No. 2007-5153

In the United States Court of Appeals for the Federal Circuit

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CASITAS MUNICIPAL WATER DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from United States Court of Federal Claims Case No. 05-CV-168
Senior Judge John P. Wiese

AMICUS CURIAE BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF THE UNITED STATES' PETITION FOR REHEARING AND/OR REHEARING EN BANC

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CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Natural Resources Defense Council certify the following:

1. The full name of every party or amicus represented by us is:

Natural Resources Defense Council

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is: None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by us are: None

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners and associates that appeared for the party or amici now represented by us in the trial court or agency or are expected to appear in this court are:

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Katherine S. Poole, Natural Resources Defense Council

Dated December 17, 2008

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John D. Echeverria

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INTEREST OF THE AMICUS CURIAE

The Natural Resources Defense Council is a not-for-profit, member-supported conservation organization with significant expertise in water resource management issues and a particular interest in restoration of the Ventura River.

INTRODUCTION

The panel's application of a per se "physical appropriation" theory to the requirement that a dam operator devote a portion of its water interests to operation of a fish ladder represents a seriously mistaken innovation. The ruling is inconsistent with a long legal tradition upholding public authority to regulate water uses to mitigate damage to public fisheries, including cases specifically rejecting claims that fish passage requirements result in takings. The panel relies on a trilogy of 45- to 70-year old Supreme Court cases: Dugan, Gerlach Live Stock, and International Paper. But those cases involved forced transfers of private water interests to third parties, not fish passage regulations. Moreover, the decisions in those cases did not challenge the earlier precedents involving fish passage and, until the panel ruling in this case, have never been read to support the theory that such a requirement results in a taking. The trilogy is plainly beside the point.

The panel decision also is inconsistent with the established definition of an appropriation. An appropriation occurs when the government seizes possession of and/or exercises ownership over property and then uses the property for its own

proprietary purposes or transfers the property to some third party for its use. See, e.g., Kelo v. City of New London, 545 U.S. 469 (2005); United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951). This case does not involve an appropriation because the government is not asserting ownership or possession of the plaintiff's water interests, and the government is not utilizing the water for a proprietary purpose or transferring the water to third parties for their use.

Even if there were room for doubt about whether a per se test applies in this case (there is not), the Supreme Court has emphasized that "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances." Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002), quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). Accordingly, the Court has said, "the temptation" to use per se rules, which preclude consideration of relevant circumstances, should be "resist[ed]." Tahoe-Sierra, 533 U.S. at 326. See also Lingle. v. Chevron USA, Inc., 544 U.S. 528 , 538 (2005) (referring to the "relatively narrow" per se tests); Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1195 (Fed. Cir. 2004) (stating that per se takings tests can only be triggered by "the typically obvious and undisputed predicate of a physical invasion or appropriation of private property by the government "). The panel's decision, however, evinces no awareness of the Supreme Court's instruction to resist per se tests. Applying a per se test on the

facts of this case is especially troubling because plaintiff has conceded that its evidence of economic harm is so weak – indeed it may never suffer any harm – that it cannot possibly prevail under a Penn Central analysis.

Because we anticipate that the United States and other amici will address the foregoing points in detail, the balance of this brief focuses on the specific legal analysis in the panel opinion, explaining how the panel has gone astray.[1]

One last preliminary point: The case decided by the panel is not the same case plaintiff argued below nor the same case the claims court decided. Plaintiff claimed below that the ESA regulation resulted in a per se taking because it required plaintiff to pass downstream a portion of the water that it otherwise would have diverted from the Ventura River. (JA 173-74, 1001, 1187-94, 1900) Plaintiff invoked the decision in Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001), in which Judge John Wiese, the claims court judge also handling this case, ruled that a regulatory restriction on water diversions constitutes a per se physical taking. Judge Wiese, in this case, repudiated his reasoning in Tulare Lake and rejected the per se theory; in accord with plaintiff's

[1] The significance of this petition is not altered in the least by the fact that United States could still defend against the claim on remand based on applicable background principles of California law, see 543 F.3d at 1297 n. 17, and might well prevail based on the reasonable use doctrine, the public trust doctrine or some other principle of California law. See id. at 1297. This Court's decisions establish nationwide precedent while the scope and state of development of background principles of state water law vary widely from state to state.

original claim, Judge Wiese ascribed no particular significance to the fact that this case involved, not only a restriction on diversions, but a fish passage requirement. On appeal, plaintiff apparently recognized the weakness of Tulare Lake and changed course, in its reply brief and particularly during oral argument, and argued that the regulation resulted in a taking solely because of the requirement that a portion of the water had to be passed through the ladder. The Court should grant the petition to fully air the merits and implications of plaintiff's new position.

ARGUMENT

The panel's first error was its premise that a regulation about how an owner uses her property, as opposed to a mere negative restriction on property use, represents an "appropriation." See 543 F.3d at 1290-92. The panel believed (correctly) that a negative restriction on water use should be analyzed as a potential regulatory taking. At the same time, the panel believed that this case involves (at least in part) an appropriation because the regulation imposed an affirmative duty, that is, the Endangered Species Act required "water to be physically diverted away from the Robles-Casitas canal and into the fish ladder." Id. at 1291.

But the distinction between negative and affirmative regulation provides no basis for calling a regulation imposing affirmative duties an "appropriation." Whether the government is restricting use of property or directing a property owner about how to use property, the government is not seizing ownership and/or

possession of the property and it is not devoting the property to some proprietary government purpose or transferring the property to a third party for its use.

In accordance with this reasoning, numerous decisions, ignored by the panel majority, indicate that the regulatory takings framework, rather than a per se physical takings test, applies to regulations, like the ESA in this case, imposing affirmative mandates on how owners must manage their property. In Loretto v. Teleprompter CATV Corp., 458 U.S. 419 (1982), the Court ruled that compelled physical occupations of private property by the government or a third party will generally represent per se physical takings. But the Court stressed that the per se rule did not apply to affirmative regulatory mandates on property owners about how they should manage their own property. The Court said that "our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the [Penn Central] multifactor inquiry generally applicable to nonpossessory governmental activity." Id. at 440 (emphases added).

In terms directly applicable to this case, the Loretto Court rejected the suggestion that it was "incidental" that the cable box in that case was owned by the

cable company acting with government authority, rather than by Jean Loretto herself. Id. at 440 n. 19. In the Court's words, ownership of the equipment

> "would give a landlord (rather than a [cable] company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning [cable] and therefore could minimize the physical, esthetic, and other effects of the installation."

Id. Thus, even though Casitas acted under a regulatory mandate, it is significant that it was plaintiff who retained and supervised the firm that designed the fish ladder (JA 470-476), and it is plaintiff who controls the day-to-day operations of the facility, including the flow of water through the ladder (JA 22).

Rose Acre Farms, supra, is in the same vein. The Federal Circuit ruled that federal officials' seizure and destruction of plaintiff's chickens for testing did not constitute a physical taking of its chickens. Directly to the point for present purposes, the Court also observed that, if the government had required the farm owner itself to kill and test its chickens, there would be no conceivable basis for claiming a per se taking. As the Court stated, "What is clear is that had the regulations required Rose Acre itself to kill and test the hens, no per se taking could be found." Id. at 1997 (emphasis added). Similarly, in Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990), the Court rejected the argument that federal regulations effected a physical taking by requiring companies engaged in uranium mining to stabilize the mill tailings on their properties. Again, the

decisive point precluding application of a physical takings theory was that the government was regulating the claimants' management of their own property, and it was irrelevant that the regulations involved affirmative duties rather than purely negative restrictions.

The fact that a regulation imposes affirmative duties on an owner, as opposed to negative prohibitions, is not necessarily irrelevant in takings analysis. Indeed, the affirmative nature of a regulatory mandate appears directly relevant to the required assessment of the "character" of a government action under Penn Central. The essential point for the purpose of this rehearing petition is simply that the affirmative nature of a regulatory mandate, by itself, does not justify per se takings treatment. In concluding otherwise, the panel was plainly wrong.[2]

The panel's second error was to equate the government regulation in this case with the type of appropriation at issue in the Supreme Court trilogy on the basis that both serve a "public use." See 543 F.3d at 1290-93. In response to the government's argument that, in this case, unlike in the trilogy, "the United States did not appropriate the water for its own use or for use by a third party," the panel asked: "If this water was not diverted for a public use, namely protection of the

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[2] It is also noteworthy that the panel's per se theory for fish ladder flows would lead to the bizarre result that the 50 cfs of water required to be passed through the fish ladder (on its way back to the river) would be evaluated under a per se test, but additional flows that Casitas must release under the Biological Opinion to meet instream flow targets above 50 cfs below the dam would be subject to a regulatory takings analysis. See Brief Amicus Curiae of California Trout, Inc.

endangered fish, what use was it diverted for?" This rhetorical question misapprehends the function of the "public use" requirement in takings law and improperly blurs what the Supreme Court has called the "fundamental distinction" between regulations and physical appropriations. Tahoe-Sierra, 535 U.S. at 325.

The panel's reasoning goes too far because every alleged taking, whatever the theory of liability, must serve a "public use." The Supreme Court has said that the term "public use" in the Takings Clause means "public purpose." See Kelo, 554 U.S. at 580. Moreover, a public use is a precondition for any claim under the Takings Clause, including both a physical taking claim, id., and a regulatory taking claim. See Lingle, 544 U.S. at 543. Because every alleged taking must serve a "public use," i.e., a public purpose, the panel's position that a regulation constitutes an appropriation when it serves a public use would mean that every regulation would be a per se taking. As Judge Mayer observed, the panel's reasoning on this point "eras[es] the line between physical and regulatory takings," Id. at 1300

The panel's reasoning also confuses the fact that while every alleged taking must serve a "public use" (i.e., a public purpose,), only an appropriation involves actual proprietary utilization (sometimes, confusingly, also referred to as "use") of the property by the government or some third party. The Supreme Court and this Court have recognized this distinction on many occasions. For example, in Tahoe-Sierra, the Court explained the difference between an appropriation of a leasehold

and a temporary regulatory moratorium in the following terms: "Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." 535 U.S. at 325 n. 19 (emphases added). In other words, contrary to the panel's reasoning, the Supreme Court has affirmed that a regulation serving a public "use" (i.e., advancing a public purpose) cannot be equated with a direct appropriation involving government proprietary "use" (i.e., utilization) of private property.[3] See also Seiber v. United States, 364 F.3d 1356, 1367 (Fed. Cir. 2004) (explaining that "government protection of owls" is "not comparable to a government authorization to third parties to utilize property") (emphases added).

The panel's third error was its conclusion that Tahoe-Sierra, which instructs that per se rules must be "resisted," could be distinguished on the basis that the water use rights in this case were "permanently gone" whereas the land use rights

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[3] The panel refers a law review article, see 543 F.3d at 1296, citing Stephen J. Eagle, Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners, 31 Fla. St. U.L. Rev. 429 (2004), which criticizes Tahoe-Sierra for drawing "a strident and bright-line distinction" between physical takings and potential regulatory takings, a distinction the author describes as "arbitrary" and reflecting a "significant defect" in logic. Whatever the academic interest of this article, Tahoe-Sierra represents binding precedent.

in Tahoe-Sierra were supposedly restored after the moratorium was lifted. See 543 F.3d at 1296. But, in Tahoe-Sierra, the use rights during the period of the moratorium were permanently gone as a result of the regulation. Moreover, as explained by the United States, in numerous other cases, in which the property-as-a-whole rule has been applied in the geographic dimension rather than the temporal dimension, the courts have rejected takings claims despite the fact that certain portions of the claimants' use rights were permanently gone due to regulation.

CONCLUSION

Judge Wiese, a sage and experienced jurist, observed that plaintiff's counsel "has a way of revolutionizing the law in the sweetest of terms." (JA 923) The Court should grant rehearing and/or rehearing en banc to undo this revolution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Circuit rules 32(a)(7)(C) and 35(g), I certify that the text of this brief, including footnotes, uses a proportionally spaced 14-point font and is ten pages in length.

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John D. Echeverria

CERTIFICATE OF SERVICE

I certify that two copies of the "Amicus Curiae Brief of Natural Resources Defense Council in Support of the United States' Petition for Rehearing and/or Rehearing En Banc" have been served upon counsel by first class mail, postage prepaid, on this 17th day of December, 2008, to:

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