

Takings Litigation in the San Joaquin River Restoration Program: The Role of the Implied Seepage Easement Under The Federal Navigational Servitude

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I. INTRODUCTION

The San Joaquin River is one of the two primary Delta watersheds.¹ It originates in the Sierra Nevada Mountains, flowing northwesterly through the Central Valley until it joins the Sacramento River in the Delta. Because the San Joaquin River drains into the Delta, its health is inextricably tied to the overall health of the Delta ecosystem.² Reduced flows in the San Joaquin resulting from water diversions impact the Delta's water quality (including its salinity), as does polluted runoff entering the river from the vast agricultural fields of the Central Valley.

The San Joaquin River Restoration Settlement Act of 2009 sought to restore greater flows to the river with the objective of reintroducing native Chinook salmon to its waters. Because portions of the river had lain dry for nearly seventy years, the federal Bureau of Reclamation had to make various structural improvements to the river channel to facilitate its effective conveyance of restored flows. But the Bureau's plans led owners of adjacent agricultural property to file suit, arguing the restored flows would create seepage impacts to their land, reducing its productivity for farming. These impacts, they alleged, would effect a taking of their property under the Fifth Amendment to the U.S. Constitution, requiring just compensation.

This paper argues the Bureau should assert its actions to restore the San Joaquin fall within the scope of the federal navigational servitude and its implied seepage easement. The servitude protects the United States from takings liability when it undertakes activities within a navigable river that are intended, at least in part, to improve navigation. Since the servitude only applies to the impacts of such activities within a river channel up to the ordinary high water mark, government-induced seepage of adjacent land has generally been found to be outside of the servitude's scope, and thus a potential taking. However, this paper suggests that the navigational servitude should be seen as encompassing an implied seepage easement covering the area around the river channel that would naturally experience seepage as a result of flows within the channel up to the ordinary high water mark.

This understanding derives from the underlying purpose of the navigational servitude: to enable Congress to experiment within rivers to improve navigation in the interest of commerce.³ If Congress could not return water levels to the original high water mark after temporarily lowering them without owing compensation, the servitude would be an illusory tool. As applied to seepage

¹ JAY LUND ET AL., PUB. POLICY INST. OF CAL., ENVISIONING FUTURES FOR THE SACRAMENTO-SAN JOAQUIN DELTA 31 (2007).

² See, e.g., *id.* at 54.

³ *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1382 (Fed. Cir. 2000); *Mildenberger v. United States*, 91 Fed. Cl. 217, 247 (2010).

alongside a river channel, returning flows to their natural level would likely increase seepage impacts to adjacent land; the implied seepage easement would prevent those effects outside the riverbed from being viewed as a taking. The servitude's geographic extent should thus be re-conceptualized. In an era when river restoration projects may be on the rise, recognition of the implied seepage easement could enhance the navigational servitude's relevance in defending against takings claims over the release of natural flows to long dormant riverbeds.

II. HISTORICAL TRANSFORMATION OF LAND AND WATER USE IN THE DELTA AND SAN JOAQUIN VALLEY

During the California Gold Rush of the mid-1800s, the Delta saw a massive influx of people, many of whom soon perceived the value of Delta lands for agriculture.⁴ Both the federal and State governments sought to encourage the private conversion of Delta wetlands to productive use. The reclamation process typically entailed "the diking and draining of flooded Delta lands."⁵

Through the Swampland Act of 1850, Congress transferred ownership of nearly 500,000 acres of Delta wetlands to the State of California.⁶ The California legislature subsequently authorized the sale of up to 320 acres per person of "swamp and overflowed lands" at a cost of one dollar per acre⁷ on condition the land was reclaimed.⁸ The later repeal of acreage purchase limitations allowed speculators to purchase large tracts of land, facilitating private-sector investment in large-scale levee construction.⁹ The State also sought to promote the Delta's reclamation by creating a State board to oversee the formation of reclamation districts, through which landowners could collectively invest in the building of levees.¹⁰ These efforts transformed an originally complex ecosystem consisting of seasonal wetlands and innumerable streams and sloughs into the modern-day grouping of levee-fortified "islands" separated by defined water channels. Much of the land in the central Delta remains in agricultural use to this day.¹¹

South of the Delta lay the vast San Joaquin Valley, boasting great potential for agriculture but lacking adequate sources of irrigation water prior to the

⁴ LUND ET AL., *supra* note 1, at 19.

⁵ *Id.*

⁶ *Id.* at 20.

⁷ *Id.*

⁸ A.A. WHIPPLE ET AL., S.F. ESTUARY INST.-AQUATIC SCI. CTR., SACRAMENTO-SAN JOAQUIN DELTA HISTORICAL ECOLOGY INVESTIGATION: EXPLORING PATTERN AND PROCESS 64 (2012).

⁹ LUND ET AL., *supra* note 1, at 20.

¹⁰ WHIPPLE ET AL., *supra* note 8, at 22.

¹¹ *Id.* at 4.

1940s.¹² Much of California's water is located in the northern and eastern parts of the state, but the agriculturally productive lands are concentrated in the Central Valley. The main approach to developing this water supply was to dam rivers and build reservoirs for water storage.¹³ The water could then be transported via aqueduct across the Central Valley and used for irrigation in the summer.¹⁴

This is precisely what happened along the San Joaquin River. As part of the Central Valley Project, the U.S. Bureau of Reclamation ("Bureau") constructed the Friant Dam on the upper San Joaquin in the Sierra Nevada foothills, resulting in the creation of Millerton Lake—a reservoir with a storage capacity of 520,000 acre-feet.¹⁵ The Bureau entered into long-term contracts with various water providers, including cities and irrigation districts, which in turn sold the water to Central Valley farmers and other users.¹⁶ Once the dam was complete in the early 1940s, flows to the river below the dam were reduced dramatically, leaving the river dry in two long stretches.¹⁷ As a result, Chinook salmon populations dwindled and eventually disappeared from the river.¹⁸

III. OBJECTIVES OF THE SAN JOAQUIN RIVER RESTORATION PROGRAM

In 1988, environmental organizations including Natural Resources Defense Council ("NRDC") brought suit against the Bureau, challenging its renewal of these long-term water contracts despite impacts to the endangered Chinook salmon's habitat in the San Joaquin River.¹⁹ In 2006, the parties finally reached a settlement, approved by Congress through passage of the San Joaquin River Restoration Settlement Act—part of the Omnibus Public Land Management Act of 2009 (Public Law 111-11).²⁰

The settlement and subsequent legislation encompassed two main objectives: river restoration and water management.²¹ Restoration would be accomplished by releasing sufficient water from Friant Dam to reestablish a self-sustaining Chinook salmon fishery on the river's main stem between the dam and the Merced River confluence.²² The settlement envisioned that various channel and

¹² LUND ET AL., *supra* note 1, at 31-32.

¹³ *See id.* at 31-35.

¹⁴ *See id.*

¹⁵ GARY PITZER, WATER EDUC. FOUND., A BRIEFING ON THE SAN JOAQUIN RIVER RESTORATION PROGRAM 11 (2011).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 12-14.

²⁰ *Id.* at 2-3.

²¹ *Background and History*, SAN JOAQUIN RIVER RESTORATION PROGRAM, <http://restoresjr.net/background.html> (last visited Nov. 24, 2014).

²² *Id.*

structural modification projects would need to be undertaken in the riverbed before flows could be increased substantially.²³ Funding for these projects (and other river restoration costs) would come from a mix of sources, including \$200 million in State bond funds, as much as \$300 million in federal appropriations, and approximately \$17 million per year in water user fees.²⁴

The water management component of the settlement was intended to minimize any reduction in water deliveries to long-term Friant contractors due to restoration activities.²⁵ The quantity of water available for agricultural uses would be maximized through the recapture of increased flows downstream of the Merced River confluence and recirculation of that water “by direct diversion, reuse, exchange, or transfer.”²⁶ A draft plan released in 2011 describes the locations at which the water could be recaptured and the existing conveyance structures to be used in transporting that water to various users.²⁷ Gages at various points in the river would measure and record the recaptured flows, and adjustments could be made to account for losses and tributary inflows.²⁸

IV. NATURE OF POSSIBLE TAKINGS CLAIMS RELATED TO SAN JOAQUIN RIVER RESTORATION PROGRAM

In 2010, the owners of agricultural land on or in proximity to Reaches 4A and 4B²⁹ of the San Joaquin River (“Plaintiffs”) brought suit against the United States, alleging a taking of nearly thirteen thousand acres without just compensation.³⁰ Plaintiffs alleged numerous forms of physical and regulatory takings.³¹ However, this paper will focus on one particular type of alleged physical taking: the taking of seepage and flooding easements in connection with restoration of the San Joaquin River to its natural condition.³²

The Fifth Amendment to the United States Constitution states that private

²³ Press Release, U.S. Dep’t of the Interior et al., Agreement Signals Start to Historic San Joaquin River Restoration (Sept. 13, 2006), http://restoresjr.net/program_library/06-Settlement_Related/SJRS%20final%20News%20Release%20091206%20.pdf.

²⁴ *Legislation & Funding*, SAN JOAQUIN RIVER RESTORATION PROGRAM, <http://restoresjr.net/legislation/index.html> (last visited Nov. 24, 2014).

²⁵ *Background and History*, *supra* note 21.

²⁶ BUREAU OF RECLAMATION, U.S. DEP’T OF THE INTERIOR, DRAFT PLAN FOR THE RECIRCULATION, RECAPTURE, REUSE, EXCHANGE, OR TRANSFER OF INTERIM AND RESTORATION FLOWS 3-1 (Feb. 10, 2011).

²⁷ *Id.* at 2-2, 2-3, 3-2, 3-3.

²⁸ *Id.* at 4-1.

²⁹ See Figure 1 *infra* p. 54.

³⁰ Complaint for Just Compensation at 1, *Wolfsen Land & Cattle Co. v. United States*, No. 10-580 L (Fed. Cl. Aug. 26, 2010).

³¹ *Id.* at 16-23.

³² See *id.* at 19, 23.

compensate the land owner for the value of the flooded land.³⁶ Even if the taking is intermittent (e.g., flooding for two months of the year on an on-going basis), the government must pay for an easement to flood the land intermittently.³⁷ The U.S. Supreme Court recently held that government-induced flooding of property may constitute a taking even when the flooding was temporary (having occurred during a finite period) and will not reoccur.³⁸ A takings determination under those circumstances requires a fact-specific inquiry that weighs the property owner's "distinct investment-backed expectations," and the duration, foreseeability, and severity of the flooding.³⁹

In the context of the San Joaquin River Restoration Program, Plaintiffs claimed that increased water releases from Friant Dam caused water seepage and a higher water table in their surrounding farmland.⁴⁰ This, in turn, has raised salinity levels in the soil, reducing the agricultural productivity of the land.⁴¹ Plaintiffs alleged that, as a result, few, if any, crops could be grown within up to a mile of the restored river channel.⁴² Plaintiffs notably claimed a taking of the historic riverbed itself,⁴³ which had been dry and farmable, and is now subject to constant "flooding" by the United States.

As part of the San Joaquin River Restoration Program, the implementing agencies prepared detailed plans to study and mitigate potential environmental impacts from the river restoration process. The draft Physical Monitoring and Management Plan contains a chapter setting forth methods of monitoring and responding to seepage impacts caused by the release of interim and restoration flows.⁴⁴ Issues of concern would include rising groundwater and salinity levels affecting the root zone of crops and degradation of levees.⁴⁵ Wells will be installed to monitor groundwater levels in areas potentially vulnerable to seepage impacts.⁴⁶ Groundwater depth information will be used in conjunction with information about crops grown in the surrounding area (including their

³⁶ See, e.g., *United States v. Dickinson*, 331 U.S. 745, 750-51 (1947) (upholding inverse condemnation award where government had flooded the plaintiff's land by operation of its dam).

³⁷ See *id.*

³⁸ *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012).

³⁹ *Id.* at 522 (where periodic flooding of petitioner's property occurred during a six-year timeframe).

⁴⁰ Complaint for Just Compensation, *supra* note 30, at 18-19.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 23.

⁴⁴ BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, DRAFT PROGRAM ENVIRONMENTAL IMPACT STATEMENT/REPORT, APPENDIX D: PHYSICAL MONITORING AND MANAGEMENT PLAN, SEEPAGE MONITORING AND MANAGEMENT COMPONENT PLAN 3-1 (Apr. 2011).

⁴⁵ *Id.* at 3-9.

⁴⁶ *Id.*

maximum root depth) to ascertain when crops are at risk of being waterlogged.⁴⁷ The Bureau's responses may range from temporary reductions in releases from the dam and diversion of flows into bypass canals to structural modifications such as berms to protect levee stability or slurry walls in the river channel to minimize seepage.⁴⁸

Both structural and channel modifications are planned for Reach 4B of the river and the associated flood control bypass system.⁴⁹ The upstream segment of Reach 4B (Reach 4B1) has been largely devoid of active flow for decades (with the exception of agricultural runoff) since river flows have been diverted into the bypass system in this location.⁵⁰ Consequently, current channel capacity is unknown, but likely quite low.⁵¹ Channel capacity of the river will likely be increased in Reach 4B1 to allow for water conveyance of at least 4,500 cubic feet per second ("cfs") (unless at odds with restoration goal); bypass channels may be modified if needed for fish migration; headgates and control structures will be modified to facilitate fish passage and increased flows along both the river and bypass channels.⁵²

A 2011 technical memorandum observes that these projects may cause seepage impacts to adjacent landowners, potentially affecting the agricultural productivity of their lands.⁵³ The relatively high water table in proximity to Reach 4B⁵⁴ tends to support this conclusion. The memorandum notes that the "Lead Agencies are committed to addressing any material adverse impacts to third parties from groundwater seepage."⁵⁵

V. DOES THE FEDERAL GOVERNMENT HAVE A NAVIGATIONAL SERVITUDE ON THE SAN JOAQUIN RIVER THAT MAY IMMUNIZE IT FROM TAKINGS LIABILITY?

The United States' navigational servitude along navigable waterways is grounded in its Commerce Clause power to regulate U.S. waters in support of commerce.⁵⁶ The servitude is a background principle of property ownership: if the conditions giving rise to the servitude are met, the United States cannot be

⁴⁷ *Id.*

⁴⁸ *Id.* at 3-11, 3-12.

⁴⁹ BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, REACH 4B, EASTSIDE BYPASS, AND MARIPOSA BYPASS CHANNEL AND STRUCTURAL IMPROVEMENTS PROJECT: INITIAL ALTERNATIVES TECHNICAL MEMORANDUM 2-1 (erroneously labeled as 3-1) (Oct. 2011) [hereinafter TECHNICAL MEMORANDUM].

⁵⁰ *Id.* at 1-4.

⁵¹ *Id.* at 2-4.

⁵² *Id.* at 1-3.

⁵³ *Id.* at 2-10.

⁵⁴ *Id.* at 3-16.

⁵⁵ *Id.* at 2-10.

⁵⁶ *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1382 (Fed. Cir. 2000).

liable for a taking as long as it acts within the bounds of the servitude.⁵⁷ The navigational servitude exists on waterways that are navigable and protects government action intended to promote navigation,⁵⁸ subject to the limitation that the servitude does not extend beyond the ordinary high water mark of the waterway.⁵⁹

a. Is the San Joaquin River subject to the federal navigational servitude?

The navigational servitude does not exist along all navigable waterways. The Supreme Court has pointed to four factors that must be considered in making a navigability determination for servitude purposes: (1) the navigability of the water body in its natural state; (2) the ownership of the water body under state property law; (3) the use of private funds to make the water body navigable; and (4) government approval of private actions to make a private water body navigable.⁶⁰

i. Is the San Joaquin navigable in its natural state?

Navigability does not require ideal conditions for navigation; neither natural obstructions (e.g., boulders, rapids, waterfalls, etc.) nor seasonal non-navigability precludes a finding of navigability for purposes of the navigational servitude.⁶¹ Further, a river does not have to accommodate steamships to be navigable,⁶² as travel by canoe⁶³ or raft of lumber⁶⁴ may suffice. Once a river has been used for navigation, subsequent disuse of the river for navigational purposes does not change the river's navigable status.⁶⁵

Since the crucial question is a river's navigability in its natural state, one must refer to historical accounts (i.e., pre-Friant Dam) to determine the San Joaquin's navigability. One such account from the mid-1800s describes hundred-ton ships navigating approximately ninety miles inland from the river's mouth during spring and summer.⁶⁶ Another from the late 1800s suggests that small steamships could travel on the main stem of the river as far inland as Fresno.⁶⁷

The Plaintiffs' complaint specified that the land allegedly taken by the United

⁵⁷ *Mildenberger v. United States*, 91 Fed. Cl. 217, 247 (2010).

⁵⁸ *Id.*

⁵⁹ *Palm Beach Isles Assocs.*, 208 F.3d at 1382.

⁶⁰ *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979).

⁶¹ *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921).

⁶² *Id.* at 122-23.

⁶³ *Id.* at 117.

⁶⁴ *Id.* at 122.

⁶⁵ *Id.* at 123-24.

⁶⁶ A.A. WHIPPLE ET AL., *supra* note 8, at 325.

⁶⁷ J.M. HUTCHINGS, A TOURIST'S GUIDE TO THE YO-SEMITE VALLEY 30 (1871).

States is located along Reaches 4A and 4B of the San Joaquin.⁶⁸ Based on the aforementioned historical accounts, Plaintiffs' acreage, situated downstream of Fresno, was likely located along stretches of the river where large-scale commercial navigation occurred historically. Even small-scale commercial navigation has generally been found sufficient to establish navigability.⁶⁹ Furthermore, that Reaches 4A and 4B have been largely dry since construction of Friant Dam⁷⁰ in no way affects its navigable status since neither disuse⁷¹ nor changed conditions preventing use⁷² can eliminate the federal government's navigational servitude. As such, a court would almost certainly find Reaches 4A and 4B of the San Joaquin navigable.

ii. Do Plaintiffs have a protected property interest under California law?

In California, private ownership of land adjacent to non-tidal navigable waterways such as lakes and rivers generally extends from the upland areas to the low water mark.⁷³ The State retains ownership of the lands below that point.⁷⁴ Thus, the private landowner typically owns the land between the high and low water mark.⁷⁵

Title is not the sole determinant of a private party's property rights in navigable waterways, however. Under the public trust doctrine, the State holds all navigable waterways in trust for the public's benefit.⁷⁶ The public trust easement extends up to the high water mark.⁷⁷ Although the legislature can convey title to such lands to private parties, such conveyance, unless made to effectuate trust purposes, is presumed to be subject to the public trust.⁷⁸ Trust purposes include the public's right to use the property for navigation, fishing, bathing, recreation, and for the preservation of ecological and scenic resources.⁷⁹ Even when the State approves actions that harm public trust uses (e.g., diversion of large quantities of water), no vested right to continue such actions can ever be

⁶⁸ Complaint for Just Compensation, *supra* note 30, at 3. See Figure 1 *supra* p. 54.

⁶⁹ See, e.g., *Econ. Light & Power Co.*, 256 U.S. at 117 (holding river subject to servitude based on historic fur trade by canoe and "other boats of various kinds").

⁷⁰ See PITZER, *supra* note 15, at 3.

⁷¹ See *Allen Gun Club v. United States*, 180 Ct. Cl. 423, 429 (1967).

⁷² *Econ. Light & Power Co.*, 256 U.S. at 123.

⁷³ CAL. CIV. CODE § 830 (Deering 2014); *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 225-26 (1981).

⁷⁴ CAL. CIV. CODE § 670 (Deering 2014); *Lyon*, 29 Cal. 3d at 222. In contrast, the State generally owns below the ordinary high water mark in tidally influenced lands. CIV. § 670.

⁷⁵ *Lyon*, 29 Cal. 3d at 226.

⁷⁶ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980); *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 434-35 (1983).

⁷⁷ See *Lyon*, 29 Cal. 3d at 231.

⁷⁸ *City of Berkeley*, 26 Cal. 3d at 523-24.

⁷⁹ *Nat'l Audubon Soc'y*, 33 Cal. 3d at 434-35; *Lyon*, 29 Cal. 3d at 230-31.

acquired.⁸⁰ The State always retains the right to reconsider a prior course of action that has harmed public trust resources and instead pursue a strategy that gives greater weight to public trust interests.⁸¹

Here, Plaintiffs claimed to hold title to the riverbed, as well as the adjacent farmland.⁸² Although lower portions of the San Joaquin River are tidally influenced, Plaintiffs' land appears to be located along a segment of the river beyond tidal influence.⁸³ As such, a deed specifying the river as a property boundary would be interpreted as vesting title to all property upland of the low water mark.⁸⁴ Plaintiffs may thus hold title to the riverbed between the high and low water mark. But they would nonetheless own the land subject to the public trust easement unless the State's original conveyance of the land explicitly disclaimed that easement.⁸⁵

Plaintiffs may argue that federal and State action in constructing Friant Dam and allowing the San Joaquin to go dry converted the formerly navigable river into a non-navigable river, removing it from the State's public trust resources, but this argument will likely fail. Plaintiffs benefited from federal and State actions that harmed public trust uses. If an entity that diverts water can acquire no vested right to continue such diversions when harm to public trust resources results,⁸⁶ then a party that indirectly benefits from such diversions (e.g., through more productive farmland) can acquire no vested right to continued diversions either.

Here, the State gave scant consideration to environmental values when Friant Dam was constructed. As the State has an on-going obligation to weigh public trust interests against competing goals and can reprioritize its water allocation criteria at any time,⁸⁷ the State's decision to reverse course and pursue restoration of the San Joaquin River was entirely permissible under the public trust doctrine since it plainly promoted public trust uses (e.g., navigation, recreation, and ecological health).⁸⁸ Because Plaintiffs presumably hold title subject to the public trust easement, a court would likely find that Plaintiffs have

⁸⁰ *Nat'l Audubon Soc'y*, 33 Cal. 3d at 425-26, 437.

⁸¹ *Id.* at 447.

⁸² Complaint for Just Compensation, *supra* note 30, at 23.

⁸³ See REGIONAL CLIMATE CHANGE AND VARIABILITY: IMPACTS AND RESPONSES 34 (Matthias Ruth et al. eds., 2006) ("Vernalis is the furthest downstream point in the [San Joaquin River] without tidal influence."). Since Vernalis is downstream of the San Joaquin and Merced River confluence, which is downstream of Plaintiffs' property, Plaintiffs' property is likely not subject to tidal influence.

⁸⁴ See CAL. CIV. CODE § 830 (Deering 2014); *Lyon*, 29 Cal. 3d at 225-26.

⁸⁵ See *Lyon*, 29 Cal. 3d at 231.

⁸⁶ See *Nat'l Audubon Soc'y*, 33 Cal. 3d at 425-26, 437.

⁸⁷ *Id.* at 447.

⁸⁸ See *id.* at 440 ("Except for . . . rare instances . . . the grantee holds subject to the trust, and while he may assert a vested right to the servient estate . . . he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.").

no protected property interest in the riverbed that trumps the State's overriding right to further trust purposes.

iii. Did Plaintiffs invest substantial private resources in reliance on federal statements and actions?

The third and fourth factors—use of private funds, with government approval, to make a water body navigable—relate to the reliance interests of private parties. In *Kaiser Aetna v. United States*, a long-term lessee made costly improvements to a pond on its property to make it navigable—all with the approval of the Army Corps of Engineers.⁸⁹ The government later claimed that it held a navigational servitude over this newly created navigable waterway and sought to compel public access without compensating the lessee.⁹⁰ In holding for the lessee, the Court considered the latter's substantial investment in reliance on federal officials' statements and actions.⁹¹

Kaiser Aetna's facts are very different from those alleged in Plaintiffs' complaint. There, a long-term lessee invested large sums to transform a non-navigable pond on private property into a navigable waterway subject to federal oversight. Here, Plaintiffs may have made an investment by planting crops (and potentially installing irrigation systems) within and alongside the dewatered bed of a formerly navigable river.

However, in both cases, plaintiffs made investments in their land in reliance on the statements and actions of federal officials. Upon construction of Friant Dam and the subsequent sale of water rights to Central Valley irrigation districts or private companies, Plaintiffs may reasonably have concluded that the dam—one component of the massive Central Valley Project—would continue to be used as it had been for the seventy years following its construction, resulting in a permanently dry riverbed through their lands. In fact, Plaintiffs' reliance here may be more reasonable than the plaintiff's reliance in *Kaiser Aetna*; there, the reliance was based on mere statements made by federal officials whereas here, the reliance was based on massive federal investment in public infrastructure projects, sale of water rights, and longstanding federal policy.

Nevertheless, a key distinction lies in the *nature* of the action taken by each plaintiff. In *Kaiser Aetna*, the plaintiff improved a private pond to make it navigable, while Plaintiffs here used an existing, historically navigable riverbed for agricultural purposes. The directionality is of critical importance: private to public in the first case; public to private in the second.

The reliance consideration raised in *Kaiser Aetna* is inextricably bound up with the first two factors referenced above—navigability of the water body in its

⁸⁹ *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1979).

⁹⁰ *Id.* at 168-69.

⁹¹ *Id.* at 179-80.

natural state and legally recognized state property interests. While Plaintiffs' reliance may have been reasonable, their subsequent investment in the land did not result in the loss of any of their original property rights. Although a court might determine that Plaintiffs suffered some economic loss in reliance on federal agency action, it would not likely conclude that such reliance was so detrimental with regard to their property interests as to affect any judicial determination regarding the navigational servitude's applicability.

Based on the totality of the circumstances, a court would likely conclude that Reaches 4A and 4B of the San Joaquin River are subject to the federal navigational servitude.

b. Is the federal action intended to promote navigation on the San Joaquin River?

Federal action within a navigable waterway to promote navigability typically falls within the scope of the United States' navigational servitude.⁹² A qualifying action may serve purposes other than navigation as well.⁹³ In fact, even if the improvement of navigability is merely an incidental purpose of a federal project,⁹⁴ the action may still qualify for the servitude's protection as long as it is not "wholly unrelated" to navigation.⁹⁵ The navigational purpose behind a project is determined by looking at the project as a whole; there is no requirement that each component of a project individually improve navigation.⁹⁶ Furthermore, whether a particular project will improve navigation is a decision reserved to the judgment of Congress.⁹⁷ Courts presume Congress intended to exercise its power under the servitude in the absence of a clear legislative intent to the contrary.⁹⁸

In deciding whether the federal actions authorized through passage of the San Joaquin River Restoration Settlement Act of 2009 are covered by the navigational servitude, one must examine the language of both the 2009 Act and the legislation that originally authorized construction of the entire Central Valley Project—the Rivers and Harbors Acts of 1937 and 1940. In both the 1937 and 1940 Acts, Congress stated: "[T]he entire Central Valley project. . . is. . . declared to be for the purposes of improving navigation, regulating the flow of the San

⁹² *Owen v. United States*, 851 F.2d 1404, 1408 (Fed. Cir. 1988).

⁹³ *Mildenberger v. United States*, 91 Fed. Cl. 217, 247 (2010).

⁹⁴ *See, e.g., United States v. Twin City Power Co.*, 350 U.S. 222, 223 (1956) (holding servitude applicable where legislation declared project's primary purpose was power generation, with incidental improvements to navigation).

⁹⁵ *Mildenberger*, 91 Fed. Cl. at 247.

⁹⁶ *See, e.g., Coastal Petroleum Co. v. United States*, 207 Ct. Cl. 701, 711-12 (1975).

⁹⁷ *Owen*, 851 F.2d at 1408 (quoting *United States v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. 592, 596-97 (1941)); *Mildenberger*, 91 Fed. Cl. at 248.

⁹⁸ *Coastal Petroleum Co.*, 207 Ct. Cl. at 709.

Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof . . .”⁹⁹ The 1937 Act further stated that “the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control. . .”¹⁰⁰

The 2009 Act could be viewed as one component of the much larger Central Valley Project because the Act’s passage constituted congressional approval of the settlement of environmental claims arising out of the Central Valley project’s operational impacts. Since the legislation that authorized the Central Valley Project unequivocally proclaimed Congress’ intent to improve navigation, the fact that the 2009 Act’s primary purpose is habitat restoration may not preclude the applicability of the navigational servitude to that smaller component project.

The 2009 Act does not explicitly announce a navigational purpose for the river restoration project.¹⁰¹ It also contains a number of provisions to minimize potential impacts on affected property owners; these include a prohibition on acquiring water rights by eminent domain¹⁰² and a requirement to reduce interim flows if water seepage is materially harming adjacent property interests.¹⁰³ But nowhere in the statute does Congress state its intent to forego its rights under the federal navigational servitude.¹⁰⁴

A comparison of the facts alleged by Plaintiffs here with the facts in *United States v. Gerlach Live Stock Co.* is instructive.¹⁰⁵ In *Gerlach*, the plaintiff sought compensation for its loss of riparian water rights in the San Joaquin River following construction of Friant Dam.¹⁰⁶ Because Congress had directed the Bureau of Reclamation to proceed under federal reclamation law (requiring federal action to conform to state law), the Court held that Congress had expressed its intent to honor State-created private property rights.¹⁰⁷ Thus, the United States had to compensate the plaintiff for its interference with the riparian water rights he had acquired under State law.¹⁰⁸

The 2009 Act contains similar provisions requiring the Secretary of the Interior to execute the statute in accordance with federal reclamation law. Unlike in *Gerlach*, however, Plaintiffs here have no legally cognizable property right to

⁹⁹ Rivers and Harbors Act of 1937, Pub. L. No. 75-392, § 2, 50 Stat. 844, 850 (1937); Rivers and Harbors Act of 1940, Pub. L. No. 76-868, § 2, 54 Stat. 1198, 1199-1200 (1940).

¹⁰⁰ § 2, 50 Stat. at 850.

¹⁰¹ See San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, §§ 10001-11, 123 Stat. 1349-64 (2009).

¹⁰² *Id.* § 10004(a)(3).

¹⁰³ *Id.* § 10004(h)(3).

¹⁰⁴ *Id.* §§ 10001-11.

¹⁰⁵ See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

¹⁰⁶ *Id.* at 729-30.

¹⁰⁷ *Id.* at 734.

¹⁰⁸ *Id.* at 754-55.

exclude water from the historic river channel. As discussed previously, even if they hold legal title to the riverbed, the California public trust doctrine gives them no right of control over the waters flowing naturally within that channel. As such, a court could hold that Congress did not surrender its rights under the navigational servitude in enacting the San Joaquin River Restoration Settlement Act.

c. Is the federal action restricted to the riverbed's ordinary high water mark?

The federal navigational servitude only shields the United States from takings liability for actions it undertakes within the river channel up to the ordinary high water mark.¹⁰⁹ It applies across the whole channel horizontally, including portions near the river banks that may be non-navigable.¹¹⁰ Any impacts affecting private property outside the bounds of the riverbed may result in takings liability.¹¹¹ Federal projects that raise the level of a navigable waterway above the ordinary high water mark, including dams and reservoirs, causing either flooding of or seepage into adjacent lands, are generally seen as falling outside the scope of the navigational servitude.¹¹²

Here, it is immediately apparent that Plaintiffs' "farmland" situated in the riverbed falls within the geographic bounds of the navigational servitude. But a factual determination regarding the precise location of the riverbed is not always as straightforward as it would seem. Here, the river channel in Reach 4B1 is poorly defined because it is no longer used to convey active flows,¹¹³ which have been rerouted to the flood bypass channel system for many decades.¹¹⁴ As a result, sedimentation and dense vegetation have overtaken portions of the unused riverbed,¹¹⁵ likely further complicating efforts at identifying its historical bounds. But the privately built levees adjacent to the river channel¹¹⁶ should demarcate the channel's general course, thus facilitating a determination as to the horizontal contours of the riverbed along this stretch. Ascertaining the ordinary high water mark of the river in its natural state along Reach 4B1 will likely prove far more difficult in the absence of historical data, including information about the original channel depth. Despite these practical difficulties, the theoretical applicability of the navigational servitude concept is indisputable in this context.

¹⁰⁹ *Mildenberger v. United States*, 91 Fed. Cl. 217, 249 (2010).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See, e.g., United States v. Dickinson*, 331 U.S. 745, 750-51 (1947) (upholding inverse condemnation award where government had flooded the plaintiff's land by operation of its dam).

¹¹³ TECHNICAL MEMORANDUM, *supra* note 49, at 3-1.

¹¹⁴ *Id.* at 3-19.

¹¹⁵ *Id.* at 2-4.

¹¹⁶ *Id.* at 3-15 (describing private levees lining Reach 4B1 with design capacity of 1,500 cfs).

The concept's applicability with regard to the seepage and ground water impacts to Plaintiffs' riparian lands requires more nuanced thinking, however. At first glance, it would appear that these impacts do not fall under the servitude's protection since these impacts happen outside of the riverbed. Prior cases related to seepage and water table impacts on riparian farmland are distinguishable from this case though. Those cases have consistently involved federal actions that altered the natural flows of waterways—generally by constructing dams and/or reservoirs and raising water levels beyond the ordinary high water mark. Here, the initial federal action (i.e., construction of Friant Dam and its related reservoir) resulted in the cessation of water flows through Plaintiffs' property. The restoration activities authorized by the 2009 Act are intended merely to restore flows to no more than natural levels.

Logically, the seepage and ground water impacts to adjacent lands resulting from a river flowing in its natural state cannot be deemed outside the geographic scope of the servitude. Otherwise, any time a federal project temporarily lowered water levels to below natural levels, a landowner could argue that he has acquired a property interest in the resultant lower water tables in his riparian lands, which may in fact be more productive and valuable as a consequence. This conclusion is at odds with the purpose of the navigational servitude: to improve the navigability of naturally navigable waterways to facilitate transportation and commercial exchange.

In Plaintiffs' view, the United States would be estopped, absent compensation, from restoring waterways to promote navigation under its servitude merely because historically normal amounts of seepage might return the agricultural productivity of adjacent lands to original levels, and these effects occur outside the riverbed. As a result, Congress would be prevented from experimenting with different approaches to river management because, by reducing water flows on a temporary basis, it would automatically lose its power to restore those flows in the interest of navigation. This limiting interpretation of the United States' navigational servitude over its navigable waters conflicts with the view expressed repeatedly by courts that it is a dominant servitude.¹¹⁷

Because seepage impacts to neighboring property result from the restoration of no more than original flow levels to the San Joaquin River and the federal action itself is restricted to the riverbed, a court should conclude that such restoration activities fall within the geographic scope of the navigational servitude's implied seepage easement. It appears, however, that this would be a case of first impression that would require the court to interpret the existing navigational servitude precedent more broadly, relying heavily on the servitude's underlying purposes. As such, the court's ultimate ruling in such a

¹¹⁷ See, e.g., *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); *Marks v. United States*, 34 Fed. Cl. 387, 403 (1995); *Coastal Petroleum Co. v. United States*, 207 Ct. Cl. 701, 707-08 (1975).

case would be uncertain. It is worth noting here that only the level of seepage resulting from water flowing up to the historical (i.e., pre-dam) ordinary high water mark in the natural river channel should be viewed as encompassed within the navigational servitude's implied seepage easement; any additional seepage caused by flows exceeding the ordinary high water mark would qualify as a compensable physical taking under the Fifth Amendment.

VI. CONCLUSION

The San Joaquin River Restoration Program presents an unparalleled opportunity to restore the ecological health of California's second most important river system. The numerous benefits from the project include: restoration of critical habitat for the endangered Chinook salmon, other aquatic species, and waterfowl; improvements in the quality and quantity of water entering the Central Delta, thereby promoting greater ecosystem health in the Delta; and the creation of outdoor recreational opportunities for the public.

Federal funds for restoration activities are limited and should be aimed at the accomplishment of the project's specific objectives. Unnecessary payment of compensation to neighboring land owners could jeopardize the ultimate success of the project by diverting restoration funds to private parties. Invocation of the United States' navigational servitude, and what this paper has termed the servitude's implied seepage easement, is one defense the government should pursue in any inverse condemnation proceedings.

Demonstrating that project activities meet the servitude's requirements may be a challenge because of the novelty of this type of river restoration project. Nevertheless, a court would likely conclude that the San Joaquin is a navigable waterway in Reaches 4A and 4B, despite its dryness over a seventy-year period, based on both the historical flow conditions and commercial usage of the river and Plaintiffs' lack of a legally cognizable right to exclude water flows from the riverbed crossing their land.

It is less clear whether a court would find that the federal action has a navigational purpose. If a court views this project as a small component of a much larger project—the Central Valley Project—the court could look to the expressly stated legislative intent to improve navigation in the Rivers and Harbors Acts of 1937 and 1940. Given that the San Joaquin River Restoration Settlement Act of 2009 was enacted in response to litigation generated by the environmental effects of the Central Valley Project, and was not conceived as a stand-alone project, that approach would be both reasonable and consistent with precedent.

However, should a court choose to look solely to the legislative intent of the 2009 Act, a court may conclude the project is unrelated to navigation since the Act expressly notes the objective of critical habitat restoration and does not mention river navigability as one of its objectives. Furthermore, there is

language in the statute conferring various protections on private landowners; these include a prohibition on taking water rights by eminent domain, a requirement to reduce interim flows if water seepage causes material damage to private property, and an authorization for the Secretary of the Interior to purchase private property needed to effectuate the settlement. A court could interpret this language as Congress choosing not to exercise its rights under the servitude, as in *Gerlach*. However, it is noteworthy that Congress does not explicitly surrender these rights in the 2009 Act.

Lastly, it is uncertain if a court would hold that the restoration of natural water flows to the river falls within the geographic scope of the federal navigational servitude, given the seepage impacts to adjacent private property. This paper has argued that a court should view these impacts as encompassed within the servitude's implied seepage easement. This conclusion can only be justified by distinguishing previous cases where courts have found seepage impacts to be outside the servitude's scope. The servitude has essentially no meaning if it does not allow the government to adjust flow levels within a river channel in the interest of navigation up to the ordinary high water mark.

Although it may seem unfair that landowners who relied on the absence of flowing water to expand their farming operations into the riverbed are being financially impacted by restoration activities, many of these same landowners (or their predecessors in interest) received compensation from the United States for the loss of their riparian rights following construction of Friant Dam in the early 1940s. It would be inequitable for owners to be compensated first for the loss of water in the river and then for the return of water to the river. When the United States acquired these farmers' water rights (or provided them with access to reclamation water), it did not guarantee it would not increase water releases from the dam in the future. Furthermore, the benefit of additional land for farming and greater productivity gained by the farmers from cessation of the river flows was never offset against the loss of their riparian water rights, so it is not inequitable to refuse compensation for the specified seepage impacts resulting from the river restoration project.