IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

Roger J. Marzulla
Nancie G. Marzulla
MARZULLA & MARZULLA
1350 Connecticut Ave., N.W.
Suite 410
Washington, DC 20036
(202) 822-6760
(202) 822-6774 (facsimile)

Counsel for Plaintiff

January 5, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

INTRODUCTION

Defendant asks this Court to repudiate its decision in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001), which held that the government's physical retention and diversion of plaintiffs' State Water Project water was a per se taking, and to enter a judgment (without the benefit of factual development of the issue) holding that the takings of water rights, and especially the taking of Plaintiff's water rights in this case, must be determined by applying the ad hoc factual takings standard announced by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Defendant's motion is fatally flawed for three reasons: (1) there are triable issues of fact making summary judgment inappropriate; (2) recent decisions of the Supreme Court and the Federal Circuit do not hold that the taking of water rights is to be analyzed by the same standards as land use takings cases; and (3) *Tulare* was correctly decided.

First, the material facts supporting Defendant's motion are disputed. Indeed, the facts that anchor a takings analysis are all disputed. Plaintiff notes, for example, that Defendant indicates in footnote 2 of its memorandum that it does not agree "with plaintiff's characterization of the scope of its property interest arising from water license 11834." Def.'s Br. at 2 n.2. If the parties cannot even agree on what property interest has been taken, it is difficult to see how the Court can summarily decide what the appropriate takings standard is.

Second, Defendant misreads recent Federal Circuit and Supreme Court decisions, *Lingle v. Chevron USA Inc*., 544 U.S. 528 (2005) and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), as supporting its argument that any taking that does not involve a permanent, physical occupation of property must be analyzed under the *Penn Central* ad hoc, factual inquiry. Defendant's theory that the Supreme Court has in these two

cases implicitly overruled countless prior Supreme Court and lower court takings decisions involving a wide array of property claims, including water rights cases, strains credulity. For starters, there are many forms of property that are not susceptible to physical occupation, but which can be taken by the government through seizure or confiscation, such as a trade secret, a chose in action, or water. In many such cases, courts have dispensed with the ad hoc, factual inquiry to hold that the destruction or seizure of that property right was a per se taking. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704 (1987) (taking of right to devise private property is a per se taking); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (disclosure of trade secret is per se taking); *Lynch v. United States*, 292 U.S. 571 (1934) (taking of contract is a per se taking). Defendant's misreading of takings law is reflected in its reliance almost exclusively on land-use takings cases to inform its analysis.

Finally, even if summary judgment were appropriate in this case, the *Tulare* case was correctly decided. The facts of that case showed that the government's requirement that the Cross-Channel gates be closed, physically retaining the plaintiffs' water, provided ample support for the conclusion that a per se taking had occurred. Moreover, none of the cases cited by Defendant support its argument that the law regarding the taking of water rights has changed since Tulare was decided and that it now requires that all water rights takings cases be analyzed under a *Penn Central* standard. To the contrary, *Washoe County v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003), involved the alleged taking of a right-of-way permit application for a water pipeline project, not of water rights. Indeed, in *Washoe* the Federal Circuit cited the *Tulare* decision, and the two cases relied on by the *Tulare* Court (*Dugan v. Rank* and *International Paper Co. v. United States*), with approval. Defendant's other case, *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006), which involved grazing permits and water rights,

was decided on the basis of the statute of limitations, and not on the merits. *But see Hage v. United States*, 35 Fed. Cl. 147, 156 (1996) (holding that water rights were unconstitutionally taken both by regulatory and physical actions—"cancelling and suspending [the plaintiffs'] permit and diverting and using their water").[1]

Accordingly, for all of these reasons, Plaintiff urges this Court to deny Defendant's motion for summary judgment, and to allow this case to go forward to trial.

Factual Background

The majority of the facts relevant to determination of this motion are found in this Court's decision on the first motion for summary judgment, extracted here for the Court's convenience:

> On March 1, 1956, Congress authorized the construction of the Ventura River Project, a facility designed to supply Ventura County, California, with water for the irrigation of farmland as well as for other municipal, domestic, and industrial uses. Pub.L. No. 423, 70 Stat. 32 (1956). Pursuant to that grant of authority, the Secretary of the Department of the Interior, acting through the Bureau of Reclamation ("BOR"), entered into a contract with plaintiff ("Casitas" or the

[1] Defendant also cites, *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261 (2006), and a decision from this Court, *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005), apparently as support for its argument that *Tulare* was wrongly decided. *See* Def.'s Br. at 21 n. 13. Plaintiff questions the relevance of these cases since both are factually different from this case. *Allegretti* involved an alleged taking of land, based on the government's denial of an alternative well permit for water that the land owner had no legal right to receive. The *Allegretti* Court criticized the Tulare Court's conclusion that the Tulare plaintiffs had a property right. The court did not comment on the takings standard. *Klamath* involved the alleged taking of Reclamation project water for which the Court held the landowners had no property rights. The *Klamath* Court in dictum criticized the Tulare Court's holding that the Tulare plaintiffs possessed property rights. The *Klamath* Court did not discuss the takings standard. Of course, other courts and commentators have favorably cited and discussed the *Tulare* decision, the import of which presumably suggests that *Tulare* was correctly decided. *See, e.g., Hansen v. United States*, 65 Fed. Cl. 76 (2005) (holding that ranch owner had a protected property interest in ground water under his ranch that could not be taken without payment of just compensation); Jesse Barton, *Tulare Lake Basin Water Storage District v. United States*: *Why It Was Correctly Decided and What It Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL'Y J. 109 (2002); Douglas Gant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331 (2006).

"District") on March 7, 1956, providing for the construction of the project. Under the terms of the contract, Casitas agreed to "repay to the United States the actual reimbursable [construction] cost, but not in excess of . . . $27,500,000" (later amended to $30,900,000), and upon completion of the project, to "take over and at its own expense operate and maintain the project works." In addition, the contract provided that "the District shall have a prior right in perpetuity to the use of the water made available by the project works, subject only to existing vested rights." Title to the project works, however, remained with the United States.

Before construction of the project began, a question arose concerning the need for the installation of a fish passage facility to accommodate the migration of the West Coast steelhead trout. Initially, the California Department of Fish and Game maintained that such a facility should be included as part of the proposed construction. The Department later changed its position, however, accepting plaintiff's written assurance that "if and when [the] need develops our District will cooperate fully with your Department toward the installation of an adequate fish ladder." The project, as completed, thus contained no such fish passage facility.

Forty years after the construction of the project, the issue of fish protection again emerged. On May 27, 1994, the National Marine Fisheries Service ("NMFS") proposed listing the West Coast steelhead trout as an endangered species, 59 Fed.Reg. 102 (May 27, 1994), a step NMFS in fact took on August 18, 1997, 62 Fed.Reg. 159 (Aug. 18, 1997). As a result of this determination, it became unlawful under Section 9 of the Endangered Species Act ("ESA") "for any person subject to the jurisdiction of the United States to . . . take any such [endangered] species within the United States." 16 U.S.C. § 1538(a)(1) (2000).

. . . .

Over the next several years, Casitas, BOR, and NMFS held regular meetings to develop the design of a fish passage facility and new operations criteria for the project that would meet the needs of the steelhead trout. The results of this process were reflected in a final Biological Opinion issued by NMFS on March 31, 2003. That opinion concluded that construction of the fish passage facility as designed, together with a new set of operating criteria to facilitate upstream and downstream passage of the fish, were necessary to avoid jeopardy to the steelhead trout.

Thereafter, Casitas adopted a resolution agreeing to implement the requirements set forth in the Biological Opinion. That resolution, however, was conditioned upon Casitas's requesting and receiving from BOR a directive ordering it to proceed with the construction of the fish passage facility and to implement the related operational requirements set forth in the Biological Opinion. BOR provided such a directive on May 2, 2003, saying in part as follows:

> In order to be exempt from the Take Provisions of the ESA, non-discretionary terms and conditions have been established in the [Biological Opinion] and must be implemented.
>
> . . . .
>
> In compliance with BOR's directive, Casitas constructed the fish passage facility for a total cost of approximately $9.1 million and implemented the revised operational criteria contained in the Biological Opinion, thus incurring an alleged water loss of up to 3,200 acre-feet per year. Casitas in turn filed suit in this court on January 26, 2005, seeking contract damages and/or just compensation pursuant to the Fifth Amendment.

Casitas Mun. Water Dist. v. United States, 72 Fed. Cl. 746, 748-49 (2006) (footnotes omitted).

Casitas' Board of Directors explained its decision to comply with the requirements of the Biological Opinion in its April 9, 2003 resolution, adopted a few days after NMFS published its biological opinion:

> WHEREAS, on March 31, 2003, National Marine Fisheries Service signed the Biological Opinion and delivered that Opinion to Casitas on April 2, 2003; and
>
> WHEREAS, the Biological Opinion requires that Casitas release up to 3,200 acre feet of safe yield in violation of Casitas' agreement with the United States of America and in effect taking the property of Casitas without compensation; and
>
> * * *
>
> WHEREAS, Section 9 of the Endangered Species Act makes it illegal to take endangered species such as the steelhead trout and provides civil and criminal penalties for that take; and
>
> WHEREAS, the Biological Opinion dated March 31, 2003, provides that "If Reclamation (1) fails to assume and implement the terms and conditions, or (2) fails to require Casitas to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse."; and
>
> WHEREAS, the lapsing of the incidental take statement will subject Casitas to Section 9 of the Endangered Species Act; and
>
> * * *
>
> WHEREAS, Casitas is under a powerful coercive effect to move forward with the

> fish passage project; and
>
> WHEREAS, Casitas . . . has a Biological Opinion directed at its operation and feels that it has been coerced into following the Biological Opinion.

Pl.'s Mem. Supp. Cross-Mot. for Summ. J. Ex. 2 at CMWD_1260245-46.

On October 2, 2006, this Court ruled that Casitas had not stated a breach of contract claim against the United States because (1) the cost of constructing the fish passage facility is an operation and maintenance expense allocated to Casitas by Article 9 of the contract; and (2) "Article 4 is not a promise by BOR to supply water to Casitas, but is instead simply an acknowledgment of Casitas's existing right to the use of the project water as granted under a permit issued by the State Water Resources Control Board." *Casitas Mun. Water Dist.,* 72 Fed. Cl. at 753. In ruling that the United States as contractor was not liable for Casitas' water loss, which resulted from the United States' action as sovereign under the Endangered Species Act, the Court accepted Defendant's argument that:

> any implied obligation that BOR may have had under Article 4 to refrain from interfering with Casitas's water rights was not breached by the issuance of the May 2, 2003, directive advising Casitas that it was obligated to comply with the requirements of the Biological Opinion. Those requirements, defendant maintains, originated in a sovereign act--NMFS's issuance of the Biological Opinion under the ESA--that was as much binding on BOR as owner of the project as it was on Casitas as operator of the project. Given these circumstances, defendant contends that any intrusion by BOR upon Casitas's water rights originated in the need for compliance with the requirements of the Biological Opinion and not in the independent actions of BOR acting as a contracting party.

Id.

The parties' first motion for summary judgment addressed only Defendant's liability as contractor, reserving for the May 8, 2007 trial the issue of Defendant's liability as sovereign for the taking of Casitas' property under the Fifth Amendment:

> In its complaint, plaintiff also asserts that the requirement that it divert a portion of the Ventura River Project water supply for fish preservation purposes

> constitutes a Fifth Amendment taking for which just compensation is due. Pursuant to the agreement of the parties, however, resolution of this issue has been deferred pending a ruling on plaintiff's contract claim.

Casitas Mun. Water Dist., 72 Fed. Cl. at 748 n.1.

Procedural Background

Casitas filed this suit for breach of contract and taking on January 26, 2005. Defendant filed its Answer on May 23, 2005. On October 2, 2006, the Court ruled on the parties' cross-motions for summary judgment on the contract claims, holding that Defendant was not contractually obligated to reimburse Casitas the $9.1 million it incurred in constructing the fish facility on the Ventura River Project. Defendant has now moved for partial summary judgment asking that the Court now determine the appropriate takings standard applicable to Casitas' taking claims based on the Defendant's requirement that Casitas divert up to 3,200 acre-feet of water per year for fish protection. A trial in this case is scheduled to commence on May 8, 2007.

Standard for Granting Motions for Summary Judgment

This Court may grant a motion for summary judgment only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) ("[T]he moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment."); *Walcek v. United States*, 44 Fed. Cl. 462, 465 (1999) ("[S]ummary judgment will not be granted if 'the

dispute about a material fact is genuine, that is, if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.'") (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). The benefit of all reasonable presumptions and inferences runs to the party opposing summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

REASONS FOR DENYING SUMMARY JUDGMENT

I. Summary Judgment Is Not Appropriate Because the Parties Dispute Material Facts Necessary for a Liability Determination

Although summary judgment is certainly a salutary vehicle for resolving appropriate cases, the need for a trial cannot be avoided where the parties cannot agree on the material facts of the case. This is such a case. Consequently, the Court has set this case for a trial commencing May 8, 2007, precisely to allow the parties to present evidence supporting their conflicting views of the case. Among the triable issues of material fact that preclude summary judgment, and which will be determined at the upcoming trial, are the following:

1. The Parties Disagree on the Nature of the Property Right

The first inquiry in any taking case is determination of the nature of the property right allegedly taken. *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004) ("First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment."); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) ("First, a court must evaluate whether the claimant has established a 'property interest' for purposes of the Fifth Amendment.")

In this case, Casitas claims the right to divert through the Ventura River Project 107,800 acre-feet of water from the Ventura River per year and the right to put 28,500 acre-feet of water to beneficial use each year (subject only to prior existing rights and other limitations not relevant

here). *See* Def.'s (Breach of Contract) App. Ex. 11 (SWRCB Permit No. 10364 License No. 11834). Casitas' right to Ventura River water was lawfully created under California state law. *See* CAL. WATER CODE § 102 ("All 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.") California law recognizes such water rights as property, protected by the Fifth Amendment. *See, e.g., Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001); *see also Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1401 (9th Cir. 1993) (stating that "a valid contract right [to receive water] of an irrigation district against the United States is property protected by the Fifth Amendment"); *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 101 (Cal. 1986) ("It is equally axiomatic that 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.") (citations omitted); *Los Angeles County Flood Control Dist. v. Abbot*, 24 Cal. App. 2d 728, 736 (1938) (the right to receive water is "a valuable property right" that could not be taken without just compensation).

Defendant, however, states that it disagrees with Casitas' characterization of the nature of the property right taken, creating a triable issue of fact on this first element of the takings inquiry: "Defendant does not agree with plaintiff's characterization of the scope of its property interest arising from water license 11834." Def.'s Br. at 2 n.2. As the Federal Circuit has held, defining the property right is the first step in a takings inquiry. Without knowing the nature and extent of Plaintiff's property right, the Court cannot proceed to the second stage of the inquiry (determining whether that property right was taken) as Defendant urges in its motion. *Maritrans*,

342 F.3d at 1351 ("The Federal Circuit has developed a two-part test to evaluate claims that a governmental action constitutes a taking of private property without just compensation."); *Carpenter v. United States*, 69 Fed. Cl. 718, 729 (2006) ("The court must first determine whether the claimant has established the existence of a protected property interest for Fifth Amendment purposes. If the court determines that such a property interest exists, it then must analyze whether a compensable taking of that interest has occurred.") (citations omitted).

Defendant's suggestion that the nature of the property right is irrelevant to determination of the proper taking test to be applied by the Court, and that the sole relevant consideration is the character of the government's action, is overly simplistic and is, as a result, wrong. Def.'s Br. at 2 n.2. Contrary to Defendant's contention, a regulation may give rise to a per se taking. *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003) (applying per se analysis to takings claim involving IOLTA accounts); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (regulation that deprives an owner of "all economically beneficial use" of land is per se a taking); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (regulation that "abolishes both descent and devise" of interests in land is a per se taking); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (regulation abrogating contract with the United States is a per se taking).

2. The Parties Disagree on Whether the Government Has Physically Appropriated Ventura River Water for Its Own Use

This case involves Casitas' claim that the government has appropriated what will amount to approximately 138,618 acre-feet of its Ventura River water to benefit the endangered steelhead over a thirty-six year hydrological cycle. Pl.'s (Takings) App. Ex. 1 at 16; Pl.'s Findings of Fact No. 7. This is approximately one-half the storage volume of Lake Casitas or approximately six years of additional water yield to the existing water uses. Pl.'s (Takings) App. Ex. 1 at 16. Prior to the listing of the steelhead as endangered and the issuance of the Biological

Opinion, the Ventura River Project was operated such that Casitas only had to allow 20 cubic feet per second ("cfs") of water to bypass at Robles Diversion Dam; under the operations criteria imposed by NMFS in the Biological Opinion, Casitas must allow flows at or above 50 cfs to bypass at Robles during storm events in order to provide sufficient water for the fish to mount the fish ladder and swim over the Robles dam. Pl.'s Findings of Fact Nos. 5–6. As a result, Casitas has permanently lost an average of 3,492 acre-feet of Ventura River water per year.

Accordingly, the government's contention that it has never "physically diverted water in the Ventura River away from Casitas Reservoir or physically impounded water from Casitas Reservoir for its own purposes," Def.'s Br. at 11, is a contested issue of material fact. Casitas contends, and will prove at trial, that the government in fact owns and controls the operation of all of the Ventura Project facilities, including the Robles dam and fish ladder; that Casitas was required, both by Reclamation and by the NMFS biological opinion, to provide a portion of its water for the benefit of the fish; and, that Casitas would have provided this water to its customers if the government had not taken it for the government's own purpose—fish protection. Pl.'s Finding of Fact Nos. 4, 6.

3. The Parties Disagree on Whether Casitas or Reclamation Controls the Flow of Water in the Ventura River Project

Critical to Defendant's argument is the contested factual assertion that Casitas establishes the operational criteria for the Project, for if Reclamation controls the release of water over Robles dam, this case is squarely within the rule of *Dugan v. Rank*, 372 U.S. 609 (1963), and *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), in which Reclamation's control of water through its dams and reservoirs was found to be a taking of plaintiffs' water. Under the heading "Plaintiff's Operation of the Ventura River Project," Defendant asserts that "Plaintiff operates the Ventura River Project"; that "Plaintiff also stores water in Casitas Reservoir"; that

"plaintiff's standard operating procedures limit the amount of water that it captures from the Ventura River"; and that "plaintiff generally operates Robles Diversion Dam so as to keep the first 20 cubic feet per second ("cfs") of water." Def.'s Br. at 4–5. Defendant further asserts that "plaintiff, and not Reclamation, operates the Robles Diversion Dam." Def.'s Br. at 8 n.7. By painting Reclamation completely out of the Ventura River Project picture, Defendant hopes to convince this Court that Reclamation exercises no physical control over Ventura Project water, and thus that a physical taking did not occur.

Defendant's assertion that Reclamation does not control the flow of water through the Ventura River Project is untrue, as Casitas will prove at trial. As Reclamation itself has stated, "Casitas Municipal Water District operates the Ventura Project on Reclamation's behalf." Def.'s (Breach of Contract) App. Ex. 3. Casitas operates the Project according to rules and regulations prescribed by Reclamation, which has the right to take back Project operation from Casitas. Def.'s (Breach of Contract) App. Ex. 1 at 12 ("The District agrees to accept . . . the care, operation, and maintenance of the transferred works . . . in accordance with reasonable regulations furnished by the contracting officer. . . .") The contract provides that title to the Project facilities is retained by the United States (Def.'s (Breach of Contract) App. Ex. 1 art. 18)), and that Casitas cannot make any changes to the facility without written authorization from the contracting officer: "[n]o substantial change in any of the transferred works shall be made by the District without first obtaining the written consent of the contracting officer." *Id.* art. 7(c).

The contract also provides that Casitas acts as operations and maintenance contractor under the direction of Reclamation's contracting officer with the duty:

> [T]o care for, operate and maintain the transferred works and any existing works of the District and deliver water therefrom in full compliance with the Federal reclamation laws, the terms of this contract, and in accordance with reasonable regulations furnished by the contracting officer and in such manner that said

> works shall remain in as good and efficient condition, except for normal depreciation and wear, for the development, diversion, and distribution of the aforesaid water supply as on the effective date of such transfer to the District.

Id. art. 7(a). Should Casitas fail to perform these duties, the United States has the right to take back operations of the Ventura River Project:

> At any time prior to full payment of the construction obligation that the contracting officer determines that the District has not cared for, operated, maintained, or delivered water from transferred works in the manner as aforesaid, the United States may take back and operate and maintain such works, and the District hereby agrees to surrender possession of said works.

Id. Should Casitas fail to make payments when due, its water supply can be cut off by the United States:

> No service from the project works shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears in the payment of charges required to be paid by the District under the terms of Article 6 and Article 7 of this contract or for more than twelve (12) months in the payment of construction charges accruing under this contract.

Id. art. 13.

Nor does Casitas establish the operations criteria for the Ventura River Project. The 1959 criteria (which were in effect until 2000) were created by Reclamation. *See* Def.'s (Breach of Contract) App. Ex. 17. In 2000, Reclamation prescribed new criteria to protect the recently listed steelhead. And on May 2, 2003, Reclamation ordered Casitas to comply with the operating criteria found in the Biological Opinion. Def.'s (Breach of Contract) App. Ex. 3 ("The Casitas Municipal Water District operates the Ventura Project on Reclamation's behalf, pursuant to Contract 14-06-200-5257 as amended, and as such must also comply with the Terms and Conditions of the BO.")

4. The Parties Disagree on Whether the Criteria Established by the Biological Opinion Result in Loss of Water by Casitas

Defendant's assertion that Casitas has suffered little, if any, water loss as a result of the operations criteria imposed on the Ventura River Project is based exclusively on wet weather in the last two years, and is contested by Casitas. Defendant makes much of the wet weather in the last two years, asserting that "Plaintiff stopped diverting water from the Ventura River on March 22, 2005 because it had reached approximately two feet below the spillway," "as of June 2, 2006, Casitas Reservoir was 99.36% full," and "Plaintiff has had a nearly full reservoir for the past two years, even after operating the Project in substantial conformance with the operational parameters contained in the BO." Def.'s Br. at 5 n.5. Defendant also asserts that "[a]lthough plaintiff contends that the BO 'orders' it to 'dedicate up to 3200 acre-feet of the yield of the Ventura River Project to benefit the fish,' nowhere in the BO does that alleged 'order' appear." Def.'s Br. at 9 n.8.

As Casitas' expert witness, Steven E. Wickstrum, will testify at trial, however, California weather is characterized by alternating wet and dry cycles lasting several years. Pl.'s (Takings) App. Ex. 1 at 6–8. Above average precipitation in 2005 and 2006 is far from a guarantee that future years will also bring above average precipitation. To the contrary, the current wet cycle will likely be followed by a dry cycle in which precipitation will be scarce, resulting in a serious draw-down of Casitas' reservoir and limitations on the water which Casitas can supply to its customers.

5. The Parties Disagree on Whether Casitas Conducted the Section 7 Consultation and Authorized the Operations Criteria Contained in the Biological Opinion.

Early in this case Defendant asserted the defense that Casitas acted voluntarily in

relinquishment of its water rights.[2] Although Defendant appears to have abandoned this unsubstantiated argument, Defendant still clings to a variant: that Casitas initiated and conducted the Section 7 consultation with NMFS, and authorized the operational criteria included in the biological opinion.

Defendant states: "As a result of this concern, plaintiff engaged in the regulatory process known as a Section 7 consultation under the ESA to analyze . . . new operations criteria for the Project. . . ." Def.'s Br. at 1; "plaintiff hired a consulting firm, ENTRIX, Inc. ("ENTRIX"), to develop a Biological Assessment regarding . . . the ongoing operations and maintenance of the Robles Diversion Facility," *id.* at 7; and "[t]he proposed action, along with the entire Biological Assessment, was drafted by ENTRIX and authorized by plaintiff prior to being submitted to NMFS." *Id.* at 8.

Casitas contends that it did not, and could not, initiate a Section 7 consultation, and that it vigorously opposed—and thus did not authorize—the new operations criteria imposed by Reclamation and NMFS on the Ventura Project. First, it was Reclamation and not Casitas that initiated the Section 7 consultation by letter on March 8, 1999: "The purpose of this letter is to request informal section 7 consultation and technical assistance in the design construction, operation and maintenance of a fish ladder and screen at Robles Diversion Dam and Canal." Def.'s (Breach of Contract) App. Ex. 24. It is because of Reclamation's ownership and control over the operation of this Reclamation Act facility that consultation under Section 7 of the Endangered Species Act was required. *See* 50 C.F.R. § 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement *or control*.")

[2] Joint Preliminary Status Report at 8 ("To the contrary, Plaintiff proposed taking that action in response to California Trout, Inc.'s ("Cal Trout"), December 18, 1998, 60-day notice of intent to sue Casitas for the purported taking of steelhead trout through Casitas's operation of the Robles Diversion Dam on the Ventura River.")

(emphasis added); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1248 (N.D. Cal. 2001) (finding that the Bureau of Reclamation, as owner of the Klamath Project, "committed a substantial procedural violation of the Endangered Species Act in operating Klamath Project for an entire year pursuant to its 2000 Operations Plan without completing a biological assessment of the likely impact of that plan on the threatened coho salmon or its critical habitat, or engaging in consultation as the Act and the regulations specifically required it to do"). Reclamation exercised its rights as owner with the right to control the Ventura River Project works (and its duty as a federal agency to comply with the Endangered Species Act) when, on May 2, 2003, it ordered Casitas (its maintenance and operations contractor) to comply with the 2003 Biological Opinion, stating: "The Casitas Municipal Water District operates the Ventura Project on Reclamation's behalf, pursuant to Contract 14-06-200-5257 as amended, and as such must also comply with the Terms and Conditions of the BO." Def.'s (Breach of Contract) App. Ex. 3.

Moreover, far from authorizing the new operations criteria which took an average 3,492 acre-feet per year of its water supply, Casitas' Board knew that it had no choice but to comply with the Endangered Species Act. As the Board stated, "Casitas . . . has a Biological Opinion directed at its operation and feels that it has been coerced into following the biological opinion . . . ." Pl.'s (Breach of Contract) App. Ex. 2. As Casitas' General Manager, John Johnson, has stated: "Casitas has never offered to dedicate any portion of its Ventura River Project water supply to fish, and it has done so with the greatest reluctance and under the coercion of the United States to protect the remainder of its Ventura River Project water supply." Def.'s (Breach of Contract) App. Ex. 7 (Johnson Decl. ¶ 11).

II. Recent Decisions of the Supreme Court and the Federal Circuit Do Not Hold That the Taking of Water Rights Is To Be Analyzed by the Same Standards as Land Use Takings Cases

Defendant argues that two recent decisions of the Supreme Court (*Lingle and Tahoe-Sierra*) and recent Federal Circuit decisions hold that unless the taking is premised on a permanent physical occupation, regardless of the kind of property at issue or the facts of the case, the taking must be determined by application of the ad hoc, factual inquiry set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (economic impact, reasonable investment-backed expectations, and character of the government action). In the government's brief, it flatly asserts that "[g]enerally, courts recognize two types of takings – physical and regulatory takings." Def.'s Br. at 12. The government further asserts that "this distinction between two types of government action is critical because it dictates whether a per se rule is applied (physical takings) or the multi-factor *Penn Central* inquiry is applied (regulatory takings)." *Id*. Thus, according to Defendant, if the taking in this case is not a physical occupation, the Court must apply the multi-factor *Penn Central* analysis to determine if a taking has occurred. *Id*. at 1 ("Since there has been no physical occupation of plaintiff's property interest, any regulatory restrictions on the use of plaintiff's property must be analyzed as a regulatory taking.")

Defendant relies almost exclusively on land-use takings cases to support its overly simplistic argument. Takings jurisprudence, however, is more complex and encompasses far more than just land use or real property takings cases.

In reality, even assuming arguendo that a physical taking did not occur in this case (Plaintiff does not concede that it cannot prove at trial that a physical taking occurred in this case), a per se rule may still apply. Even a cursory review of takings cases show that many cases

have employed a per se takings standard even where a physical occupation has not occurred, depending on the type of property involved in the case. For example, in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), which was decided after *Tahoe-Sierra*, the specific issue before the Supreme Court was whether a per se or *Penn Central* analysis should be used to analyze the regulatory requirement that interest on lawyers' trust accounts be transferred to a public legal foundation. The government argued there, as it does here, that no physical occupation had occurred, and that therefore *Penn Central* analysis was required. Rejecting the government's argument, the Supreme Court stated:

> We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." 524 U.S. at 172. If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.

Id. at 235; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1027 (1992) (regulation that deprives an owner of "all economically beneficial or productive use" of land is per se a taking); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (regulation that "abolishes both descent and devise" of interests in land is a per se taking); *Ruckelshaus v. Monsanto Co*., 467 U.S. 986 (1984) (taking of a trade secret is a per se taking); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (taking of real estate lien analyzed as per se taking). In other words, "[s]ince *Penn Central*, . . . the Court has held that certain interferences with 'core' property rights (the right to exclude others from your property and the right to pass your property on at death) may constitute per se takings." Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 n.1 (1990). Therefore, the government is incorrect to argue that unless this is a physical occupation, *Penn Central* applies.

A. The Takings Cases Relied on By Defendant Do Not Hold That Per Se Rules Can Only Be Used for Physical Takings

Nothing in the Supreme Court's or Federal Circuit's recent decisions (*Tahoe-Sierra* and *Lingle* included) invalidates or reverses the large, existing body of takings jurisprudence that employs per se rules in a variety of contexts. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court faced a takings claim involving the application of a 32-month moratorium on land development. As useful as that decision may be for other land-use takings cases, it has little applicability to this case. The underpinnings of this takings rule reveal that it was crafted for real property with little, if any, applicability to water rights (or other non-land) takings cases:

> 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. . . . Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.

Id. at 1483. Obviously, when water is the property at issue one can not think in terms of metes and bounds, as water is always flowing and does not stay in a fixed location. *See Hage v. United States*, 51 Fed. Cl. 570, 573 (2002) ("The property involved in this case is atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and flows throughout the year.")

The Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005), has even less applicability here. In *Lingle*, an oil company had brought suit challenging a Hawaii statute limiting rent that oil companies could charge dealers leasing company-owned service stations, alleging that the statute was unconstitutional because it failed to substantially advance

its stated purpose. The Supreme Court expressly overruled a previous holding, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which had announced the substantial advancement test, which the Court found to be a due process test, not a true takings test:

> In *Agins v. City of Tiburon*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land . . . Because this statement is phrased in the disjunctive, *Agins'* "substantially advances" language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test. Indeed, the lower courts in this case struck down Hawaii's rent control statute based solely upon their findings that it does not substantially advance a legitimate state interest. . . . Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins*, this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence. There is no question that the "substantially advances" formula was derived from due process, not takings, precedents.

Lingle, 544 U.S. at 540 (citations omitted).

The Court expressly indicated that other than invalidating the substantial advancement test (not at issue in this case), it was leaving other takings jurisprudence in tact, which it broadly summarized:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property-perhaps the most fundamental of all property interests. the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

Id. at 539 (citations omitted). The Court neither expressly states, nor reasonably implies, that it was reversing all the many other cases involving a wide range of forms of property in which the Supreme Court and lower courts have applied per se takings rules.

Defendant also cites *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014-12 (1992) and *Tuthill Ranch, Inc. v. United States,* 381 F.3d 1132, 1135 (Fed. Cir. 2004), claiming that these cases hold that "[g]enerally, courts recognize two types of takings—physical and regulatory takings." Defendant's Br. at 12. Defendant, however, again misapprehends the import of these cases.

Lucas, of course, is the seminal case holding that the taking of the total beneficial use of land is a per se violation of the Just Compensation Clause. That case involved the application of a Beachfront Management Act depriving the landowner of all use of two building lots. Notably, the Supreme Court did not state that there were only two types of takings (the proposition for which it is cited in Defendant's Brief at 12). Rather, the Court stated that there were at least two categories of *regulatory* action compensable without resort to the case-by-case analysis required under the ad hoc factual inquiry set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978):

> We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. . . . . For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking.
>
> * * *
>
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

Lucas, 505 U.S. at 1015.

In applying the latter rule (deprivation of all economically beneficial use), the *Lucas* Court explained: "We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017 (citing *See San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981)).

The Federal Circuit in *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132 (Fed. Cir. 2004), another land use takings case relied on by Defendant, concluded that there had been no physical taking in that case because the government had already fully compensated the landowner for the physical occupation of its property. The Federal Circuit's definition of the term physical occupation as being the government's destruction of the "owners right to possession, use, and disposal of the property" ties its takings analysis to real property concepts:

> (1) possession, "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space;
> (2) use, "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property; and
> (3) disposal, "even though the owner may retain the bare legal right to dispose of the occupied space . . . ., the permanent occupation of that space . . will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. at 1138 (quoting *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002)).

Defendant also fails to cite any cases holding that all takings cases brought under the aegis of the Endangered Species Act (ESA) must be analyzed utilizing the *Penn Central* standard. Certainly neither of the cases cited by Defendant stands for this proposition. Neither *Boise Cascade v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), nor *Seiber v. United States*, 364

F.3d 1356 (Fed. Cir. 2004), involves water rights or holds anything close to Defendant's assertion that all takings cases brought under the ESA must be analyzed using the *Penn Central* standard. To the contrary, *Boise Cascade* involved the allegation that the government's obtaining of a temporary logging injunction for logging of the timber on the land without an incidental take permit (ITP) under the Endangered Species Act (ESA) was a taking. The court concluded that the claim was not ripe for review because the landowner had not even applied for, much less been denied, an ITP permit, and dismissed the lawsuit on ripeness grounds. 296 F.3d at 1342. The Federal Circuit concluded that case was governed by the Supreme Court's holding in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which holds that "[o]nly when a permit is denied and the effect is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." 474 U.S. at 126-27. As the Supreme Court explained in *Riverside Bayview*:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take the property in any sense; after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use his property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner.

Id. The Federal Circuit rejected the landowner's argument that *Tahoe-Sierra* reversed *Riverside Bayview* and required that the regulatory takings claims be analyzed on the merits under *Penn Central* instead of dismissed as not ripe under *Riverside Bayview*, stating that "the *Tahoe* Court did not explicitly overrule, or even discuss, the ripeness rule articulated in *Riverside Bayview*." *Boise Cascade*, 296 F.3d at 1351.

The court also rejected the landowner's argument that the taking was a physical taking based on the facts of the case, which showed that the permitting requirement and injunction conditions imposed on the landowners pursuant to the ESA:

> "were incidents of the permitting process that were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself." We agree with the trial court that the nature of the intrusion complained of in this case does not make out a per se takings claim under *Loretto*.

Id. at 1352. [3]

In *Seiber*, the owners of commercial timberland designated as spotted owl habitat sued the government, alleging that the land had been temporarily taken due to the Fish and Wildlife Service denial and later rescission of its application to cut timber on the property. The Federal Circuit rejected the landowner's argument that the permit denial constituted a physical taking, concluding that the permit denial operated as a regulatory restriction on the use of the property, not a physical taking. The court also rejected the landowner's argument that each tree constituted a separate property interest for purpose of the takings analysis, because no State law and "[n]o authority has been brought to our attention that holds as a matter of federal takings law that trees are a separate property interest before they are severed from their underlying land." *Seiber*, 364 F.3d at 1369. Finally, the court also rejected that landowner's argument that the permit denied all beneficial use of the property because the prohibition on use was temporary. The court concluded that the fee simple estate could not be rendered valueless by a temporary prohibition on economic use, since the property value recovered as soon as the prohibition was lifted. *Id.* at 1371.

[3] In noting that the injunction only prevented the landowner's use of the land without a permit operated as a regulatory restriction on the use of the property, and not as a per se taking, the court did not hold that any action taken by the government under the ESA could never constitute a per se violation. *Id.* at 1354.

B. Real Property Takings Tests Cannot Be Squared with Takings Tests Utilized for Other Forms of Property

Real property rules and rationales make perfect sense when applied to real property. When applied to such property interests as a trade secret, a leasehold, or water, however, they often become meaningless. How can one, for example, talk meaningfully about the relevant parcel for a trade secret? Should the court look to see how many trade secrets a company owns before it determines if the government has inversely condemned a trade secret? *But see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secret analyzed as a per se taking). What is the relevant parcel for interest—should the court compare the amount of interest earned to the principle? Requiring the court to look for the relevant parcel in an interest takings case would be nonsensical. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (taking of interest on IOLTA account analyzed as a per se taking). Should the court look to see if the government actually physically possesses the paper on which a contract is written before it can determine that the government has taken a contract right? *But see Cienega Gardens v. United States*, 331 F.3d 1319, 1339 (Fed. Cir. 2003) ("[T]he government argues that prohibiting prepayment does not have the character of a compensable taking because the legislation did not appropriate the owners' titles or dispossess them in any way; it merely denied them a future enhancement in the value of their property. As already described, precedent does not support this argument. Dispossession is not required for a regulatory taking. Nor is divesting title.")

The reason why takings rules differ for different forms of property is because the rights associated with different forms of property likewise differ. The Federal Circuit has defined property as: "the right to possess, use and dispose of it. . . . It is "[t]he notion of exclusive ownership as a property right that is fundamental to our theory of social organization." *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991). The rights associated with land differ

from rights associated with an improvement of the land, leases, contracts, trade secrets; pension plans, money, interest, causes of action, business interest; and water. Therefore, courts have fashioned takings rules sufficiently flexible to accommodate the taking of the different rights associated with different forms of properties. *See Argent v. United States*, 124 F.3d 1277, 1283 (Fed. Cir. 1997) ("The Government ascribes to takings jurisprudence an inflexibility that does not exist.") As the Federal Circuit explained in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (2002) (en banc):

> Not every physical *invasion* is a taking. . . . the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 1353 (citations omitted).

Since water rights are diametrically different from land, which has perhaps the fullest panoply of rights associated with fee ownership, such ownership rights are recognized as a limited right of ownership, a usufruct. The rights in the water owner's bundle are limited essentially to a right of use (and perhaps in some instances the rights to devise, receive, divert, or store the water). For this reason, when the government inversely condemns a water right, it essentially takes every stick in the bundle of rights associated with water right ownership. In real property terms, when the government takes a water right it absolutely dispossess the owner, and rendered the water right estate valueless to the owner. Or, as the Supreme Court put it in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the taking "chops through the bundle, taking a slice of every strand" and thus constitutes a per se violation off the Just Compensation Clause.[4] In water, of course, there are not as many sticks in the bundle as there

[4] As one commentator has reasoned:

are with land, so it is easier for the government to chop through the entire bundle. In the case of water, whenever the use of water is diverted or not provided to the owner, and taken for another use, the bundle of sticks in a water right are also chopped through.[5]

Water rights taking cases, thus, do not employ a takings test formulated for real

---

> Undeniably, there is a parallel between the two fact situations. The beachfront regulation reallocated the use of Lucas's two parcels from his intended residential development to ecological and other public purposes. Similarly, in the water situation exemplified by Klamath and Tulare, ESA regulation reallocates water contracted for irrigation or municipal use to species habitat use.
>
> But the parallel is not complete. The beachfront legislation did not oust Lucas from possession of the lots. There was no physical taking, so the Court created a per se regulatory taking category. In Klamath and Tulare, implementation of the ESA ousted the contract water users from physical possession of water molecules to which they had a right. There was a traditional physical taking.
>
> Another argument made against treating the Klamath and Tulare situations as per se physical takings is that this would be inconsistent with the Court's decisions upholding land use regulations like zoning and set back requirements. Again, however, these land use regulations are distinguishable from Klamath and Tulare because they do not oust the owner from possession. The owner remains in possession and can still use the land in various ways not barred by the regulation.

Douglas L. Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1371-1372 (2006).

[5] Agreeing with the Court's reasoning in Tulare, one commentator has stated that:

> The *Tulare* court's use of *Causby* to support the finding of a physical taking reflects the court's understanding of the reasons behind the rule on physical takings. A 'physical invasion' is not absolutely necessary to determine the presence of a physical taking; such a taking can result from interference so complete with the rights of the owner that it is nearly indistinguishable from a physical invasion. Causby is not the only case that makes this observation. Additional cases support two similar reasons why the facts in Tulare compel the finding of a physical taking.

Jesse W. Barton, *Tulare Lake Basin Water Storage Dist. v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL'Y J. 109, 130 (2002).

property. For example, in *International Paper Co. v. United States*, 282 U.S. 399 (1931), the government had requisitioned the output of a hydroelectric power plant on the Niagara River during World War I. The company, however, had a contract from the permit holder to receive a portion of the water from the same canal that that the power company received its water. By taking the output of the hydroelectric plant, the government also cut off the water flow to International Paper's sawmill. The Supreme Court held this mandatory diversion of water was a per se taking of plaintiff's right to receive water:

> There is no room for quibbling distinctions between the taking of power and the taking of water rights. 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.

International Paper Co. v. United States, 282 U.S. 399, 407 (1931).

In *Dugan v. Rank*, 372 U.S. 609 (1963), the Supreme Court reviewed the claims of water rights holders who had brought suit against the federal government challenging the constitutionality of the taking of their water rights. Although the United States was dismissed from the lawsuit on the ground that it had not waived its sovereign immunity, the Supreme Court made plain that the taking of water rights was a physical appropriation: "A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land . . . ." 372 U.S. at 625.

In *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 752-53 (1950), riparian rights were also taken in connection with the Friant Dam. The Court held that "[n]o reason appears why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation." 339 U.S. at 752-

53.

This Court has likewise applied a per se taking test to the taking of water. In *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996), a case involving the taking of stock watering rights, the court held "that water rights are not 'lesser or diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution." 35 Fed. Cl. at 172

In *Ball v. United States*, 1 Cl. Ct. 180, 183 (1982), the Court of Claims best summed up the rule on the taking of water rights stating: "In general terms, water rights in surface waters, whether riparian or appropriative, constitute property, and, under familiar principles, cannot be taken except for public use and upon payment of just compensation." 1 Cl. Ct. at 183 (quoting 2 NICHOLS ON EMINENT DOMAIN § 5.79, p. 5-302 (Rev. 3d Ed. 1981)); *see also Store Safe Redlands Associates v. United States*, 35 Fed.Cl. 726, 730 (1996) (concluding that the alleged taking of plaintiff's water rights was "not on its facts a regulatory taking" but rather "share[d] many commonalities with the so-called physical taking").

III. The Tulare Decision Remains Good Law and Should Be Followed in this Case

Following an unbroken line of precedent (*Int'l Paper Co. v. United States*, 282 U.S. 399 (1931); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Dugan v. Rank*, 372 U.S. 609 (1963)) in *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), this Court ruled that the government's diversion of water to benefit an endangered fish species is properly analyzed as a per se taking:

> Our characterization of water rights as the subject of a physical taking is confirmed by *International Paper Co. v. United States*, 282 U.S. 399, 51 S. Ct. 176, 75 L. Ed. 410 (1931). There, the Supreme Court, in assessing whether the government's acquisition of a corporation's entire right to water power constituted a taking, noted that "the petitioner's right was to the use of 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 that use." *Id*. at 407, 51 S. Ct. 176. Similarly, in *Dugan v. Rank*, 372 U.S. 609, 625, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963), the Court made approving reference to cases that treated water rights as the object of physical seizure (*e.g.*, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958)), before noting that "[a] seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land." The Court went on to conclude that "when the Government acted here 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses 'whenever it saw fit,' 'with the result of depriving the owner of its profitable use [there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made.'" *Id.*

Tulare, 49 Fed. Cl. at 319. This holding remains good law, and should be applied in the present case as well.

The only Federal Circuit case to discuss *Tulare*, *Washoe County, Nev. v. United States*, 319 F.3d 1320 (Fed. Cir. 2003), cites *Tulare* with approval in the company of two Supreme Court cases, for the proposition that a taking of water rights may be found where either (1) the government diverts the plaintiff's water for its own purposes, or (2) the government action decreases the amount of water accessible to the plaintiff:

> In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights. *See Dugan v. Rank*, 372 U.S. 609, 625-26, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963) (finding a taking where the government diverted water at a dam from downstream owners of water-rights for public purposes); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-08, 51 S. Ct. 176, 75 L. Ed. 410 (1931) (finding a taking where the government ordered diversion of water from the owners of water-rights for use in government power production); *Tulare*, 49 Fed. Cl. at 320 (stating that a deprivation of water from the owner of the water rights amounts to a physical taking).

Washoe County, 319 F.3d at 1326. Indeed, the Federal Circuit in *Washoe County* employed *Tulare's* analytic framework to distinguish appellants' claim on the ground that, unlike the

pumping restrictions imposed in *Tulare*, the government's permit denial in *Washoe County* had not reduced the quantity of water physically available to appellants on their ranch:

> In *Tulare*, the plaintiffs included county water districts that had contracted with a state agency for "the right to withdraw or use prescribed quantities of water" stored in a state water project. 49 Fed. Cl. at 315. To protect certain fish species pursuant to the Endangered Species Act, however, federal and state agencies restricted pumping from the water projects. *Id.* The Court of Federal Claims found that the contracts had conferred on plaintiffs an identifiable property interest in a stipulated amount of water and that the restrictions prevented the plaintiffs from receiving the full amount of water to which they were entitled under the contracts. *Id.* at 318-20. The court reasoned that the government had physically appropriated the plaintiffs' water because its actions were no different than if the government had physically diverted water for its own consumptive use. *Id.* at 319-20. In the instant case, the government has neither physically diverted or appropriated any water nor physically reduced the quantity of water that is available to the Appellants from the water source on the Ranch.

Washoe County, 319 F.3d at 1326-27.

Defendant fails even to cite another well-reasoned decision of this court, *Hansen v. United States*, 65 Fed. Cl. 76 (2005), likewise endorsing this Court's *Tulare* analysis:

> This court has concluded that water rights are property protected by the Fifth Amendment in some notable cases. *Hage v. United States*, 35 Fed. Cl. 147 (1996), involved a claim that the government had taken the plaintiff's water rights both by regulatory and physical actions (i.e., "cancelling and suspending [the plaintiffs'] permit and diverting and using their water"). *Id.* at 156. In *Hage*, this court rejected the argument that water rights were "limited, usufructuary rights" not entitled to Fifth Amendment protection. *Id.* at 172. "[W]ater rights are not 'lesser' or 'diminished' property rights unprotected by the Fifth Amendment." *Id.* On the contrary, *Hage* concluded: "Water rights, like other property rights, are entitled to the full protection of the Constitution." *Id.* Likewise, in *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), the plaintiffs claimed that the Bureau of Reclamation's decision to reduce water outflows for the preservation of a few species of fish deprived them of their water rights without just compensation. *Id.* at 314-15. This court granted summary judgment in favor of the plaintiffs, concluding that "the government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." *Id.* at 324.

Hansen, 65 Fed. Cl. at 123.

Defendant also ignores the decision of the Tenth Circuit in *Rio Grande Silvery Minnow v. Keys*, where the district court ordered the federal government to "compensate those . . . whose

contractual rights to water are reduced in order to meet . . . flow requirements." *Rio Grande Silvery Minnow v. Keys,* 356 F. Supp. 2d 1222, 1237 (D. N.M. 2002). This issue was found to be moot on appeal. *Rio Grande Silvery Minnow v. Keys,* 333 F.3d 1109, 1138 (10th Cir. 2003).

Nor does Defendant mention the decision of the Washington Supreme Court in *Public Utility Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology*, 51 P.3d 744 (Wash. 2002), citing 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:

> A governmental abrogation of a preexisting, vested water right is an appropriation of that enhanced minimum flow to a public use and therefore is a taking encompassed in the Fifth and Fourteenth Amendments no matter how minimal the intrusion may be. *See Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319-20 (2001) (discussing *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946); *Int'l Paper Co. v. United States*, 282 U.S. 399, 51 S. Ct. 176, 75 L. Ed. 410 (1931); *Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L.Ed.2d 15 (1963)).

Public Utility Dist. No. 1 of Pend Oreille County, 51 P.3d at 773.

Defendant's reliance on dictum in a recent decision of California's intermediate appellate court, *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 129-32 (Cal. Dist. Ct. App., 2006), is misplaced, for that court never reached the question of whether *Tulare's* per se taking test or the *Penn Central* test should be applied, distinguishing the case instead on the ground that *Allegretti* lacked the identifiable water rights created by the *Tulare* plaintiffs' contracts:

> Even if we found it appropriate to consider *Tulare Lake*, we would find it distinguishable by virtue of the existence of identifiable contractual rights between the plaintiffs and water rights holder, rights that are not present in this case.

Allegretti & Co., 42 Cal. Rptr. 3d at 131. Notably, however, the *Allegretti* disagreed with the Court's holding in *Tulare* that the water rights holder possessed a property right, but agreed with the Supreme Court's decision in *International Paper Co. v. United States*, 282 U.S. 399 (1931).[6]

Likewise, in *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005), a decision in which the court found that the plaintiffs lacked a property right, the Court disagreed with the *Tulare* holding that the plaintiffs had a property right. The *Klamath* Court did not address the issue raised by Defendant in this motion: whether the taking of water is properly analyzed as a per se or as a *Penn Central* taking.[7]

In fact, Defendant cannot cite a single case from any federal court applying the *Penn Central* test to determine whether the right to receive water has been taken. All such cases apply the per se test which this Court adopted in *Tulare*. *See, e.g., United States v. Great Falls Mfg.*

---

[6] Surprisingly, Defendant also mischaracterizes the case as involving the requisition of a mill. Def.'s Br. at 25 ("[A] case concerning the government requisition of a mill, *International Paper Co. v. United States*, 282 U.S. 399 (1931).") One commentator has noted:

> However, some may claim that *International Paper* may be distinguished from *Tulare* because *International Paper* involved the actual physical diversion of water by the U.S. rather than a restriction on pumping. Yet this is incorrect. The water in *International Paper* was not delivered because of a government regulation on a private company, not because the government erected a physical barrier that prevented the delivery. Thus, the water in both *International Paper* and *Tulare* was restricted due to government regulation, but because the loss was so complete both courts treated it in a per se manner, just like a physical invasion. To the courts, it did not matter how the government abrogated the Paper Company's or the water district's right to use, only that it did.

Jesse W. Barton, *Tulare Lake Basin Water Storage Dist. v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL'Y J. 109, 134 (2002).

[7] The *Klamath* Court's views may also have been colored by its erroneous belief that the *Tulare* plaintiffs had a contract remedy against the federal government (they had no contract with the United States) and that this Court failed to examine certain aspects of California water law (although it did).

Co., 112 U.S. 645 (1884); *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931); *Dugan v. Rank*, 372 U.S. 609 (1963). As one commentator has noted:

> Dugan does not stand alone in Supreme Court takings jurisprudence. *Gerlach* is similar both factually (even involving Friant Dam interference with downstream water rights) and in outcome. *Gerlach* contains no hint of multifactor balancing. In *International Paper Co. v. United States*, the government's World War I requisition of all the hydropower capable of being produced at a certain power company's plant also ended *International Paper's* use of water at its mill because all of its water had to go instead to the plant . . . . There was no hint in the opinion of multifactor balancing, so the Court evidently saw the case as a traditional physical taking of *International Paper's* right to water. *Dugan*, *Gerlach*, and *International Paper* refute the idea that there can be no physical taking of a water right because it is a usufructuary interest.

Douglas L. Grant, *ESA Reductions In Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1366 (Fall 2006).

As another commentator states, the rationale underlying *Loretto's* per se physical taking rule for land and buildings applies equally to other types of property, such as water rights, which cannot be physically occupied but can nevertheless be appropriated by regulatory action:

> First, different kinds of property interests, such as ownership in fee, leaseholds, and easements, enjoy different kinds of rights. Among these different rights are some whose importance is so central to the property interest that the infringement of this "core" right will likely result in a per se treatment of the taking, similar to a physical or categorical taking. The reason that the core right is so jealously protected is because once the core right is infringed upon or extinguished, the other rights have little meaning because the loss is so complete.
>
> This accepted recognition of core rights with regard to property rights in land justifies the same outcome with regard to property rights in water. A water right, like other property interests, enjoys different rights and among these different rights is the core right – the right to use. As is true with other property interests, an infringement or extinguishment of this core right renders any other subsidiary rights associated with the property useless and should result in a per se treatment of the taking, similar to physical and categorical takings. Just because the government never physically contacts and interferes with the water right (such as the construction of a dam just upstream from the water contractors) this should not preclude treating the action in a per se manner as many on the Supreme Court have pointed out. Permanent physical contact with the property was not required in *Causby*, nor was a physical invasion required in a celebrated easement case,

Nollan v. California Coastal Commission.

> Second, a closer examination of the right to use reveals the negative corollary – the right to exclude others from use. This right exists to enforce one's right to use water against another and is statutorily recognized in California. The exercise of this right occurs most commonly when water right holders sue to enjoin an individual who does not have a water right from removing water from a waterway.
>
> Thus, the right to use, the chief characteristic of a water right, necessarily includes the right to exclude others from using the water, similar to a landowner's right to exclude others from entering his property. And as previously noted, the right to exclude is one of the most cherished rights in the bundle of sticks that make up property rights – interference with it is more likely than any other right to result in a taking. Continuing with this reasoning results in the conclusion that a governmental restriction of an individual's water right, whether the right was contracted for or granted by permit, is a taking because it interferes with that individual's right to exclude others from his right to use.

Jesse W. Barton, *Tulare Lake Basin Water Storage Dist. v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL'Y J. 109, 130-32 (2002).

In short, the rationale for applying a per se rule for physical occupation of real property is that such action clearly violates the fundamental right of a landowner to exclude others. In the context of water rights, denying the water rights owner the use of the water denies him the sole stick in his bundle of property rights, crossing the bright line which separates takings from mere regulation:

> Granted, there is no real physical invasion; however, in the context of water rights an actual physical invasion is unnecessary. The right to use the water is as equally extinguished whether the government erects a dam upstream from the water right holder or prohibits the water right holder to pump water. The takings clause does not unequivocally demand a physical invasion in order to treat a taking in a per se manner. Instead, the courts in their application of the takings clause have always looked behind the rule of physical takings for the reasoning and then applied that reasoning to different contexts. The reason for the bright line rule used in physical takings is that the physical presence leaves no doubt that the government has deprived the owner of all use of the land. Similarly, the deprivation of use of a water right leaves no doubt that the government has denied

> the owner of all use of the restricted water. Once the core right of the interest is denied, the purpose for which the interest was acquired ceases to exist. Thus, it should be no surprise that when the government restricted the water contractor's water right, the court found the restriction analogous to a physical taking and treated it in a per se manner. The right to use was extinguished.

Id. at 136.

Thus, this Court's decision in *Tulare* remains good law and, if the factual evidence supports it, should be applied in this case:

> *Tulare Lake Basin Storage Dist. v. United States* represents the logical application of the Fifth Amendment. It is solidly reasoned and consistent with precedent. The contract entered into by the plaintiffs represented more than just an expectation of water, it represented a right to the exclusive use of a stipulated amount of water for which the plaintiffs were required to pay. One does not pay for an expectation, one pays for an obligation. Once one pays for property, the government cannot take place of the owner by physically invading the owner's property and denying the owner the use of the property without paying the owner for what he lost. Nor can the government, by subtlety, accomplish the same ends by regulation. The Supreme Court has explicitly forbidden this. This is not to say the state is powerless to redefine property rights through regulation, only that if property rights are to be redefined such redefinitions are subject to strict constitutional limitations and are best left to the state where its needs and expertise are paramount.

Id. at 143-44.

Conclusion

For all of these reasons, Plaintiff asks that this Court deny Defendant's motion for partial summary judgment.

Respectfully submitted,

_____

Roger J. Marzulla
Nancie G. Marzulla
MARZULLA & MARZULLA
1350 Connecticut Ave., N.W.
Suite 410
Washington, DC 20036
(202) 822-6760
(202) 822-6774 (facsimile)

Dated: January 5, 2007

Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that on this 5th day of January 2007, a true and correct copy of the below-listed documents was sent via electronic mail and placed in first-class mail, postage prepaid, to:

Kathleen Doster
Trial Attorney
Natural Resources Section
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044
Kathleen.Doster@usdoj.gov

Documents served:

1. Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment on Liability;
2. Plaintiffs' Appendix in Support of Its Opposition;
3. Plaintiff's Proposed Findings of Uncontroverted Fact; and
4. Plaintiff's Responses to Defendant's Proposed Findings of Uncontroverted Fact.

_____
William McGonigle