does not protect the no-breach-per-the-terms-of-the-contract scenario apply here. Just as a plaintiff should get no second bite at the apple by having a takings claim in the no-breach scenario, it seems equally illogical to let the government have its cake and eat it too by barring a takings claim in the breach-but-sovereign-acts-defense scenario.

The first rationale for barring takings claims involving rights created by contract with the government is that the claimant remained “unfettered in its ability to . . . enforce the contract according to its terms,”¹⁸³ retaining the “right to try to establish their contract damages.”¹⁸⁴ Courts’ refusals to invoke takings principles in the no-breach scenario directly results from the availability of contract remedies.¹⁸⁵ In the Federal Circuit’s phrasing, the plaintiff typically retains the necessary “range of remedies associated with the vindication of a contract.”¹⁸⁶

182. *Klamath Irrigation Dist. v. United States (Klamath I)*, 67 Fed. Cl. 504, 536–38 (2005).

183. *Janicki Logging v. United States*, 36 Fed. Cl. 338, 346 (1996), *aff'd*, No. 97-5006, 1997 WL 468285 (Fed. Cir. 1997).

184. *Home Sav. of America, F.S.B. v. United States*, 51 Fed. Cl. 487, 495 (2002) (emphasis added).

185. *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 737 (2004) (“refusal to invoke takings principles has been explained as directly resulting from the availability of contract remedies”).

186. *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (citation omitted).

Yet in the context of the government breaching the terms of the contract but successfully asserting a sovereign act defense, the government has deprived the claimant of just that ability. The plaintiff *would* have had a viable claim according to the terms of the contract. The sovereign acts doctrine is, by definition, an exception to the normal rules of contract law, allowing the government to escape liability where a private party would not.¹⁸⁷ Where the government takes actions that no private party could, the Court has allowed the plaintiff to proceed on a takings claim.¹⁸⁸ And where the government passes a law abrogating the government's contractual obligations, the Court has allowed the plaintiff to pursue a takings claim.¹⁸⁹ One predicts the Court would do the same today.

This distinction is consistent with Contracts Clause jurisprudence. While "it would be absurd to turn every breach of contract. . . into a violation of the federal Constitution,"¹⁹⁰ where the government both breaches a contract and impairs the other party's right to recover damages for that breach, the government may run afoul of the Contracts Clause.¹⁹¹ Where the government asserts an affirmative defense that it is excused by law from performing the contract or paying damages, the plaintiff may state a Contracts Clause violation.¹⁹² Similarly, where the government breaches the contract but successfully asserts a sovereign acts defense, it has also impaired plaintiff's ability to obtain a remedy. Such a case would seem to "reach constitutional dimensions."¹⁹³ A takings claim should be just as available here as where the government restricts any other right.

The second rationale, the capacity issue, bars a takings

187. See *Carabetta Enters., Inc. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007) (The sovereign acts doctrine is an exception to the general rule from contract law that a contracting party cannot discharge its contract duties where party's own actions made contract performance impossible.).

188. *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960).

189. *Lynch v. United States*, 292 U.S. 571, 579–80 (1934).

190. *Redondo Constr. Corp. v. Izquierdo*, 662 F.3d 42, 48 (1st Cir. 2011) (*quoting* *Horowitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996)).

191. *Cf. id.*

192. *Cf. id.*

193. *Cf. TM Park Ave. Assocs. v. Pataki*, 214 F.3d 344, 349 n.3 (2d Cir. 2000) (internal quotations and citation omitted) (a breach of contract claim does not reach constitutional dimensions).

claim where the government was acting only in its proprietary (and not sovereign) capacity when it infringed on the contract to which the plaintiff is privy.¹⁹⁴ Only a sovereign act can produce a taking; the government acting solely in its proprietary capacity leaves plaintiffs with just a breach of contract claim.¹⁹⁵ Yet where the government wins on a sovereign acts defense, it was by very definition acting in this sovereign capacity.¹⁹⁶ It is not clear why that sovereign act should be any less challengeable as a taking than any other sovereign act.¹⁹⁷

Barring a takings claim here functionally allows the government to have it both ways. First the government can argue, for purposes of the takings analysis, that the restriction was a product of the government acting in its proprietary, not sovereign, capacity, thus precluding takings recovery. Then the government can reverse course and argue, for purposes of the contract analysis, that the restriction was the act of the sovereign, not the contract player, thus precluding contract recovery. This was what *Klamath I* and *II* functionally permitted, finding that a takings claim was unavailable, “entirely subsumed” within the contract claim, then finding that the sovereign acts doctrine immunized any contract breach.¹⁹⁸

The third rationale, limitation-inhering-in-title, similarly does not apply. Where the particular use interest proscribed by the governmental action was not part of the owner’s title to begin with, no takings claim arises.¹⁹⁹ The limitation in the title precluded a taking from occurring.²⁰⁰ Yet, where the

194. *Hughes Commc’ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citations omitted).

195. *Id.* See also *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008); *Textainer Equip. Mgmt Ltd. v. United States*, 99 Fed. Cl. 211, 218 (2011); *Envtl. Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 100 (2010); *Nwogu v. United States*, 94 Fed. Cl. 637, 661 (2010).

196. After all, it is the “sovereign acts” defense, not the “proprietary acts” defense.

197. This is consistent with the maxim that “to effect a taking, the government must act pursuant to its sovereign power or invoke sovereign protections.” *Textainer Equipment*, 99 Fed. Cl. at 218 (emphasis added).

198. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 535 (2005), 75 Fed. Cl. 677, 685, 695 (2007).

199. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1211 (Fed. Cir. 2005) (citations omitted).

200. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–30 (1992). This is no different in the water context. A takings claim will “ultimately rest on the scope of

proscribed use was indeed part of the owner's title, there was no such contract limitation. It is not true that no recovery is available "because the contract did not give a right to recovery."²⁰¹ No contract-based recovery is available *despite* the fact that contract terms gave a right to recovery.²⁰² Instead, the government trumped the plaintiff's contract rights. A takings claim should be just as available here as where the government abrogates any other right.

Fourth, barring a takings claim would create a similar (though converse) asymmetry, a pro-government "Heads I win, tails I lose. . . but don't need to accept the consequences." If a private party's actions render her own performance to the government impossible, she presumably owes the government damages.²⁰³ Yet, if the government's actions render its own performance to the private party impossible, it would owe nothing. That may be fine as a matter of contract law—the very essence of the sovereign acts doctrine—but the plaintiffs should be able to show that the sovereign act created a taking. To bar pursuit of a takings claim creates an asymmetric playing field.

Fifth and finally, to bar a possible takings claim in the sovereign acts context would also violate the oft-repeated rule that the takings concept has "limited application" where rights are voluntarily created by contract.²⁰⁴ Barring a claim in the breach-but-sovereign-acts defense scenario would functionally change "limited application" to "no application."

their right to use the decreed water rights." *Kobobel v. State Dept. of Nat. Res.*, 249 P.3d 1127, 1132 (Colo. 2011).

201. *Cf. Home Savings of America, F.S.B. v. United States*, 51 Fed. Cl. 487, 495–96 (2002).

202. At least the contract might have given a right to recovery. In *Klamath II* and *Casitas I*, the court decided that sovereign acts defense applied without determining whether the contract had actually been breached. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 752–55 (2006); *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677, 682 (2007).

203. *Carabetta Enterprises, Inc. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007) (explaining the general rule from contract law that a contracting party cannot discharge its contract duties where the party's own actions made contract performance impossible).

204. *See, e.g., St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008); *Castle v. United States*, 301 F.3d 1328, 1341–42 (Fed. Cir. 2002); *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1034 (Fed. Cir. 1992); *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978); *J.J. Henry Co. v. United States*, 411 F.2d 1246, 1249 (Ct. Cl. 1969).

Thus, in the breach-but-sovereign-acts defense scenario, a plaintiff should be allowed to assert a takings claim.²⁰⁵ This was the result the Federal Circuit allowed in *Casitas III*. The panel determined that the government, employing its sovereign powers, went beyond what the contract allowed it to do when it diverted the water, thus breaching the terms of the contract.²⁰⁶ But it also determined that the government had a valid sovereign acts defense.²⁰⁷ The panel then proceeded to address the merits of the taking claims.²⁰⁸ That has to be the correct approach. It does not, of course, mean the plaintiff will prove a taking, but she should at least be able to have her takings claim considered.

C. *The Complexities of the Water Arena*

This article's thesis, that the answer to whether government action involving a property interest created by contract with the government can lead to a takings claim in addition to a contract claim should turn on *why* the contract claims fails, received significant treatment earlier this year. In *Century Exploration New Orleans, Inc. v. United States*, the trial court agreed that a lack of breach shows nothing has been taken from plaintiffs and recognized that such reasoning does not apply where the government breaches the contract yet successfully invokes the sovereign acts shield.²⁰⁹ The court, however, found itself bound to *Stockton East III*,²¹⁰ which, as discussed above, allowed the plaintiffs to proceed on a takings

205. *Accord* Garden, *supra* note 141, at 205 (noting that if the government defends a breach claim by asserting a sovereign acts defense, it "has laid the groundwork for a later takings claim should the court agree that the sovereign acts defense applies").

206. *Casitas Mun. Water Dist. v. United States (Casitas III)*, 543 F.3d 1276, 1286–87 (Fed. Cir. 2008), *reh'g* and *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

207. *Id.* at 1288.

208. The trial court determined that a regulatory, not physical taking, analysis was the correct one to apply, and concluded there was no taking. *See Casitas Mun. Water Dist. v. United States (Casitas II)*, 76 Fed. Cl. 100, 106 (2007). The Circuit reversed, finding that the *per se* taking analysis applied. *Casitas III*, 543 F.3d at 1296. The applicability of the physical versus regulatory taking analysis is beyond the scope of this article.

209. *Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70, 81 (2012).

210. *Id.* at 83. Because this article discusses two earlier *Stockton East* decisions, it employs "*Stockton East III*" to describe what *Century Exploration* references as "*Stockton East II*."

claim even where the plaintiff lost its breach of contract claim on the merits (*i.e.* no sovereign acts defense).

Yet *Stockton East III* was itself bound by precedent. It could not overrule a previous precedential decision, absent an *en banc* or Supreme Court decision.²¹¹ Only a year before *Stockton East III*, in *St. Christopher Associates v. United States*, the Federal Circuit denied the breach of contract claim on its merits yet dismissed the takings claim, holding that “any claim that St. Christopher may have asserted should be a breach of contract claim.”²¹² *St. Christopher’s* dismissal of the takings claim in a case where it had just denied recovery on the contract claim presents the same factual scenario as the two pertinent years in *Stockton East*. *Stockton East III’s* characterization of *St. Christopher’s* dismissal of the takings claim as a “passing comment”²¹³ is incorrect; it was the holding of the case.²¹⁴ *St. Christopher* is entitled to at least as much precedential weight as *Stockton East III* on this question.²¹⁵

Further, *St. Christopher* was not a departure. Before *St. Christopher*, in *Castle v. United States* the plaintiffs were not awarded any contract damages for the government’s alleged breach of contract, yet the Circuit agreed that because plaintiffs retained the full range of contract remedies, there could not be a taking.²¹⁶ And before *Castle*, in *Baggett Transportation Company v. United States* the plaintiffs with a government contract lost on their contracts claim and

211. *Hernandez-Garcia v. Nicholson*, 485 F.3d 651, 653 (Fed. Cir. 2007).

212. *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008).

213. *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009), *on reh’g*, 638 F.3d 781 (Fed. Cir. 2011).

214. *St. Christopher Assocs.*, 511 F.3d at 1385. In the paragraphs that followed its holding that the takings claim was unavailable, *St. Christopher*, went on to analyze whether, “even if we were to conclude that St. Christopher could pursue a claim outside the contract,” plaintiff had stated a taking claim. *Id.* It found plaintiff had not. *Id.* at 1385–86. That alternative analysis does not diminish the holding.

215. *See also Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724, 738 (2008), *aff’d*, 550 F.3d 1135 (Fed. Cir. 2008). After denying plaintiff’s contract claim, the court dismissed plaintiff’s takings claim without reaching the merits because the property rights underlying the takings claim did not “exist independently of their contracts” and in such a scenario the “proper remedy for infringement lies in contract, not taking.” *Id.* at 724. The Circuit affirmed.

216. *Castle v. United States*, 301 F.3d 1328, 1341–42 (Fed. Cir. 2002). Because the panel determined that plaintiffs were not entitled to any contract damages even if there was a breach, the court declined to reach the issue of whether there had been a breach at all. *Id.* at 1341.

attempted to bring a takings claim.²¹⁷ The Federal Circuit rejected the claim as “merely a reformulation of the carriers’ argument, which we rejected” in dismissing the contracts claim, and it summarily dismissed the takings claim.²¹⁸

Moreover, the most prominent case discussing the “limited application” rule was *Sun Oil Company v. United States*.²¹⁹ While *Sun Oil* did use the “limited application” language in the context of a plaintiff prevailing on a portion of the contract claim seeking additional recovery through a takings claim,²²⁰ *Sun Oil* itself pointed to *J.J. Henry Company v. United States* as the source of the “limited application” rule.²²¹ *J.J. Henry* had announced a decade earlier that the Takings Clause “has limited application to the relative rights in property of parties litigant which have been voluntarily created by contract.”²²² Crucially, in *J.J. Henry* the plaintiff *lost* the contract claim, yet the court still dismissed the takings claim.²²³ The “limited application” language in *J.J. Henry* had nothing to do with barring additional recovery by a successful contract claimant. The rule does not apply only to winning contract claimants.

Reading the “limited application” doctrine as simply a rule barring takings compensation on top of contract damages is not only inaccurate as a matter of precedent, it creates a redundancy. There is already an ample rule against double recovery. As the Court has observed, it “goes without saying that the courts can and should preclude double recovery.”²²⁴ Allowing a plaintiff to recover twice for the same injury would already produce a “manifest error of law,”²²⁵ quite apart from any special takings/contract interplay. There would have been no need in any of the cited cases for a scholarly analysis of the relationship between the Takings Clause and contract rights if all that needed to be said was, “Of course, a plaintiff cannot recover twice for the same injury.”

Instead, the “limited application” language makes perfect

217. *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1033–34 (Fed. Cir. 1992).

218. *Id.* at 1034.

219. *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978).

220. *Id.* at 820.

221. *Id.* (citing *J.J. Henry Co. v. United States*, 411 F.2d 1246 (Ct. Cl. 1969)).

222. *J.J. Henry*, 411 F.2d at 1249.

223. *Id.* at 1255.

224. *EEOC v. Waffle House*, 534 U.S. 279, 261 (2002).

225. *Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 642 (7th Cir. 2011).

sense if it means the following. First, the Takings Clause has no place where rights are created by contract and the government either breaches (or does not breach) the contract, according to the terms of the contract. Second, the Takings Clause must apply in that minority of cases where the government breaches the terms of the contract yet is able to escape liability by arguing that its breach was immunized by the sovereign acts doctrine. That breach-but-sovereign-acts-defense scenario is a restricted but occasional scenario that fits the definition of “limited.”²²⁶

The above analysis applies even where a plaintiff in contract or privity of contract with the government elects to bring only a takings claim and avoids a contract claim. Where a plaintiff alleges that government action or inaction relating to its contract with plaintiff worked as a taking, the plaintiff does not state a takings claim even if she decides not to plead breach of contract.²²⁷ If a takings claim is “at bottom, a simple action for breach of contract” and there is no showing that the government would refuse a contract remedy, should the plaintiff prove a breach, the plaintiff does not state a takings claim even where she chooses not to pursue the contract claim.²²⁸ Because the government has not impaired plaintiff’s ability to enforce the rights secured by contract, a plaintiff is “free to pursue whatever remedy” her contract allows and “[n]o taking lies.”²²⁹

More generally, as the Federal Circuit notes, where a claim “stems from a breach of contract, the cause of action is ultimately one arising in contract.”²³⁰ A plaintiff may not, through “crafty pleading,” style a breach of contract claim as something else.²³¹ A court should “not permit plaintiff to pursue a takings remedy in order to circumvent the limitations inherent in its contractual relationship with the Government.”²³² That statement is consistent with the Court’s

226. THE MERRIAM WEBSTER DICTIONARY (11th ed., 2005) (defining limited as “confined within limits; restricted”).

227. *Griffin Broadband Commc’ns, Inc. v. United States*, 79 Fed. Cl. 320, 322–25 (2007).

228. *Casey v. Depetrillo*, 697 F.2d 22, 23 (1st Cir. 1983).

229. *Griffin Broadband*, 79 Fed. Cl. at 324.

230. *Awad v. United States*, 301 F.3d 1367, 1372 (Fed. Cir. 2002).

231. *Evers v. Astrue*, 536 F.3d 651, 658 (7th Cir. 2008).

232. *Cf. Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 303 (2003) (finding no

recent warning in a takings case against “a mere pleading rule”; the focus, instead, must be on the “operative facts and not whatever remedies an aggrieved party might later request.”²³³

But applying the above principles to water cases involves another wrinkle. First, the “limited application” the Takings Clause discussed above is only for parties in contract (or in privity of contract with) the government. Privity of contract is a threshold requirement for a contract claim; if a claimant is not in privity of contract, he or she can (indeed, can only) proceed under a takings theory.²³⁴ There may be some water rights holders in a given dispute who enjoy no privity. For example, under the contract in *Orff v. United States*, the Ninth Circuit determined that only the water district (and not the farmers who used the water) could assert a breach of contract claim.²³⁵ If certain water users have no privity of contract with the government on which to base a contract claim, the above analysis does not apply; the Takings Clause might be the only avenue to seek a remedy.²³⁶

Second, and significantly more complicating, the “limited

additional damages available).

233. *United States v. Tohono O’odham Nation*, 131 S.Ct. 1723, 1728–31 (2011). *Tohono* is instructive in another respect; even the dissent had no qualms finding a plaintiff barred from pursuing a takings claim when the plaintiff simply lost the other claim on the merits; the dissent’s concern was barring a takings claim where the plaintiff was “unable” to obtain relief because the other claim could not have been adjudicated. *Id.* at 1738 (Sotomayor, J., dissenting). That seems consistent with this article’s thesis that a plaintiff simply losing a contract claim on the merits does not state a takings claim, while a plaintiff barred by the sovereign acts doctrine from pursuing her contract remedies does.

234. *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003) (citing *Cienega Gardens v. United States*, 194 F.3d 1231, 1293 (Fed. Cir. 1998)) (finding that for those plaintiffs not in privity of contract, a contract claim was not available and a takings claim was the correct avenue).

235. *Orff v. United States*, 358 F.3d 1137, 1146, 1149 (9th Cir. 2004), *aff’d on other grounds*, 545 U.S. 596 (2005). The Court rested its affirmance on the lack of a sovereign immunity waiver for the district court to entertain such claims; the Court implied that had the farmers pursued their claims in the correct court (the United States Court of Federal Claims), they might have had a contract claim. *Id.* at 601–02 n.2. Under the contracts in *Klamath*, the trial and appellate courts agreed that the water users had contract claims. *Klamath Irrigation Dist. v. United States (Klamath I)*, 67 Fed. Cl. 504, 534 (2005); *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505, 510 (Fed. Cir. 2011).

236. *Cf. Klamath I*, 67 Fed. Cl. at 532. *See also* *Armstrong v. United States*, 364 U.S. 40, 46 (1960) (findings plaintiffs not a party to pertinent contract could pursue takings claim).

application” the Takings Clause has to cases involving parties in contract with the government applies only where rights are “voluntarily created by contract.”²³⁷ That does not unduly bedevil a case like *Century Exploration*, where, after some preliminary wrangling the court could fairly easily determine that the only property interest in question was the right voluntarily created by the contract (lease) with the government; there were no rights in play existing independently of the contract.²³⁸ It is not so simple in the water rights context.

Klamath provides a taste of the complexity. *Klamath I* explained that there were five different categories of contractual agreements with the United States, including property interests that pre-existed the project but may have been exchanged later for project water, and the reverse, interests derived from project contracts that may have later become something else.²³⁹ *Klamath III* addressed the interplay between the contractual agreements and the plaintiffs’ property interests in the water, but could not “provide a definitive answer.”²⁴⁰ Two judges in *Klamath IV* believed that plaintiffs had a cognizable property interest for purposes of a takings claim, though such interests might have been eliminated by contractual agreements with the government,²⁴¹ while the concurring judge was more absolute, believing that the initial creation of that water right was itself contingent upon the agreements.²⁴² And if that was not enough complexity, the government’s potential infringement of a water contract may very well have impacted other, non-water rights a plaintiff separately holds. For example, if the government cuts off water, a plaintiff may claim that the government took not only a state water right but also her land and

237. See, e.g., *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1034 (Fed. Cir. 1992) (quoting *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978), which in turn borrowed the language from *J.J. Henry Co. v. United States*, 411 F.2d 1246, 1249 (Ct. Cl. 1969)).

238. *Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70, 80 (2012).

239. *Klamath I*, 67 Fed. Cl. at 530–31.

240. *Klamath Irrigation Dist. v. United States (Klamath III)*, 227 P.3d 1145, 1165–66 (Ore. 2010).

241. *Klamath Irrigation Dist. v. United States (Klamath IV)*, 635 F.3d 505, 519 (Fed. Cir. 2011).

242. *Id.* at 524 (Gajarsa, J., concurring in judgment).

improvements, for instance by rendering a farm and farming improvements “essentially useless” without the water.²⁴³

It is not entirely clear how the courts will or should handle the “created by contract” angle in the water cases. In *St. Christopher Associates v. United States*, plaintiff attempted to frame as a takings claim its initial assertion that the government breached the contract (involving a low interest loan) by failing to consider plaintiff’s rent increase request, reasoning that the result of the government’s failure was a decreased rate of return and a deteriorating apartment building, a building which was undoubtedly plaintiff’s separate property.²⁴⁴ The Federal Circuit rejected the assertion that a takings claim was available; a contract claim (in that case, a losing contract claim) was the only available avenue.²⁴⁵ As *Franconia Associates v. United States* phrased it, a takings claim is unavailable even where the breached contract affects not only the contract right but results in a “substantial devaluation” or even “total loss” of the plaintiff’s other property existing independent of the contract (in that case also an apartment building).²⁴⁶ *Franconia’s* conclusion turned on the nature of the power (proprietary v. sovereign) the government invoked “rather than the nature of the [plaintiff’s] property itself.”²⁴⁷

Under this reasoning, it would not matter for purposes of this analysis whether a plaintiff had a contract with the government to receive water, took that contract water, put it to beneficial use, and obtained some certificate or patent or, conversely, that the plaintiff had a previously-existing water right she later exchanged for a contract right to receive water under certain terms. If the government breached the contract terms, the *impact* of that breach on plaintiff or plaintiff’s other property may or may not be recoverable as a matter of contract damages.²⁴⁸ But if a contract remedy does not produce a

243. *Kobobel v. State Dept. of Nat. Res.*, 249 P.3d 1127, 1133 (Colo. 2011).

244. *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1379, 1385 (Fed. Cir. 2008).

245. *Id.*

246. *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 739–40 (2004).

247. *Id.*

248. *Pacific Gas & Elec. Co. v. United States*, 70 Fed. Cl. 766, 779 (2006) (if government’s breach created reasonably foreseeable costs, these “may be fully vindicated through a breach of contract”). *Cf.* Shelly Ross Saxer, *Managing Water*

particular recovery, it is because the contract (and contract law) does not give a right to that recovery.²⁴⁹ The case law discussed above is consistent that a plaintiff winning on a contract claim cannot (*via* a takings claim) seek compensation unavailable as a matter of contract damages.²⁵⁰

Conversely, if the government did not breach the pertinent contract—if, for example, a contract includes a shortage clause immunizing the government under certain conditions, and a court finds that an environmental restriction qualified as a condition that excused the government from full performance and precluded contract liability²⁵¹—that would end the takings matter as well. The contract terms would be an inherent limitation in plaintiff's property right, the government would have acted in its proprietary capacity, and the plaintiff would retain her full range of contract remedies, all precluding a takings claim. “[I]rrigators claiming interests based upon their contracts with the districts cannot possibly have rights to water that exceed the limitations found in the contracts between those districts and the United States.”²⁵² As the Federal Circuit noted elsewhere, “[i]f the terms of the easement when first granted are broad enough” to encompass the government's action, the plaintiff “would not be in a

Rights Using Fishing Right as a Model, 91 MARQ. L. REV. 96–97 (2011) (“Courts should allow recovery under contract law for government breaches, but water districts and other water users should not be allowed to make takings claims by asserting that water usage promised in a contract constitutes a property right, subject to a governmental taking.”). The extent of allowable contract damages are beyond the scope of this article.

249. *Home Savings of America, F.S.B. v. United States*, 51 Fed. Cl. 487, 495–96 (2002).

250. *Hughes Commc'ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (rejecting plaintiff's contention that it could seek takings relief in addition to a contract claim because interest was not allowed on contract damages). Even *Stockton East III* only allowed the takings claim to proceed for those years where the contract claim failed, not those years where the contract claim succeeded. *Stockton East Water District v. United States (Stockton East III)*, 583 F.3d 1344, 1368–69 (Fed. Cir. 2009), *on reh'g*, 638 F.3d 781 (Fed. Cir. 2011). *See also* *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 303 (2003) (“If plaintiff succeeds on its breach claim, the court will award only the damages contemplated by the [contract at issue] and will not permit plaintiff to pursue a takings remedy in order to circumvent the limitations inherent in its contractual relationship with the Government.”)

251. *See, e.g., O'Neil v. United States*, 50 F.3d 677, 681–87 (9th Cir. 1995), discussed *supra* notes 56–61.

252. *Klamath Irrigation Dist. v. United States (Klamath I)*, 67 Fed. Cl. 504, 535 (2005).

position to complain” of a taking.²⁵³ The government would not be responsible for the effect exercising its rights as a contracting party had on another party’s other property interests.²⁵⁴ Unless the plaintiff could point to some other “intervening sovereign act,” something beyond the act taken by the government pursuant to its contracting authority, no takings claim would be available.²⁵⁵

But a strong argument is not an ironclad, impervious one. In another apartment rental dispute, the plaintiff claimed that the government preventing its loan repayment resulted in her apartment being “conscripted” as low-income housing beyond the terms of the initial contract, and the court allowed the takings claim to proceed.²⁵⁶ In the scenario where the government allegedly breached its contractual obligations to remove spent nuclear fuel from plaintiffs’ facilities, leaving plaintiffs to house the waste product and leading to takings claims that the government appropriated a portion of (or all) plaintiffs’ facilities, the courts have been mixed on whether to dismiss the takings claims because they were precluded by the contract claims, dismiss the takings claims on other grounds, or actually allow the takings claims to proceed.²⁵⁷ And while the court in the *Tamerlane v. United States* case cited above dismissed plaintiff’s takings claim without reaching the merits, it did so because the property rights underlying the takings claim did not “exist independently of their contracts,”²⁵⁸ which begs the question of what it means, in the

253. *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (discussing the scope of an easement).

254. In some sense, this scenario is the opposite of the one in *Palmyra Pacific Seafoods, L.L.C. v. United States*, 561 F.3d 1361 (Fed. Cir. 2009). *Palmyra* argued that the government’s prohibition on commercial fishing in surrounding waters adversely affected the value of its contract right to engage in activities on shore. *Id.* at 1366. The result was the same—no taking—but *Palmyra* involved a restriction on an (asserted) non-contract right impacting a contract right, not a restriction on a contract right impacting a non-contract right. *Id.* at 1367.

255. *Textainer Equip. Mgmt. Ltd. v. United States*, 99 Fed. Cl. 211, 218 (2011).

256. *Henry Housing Ltd. v. United States*, 95 Fed. Cl. 250, 254 (2010).

257. *See, e.g.*, *Niagara Mohawk Power Corp. v. United States*, 98 Fed. Cl. 313, 316–17 (2011) (dismissing plaintiffs’ physical and regulatory takings claims, but on other grounds); *Canal Electric Co. v. United States*, 65 Fed. Cl. 650, 655–56 (2005) (no takings claim allowed, only contract claim); *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 303 (2003) (allowing takings claim to proceed as an “alternative theory”).

258. *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724, 738 (2008), *aff’d*, 550 F.3d 1135 (Fed. Cir. 2008), *supra* notes 162, 215.

convoluted water arena, for a right to exist “independently” of the contract. Thus, the intersection of the contract and takings claims in the water rights context may be more difficult to sort out than in the typical scenario.

IV. CONCLUSION

For rights created by contract with the government, the answer to the question of whether a takings claim is available should hinge on why or how the government successfully defends the contract claim. As noted above, the courts agree that where rights are the product of a voluntary contract with the government, it is acceptable to postpone consideration of the takings claim until the contract claim is resolved.²⁵⁹ The proper rationale for doing so would be that advanced by one of the plaintiffs in *Century Exploration*: the court should not dismiss the takings claim before determining whether the government acted in a proprietary or a sovereign capacity and should allow plaintiffs to proceed with their takings claim in the event that the court dismisses the contract claim based a sovereign acts defense.²⁶⁰

Such a sequence would lead to one of three conclusions. If the government breached the contract, that is the end; the plaintiff is entitled to whatever damages contract law allows, but the plaintiff cannot recover on a takings theory even if that

259. If the plaintiff does *not* bring a breach-of-contract claim regarding government action or inaction related to the contract, and brings only a takings claim, the court would dismiss that takings claim for failure to state a claim, although presumably if the plaintiff timely re-filed a complaint urging contract and takings claims, the court could then postpone consideration of the takings count. *Cf. Griffin*, 79 Fed. Cl. at 322, 325.

260. *Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70, 75, 80 (2012). The court phrased the argument as whether the contract claim was barred under “an affirmative defense such as the sovereign acts defense.” *Id.* There are many affirmative defenses, such as the common law right of “setoff,” *Nwogu v. United States*, 94 Fed. Cl. 637, 662 (2010), that are just as available to private contracting parties as to the government. *See, e.g., Las Vegas Sands, LLC v. Nehme*, 632 F.3d 525, 534 (9th Cir. 2011) (listing several private-party affirmative defense to a breach of contract claim). The government asserting such a generally-available affirmative defense would not alter the analysis. *Nwogu*, 94 Fed. Cl. at 661–62. The discussion here is about the government asserting a sovereign acts defense that no private party could assert. Another example would be sovereign immunity. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) (allowing takings claim to proceed where the government took an action “which no private [party] could have done” yet was not, *via* sovereign immunity, subject to suit).

would yield greater recovery.²⁶¹ If the government acted within its rights and responsibilities under the contract and did not breach the contract, that is also the end; there is no takings claim, for plaintiff retained her contract remedies. The government was only doing what the contract allowed it to do, and plaintiff had no right to more.²⁶² Conversely, if the government breached the contract but successfully asserts a “sovereign acts” affirmative defense,²⁶³ there is no contract liability but the court should proceed to determine whether that sovereign act caused a taking. Such an approach would bring some much needed consistency to the takings and government contracts world.

261. *Hughes Commc'ns. Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) (finding that plaintiffs could not pursue takings claim on top of successful breach of contract claim, even though takings claim would have allowed pre-judgment interest that breach did not).

262. *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008).

263. The sovereign acts defense is an affirmative one. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008).