IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT, Plaintiff, v. UNITED STATES, Defendant.	No. 05-168 L Hon. John P. Wiese

THE ASSOCIATION OF CALIFORNIA WATER AGENCIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION'S AMICI CURIAE BRIEF

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I. INTEREST OF AMICI CURIAE

The Association of California Water Agencies ("ACWA") and the California Special Districts Association ("CSDA") (collectively "amici curiae") submit this brief as amici curiae on behalf of California's public water agencies and special districts. These public agencies have a vital interest in ensuring that a long-term, reliable water supply is available to meet California's ever-increasing demands for water. They depend upon water rights granted under California law to provide for the needs of the cities and farms they serve, now and for the future.

ACWA represents the largest statewide coalition of public water agencies in the country. Originally formed in 1910 by five irrigation districts, today ACWA represents over 440 public water agencies. Member agencies range in size from small irrigation districts to the largest urban water wholesalers in the country. These agencies manage, treat and distribute water to rural communities, farms and cities. ACWA represents these agencies before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts.

CSDA represents nearly 700 special districts throughout California. Formed in 1969, CSDA is the only statewide association representing all types of independent special districts including: irrigation, water, park and recreation, cemetery, fire, police protection, library, utility, harbor, healthcare and community services districts. CSDA provides education and training, insurance programs, legal advice, industry-wide litigation and public relations support, legislative advocacy, capital improvement and equipment funding, collateral design services, and, most importantly, current information that is crucial to a special district's management and operational effectiveness.

This case concerns the intersection of water supply and the mandates of the federal Endangered Species Act ("ESA"). Pursuant to the ESA, in order to protect fish, the Casitas Municipal Water District is being required to forego diversion of water it is otherwise entitled to divert under its water rights. The water that the federal government prevents Casitas from diverting instead flows into the ocean, and Casitas loses all use of that water. Under *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), this is a physical or *per se* taking. In this action, Casitas seeks compensation for this federal reallocation of water. As this Court has observed: "[t]he federal government is certainly free to preserve fish; it must simply pay for the water it takes to do so." *Tulare Lake*, 49 Fed. Cl. at 324.

In its motion for partial summary judgment, the United States argues that Casitas' takings claim should be analyzed under the *Penn Central* test, contrary to *Tulare Lake*. These amici disagree. ACWA and CSDA urge this Court to re-affirm its decision in *Tulare Lake*. In this brief, ACWA and CSDA provide an explanation of the property interest in appropriative water rights under California law. In particular, this brief addresses arguments raised by the United States or commentators to suggest that California water rights do not extend to the water that federal wildlife agencies have decided is needed for fish. Instead, as we explain, Casitas' rights apply to such water, unless and until the State Water Resources Control Board ("SWRCB") or a California court decides otherwise.

II. INTRODUCTION

A. Casitas Holds Vested Appropriative Water Rights

California's system of water rights is a product of the state's history and the challenges in meeting the varied water needs within California. Over two-thirds of the

state's available water falls as rain on the northern portion of the state, while over two-thirds of the state's population and most irrigated land is in the southern part of the state. California water suppliers must meet the needs of over 30 million people, businesses and industry, and millions of acres of irrigated farmland. The prosperity and well-being of California's residents, farms and businesses require a stable and functioning water supply system. Water rights are the foundation upon which California water suppliers depend to protect and assure their customers' use of water, and to justify their massive investments in water supply and treatment facilities.

This case involves appropriative rights to surface water. In general, appropriative rights to surface water are rights to divert and use otherwise unappropriated water, that is, water which is surplus to the needs of riparian owners, prior appropriators and pre-scriptors. Hutchins, *The California Law of Water Rights* (1956) at 67-68. Appropriative rights are based on physical control and beneficial use. *Id.* at 108-112. They are rights of priority in that, if the available supply is insufficient to meet the needs of all appro-priators, the one with the earliest priority date (*i.e.*, the date of the first act initiating the right) is entitled to satisfy his needs fully before those with later priority are entitled to any water. *Id.* at 47, 130-132. Appropriative rights arising under the statutory pro-cedures are an exclusive right "to the use of definite quantities of water." *Id.* at 132; *see also* Water Code § 1610 [a license "confirms the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use"]. California Water Code § 1610. An appropriator may use the water for any reasonable, beneficial purpose on any land no matter where located, and may store water from one season for use in a later season or from one year for use in subsequent years. *Id.* at 149-

151. Just as appropriative rights are gained by use, conversely, once acquired, they may be lost wholly or in part by five years non-use during a time when the water was physically available for use. *Id.* at 295.

Prior to December 19, 1914, new appropriative rights could be acquired by diverting and using the water for reasonable, beneficial purposes. *Id.* at 86. Since then, California statutory law has required appropriators to file an application and obtain a permit obtained from a state agency, now the SWRCB. *Id.* at 94-97; *see* California Water Code §§ 1201 et seq. Casitas followed this statutory permitting process to gain its right to use water from the Ventura River and Coyote Creek. Casitas holds appropriative rights to a specified quantity of water under a license issued to Casitas by the SWRCB.

Importantly, a SWRCB-issued water rights permit or license reflects the judgment of an administrative agency charged with weighing sometimes competing interests and deciding upon the outcome that best serves the public interest overall. In the permit process, the SWRCB is required to "allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." California Water Code § 1253. The SWRCB must consider the "relative benefit to be derived from . . . all beneficial uses. . . ." California Water Code § 1257. The SWRCB must also "take into account, *whenever it is in the public interest,* the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." California Water Code § 1243 (emphasis added). Indeed, the SWRCB must reject an application that is not in the public interest: "[t]he Board shall reject an applica-

tion when in its judgment the proposed appropriation would not best conserve the public interest." *Id.* at § 1255. As a California court explained:

> The nature of the public interest to be served by the Board is reflected throughout this statutory scheme. As a matter of state policy, water resources are to be used "to the fullest extent . . . capable" (section 100) with development undertaken "for the greatest public benefit" (section 105). And in determining whether to grant or deny a permit application in the public interest, the Board is directed to consider "any general or co-ordinated plan . . . toward the control, protection, development . . . and conservation of [state] water resources . . ." (section 1256), as well as the "relative benefits" of competing beneficial uses (section 1257). Finally, the Board's actions are to be guided by the legislative policy that the favored or "highest" use is domestic, and irrigation is the next highest. (Section 1254.)

United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 103 (1986) (*citing* California Water Code).

The permit process involves public notice of the application, an opportunity for interested persons to protest, and hearings before the SWRCB. California Water Code §§ 1300-1324, 1330, 1340 et seq. At the completion of this process, the SWRCB may issue a permit to appropriate water. *Id.* at §§ 1350, 1380 et seq. The issuance of a permit continues in effect the priority date of the application, and gives the right to take and use the water to the extent and for the purposes allowed in the permit, pending issuance of a license or revocation of the permit. *Id.* at §§ 1381, 1455. To complete an appropriation, and obtain a license, the water must be put to beneficial use. After a permit holder has perfected its right by putting the water to full beneficial use, it returns to the SWRCB for a license. The Board issues "a license which confirms the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use." California Water Code § 1610. The procedures set forth in the California Water Code

provide the sole and exclusive method for acquiring appropriative rights to divert and store unappropriated surface waters. California Water Code § 1225.

B. Casitas' Rights And the Biological Opinion

Casitas' water rights date to at least the mid-1950s, when the district obtained a permit (Permit 10364) from the SWRCB, and entered into a contract with the United States Bureau of Reclamation ("Reclamation") for the construction and operation of a water reclamation project on the Ventura River ("Project"). (Plaintiff's Mot. Part. Summ. J. Contract Claim at 1.) The Project facilities allow the control of the water necessary for an appropriative right. In the years after completion of construction, Casitas put the water diverted by the Project to beneficial use. Based on proof of completion of the Project facilities, and proof that Casitas had put the water to beneficial use, in January of 1986 the SWRCB issued a license (No. 11834) on the permit. The license authorizes Casitas to beneficially use the water in the Ventura River and Coyote Creek in Ventura County for municipal, domestic, irrigation, industrial, recreational, and standby emergency uses. (*Id.* at 4.) Under its license, Casitas has a right to divert up to 107,800 acre-feet per year, including to storage, and to put up to 28,500 acre-feet per year to beneficial use.

Effective October 17, 1997, the National Marine Fisheries Service ("NMFS" or "NOAA") listed the Southern California steelhead trout as an endangered species. 62 Fed. Reg. 43937 (August 18, 1997). Reclamation thereafter consulted with NMFS concerning the impacts of the Project on these fish, pursuant to section 7 of the ESA, 16 U.S.C. § 1536. On March 31, 2003, NMFS issued a biological opinion, in which it concluded that construction of a fish passage facility and a new set of operating criteria to

facilitate upstream and downstream passage of fish, were necessary to avoid jeopardy to the Southern California steelhead trout.

Historically, Casitas was only required to bypass up to 20 cfs for downstream flows in the Ventura River, under the Trial Operating Criteria. Biological Opinion, Authorization for the Construction and Future Operations of the Robles Fish Passage Facility, March 31, 2003 at 6. Under the biological opinion, the downstream released flows at the diversion are increased and "must be maintained at or above 50 cfs during the first 10 days of each migratory storm event (i.e., storms generating flows 150 cfs or greater, as measured at the Robles Diversion)." *Id.* at 17. This increased downstream flow requirement decreases the amount of water Casitas can otherwise divert under its water right license, by up to 30 cfs during the months of January through June. *Id.* at 7.

III. ARGUMENT

In *Tulare Lake*, this Court explained the nature of water rights, and why a restriction that prevents all use of water is a physical taking:

> in the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. . . . Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete occupation of property—an exclusive possession of plaintiffs' water-use rights for preservation of the fish—mirrors the invasion present in *Causby*. To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, rendered the usufructary right to that water valueless, they have thus effected a physical taking.

Tulare Lake, 49 Fed. Cl. 313, 319 (2001). The Court's holding in *Tulare Lake* is consistent with long-standing water rights and property law. *See U.S. v. SWRCB*, 182 Cal. App. 3d at 104 ("Because water rights possess indicia of property rights, water right holders are entitled to judicial protection against infringement, e.g., actions for quiet title, nuisance, wrongful diversion or inverse condemnation" (*referencing* Hutchins at pp. 262-282, 348-356).)

A. **Under California Law, A Water Right Is Property Protected By the Fifth Amendment**

As this Court recognized in *Tulare Lake*, and the California Supreme Court explained nearly one hundred fifty years ago, "[i]t is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." *Eddy v. Simpson*, 3 Cal. 249, 252 (1853). From the earliest days of its statehood, California has recognized that an appropriative water right is a private property right, subject to ownership and disposition by the owner as in the case of other private property. Hutchins, *The California Law of Water Rights* at 120-121. "The right that one may acquire with respect to water flowing in a stream is a right to its use, which will be regarded and protected as property." *Id.* at 37. The right to the use of water is "regarded and protected as property" and is "substantive and valuable property." *Id.* at 121 (*citing Kidd v. Laird*, 15 Calif. 161, 179-180 (1860) and *McDonald v. Bear River & Auburn Water & Min. Co.*, 13 Calif. 220, 232 (1859).)

The United States does not overtly dispute the proposition that water rights under California law are property protected by the Fifth Amendment. Given controlling precedent, it cannot. *See, e.g. Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). But in its brief, the United States does hint

at arguments that it and others have made elsewhere to suggest that California water rights are of such a limited or qualified nature that ESA restrictions do not truly cause a taking. The Court rejected those arguments in *Tulare Lake* and should do so again.

B. The State's Ownership Of The Corpus Of Water In The Stream Does Not Negate Private Rights To Use Water

The United States observes that "[u]nder California law, plaintiff does not own the water that is the subject of this lawsuit. Instead 'all water within the State . . . is the property of the people of the State.'" (Def. Mot. Summ. J. Takings at 5.) The United States does not elaborate upon the significance that it attributes to this principle. The rule that the corpus of water is the property of the people has led to considerable confusion in some quarters, evidenced by suggestions that under this rule in California there is no private ownership of rights to use water. Those suggestions are incorrect.

Section 102 of the California Water Code provides: "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Cal. Water Code § 102; *see also* California Water Code § 1001 ("Nothing in this division shall be construed as giving or confirming any right, title or interest to or in the corpus of any water.") The California courts have explained that, notwithstanding the people's interest in the corpus of water, parties may and do hold private property rights to use water. As the California Supreme Court explained in 1914:

> [t]he doctrine that it is public water, or that it belongs to the state because it is not capable of private ownership, has no support in the statutes of the state or in any decision of this court. The true reason for the rule that there can be no property in the *corpus* of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership. . . . One

> may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be a part of the stream.

Palmer v. Railroad Commission, 167 Cal. 163, 168 (1914). In *San Bernardino v. Riverside*, the court dismissed a literal interpretation of the legislative declaration in former California Civil Code section 1410 that "[a]ll water or the use of water within the state of California is the property of the people of the state of California." The court explained that

> [t]aken literally this would include all water in the state privately owned and that pertaining to the lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use. (See *Palmer v. Railroad Commission*, 167 Cal. 175, [139 Pac. 997].) The constitution expressly forbids it. (Art. I, sec. 14.)

San Bernardino v. Riverside, 186 Cal. 7, 30-31 (1921). Under the Water Code today, any water flowing in a natural channel that is not subject to riparian or existing appropriative rights is declared "to be public water of the State subject to appropriation in accordance with" the provisions of the California Water Code. California Water Code § 1201. Declaring that water not subject to existing rights is "public" in the sense that it is available for appropriation furthers the fundamental policy "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." California Water Code § 100.

Water rights arise when water is put to beneficial use, and as courts have explained "once rights to use water are acquired, they become vested property rights. As such they cannot be infringed by others or taken by governmental action without due

process and just compensation." *United States v. State Water Resources Control Board*, 182 Cal. App.3d at 101 (1986) (*citing Ivanhoe Irr. Dist. v. All Parties*, 47 Cal. 2d 597, 623 (1957) (*revd. on other grounds* in *Ivanhoe Irr. Dist. v. McCracken*), and *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-754 (1950).) "California courts recognize that 'once rights to use water are acquired, they become vested property rights' appurtenant to the land." *California Farm Bureau Federation v. California State Water Resources Control Board* (C050289) 2007 WL 103072, 4 (Cal. App. Ct. 3d Dist. 2007) (*citing U.S. v. SWRCB* and *Fullerton v. SWRCB*, 90 Cal. App. 3d 590, 598 ((1979)).

C. **The Weather is Uncertain, But The Right To Use Available Water In A Given Year Is Not**

The United States observes that "the amount of water plaintiff captures from the Ventura River is limited by a number of factors. For example . . . plaintiff's water license contains specific quantity and volume limitations and all diversions are subject to California water law. Moreover, Casitas Reservoir has a finite capacity of approximately 254,000 acre-feet ('AF') of water, at which point the Reservoir begins to spill if additional water is added . . . ." (Def. Mot. Summ. J. Taking at 5.) While these factors may indeed apply to limit the water available to Casitas, the issue here arises because ESA restrictions cause Casitas to lose water that otherwise would be available to it *notwithstanding* these factors.

In its brief, the United States quotes the following sentence from *United States v. State Water Resources Control Bd.*: "[u]nlike real property rights, usufructary water rights are limited and uncertain." (Def. Mot. Summ. J. Taking at 27 (*citing* 182 Cal. App. 3d at 104).) This oft-quoted statement can be misleading when taken out of context. The next sentence in the opinion shows that the court there was referring to the impact of the

weather. The full quote is: "Unlike real property rights, usufructary water rights are limited and uncertain. The available supply of water is largely determined by natural forces." 182 Cal. App. 3d at 104. Thus, the quantity of water available to a water rights holder in a particular year will depend upon precipitation, and hence the quantity available each year is uncertain. But the right to the water when natural forces make it available is not uncertain.

To illustrate this in another context, a farmer who owns an orange tree owns the oranges it produces each year. In some years, depending upon the weather and other factors, the tree may produce 200 oranges. In other years, based on the weather and other factors, it may produce 400 oranges. Whether the tree produces 200 or 400 oranges in a particular year, whatever oranges it produces belong to the farmer. The government could not seize half the oranges in a year that the tree produces 400 oranges, and then deny compensation on the theory that 200 oranges is all the tree produces in some years anyway. The oranges are the farmer's property each year, even though the quantity the tree produces each year varies.

So it is with a water right. In wet years, an appropriative water right holder may be able to divert the entire amount specified in its permit or license. In dry years, it may be limited to less than the entire quantity allowed under its permit or license, because water is not available to divert. But the variation in the quantity of water available year to year in no way diminishes its right to whatever water is available, up to the amount specified in its permit in a given year. That right is certain.

If ESA restrictions prevent a water right holder from diverting water that is otherwise available for diversion, then the water right holder has been deprived of all use

of – all right in – that water. That is so regardless of whether that much water was available to divert the year before or the year after.

D. **<u>Casitas' License Reflects The SWRCB's Judgment of Reasonable and Beneficial Use And Application Of The Public Trust</u>**

The United States observes that Casitas' license is subject to the continuing jurisdiction of the SWRCB. Indeed, page 3 of the license provides that the rights conferred under the license "are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses, prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water." The license provides that this authority may be exercised through new license terms, or limitations on diversions or use of water. But the license further provides that no such action will be taken "unless the Board determines, after notice to affected parties and opportunity for hearing" that such terms are feasible, or that such action is necessary and in the pubic interest.

The SWRCB has not amended Casitas' license to adopt the requirements of the biological opinion.

1. Reasonable and Beneficial Use

Some commentators have suggested that water rights holders have no right to divert water in a manner contrary to a NOAA biological opinion, because such diversions harm endangered fish and hence are unreasonable. These commentators correctly note that California water law prohibits the unreasonable use, method of diversion or waste of water. *See* Cal. Const. Art. X, § 2; *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 443 (1983). They also note, correctly, that the water needs of fish and wildlife are considered in determining what uses should be made of the state's water resources.

They err, however, in suggesting that a biological opinion issued by NOAA can determine what is a reasonable use or method of diversion for purposes of California water law.

Under California water law, the SWRCB and the California state courts share concurrent original jurisdiction over determinations of unreasonable use or method of diversion. *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 448-451 (1983). As the California Supreme Court has explained, "[w]hat constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes . . . . [W]hat is a reasonable use of water depends upon the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from statewide considerations of transcendent importance." *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 26 Cal. 3d 183 194 (1980) (internal citations omitted). NOAA has neither the authority nor the expertise to make this determination.

In regulating appropriations of water, the SWRCB "is expressly commissioned to carry out" the policy of Article X, section 2. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d at 129. The SWRCB is required to balance all competing uses, and strike the balance that in its judgment will "best develop, conserve, and utilize in the public interest the water sought to be appropriated." Cal. Water Code §§ 1253, 1257; *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d at 113. The SWRCB must take the needs of fish and wildlife into account "whenever *it is in the public interest*" to do so. Cal. Water Code § 1243 (emphasis added). The SWRCB is further guided by statutory policy "that domestic use is the highest use, and irrigation is

the next highest use of water." Cal. Water Code § 1254. California law is clear that fish and wildlife needs are but one factor considered when permitting water appropriations.

NOAA did not even purport to follow the process and apply the standards of California water law in determining reasonable use or method of diversion, or waste. NOAA only determined how it believed Project operations should be altered and diversions curtailed to carry out the narrower mandates of section 7 of the federal ESA, determinations that Casitas was bound to comply with or face the risk of federal criminal prosecution.

2. The Public Trust Doctrine

The California Supreme Court has been quite clear, too, that the public trust doctrine does not provide fish and wildlife resources absolute protection from any harm due to water diversions. Rather, "[t]he state must have the power to grant . . . rights to appropriate water *even if diversions harm the public trust uses.*" *National Audubon Society*, 33 Cal. 3d at 426 (emphasis added). As the court further explained:

> As a matter of current and historical necessity, the Legislature acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to instream trust values . . . . [I]t would be disingenuous to hold that such appropriations are and always have been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

National Audubon Society, 33 Cal. 3d at 446.

The *National Audubon* case is sometimes cited for the proposition that no one can acquire a "vested" right to use water in a manner that harms the public trust. *See*

National Audubon Society, 33 Cal. 3d at 437, 440, 447 and 452. Read in context, however, these statements relate only to the state's duty of continuing supervision over public trust resources. Water rights are not "vested" against operation of the public trust only in the sense that the SWRCB's allocation among uses may be revisited in the future, and following proper process and due consideration of all factors affecting the public interest, allocations may be altered prospectively to reflect changed needs or circumstances.[1] *National Audubon Society* does not hold, as some suggest, that no one can hold a right to use water if that use would harm public trust interests. As quoted above, the *National Audubon* court stated that it would be "disingenuous" to hold that appropriations that harm fish "have always been improper to the extent that they harm public trust uses." *National Audubon Society*, 33 Cal. 3d at 446.

The license issued to Casitas reflects SWRCB's balancing of the public interest, including the needs of the fish. Unless and until such time as Casitas' license is modified by the SWRCB, or the terms of its water right are declared by the final judgment of a California court to be unreasonable, or to violate the public trust, Casitas has a right recognized and protected under California water law to divert water from the Ventura River in accordance with its license.[2]

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1 "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. [¶] The state accordingly has the power to reconsider allocation decisions . . ." *National Audubon Society*, 33 Cal. 3d at 447.

2 In *Tulare Lake*, the Court declined the invitation of the United States and others to anticipate how the SWRCB or a California court would apply these doctrines to the permits of the State Water Project. 49 Fed. Cl. at 322. As it observed there "a finding of unreasonableness by this court would be tantamount to our *making* California law rather

E. The *Allegretti* Case Does Not Require Reconsideration Of *Tulare Lake*

The United States cites a recent California case, *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 42 Cal. Rptr. 3d 122 (2006), to argue that the Court should apply a *Penn Central* analysis to taking of Casitas' water. (Def. Mot. Summ. J. at 27-29.) In that case, the court applied the *Penn Central* test and found no taking from a conditional use permit issued by Imperial County for a new groundwater well. A condition in the permit would have limited the total volume of groundwater pumping on the property.

The *Allegretti* decision is of no import here. This Court, of course, is not bound by the views of a California state court regarding application of the Fifth Amendment. While the Court must look to state law in determining the relevant property right, *Allegretti* is of little relevance to understanding Casitas' property rights. The *Allegretti* case did not involve rights to surface water, or a license issued by the SWRCB. Indeed, the *Allegretti* decision barely mentions the nature of the plaintiff's rights to groundwater as an overlying owner. Furthermore, in *Allegretti*, the county's conditional use permit did not even diminish the landowner's existing use of water. The permit condition never took effect, because the landowner declined to record it, and the county imposed no other restrictions on the landowner's use of his existing wells. *Allegretti* at 1268. Here, Casitas is being required to forego diversion of water by its existing facility under its existing right. Finally, the landowner in *Allegretti* offered no evidence that it had the ability to extract water in excess of the county's proposed cap in any event. *Id.* at 1269.

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than applying it." *Id.* at 324. For the same reasons, here it should decline to anticipate how the SWRCB or a California court would apply these doctrines to Casitas' license.

Hence, the landowner did not show that exercise of its groundwater rights had been limited.

The United States emphasizes the portion of the *Allegretti* decision that declined to apply a physical or *per se* taking analysis to the county's proposed groundwater pumping cap, and argues that *Allegretti* is persuasive authority for the view that restrictions on Casitas' diversions of surface water are not a physical taking. (Def. Mot. Summ. J. Takings at 27-29.) But the United States overlooks an essential difference between surface water and groundwater. Once surface water flows past the last point of diversion, it is lost to use, immediately and permanently. By contrast, groundwater in an aquifer remains essentially in place. And, as noted above, the landowner in *Allegretti* failed to show that it could extract more than the county's proposed cap.

Finally, there is reason to question the *Allegretti* court's full understanding of the facts and reasoning of *Tulare Lake*. The *Allegretti* court said the taking in *Tulare Lake* arose from "use restrictions imposed by the State Water Resources Control Board (the Board) under the Endangered Species Act." *Allegretti* at 1273. But as the Court knows, instead the ESA restrictions at issue in *Tulare Lake* were imposed by federal wildlife agencies. This is no minor discrepancy. The fact that the federal agencies, not the SWRCB, imposed the pumping restrictions was central to this Court's holding in *Tulare Lake*. 49 Fed. Cl. at 322.

IV. <u>CONCLUSION</u>

In the United States' view, the federal government should be able to reallocate water in California for the benefit of fish, without providing compensation to the holder of a valid water right to the reallocated water. But under the Fifth Amendment of the United States Constitution, property holders are entitled to compensation when the

government takes their property. Because under California law Casitas has a protected property interest in the right to use the water in the Ventura River, federal restrictions preventing it from diverting water is a taking of its property under its water right.

For the foregoing reasons, this Court should deny the United States' motion for partial summary judgment, and reaffirm the rationale of its decision in *Tulare Lake*.

Dated: January 30, 2006

Respectfully submitted,

KRONICK, MOSKOVITZ, TIEDEMANN &
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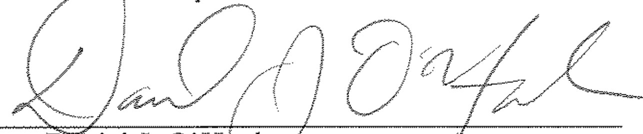

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 30th day of January, 2007, a true and correct copy of **THE ASSOCIATION OF CALIFORNIA WATER AGENCIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION'S AMICI CURIAE BRIEF** was sent via electronic mail and placed in first-class mail, postage prepaid, to:

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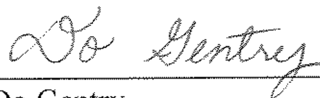

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