IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT,	)	
	)	
	)	No. 05-168L
Plaintiff,	)	
	)	
v.	)	
	)	Judge John P. Wiese
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Natural Resource Defense Council (NRDC) respectfully submits this memorandum amicus curiae urging the Court to grant the United States' motion for partial summary judgment on the issue of whether the alleged taking should be analyzed as a regulatory restriction on the use of private property or as a physical occupation or appropriation of private property.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should conclude that this takings claim must be evaluated as a traditional regulatory restriction on the use of private property. Enforcement of the Endangered Species Act (ESA) restricted the quantity of water plaintiff could divert from the Ventura River, limiting plaintiff's use of its water right. This is a straightforward regulatory restriction on the use of property and should be analyzed as such. Indeed, as we explain below, given the limited nature of private rights in water, a regulatory takings analysis is especially appropriate in this type of case.

The Court's resolution of the United States' motion will define what degree of economic impact plaintiff would have to prove to establish a taking. In a takings case based on a regulatory use restriction, the claimant's property "must be viewed in its entirety." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002). Here, almost all of plaintiff's property remains unaffected by the ESA, which has prevented the diversion of only a small fraction of the total volume of water encompassed by plaintiff's water right. Therefore, plaintiff's claim will almost certainly fail under the traditional regulatory takings analysis.

On the other hand, when the government physically invades or appropriates a property interest, it has a duty to pay compensation, without regard to whether the burden

is imposed on the entire parcel. Id. at 322. Here, plaintiff indiscriminately blends the physical invasion and direct appropriation doctrines in an effort to justify the application of a per se rule. If the Court resolves this motion in favor of plaintiff, and decides to apply a per se rule, the plaintiff could more easily establish a taking despite the relatively modest burden on its water right. Nonetheless, even if this court were to find the physical occupation doctrine or direct appropriation doctrine applicable, in order to prevail in this lawsuit, plaintiff would still need to establish that the ESA restrictions impaired a protected property right. In NRDC's view, plaintiff could not make this showing in light of applicable background principles of California law. Of course, the Court need not reach this issue in resolving this motion, which focuses on the takings liability standard that should apply in this case.

The first section of this memorandum discusses the reasons that plaintiff's claim should be analyzed as a traditional regulatory restriction on the use of private property. To clarify the terms of debate, NRDC first describes the three basic types of takings: direct appropriations, physical occupations or invasions, and regulatory restrictions on the use of property. NRDC then explains why plaintiff's allegations cannot be shoehorned into either the direct appropriation or physical occupation/invasion categories, and instead fit into the category of regulatory use restrictions.

The second section of the memorandum responds to plaintiff's various arguments that its claim should be analyzed as a type of per se taking.[1] First, NRDC addresses plaintiff's strawman argument that the government incorrectly contends that all claims

[1] As noted, Plaintiff does not clearly identify the theory of per se taking it asks this Court to apply. Instead, Plaintiff's brief relies on an amalgam of the direct appropriation and physical invasion doctrines.

that do not involve a physical occupation must be resolved using the multi-factor Penn Central analysis. The government did not make this argument, nowhere denying the existence of the per se takings rules that govern direct appropriations and regulations that make property valueless. However, in any case, these additional per se rules are of no avail to plaintiff because neither applies to this case.

Second, NRDC refutes plaintiff's argument that all or virtually all cases involving property that is not land are controlled by per se tests. While the nature and scope of a property interest is relevant to the merits of a takings claim, it does not dictate the type of takings analysis that should apply. The traditional regulatory takings tests for restrictions on use of property govern all types of property subject to use restrictions. Plaintiff's argument is inconsistent with numerous Supreme Court and Federal Circuit precedents applying the traditional regulatory takings tests in cases that do not involve real property.

Finally, NRDC addresses plaintiff's argument that it should be deemed to have suffered a physical occupation because the ESA restrictions allegedly destroyed all of the use and value of its property interest in its water right. The premise of this argument is mistaken because, in reality, the ESA has imposed only a very modest restriction on plaintiff's ability to divert water. The only conceivable way one could conclude that the ESA effected a "total taking" in this case would be to ignore the entire property rule and assume that the property taken was whatever amount of water plaintiff was barred from diverting. But that assumption would beg the question at issue: whether or not plaintiff's allegations can support a per se takings claim. This circular reasoning cannot support plaintiff's argument for per se analysis. Furthermore, as a legal matter, plaintiff is

mistaken in thinking that a regulation that eliminates all use or value of private property necessarily constitutes a physical occupation.

The third section of the memorandum discusses the specific judicial decisions plaintiff relies upon in its attempt to justify the use of per se takings analysis. Most of the cases cited by plaintiff are readily distinguishable, or quite irrelevant. Moreover, only a handful of courts have squarely addressed the particular issue raised by this motion, and of those most have concluded that regulatory restrictions on the use of water should be analyzed using traditional regulatory takings analysis. See Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006); People v. Murrison, 124 Cal. Rptr. 2d 68, 78 (Cal. Ct. App. 2002). The notable exception is this Court's decision in Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001). NRDC urges the Court to reconsider that ruling in light of the U.S. Supreme Court's subsequent decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), which provides important new guidance on the scope of the per se takings test for permanent physical occupations of private property.[2]

[2] This memorandum amicus curiae does not address plaintiff's arguments, which we believe are largely frivolous, about why a trial should be held to resolve the legal question of what liability standard should apply in this case. NRDC understands that the United States intends to address those arguments in its reply memorandum.

ARGUMENT

I. THE COURT SHOULD ANALYZE PLAINTIFF'S ALLEGATIONS USING THE TRADITIONAL, DEFERENTIAL BALANCING TEST FOR REGULATORY RESTRICTIONS ON THE USE OF PRIVATE PROPERTY, NOT A PER SE TEST.

A. The Alternative Categories of "Takings" in Modern Takings Doctrine.

To help clarify the issues discussed in this memorandum, it will be useful to lay out the different types of "takings" that have been recognized by the U.S. Supreme Court.

The first category of takings – often overlooked because its application is generally so straightforward – is so-called "direct appropriations." This type of taking occurs when the government exercises its authority to obtain ownership and/or possession of private property and either dedicates the property to its own purposes or transfers the property to some third party. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (2003) (referring to "a 'direct appropriation' of property" as a traditionally recognized type of a taking); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (referring to "a direct government appropriation" as "a paradigmatic taking requiring just compensation"). One example of an appropriation of private property is the kind of condemnation at issue in Kelo v. City of New London, 545 U.S. 469 (2005). Another example is provided by the case of United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951), in which there was an "actual taking of possession and control" of a coal mine by the government. See also Brown v. Wash. Legal Found., 538 U.S. 216 (2003) (assuming for the sake of argument that government-mandated transfer of ownership of interest earned in lawyer trust accounts from the clients to a non-profit foundation effected a taking). While there may be a question about whether an appropriation serves a "public use," see Kelo, supra, or whether the property has been appropriated "without just

compensation," see Brown, supra, there will generally be no question that a direct appropriation is actually a taking.

The second type of taking involves physical occupations or invasions of private property. This type of taking typically occurs as a result of the government, or a third party under the authority of the government, entering and occupying private property. The Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), cited construction of a dam that results in flooding of private land, id. at 427, and the installation of facilities such as "telegraph and telephone lines, rails, and underground pipes or wires," id. at 430, as classic examples of physical occupation takings. In Loretto itself, the Court ruled that a law requiring a property owner to allow a cable television company to attach equipment to her building effected a taking under a physical occupation theory. Id. at 438-39. Physical occupations represent a taking regardless of whether the occupation affects the entirety or only a portion of the owner's property. Tahoe-Sierra, 535 U.S. at 322. In this takings category, a per se, or essentially automatic, liability standard applies.

The per se rule for physical occupations applies in only a narrow, well-defined set of cases. As the Supreme Court explained in Tahoe-Sierra, id. at 324, physical appropriations subject to the per se rule "are relatively rare" and "easily identified." See also Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002) ("The holding of Loretto is quite narrow."). This narrow scope is explained by the "unique burden" on property rights the rule is designed to address. Lingle, 544 U.S. at 539. As the Court stated in Loretto, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." 458 U.S. at 436; see also id. at 435

(noting that a permanent physical occupation is "perhaps the most serious form of invasion of an owner's property interests"). Because the rule is designed to deal with a special kind of injury to property rights, it is necessarily confined to cases actually involving this special type of injury. The Supreme Court has also explained that the per se rule for physical occupations must be narrowly confined to avoid imposing ruinous liabilities on government acting in the public interest. As the Court said in Tahoe-Sierra, "Land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford." 535 U.S. at 324. The Supreme Court, in addition, has established an important distinction between permanent physical occupations and so-called temporary invasions. While a permanent physical occupation is subject to per se analysis, a temporary invasion must be evaluated under Penn Central's multi-factor test. Loretto, 458 U.S. at 428; see also Boise Cascade, supra (rejecting per se physical occupation takings claim based on inspections of private property conducted by U.S. Fish and Wildlife Service officials).

The third category of takings involves restrictions on the use of private property that so burden the owner's ability to use the property that they require payment under the Takings Clause. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). This so-called regulatory takings doctrine is reserved for "extreme circumstances," United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985), where the restriction is so severe that it is "functionally equivalent" to a classic taking involving a direct appropriation or physical occupation. Lingle, 544 U.S. at 539. The doctrine governing regulatory use restrictions is divided between Lucas takings, in which the

regulatory restriction renders property economically worthless, and Penn Central takings, in which the regulatory restriction severely burdens the property but stops short of destroying all of its economic value. The rare use restriction that falls into the Lucas category is a per se taking. In a Penn Central case, the analysis is more complicated, focusing on different factors, including the magnitude of the economic burden imposed by the government action, the character of the government action, and the degree to which the action interferes with the owner's reasonable, investment-backed expectations. See Tahoe-Sierra, 535 U.S. at 315 n.10. Under both Lucas and Penn Central analyses, the impact of the regulation must be evaluated in relation to the entirety of the property. See Tahoe-Sierra, 535 U.S. at 327; see also Seiber v. United States, 364 F.3d 1356, 1368 (Fed. Cir. 2004) (noting that whether a government regulation constitutes a total Lucas taking must be evaluated in light of the entire property).[3]

B. Plaintiff's Allegations Present a Traditional Regulatory Takings Claim.

It is plain that plaintiff's allegations cannot establish a direct appropriation or a physical occupation, but instead present, at most, a potential regulatory taking. NRDC observes, in addition, that because the ESA has imposed only a modest restriction on the "entirety" of plaintiff's property interest in water, plaintiff's regulatory takings claim should ultimately fail.[4]

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[3] An additional category of takings with no relevance to this case is represented by so-called regulatory exactions. See Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Exactions are conditions attached to permits which, if imposed unilaterally, would result in per se takings, but which the owner can avoid by declining the permit. The Court has said that exactions must be reviewed using an intermediate standard of scrutiny. This case does not involve a regulatory exaction.

[4] On the other hand, even if the plaintiff prevailed on this motion and the Court ruled that the claim should be analyzed under a per se physical occupation or direct

Plaintiff's allegations do not present a direct appropriation claim because it does not assert that the government has obtained ownership or possession of plaintiff's water interest and then converted the property to some governmental use or transferred the property to some other private person for its use. Instead, plaintiff is alleging that, as a result of the ESA, the government has directed plaintiff to leave water in the river that it otherwise would have diverted for water supply purposes. This type of negative restriction on water use is wholly unlike the outright condemnation of Mrs. Kelo's property, Kelo, supra, a governmental occupation and operation of a private factory, Pewee, supra, or mandatory transfer of private funds from the owners to a non-profit foundation, Brown, supra.

It might be contended that the ESA appropriated private property in the sense that the regulatory restriction took a stick from the proverbial bundle of rights belonging to plaintiff and in effect devoted that stick to some larger public purpose. But this expansive definition of appropriation would obliterate the category of regulatory takings and convert every regulatory restriction into a per se taking. The Supreme Court has clearly and unequivocally rejected such an extreme position, as discussed above. To

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appropriation theory, plaintiff's claim should still fail. Regardless of what liability test is applied, in order to prevail on its claim, plaintiff would have to overcome the hurdle of demonstrating that it possesses a vested property right to exploit its water right under the circumstances of this case. In NRDC's view, the California public trust doctrine and other background principles of state law would preclude plaintiff from claiming a property right to exploit its water right in a fashion that harms public fishery resources. See John D. Echeverria, Why Tulare Lake Was Incorrectly Decided, a paper presented to American Bar Association, Section on Energy, Environment and Resources (Sept. 2005), available at http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_ Law_TulareLakeIncorrect.pdf; see also Andrew H. Sawyer, Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust, 50 Okla. L. Rev. 311 (1997) (discussing background principles of California law applicable in takings litigation).

preserve appropriations as a distinct species of takings, and to avoid converting every government action impinging on property rights into a taking, appropriations must be reserved for cases in which the government actually acquires ownership or possession of private property and converts it to some new use.

There is also no physical invasion or occupation in this case. The ESA restriction simply prevented plaintiff from diverting some amount of water for irrigation and other purposes. This negative prohibition caused no occupation or invasion of the water. As the United States has cogently explained (U.S. Mem. in Support of Summary Judgment at 19-20), this case is, in substance, no different from recent Federal Circuit cases involving ESA restrictions on logging activity on private lands. In those cases the Court rejected plaintiffs' efforts to shoehorn their claims into the physical occupation category. See Boise Cascade, supra; Seiber, supra; see also Stearns Co. v. United States, 396 F.3d 1354 (Fed. Cir. 2005) (distinguishing between regulatory use restrictions and physical occupations).

There is a second, independent, and common sense reason why plaintiff's allegations could not establish a per se physical-occupation taking: because plaintiff has merely a usufructury interest in its water rights, its property is literally incapable of being "physically occupied." Under California law, actual ownership of the water in the state's rivers and streams lies in the people; "[A]ll water within the State . . . is the property of the people of the State." Cal. Water Code § 102. Thus, a water right holder does not own actual molecules of water, but rather a priority, relative to other water rights holders, to the use of a certain quantity of water at a certain location and for a certain purpose. See Eddy v. Simpson, 3 Cal. 249 (1853). A mere use right might be impaired by

regulation, possibly even destroyed, but it cannot be occupied. For this independent reason, the physical occupation theory of takings liability has no relevance in this case.[5]

Finally, the category of takings that is potentially relevant in this case involves regulatory restrictions on the use of property. Although the government has not appropriated plaintiff's property, nor physically occupied it, the government's enforcement of the ESA has restricted plaintiff's ability to use its water right. By limiting plaintiff's diversion of water, the government has regulated plaintiff just as it regulated the property owners in Seiber and Boise Cascade by requiring that certain trees be left standing. As discussed above, a regulatory use restriction can raise a per se claim under Lucas, if the regulation renders the property completely valueless, or a claim under the multi-factor Penn Central test, if the burden imposed by the regulation is less than a complete obliteration of value. While the Court need not decide the question for the purpose of resolving this motion, the de minimis burden on plaintiff's water rights imposed by the ESA is insufficient to support a per se claim under Lucas or even a Penn Central claim.

[5] The irrelevance of physical occupation takings analysis in the context of water rights is further confirmed by the manner in which water rights are generally administered in the western United States. A water right assigns a water right holder a priority, relative to other water right holders, to "call" for the delivery of a certain quantity of water. But in the event a water right holder decides not to make a call for water in any particular year, it cannot block delivery of the water to the next water right holder in the chain of priority. In this respect, water is entirely different from land. A landowner may exclude others from his property even if he chooses not to use it. A water right holder has no similar independent right to exclude others from exploiting water he is not actually using. Physical occupation implies the ability to exclude another's physical presence; it is incongruous to think of anyone, including government, physically occupying a water right. See John Leshy, A Conversation about Takings and Water Rights, 83 Tex. L. Rev. 1985, 2009-15 (2005).

II. PLAINTIFF'S ARGUMENTS DO NOT JUSTIFY THE USE OF A PER SE TAKINGS ANALYSIS.

Without regard to any specific, established category of takings liability, plaintiff makes a hodgepodge of arguments in support of its position that the allegations in its complaint present a potential per se taking. Upon analysis, none of these arguments, to the extent they are even relevant to this case, succeed.

1. Plaintiff assails the United States (Plaintiff's Mem. in Opposition (Op.) at 17) for supposedly contending that a takings claim, if it is not based on an actual physical occupation, must be analyzed under the multi-factor Penn Central test. This argument attacks a strawman because, so far as NRDC can discern, the United States does not actually advance this argument. The United States does contend that plaintiff's physical occupation theory must be rejected as a matter of law and that based on the modest nature of the restrictions at issue, any potential claim should be resolved as a regulatory taking under Penn Central. But that is quite different from the categorical argument that plaintiff ascribes to the United States.

It is true that the proposition that a takings claim either rests on a physical occupation or is governed by Penn Central is plainly mistaken – but this fact does not help plaintiff in this case. A government regulation that does not constitute a physical occupation may be subject to a per se takings test if the regulation makes the property valueless, triggering the Lucas test. A government action may also trigger per se review if it amounts to a direct appropriation. This case, however, involves neither a Lucas taking nor a direct appropriation, making this line of argument advanced by plaintiff completely beside the point.

2. After (falsely) accusing plaintiff of taking the extreme position that every takings case not involving a physical occupation is governed by Penn Central, (op. at 1) plaintiff asserts the even more extreme position that the tests applicable in takings cases involving land never (or almost never) apply in cases involving property other than land. Plaintiff further contends that the appropriate test in any takings case is determined by the type of property involved, and that all or virtually all cases involving property other than real property are governed by a per se test. According to plaintiff's logic, because taking claims involving property other than land are generally governed by per se tests, and water is obviously not land, then a takings claim involving water must be resolved by a per se test. There is no merit to this argument.

It is, of course, correct that the nature and scope of property may influence the outcome of a takings analysis; for example, as discussed above, the fact that a water right represents a mere usufructury right precludes any claim that a regulatory restriction affecting it can amount to a physical occupation. But plaintiff's theory that the applicable regulatory test is necessarily determined by the type of property at issue, and the corollary that cases involving property other than real property are generally governed by per se rules, is flat wrong.

Plaintiff's argument attempts to turn the Supreme Court's Lucas ruling on its head. In that case, the Court established a categorical, per se takings rule for regulations that render land valueless. The Court justified this rule for land by referring to what it called the "historical compact recorded in the Takings Clause that has become part of our constitutional culture." Lucas, 505 U.S. at 1028. But the Court was careful to note that the same rule does not necessarily apply to personal property, stating that "in the case of

personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." Id. at 1027-28. By suggesting that real property interests should have less, rather than more, constitutional protection than other types of property, plaintiff directly contradicts Lucas.

Contrary to plaintiff's theory, the Supreme Court has repeatedly recognized that the tests for regulatory takings, although originally articulated in land use cases, also apply to other types of property. Thus, the Court has repeatedly applied the Penn Central test in cases that involve property other than land. See, e g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (applying the Penn Central test in a case involving a mineral interest); Andrus v. Allard, 444 U.S. 51 (1979) (applying Penn Central analysis to evaluate whether prohibition on commercial sale of bird feathers effected a taking); see also Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (plurality opinion) (applying Penn Central analysis to determine whether federal statute requiring companies to fund health benefits of retired coal workers effected a taking); cf. United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) (expressly declining to apply a per se analysis to a taking claim based on the fee assessed by government against awards made by Iran Claims Tribunal);. By the same token, courts have recognized that the Lucas test is not necessarily limited to real property cases. See Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) (finding that post-Watergate legislation effected a per se taking of former President Nixon's presidential papers); Innovair Aviation, Ltd. v. United States, 72 Fed. Cl. 415, 423 (2006) (finding a taking of technology licensing agreement and

noting that the court "does not see any reason to make a distinction between real and personal property in determining whether to apply per se rules").

Plaintiff cites a handful of cases to support its sweeping argument that non-real property cases are generally governed by per se rules, but those cases do not actually support this position. For example, plaintiff cites Hodel v. Irving, 481 U.S. 704, 716 (1987), in which the Supreme Court struck down, based on the Takings Clause, congressional legislation designed to remedy the fractionation of Indian land ownership by restricting Indians' right to devise real property. See also Babbitt v. Youpee, 519 U.S. 234 (1997) (reaching the same result in a challenge to a slightly modified statute). Contrary to plaintiff's interpretation, the Court in Hodel did not apply a per se rule. Rather the Court explicitly invoked and applied the traditional Penn Central analysis. Explicitly referring to two of the Penn Central factors, the Court placed particular weight on the "character" of the legislation as an impingement on traditional rights to devise property, 481 U.S. at 716-18, and also emphasized the severity of the burden imposed by the regulation. Id. at 716 (describing the legislation as "amount[ing] to virtually the abrogation" of the right to devise property); see also Babbitt, 519 U.S. at 244 (concluding that the legislation violated the Takings Clause because it "severely" impaired the right to devise property).

Lastly, plaintiff cites Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), as another example of a case in which the Supreme Court supposedly applied a per se takings analysis. But a straightforward reading of the opinion indicates that the Court once again applied the Penn Central test. While the Court concluded that the force of the

expectation factor was "so overwhelming" that it disposed of the takings question, this still represents an application of Penn Central.[6]

3. Plaintiff extends its argument that the rules applicable in land cases do not apply to other types of property to argue that the entire property rule does not apply in takings cases involving water rights. To support its position, plaintiff quotes (Op. at 19) the statement in Tahoe-Sierra, "An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest," 535 U.S. at 331-32, and then asserts: "Obviously when water is the property at issue one cannot think in terms of metes and bounds, as water is always flowing and does not stay in a fixed location." But, in fact, the Supreme Court and the Federal Circuit have had no difficulty applying the entire property rule where there are no "metes and bounds." See, e.g., Andrus v. Allard, 444 U.S. 51 (1979) (finding that regulation that prohibited commercial transactions in eagle feathers did not effect a taking because it did not bar owner from making other uses of the feathers); Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1190 (Fed. Cir. 2004) (holding that trial court erred in evaluating economic impact of government regulatory response to suspected salmonella poisoning of commercial eggs by focusing exclusively on eggs destroyed under the regulations).

[6] The Court observed that the right to exclude others is "generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" id. at 1011 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)), but only to make the point that if the legislation effected a taking, there could be no question about whether the government disclosure destroyed the economic value of the property interest, since the entire economic value of a trade secret depends on its confidentiality.

The Supreme Court decision in Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993), is particularly instructive about how the entire property rule applies in a non-land use case. Like the plaintiff in this case, the plaintiff in that case tried to persuade the Supreme Court to embrace a per se rule, arguing that federal legislation increasing the financial liability of employers who withdrew from multi-employer pension plans effected a per se taking. The Court unanimously rejected plaintiff's argument that the takings claim should be evaluated by focusing solely on the amount of additional liability imposed. Reaffirming the entire property rule, the Court stated: "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." Id. at 644.

In sum, there is no legal, practical, or conceptual obstacle to applying the entire property rule in the water rights context. The entire property is defined as the total volume of water the plaintiff is entitled to divert over a specified period; the burden imposed by a regulatory restriction is measured by looking at what portion of this amount the owner is prevented from using as a result of the regulation.

4. In a last ditch effort to sustain its per se argument, plaintiff contends that the ESA has effectively destroyed its ability to use its water right, and that this regulatory effect is, in practical and legal terms, indistinguishable from an actual physical occupation of the property. The principal difficulty with this argument is that it is essentially circular. This argument only makes sense if the relevant property for the purposes of takings analysis is the water the plaintiff cannot divert, and not the entire

water right. But that premise can only be justified if the entire property rule does not apply. However, the entire property rule will only not apply if plaintiff's claim is governed by a per se takings rule. In other words, plaintiff relies on the case being governed by a per se rule to prove that the case should be governed by a per se rule. This argument is fatally flawed and must be rejected.

In any event, plaintiff is also mistaken, as a matter of law, in asserting that a finding that a regulation renders property valueless supports the conclusion that the owner has suffered a physical occupation as well. In Lucas, while the Court acknowledged that a total regulatory taking was comparable in effect to a physical occupation, 505 U.S. at 1017, the Court stressed that the takings rules for physical occupations and total regulatory takings represent two "discrete categories." Id. at 1015. Thus, even if plaintiff could establish a total regulatory taking, that would not be equivalent to establishing a physical occupation.

Plaintiff seeks to bolster its argument by quoting language from Loretto, in which the Court stated, "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys each of these rights." 458 U.S. at 435 (emphasis in original) (citation omitted). Plaintiff reads too much into this statement, arguing that since the Court has recognized that a physical occupation often results in a denial of all use, a denial of all use is tantamount to a physical occupation. But this makes no sense, either logically or legally. In practice, a government action that results in a physical occupation of property will often preclude any use of the property, but a use restriction on private property, even a complete prohibition on use, will not necessarily entail a physical

occupation. Furthermore, legally, the Supreme Court has addressed this very issue. In Loretto, the Court emphasized that a permanent physical occupation "is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." Id. at 436. The Court also noted that the "deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking." Id. Thus, the Supreme Court expressly distinguished the deprivation of use rights even as it established a per se rule for physical occupations.

The per se rule for physical occupations is based on the impact of the physical occupation itself on the private property interest, not the secondary and incidental effects of the physical occupation on use rights. If a regulation only affects use rights, and does not involve a physical occupation, the special per se rule for physical occupations does not apply.

III. RELEVANT LEGAL PRECEDENT SUPPORTS THE CONCLUSION THAT REGULATIONS LIMITING WATER USE SHOULD BE ANALYZED AS USE RESTRICTIONS, NOT PHYSICAL OCCUPATIONS OR APPROPRIATIONS.

A. Key Decisions Supporting the Position of the United States.

Few courts have squarely addressed the proper takings analysis for regulations governing water rights. Of those that have, all but one have concluded that such regulations must be analyzed as potential regulatory takings rather than as per se takings involving physical occupations or appropriations. The one exception – Tulare Lake – is discussed in section C, below.

In Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006), the California Court of Appeals affirmed the rejection of a takings claim based on

county regulations limiting a landowner's right to use groundwater underlying its property. The court expressly rejected the physical occupation and direct appropriation theories, stating that the county's action

> cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. The County did not physically encroach on Allegretti's property or aquifer and did not require or authorize any encroachment; it did not appropriate, impound or divert any water. The County's permit decision does not effect a per se physical taking under any reasonable analysis.

Id. at 130-31 (citations omitted).

Similarly, in People v. Murrison, 124 Cal. Rptr. 2d 68, 78 (Cal. Ct. App. 2002), the California Court of Appeals declined to treat a restriction on water use as a physical occupation of private property.[7] In Murrison, the Attorney General sought an injunction against a landowner diverting water from a creek for irrigation purposes without giving prior notice, as required by law, to the Department of Fish and Game. The Court of Appeals rejected the defendant's takings argument on several alternative grounds, including that the claim was not ripe. The Court's holding on ripeness rested on a determination that the "claim is of the regulatory variety, as opposed to a physical taking." Id. at 362-63. The court explained that a virtually automatic per se liability rule applies to a physical occupation or direct appropriation, but that a regulatory takings claim requires a more nuanced examination of the actual effect of the regulation. Id. at 363. Because the owner had never actually sought, much less obtained a permit, the court concluded that the regulatory takings claim was not ripe. Id. at 363-64.[8]

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[7] While both Allegretti and Murrison are California court decisions, they both apply federal takings principles and follow U.S. Supreme Court precedent.

[8] The Court went on to state: "Because DFG has not yet imposed any restrictions on Murrison's right to take water, we also have no occasion to address the holding in

B. Supreme Court Water Rights Appropriation Cases.

Plaintiff invokes a trilogy of Supreme Court water cases that it says support use of a per se test to evaluate the taking claim in this case. While plaintiff is correct that the Court apparently applied a per se test in each case, these precedents do not support application of a per se test here. Each of the cited cases involved a direct appropriation of private property, a taking of the property from the owner and a transfer of the property to some governmental use or to a new owner. The rule applied in these cases has no bearing on regulations merely restricting the use of private rights in water.

In International Paper Co. v. United States, 282 U.S. 399 (1931), the plaintiff company successfully claimed a taking of its rights to the water flow of a power canal adjacent to Niagra Falls. At the height of World War I, the Secretary of War issued an order requisitioning the company's entire water rights for transfer to an electrical power company, which in turn utilized the rights to produce power for various enterprises important in the war effort. In the Court's words, "The petitioner's right was to the use of the water, and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power[,] it is hard to see what more the government could do to take the use." Id. at 407. This case involved a straightforward appropriation of property from A for transfer to B, warranting payment of compensation under the Takings Clause. In other words, it has no relevance to this quite different claim based on regulation of A's continued water use.

Tulare Lake Basin Water Storage Dist. v. U.S. (Fed. Cl. 2001) 49 Fed. Cl. 313, 319 [trial court], that the requirement that a recipient of water under contracts with the Central Valley project suffers a physical taking." Murrison, 124 Cal. Rptr. 2d at 360 n.8 (brackets in original). This statement notwithstanding, the Court's conclusion that plaintiff's claims raised a regulatory takings issue appears to implicitly reject Tulare Lake.

The other two cases cited by plaintiff, Dugan v. Rank, 372 U.S. 609 (1963), and United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), also involved direct appropriations. Both cases involved claims by water users whose rights were effectively destroyed and transferred to the beneficiaries of the newly constructed Friant dam. Technically, the claim in Dugan failed because the Court ruled that the suit for injunctive relief against the United States and Bureau of Reclamation officials was barred by the doctrine of sovereign immunity. 372 U.S. at 620. But the Court made clear that the water rights holders were entitled to bring a suit for compensation in the Court of Claims for what the Court characterized as an "appropriation," a transfer of water rights from the plaintiffs to new water users. Id. at 625-26. Similarly, in Gerlach, the Supreme Court upheld a takings claim based on the appropriation of water rights in connection with the construction of the Friant dam. 339 U.S. at 752 ("The waters of which claimants are deprived are taken for resale largely to other private land owners not riparian to the river and to some located in a different water shed.").

None of these venerable Supreme Court decisions supports a takings claim, much less a per se takings claim, based on a purely negative prohibition against the use of a minimal quantity of water.

C. Tulare Lake.

Understandably, plaintiff forcefully invokes this Court's decision in Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001), in which the Court ruled that a regulatory restriction on the use of an appropriative water right should be viewed as a permanent physical occupation of private property warranting payment of compensation under a per se theory. With all due respect, NRDC submits that Tulare

Lake should be reconsidered in light of subsequent legal developments and the Court should decline to rely on its reasoning in this case.

This Court decided Tulare Lake without the benefit of the U.S. Supreme Court's latest teaching on the scope of the per se physical occupation takings theory. In the landmark case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), the Court rejected plaintiff's argument that a temporary moratorium on development should be evaluated as a per se taking. In the process, the Court provided important guidance on the scope of the per se takings test for physical occupations. Echoing a viewpoint previously expressed by Justice Sandra Day O'Connor in Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring), the Court in Tahoe-Sierra stated that "[t]he temptation to adopt what amount to per se rules" should be "resist[ed]." 535 U.S. at 321. Accordingly, the Court said that the per se physical occupation test must be reserved for "relatively rare" cases in which the existence of a physical occupation can be "easily identified." Id. at 324. The Court also emphasized the need to maintain clear analytical lines between physical occupation claims and traditional regulatory takings claims: in the Court's words, it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." Id. at 323.

The ruling in Tahoe-Sierra represents a major sea change in the Supreme Court's jurisprudence. Over the prior decade, the Court had favored a prescriptive, rule-bound law of regulatory takings, rather than the relatively all-encompassing, multi-factor takings analysis established in the Penn Central case. Tahoe-Sierra represents a reversal of course, and a reassertion of the primacy of ad hoc takings analysis based on Penn Central.

The Court forthrightly explained that its rejection of an expansive theory of per se analysis was based on a concern that the resulting financial liabilities would make it impossible for government to function. See id. at 324 ("Treating [all land use regulations] as per se takings would transform government regulation into a luxury few governments could afford."); cf. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

Tahoe-Sierra calls for a thoughtful reappraisal of the use of per se analysis in Tulare Lake. At the very minimum, it cannot reasonably be said that the claim presented by plaintiff here is "easily identified" as a physical occupation. NRDC submits that the Court, upon careful consideration, should conclude that, contrary to Tulare Lake, regulatory restrictions on the use of water should be evaluated as potential regulatory takings, not per se physical occupation takings.[9]

The Tulare Lake Court reached several troubling conclusions. First, the Court adopted the view that the regulatory restriction on water use eliminated all of the property's value and that a regulation that renders property valueless constitutes a physical occupation. However, as discussed above, a regulatory restriction that destroys all use and value is not the same thing as a physical occupation of private property; Lucas

[9] Tulare Lake is different from this case in that the water right asserted in that case was derived from a contract with the Department of Water Resources whereas in this case the plaintiff received its water rights directly from the state water board. But this difference does not appear to have any particular bearing on whether a per se physical occupation test can properly be applied here. Rather, the presence of a contract in Tulare Lake raised the additional question of whether the taking claim was barred under Omnia Commercial Co. v. United States, 261 U.S. 502 (1923). See John D. Echeverria, Why Tulare Lake Was Incorrectly Decided, supra (arguing that Omnia supported dismissal of the taking claim in Tulare Lake). But there is no need to address that issue in this case.

makes clear that the per se test for "total" regulatory takings is distinct from the per se test for permanent physical occupations. 505 U.S. at 1015 (referring to the Court's two "discrete categories" of per se takings analysis).

Furthermore, the premise of this argument was mistaken because the ESA had only a modest impact on the entirety of the plaintiffs' water rights. See Melinda H. Benson, The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment, 32 Envtl. L. 551, 560 (2002) ("The restrictions resulted in an overall reduction in water availability of approximately 0.11% and 2.92% for Tulare and Kern County, respectively."). The finding that all of the value of Tulare Lake's property had been eliminated appears to rest on the faulty assumption that the takings analysis should focus solely on the water plaintiff was barred from diverting. But, for the reasons discussed above, that approach begs the question of whether the claim should be evaluated using a per se physical occupation analysis in the first place.

Second, the Tulare Lake decision misplaces its reliance on the U.S. Supreme Court decision in United States v. Causby, 328 U.S. 256 (1946). In particular, the Court in Tulare Lake referred to the assertion in Causby that the plaintiffs' "loss would be complete" if they "could not use this land for any purpose" as a result of aircraft passing through the airspace above their home. 49 Fed. Cl. at 319 (quoting Causby, 328 U.S. at 265). But, the critical fact in Causby that triggered application of the per se rule was that the overflights involved an actual invasion of the privately owned airspace. 328 U.S. at 259; see also Tahoe-Sierra, 535 U.S. at 322 (citing Causby for proposition that when government planes "use private airspace to approach a government airport," the government "occupies the property for its own purposes"); Penn Central, 438 U.S. at 135

(noting that "Causby was a case of invasion of airspace") Keystone Bituminous Coal Ass'n v. DeBenedictis, 80 U.S. 470, 488 n.18 (citing Causby as a case of physical invasion); Benson, *supra*, at 584. That the invasion also may have eliminated all possible use of the property was "relevant" in the takings analysis but it did not determine whether there was an actual physical occupation. For this reason, Causby does not support the conclusion that a government regulation that restricts property use necessarily effects a physical occupation. As discussed above, the Supreme Court in Loretto affirmatively rejected this very idea: the "deprivation of the right to use and obtain a profit from property is not . . . independently sufficient to establish a taking." 458 U.S. at 436.

Finally, the Court in Tulare Lake relied upon the trilogy of Supreme Court water appropriation cases discussed above. 49 Fed. Cl. at 319 (relying on Int'l Paper Co. v. United States, 282 U.S. 399 (1931), Dugan v. Rank, 372 U.S. 609 (1963), and United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950)). As discussed, these decisions are distinguishable from both Tulare Lake and the case currently before the Court because they involved actual appropriations of private property for use by other private parties. They do not control where government enforces a negative restriction on the use of water in order to protect public fisheries.

It is noteworthy that other courts have generally declined to follow the ruling in Tulare Lake and most academic commentators have criticized it. As discussed, the California Court of Appeals in Allegretti rejected the theory that regulatory restrictions on the use of water should be analyzed as physical occupations. Commenting on the decision in Tulare Lake, the Court of Appeals stated:

> We . . . decline to rely on Tulare Lake's reasoning to find a physical taking under the circumstances presented by County's action. . . . [W]e disagree

> with Tulare Lake's conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water. The reasoning is flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation like the government's diversion in International Paper Co. v. United States, . . . or its low flight of army and navy airplanes in Causby. . . . Tulare Lake's reasoning disregards the hallmarks of a categorical physical taking, namely actual physical occupation or physical invasion of a property interest.

42 Cal. Rptr. 3d at 132 (citations omitted).

This Court, in Klamath Irrigation District v. United States, 67 Fed. Cl. 504 (2005), did not squarely reach the issue addressed in Tulare Lake because, according to the Court's findings, the water rights at issue actually belonged to the United States, not the plaintiffs. Nonetheless, commenting on Tulare Lake, the Court stated:

> This court ruled [in Tulare] that a physical taking had occurred as a result of the restrictions and granted the plaintiffs summary judgment. But, with all due respect, Tulare appears to be wrong on some counts, incomplete in others and, distinguishable, at all events.

Id. at 538-39.

The Klamath Court observed that "Tulare has been the subject of intense criticism by commentators who, inter alia, have challenged the court's application of a physical taking theory to what was a temporary reduction in water." Id. at 538 n.59 (citing Michael C. Blumm & Lucas Ritchie, Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses, 29 Harv. Envtl. L. Rev. 321, 329 (2005); Cari S. Parobek, Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Right Collide, 27 Harv. Envtl. L. Rev. 177, 212-23 (2003); Brittany K.T. Kauffman, What

Remains of the Endangered Species Act and Western Water Rights after Tulare Lake Basin Water Storage District v. United States, 74 U. Colo. L. Rev. 837 (2003)).[10]

D. Other Cases Relied Upon by Plaintiff.

Plaintiff cites a variety of other cases that purportedly support its position, but which in fact do not.

Plaintiff asserts (Op. at 30) that the Federal Circuit in Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003), "cited Tulare with approval," but this assertion is plainly incorrect. The Federal Circuit rejected the taking claim in that case, affirming a trial court ruling that the United States could not be held liable for a taking based on the Bureau of Land Management's decision to deny plaintiffs permission to transport water by pipeline over federal public lands from their ranch property to an urban area forty miles away. The Court acknowledged the ruling in Tulare Lake but went out of its way to observe that the Court of Claims ruling "is not a precedent in this court," Washoe County, 319 F.3d at 1326, and that in any event the case was distinguishable because there was no claim in Washoe that the amount of water available to plaintiffs at their ranch had been reduced. Id. at 1326-27.

In addition, plaintiff cites Public Utility District No. 1, of Pend Oreille County v. State Department of Ecology, 51 P.3d 744 (Wash. 2002), and states that "the decision" cites "this Court's Tulare decision as support for its holding that the government's abrogation of a water right, no matter how minimal, is a compensable taking." (Op. at

[10] To be sure, plaintiff can point to a handful of academic commentaries that support its point of view. But even one of the articles plaintiff cites acknowledges that "Commentators have nearly unanimously criticized [the] opinion [in Tulare]." Douglas L. Grant, ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property, 36 Envtl. L. 1331, 1363 (2006).

32). But the passage relied upon (and quoted by plaintiff) actually comes from the dissenting opinion, not the majority opinion. Id. at 835-36 (Sander, J., dissenting). The majority did not endorse the dissent's embrace of the Tulare Lake ruling. Moreover, the dissent's musings are pure dicta. The case was an administrative law case reviewing whether an agency had the authority to condition a Clean Water Act certification on maintenance of instream flow conditions regardless of the applicant's existing water rights. As the court explained, "Our review is of the agency action, and accordingly no constitutional issues are before us. The District . . . is not asserting a takings claim at this time. . . ." Id. at 766 n. 13.

Nor can plaintiff (Op. at 31-32) gain any meaningful support from the decision in Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222 (D.N.M. 2002). In the first place, that was an administrative law case involving an effort to force the federal government to comply with the ESA and therefore the decision has limited relevance in this takings context. Second, the district court's conclusion that the United States might potentially breach its water contracts, was effectively overruled on appeal by the Tenth Circuit, which concluded that water released to meet ESA requirements was not precluded by vested contract rights. Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1130-31 (10th Cir. 2003).[11] (As plaintiff observes, the entire litigation was

[11] Significantly, the only place the Tulare Lake ruling is cited in the Silvery Minnow litigation is in the dissent to the Court of Appeals' 2003 decision. The dissenting judge argued that the preexisting water contracts barred the Bureau of Reclamation from seeking to enforce the ESA, and also argued that if the ESA were permitted to override the water contracts the plaintiffs might potentially have a viable taking claim. Rio Grande Silvery Minnow, 333 F.3d at 1143 n.2 (Kelly, J., dissenting) (citing Tulare Lake). The majority obviously implicitly rejected that viewpoint.

subsequently ordered dismissed on mootness grounds. Rio Grande Silvery Minnow v. Keys, 355 F.3d 1215 (10th Cir. 2004).).

Plaintiff likewise errs in castigating the United States (Op. at 31; see also Op. at 2 n.1) for "failing to cite" the allegedly "well-reasoned" decision in Hansen v. United States, 65 Fed. Cl. 76 (2005), which supposedly "endors[ed]" the analysis in Tulare Lake. In fact, the Hansen case dealt with a very different issue: whether a landowner's claim that his groundwater was contaminated as a result of the burial of cans of pesticides on adjacent Forest Service lands sounded in takings or in tort. Moreover, the Court in Hansen merely cited Tulare for the relatively narrow point that an interest in water can constitute "property" within the meaning of the Takings Clause. Hansen, 65 Fed. Cl. at 123. Finally, whatever relevance the analysis in Hansen might have for this case, the decision can hardly be regarded as "well reasoned;" in a decision issued four days after the decision in Hansen, the Federal Circuit, without expressly referencing Hansen, thoroughly repudiated the trial court's analysis. See Moden v. United States, 404 F.3d 1335 (Fed. Cir. 2005).

Plaintiff also derives no support from rulings in two other cases, Hage v. United States, 35 Fed. Cl. 147 (1996), and Store Safe Redlands Associates v. United States, 35 Fed. Cl. 726 (1996). Both of the cited opinions (Op. at 29) represent interlocutory rulings in cases involving claims that federal land management agencies effected takings of public land ranchers' appropriative water rights by restricting their access to the public range. The plaintiffs in these cases were essentially attempting to use a water right to create a property right in public lands. The cases are irrelevant because the Court in neither opinion actually ruled that the takings claims should be governed by a per se rule.

See, Hage, 35 Fed. Cl. at 150-153 (describing the many considerations that impact any given takings determination); Store Safe, 35 Fed. Cl. at 728-29 (referring to discussion in Hage and, further, explaining the distinction between physical and regulatory takings); Id. at 736 (discussing but not applying per se takings rules.). Rather, in both opinions, the Court's focus was on the antecedent question of whether the plaintiffs owned the alleged property rights. See, e.g., Store Safe, 35 Fed. Cl. at 730. In any event, the viability of this type of takings claim presented by Hage and Store Safe has been effectively destroyed by the recent Federal Circuit decision in Colvin Cattle Co. v. United States, 468 F.3d 803 (Fed. Cir. 2006). The Federal Circuit in Colvin Cattle affirmed this Court's ruling that possession of an appropriative water right cannot serve as a bootstrap to convert the privilege to use federal public lands into a vested entitlement.

Finally, the Court's decision in Ball v. United States, 1 Cl. Ct. 180 (1982), provides no particular support for plaintiff's proposed per se test. Op. at 29. The reported decision denied cross-motions for summary judgment on a claim that the plaintiff suffered a taking because a government construction project on an adjacent military base led to a reduction in the volume of water plaintiff could draw from a well on his property. Ball, 1 Cl. Ct. at 181-82. The ruling focused on the factual issues of whether the government's activity actually caused a reduction in water flow and whether the waters involved were "percolating waters." The Court noted that "It may well be . . . that should trial be held plaintiff will ultimately be unable to meet his burden of proving the facts essential to a conclusion that defendant's dewatering and construction activities so impacted upon a valid property right as to amount to a Fifth Amendment taking." Id.

at 184 (emphasis added). Contrary to plaintiffs assertion, this dicta suggests that the Court believed that a per se takings rule was not applicable to the case.

CONCLUSION

For the foregoing reason, the Natural Resources Defense Council urges the Court to enter partial summary judgment for the United States.

Respectfully submitted,

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January 31, 2007

CERTIFICATE OF SERVICE

The undersigned certifies that on this 31st day of January, 2007, a true and correct copy of the Memorandum *Amicus Curiae* in Support of the United States' Motion for Partial Summary Judgment was served, in accordance with RCFC 5(a) and 5(b), by hand-delivery and by placing a copy in the first-class mail, postage prepaid, to:

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