No. 2007-5153

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASITAS MUNICIPAL WATER DISTRICT,
Plaintiff-Appellant,

v.

UNITED STATES
Defendant-Appellee

Appeal from the United States Court of Federal Claims in 05-168,
Senior Judge John Wiese

BRIEF OF AMICUS CURIAE NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF THE UNITED STATES

John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9850
(202) 662-9005 (fax)

Katherine S. Poole
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, California 94104
(415) 777-0220
(415) 875-6161 (fax)

January 29, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Casitas Municipal Water District v. United States.

No. 2007-5153

Certificate of Interest

Counsel for Natural Resources Defense Council certifies the following:

1. The full name of every party or amicus represented by me is:
   Natural Resources Defense Council.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
   N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in court:
   John D. Echeverria
   Sanju Misra
   Katherine S. Poole

_____
John D. Echeverria
Counsel for Amicus Curiae
Natural Resources Defense Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANIOUS

The Natural Resources Defense Council ("NRDC") submits this brief amicus curiae in support of the United States and urges the Court to affirm the rulings of the U.S. Court of Federal Claims rejecting the claims of Casitas Municipal Water District ("Casitas").

INTERESTS OF AMICUS CURIAE

NRDC is a not-for-profit conservation organization with more than 400,000 members nationwide and more than 79,000 members in California. NRDC members use and enjoy natural resources affected by the Ventura River Project. Through its scientific, litigation, and other programs, NRDC promotes sustainable agriculture, encourages water conservation, and protects endangered species. NRDC has participated, either as a party or as an amicus curiae, in many cases involving alleged private property and/or contract rights associated with Bureau of Reclamation ("Bureau") projects. The U.S. Court of Federal Claims granted NRDC leave to participate in this case as amicus curiae.

STATEMENT OF FACTS

NRDC adopts the statement of the facts of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

To avoid unnecessary duplication of the Brief of the United States, NRDC will focus on the two issues of greatest general importance: (1) what

standard governs a taking claim based on a regulatory restriction on water use, and (2) whether the contract claims are barred under the sovereign acts and unmistakability doctrines?

The Court should recognize, at the threshold, that Casitas's taking claim is barred by California background principles that prevent a water right holder from claiming a protected property interest in using water in a way that threatens public fisheries. This issue is arguably not suitable for resolution on this appeal, given the procedural posture of the case. Nonetheless, the issue is logically antecedent to the question of whether a "taking" has occurred, and consideration of the issue also should assist the Court in resolving the takings issue.

The Court should reject Casitas's contention that the United States has effected a per se taking. Casitas argues that a special rule grants water rights holders greater protection under the Takings Clause than other property owners. Specifically, Casitas argues that a restriction on water use, no matter how modest, should be treated as a per se (or automatic) taking, even though comparable restrictions on other types of property interests are evaluated using the multi-factor Penn Central framework.

The argument is wrong and should be rejected. No such special rule exists, and the most directly relevant precedents of the Supreme Court and

this Court refute it. The argument is indistinguishable from arguments for per se analysis recently presented by other claimants in the context of regulations governing mineral interests, timber, and other natural resources. The Court rejected these arguments and should reach the same result here.

Casitas attacks Judge Wiese's decision for rejecting the analysis followed in Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed Cl. 313 (2001), a case virtually identical to this one, in which Judge Wiese accepted the theory that any restriction on water use results in a per se taking. Casitas asserts that Judge Wiese mistakenly concluded that the Supreme Court's decision in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), "overruled" his earlier analysis in Tulare. With all due respect, Tulare was wrongly decided when it was issued. The decision in Tahoe-Sierra further undermined Tulare by underscoring the importance of the distinction between physical occupations and alleged regulatory takings. Ultimately, however, that decision is only one piece of a large body of law demonstrating that Judge Wiese got it wrong in Tulare but got it right in this case.

Contrary to Casitas's position, holders of water rights are actually less likely, not more likely, to be able to mount successful takings claims than other property owners. First, because water rights are usufructuary, and

cannot be physically occupied in the way that land can be, it is nonsensical to suggest that water rights can be physically occupied; for this reason, the per se takings rule for permanent physical occupations cannot logically apply to water. Second, private water rights in California are circumscribed by various background principles limiting the scope of property interests that apply primarily if not uniquely to water.

Finally, the Court should affirm Judge Wiese's ruling that the contract claims are barred under the sovereign acts and unmistakability doctrines. The claims are barred under the sovereign acts doctrine because the federal government enforced the ESA for the public purpose of safeguarding endangered fish rather than for the purpose of altering the government's contractual obligations. As Casitas conceded below, the contract contains no unmistakable commitment by the government to accept liability if a sovereign act made performance impossible.

ARGUMENT

I. CASITAS'S TAKING CLAIM IS BARRED BY BACKGROUND PRINCIPLES OF CALIFORNIA LAW.

This Court applies a two-part test to determine whether a government action results in a compensable taking. First, the Court must determine whether the claimant has a protected property interest. Maritrans, Inc. v. United States, 342 F.3d 1344, 1351 (Fed. Cir. 2003). Second, assuming this

threshold requirement is satisfied, the Court must determine whether the government action amounts to a taking of that property interest. Id.

The property inquiry involves an examination of "existing rules and understandings" and "background principles" to define the dimensions of the relevant property interest. Id. at 1352 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992)). "The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002). Rather, the scope of a property interest is determined by "an independent source, such as state, federal, or common law." Maritrans, 342 F.3d at 1352. This case involves state-granted appropriative water rights defined by state law.

Given the posture of this case – the United States prevailed on a motion for partial summary judgment regarding the liability standard, and Casitas responded by surrendering on its taking claim – the claims court did not have the opportunity to rule on the threshold property issue. Nonetheless, the background principles issue is logically antecedent to the takings question, and the Court can appropriately recognize that the claim is barred by applicable background principles. Cf. American Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363 (Fed. Cir. 2004). In any event,

consideration of the scope of the applicable background principles should inform the Court's analysis of the taking question, including the plausibility of Casitas's per se theory.

The brief of the California Water Resources Control Board addresses background principles in detail; NRDC simply notes its complete agreement that Casitas's taking claim is barred under the California doctrines of reasonable and beneficial use, public trust, and public ownership of wildlife.

II. THE CLAIMS COURT CORRECTLY RULED THAT CASITAS'S TAKING CLAIM DOES NOT SUPPORT APPLICATION OF A PER SE TEST.

Judge Wiese properly ruled that a traditional regulatory takings analysis, rather than a per se takings test, applies in this case. Because Casitas has offered a confused description of the applicable principles, it will be helpful to describe the potentially relevant categories of takings claims. NRDC will then address why there was no per se taking in this case on any theory.

A. The Different Categories of Takings Claims.

The first category of takings claims involves physical occupations of private property. This type of taking occurs as a result of the government, or a third party acting under government authority, permanently entering onto and occupying private property. The Supreme Court in Loretto v.

Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), cited construction of a dam that floods private land, id. at 427, and installation of facilities such as "telegraph and telephone lines, rails, and underground pipes or wires," id. at 430, as examples of physical-occupation takings. In Loretto, the Court ruled that a law requiring a property owner to allow a cable television company to attach equipment to her building effected a taking under the physical-occupation theory. Id. at 438-39. Permanent physical takings trigger a per se test, meaning that a taking may be found "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, 458 U.S. at 434-35.[1]

The per se rule for physical occupations applies in only a narrow, well-defined set of cases. As the Supreme Court explained in Tahoe-Sierra, id. at 324, physical appropriations subject to the per se rule "are relatively rare" and "easily identified." See also Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002) ("The holding of Loretto is quite

[1] There is no mystery about why Casitas has staked its entire case on a per se argument rather than subject its claim to the rigors of a Penn Central analysis. As explained by the United States, Casitas has suffered no injury as a result of the ESA restriction on water diversions, and it is questionable whether it ever will. See U.S. Brief, at 14. Even Casitas concedes that its diversions have been reduced, at most, by only 1%. See Casitas Brief, at 7. In addition, protecting an endangered species from extinction obviously serves an important public purpose.

narrow."). The Supreme Court has made clear, for example, that the rule does not apply to mere temporary invasions. See Loretto, 458 U.S. at 428.

The narrow scope of this per se rule is explained by the "unique burden" on property rights the rule is designed to address. Lingle v. Chevron, USA Inc., 544 U.S. 528, 539 (2005). As the Court said in Loretto, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." 458 U.S. at 436. Given their especially intrusive character, permanent occupations represent takings regardless of whether they affect the entirety or only a portion of the property. Tahoe-Sierra, 535 U.S. at 322.

In addition, the Supreme Court has said that the per se rule for physical occupations must be narrowly confined to avoid imposing burdensome liabilities on government acting in the public interest. See Tahoe-Sierra, 535 U.S. at 324 ("regulations are ubiquitous and most of them impact property values in some tangential way - often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford.").

The second category of claims involves so-called "appropriations." See Lucas, 505 U.S. at 1014 (referring to "a 'direct appropriation' of property" as a traditionally recognized type of a taking). An appropriation

occurs when the government seizes ownership and/or possession of private property and either converts the property to some public use or transfers the property to a third party for its use. One example of an appropriation is the condemnation in Kelo v. City of New London, 545 U.S. 469 (2005), and another is the "actual taking of possession and control" of a coal mine in United States v. Pewee Coal Co., 341 U.S. 114, 116 (1951). See also Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) (assuming that a government-mandated transfer of ownership of interest held in lawyer trust accounts to a non-profit foundation effected a taking). When the government appropriates private property, a per se rule again applies. See Lingle, 544 U.S. at 537.

The third category of takings involves restrictions that so burden an owner's ability to use private property that they require payment under the Takings Clause. The so-called regulatory takings doctrine is reserved for "extreme circumstances," United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985), where the economic burden imposed by a restriction is so severe that the regulation is "functionally equivalent" to a classic taking involving an appropriation or physical occupation. Lingle, 544 U.S. at 539. The doctrine governing regulatory takings is divided between Lucas claims, involving allegations that restrictions on property use

render property economically worthless, and claims under Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), involving allegations that regulatory restrictions severely burden property but stop short of destroying all economic use.

The exceedingly rare restriction on property use that falls into the Lucas category is a per se taking; thus, unless "background principles" or other special circumstances apply, the Lucas rule leads ineluctably to a finding of a taking. In a Penn Central case, by contrast, the analysis is more complicated. While this type of claim may be barred as well by background principles, the analysis generally focuses on the magnitude of the economic burden, the "character" of the government action, and the degree of interference with the owner's "reasonable, investment-backed expectations." See Tahoe-Sierra, 535 U.S. at 315 n.10. In both a Lucas and a Penn Central case, the impact of the regulation must be evaluated in relation to the entirety of the claimant's property. See Tahoe-Sierra, 535 U.S. at 327. See also Seiber v. United States, 364 F.3d 1356, 1368 (Fed. Cir. 2004) (applying the parcel as a whole rule in a Lucas case).

It is clear beyond peradventure that Casitas cannot assert a per se claim under Lucas; indeed, Casitas expressly acknowledges that its claim involves only an alleged "partial" taking of its water right. Accordingly,

Casitas could prevail on a per se theory (assuming the claim were not barred by background principles) only if the case involved a physical occupation or an appropriation. It involves neither.

B. Casitas's Taking Claim Does Not Involve a Physical Occupation.

Enforcement of the ESA did not produce a physical occupation of Casitas's property. The ESA restriction prevents Casitas from diverting a small quantity of water for irrigation and other purposes, requiring Casitas to leave a slightly larger quantity of water in the river than it otherwise would have. As Judge Wiese explained, "The revised operating criteria - intended to augment flow requirements essential for fish migration and the preservation of their downstream habitat - prescribed an increase in downstream river flow volumes which correspondingly demanded a decrease in the amount of water Casitas would be allowed to divert." Casitas Municipal Water District v. United States, 76 Fed. Cl. 100, 102 (2007). Because the criteria limited how much water Casitas could divert – i.e., use – the claim must be analyzed using a traditional regulatory takings analysis.

Apart from the inherently regulatory nature of the ESA restriction, the nature of Casitas's property interest confirms that this case does not involve a physical occupation triggering per se takings analysis. As both sides have

recognized, Casitas merely possesses a usufructuary interest in the water and does not own the water itself. See Eddy v. Simpson, 3 Cal. 249, 252 (1853) (explaining that a water right owner merely holds a right to the use of a certain quantity of water at a certain location and for a certain purpose). A use right might be impaired by regulation, but it cannot be physically occupied. For this independent reason, the physical occupation theory does not apply in this case.[2]

Furthermore, the relevant precedent refutes Casitas's per se takings theory. In Hudson Water Co. v. McCarter, 209 U.S. 349 (1908), the only Supreme Court decision to squarely address a taking claim based on a restriction on water use, the Court applied an analysis that is inconsistent with the per se theory. The Court rejected a claim that a restriction on the export of water to a neighboring state resulted in a taking. The regulation did not bar all economic use of the property; numerous potential in-state uses remained available. Thus, the regulation represented a "partial"

[2] The incongruity of applying physical-occupation cases to water rights is underscored by the fact that a water right merely assigns the holder a priority, relative to other holders, to "call" for the delivery of a certain quantity of water. In the event the holder decides not to make a call for water in any particular year, he cannot block delivery of water to the next holder in the chain of priority. In this respect, water is entirely different from land, because a landowner can exclude others from his property even if he chooses not to use it himself. See John Leshy, A Conversation about Takings and Water Rights, 83 Tex. L. Rev. 1985, 2009-15 (2005).

restriction which, according to Casitas's theory, should have triggered per se takings analysis. But, far from applying a per se rule, the Court suggested that restrictions on water use rarely give rise to viable takings claims: "[F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. . . . The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." Id. at 356. The Supreme Court has never cast doubt on the validity of the holding in Hudson.[3] See United States v. Willow River Power Co., 324 U.S. 499, 510 (1945) ("rights, property or otherwise, which are absolute against the world are certainly rare, and water rights are not among them").[4]

[3] The Supreme Court in Sporhase v. Nebraska, 458 U.S. 941 (1982), subsequently ruled that the kind of prohibition on interstate water shipments at issue in Hudson violated the dormant Commerce Clause. But that ruling has no bearing on the continuing vitality of Hudson as a takings precedent.

[4] The available evidence strongly suggests that the founding fathers believed the Takings Clause would not be an obstacle to water regulation, especially for species-protection purposes. See John F. Hart, Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original

This Court also has ruled that restrictions on water use should be analyzed as potential regulatory takings rather than physical takings. See Goodrich v. United States, 434 F.3d 1329, 1333-34 (Fed. Cir. 2006) (characterizing an alleged taking of water rights on federally-owned grazing land as a potential regulatory taking rather than a physical taking for statute of limitations purposes).

This Court has likewise rejected the per se physical-occupation theory in cases involving other types of natural resources. In Stearns Co., Ltd. v. United States, 396 F.3d 1354 (2005), the Court refused to apply a per se test to a claim that the government effected a taking by requiring a mineral interest holder to submit to a regulatory review process; the Court dismissed the claimant's argument as "little more than an incredible attempt to transform a regulatory taking claim into a per se physical taking." Id. at 1357. Similarly, in Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002), the Court rejected the claim that a temporary restriction on tree harvesting to avoid interference with nesting birds constituted a per se physical-occupation taking, observing "that Boise's argument is merely an attempt to convert a regulatory takings claim, governed by Penn Central . . .

Understanding of the Takings Clause, 63 Md. L. Rev. 287, 315-16 (2004) (discussing James Madison's support for regulations protecting anadromous fish).

into a per se taking governed by the more generous rule of Loretto." Id. at 1357. See also Seiber v. United States, 364 F.3d 1356 (Fed Cir. 2004) (rejecting a claim identical to the one presented in Boise Cascade, and dismissing the physical-occupation theory on the ground that "[t]he Supreme Court has long held that regulatory restrictions on the use of property do not constitute physical takings"). The logic of these decisions requires rejection of the per se physical-occupation theory in this case as well.

The only decision Casitas cites that supports the physical-occupation theory is the 2001 decision in Tulare. However, that decision has been severely undermined by the fact that Judge Wiese, the author, has repudiated the decision in this case. In any event, Tulare was wrongly decided and this Court should reject it.

The Court in Tulare reasoned that the ESA eliminated all economic use of the claimant's water, that a regulation that eliminates all economic use is equivalent to a permanent physical occupation and, therefore, a per se test should apply. This logic was fatally flawed, for two reasons. First, a regulatory restriction that destroys all economic use is not the same thing as a physical occupation. See Lucas, 505 U.S. at 1015 (these two types of actions produce two "discrete categories" of takings claims). Thus, even if it were correct that the ESA had destroyed the value of the water by

restricting its use, that would not have supported a finding of a taking based on the physical occupation theory.

Second, in fact, the ESA did not eliminate all economic use of the water. See Melinda H. Benson, The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment, 32 Envtl. L. 551, 560 (2002) ("The restrictions resulted in an overall reduction in water availability of approximately 0.11% and 2.92% for Tulare and Kern County, respectively."). The Court's statement that the restriction destroyed the value of Tulare's water right rested on the premise that the takings analysis should focus on the quantity of water Tulare was barred from diverting, rather than the effect of the regulation on the water right as a whole. But that approach, which assumes the parcel as a whole rule does not apply, would have been appropriate only if a per se analysis applied in the first place. See page 8, supra. In other words, the Court mistakenly relied on the assumption that the case was governed by a per se analysis to support its conclusion that a per se analysis applied.

The Tulare decision also mistakenly invokes the Supreme Court decision in United States v. Causby, 328 U.S. 256 (1946), to support the physical-occupation theory. The Court referred to the assertion in Causby that the plaintiffs' "loss would be complete" if they "could not use this land

for any purpose" as a result of aircraft passing through the airspace above their home. 49 Fed. Cl. at 319 (quoting Causby, 328 U.S. at 261). But the critical fact in Causby that triggered the per se physical occupation test was that the overflights involved actual invasion of private airspace. 328 U.S. at 259; see Tahoe-Sierra, 535 U.S. at 322 (when government planes "use private airspace to approach a government airport," the government "occupies the property for its own purposes"). The overflights in Causby may have eliminated possible uses of the property, but that fact did not dictate the conclusion that there was a physical-occupation taking.

Other courts have declined to follow the ruling in Tulare. In Allegretti & Co. v. County of Imperial, 42 Cal Rptr. 3d 122 (Cal. Ct. App. 2006), the California Court of Appeals commented:

> We . . . decline to rely on Tulare's reasoning to find a physical taking under the circumstances presented by County's action. . . . [W]e disagree with Tulare's conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water. . . . Tulare's reasoning disregards the hallmarks of a categorical physical taking, namely actual physical occupation or physical invasion of a property interest.

Id. at 132. See also People v. Murrison, 124 Cal. Rptr. 2d 68, 78 (Cal. Ct. App. 2002) (concluding that a restriction on stream diversions raises a claim "of the regulatory variety, as opposed to a physical taking"). Judge Francis Allegra, in Klamath Irrigation District v. United States, supra, commented:

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

67 Fed. Cl. at 537-38.

In addition, "Tulare has been the subject of intense criticism by commentators who, inter alia, have challenged the court's application of a physical taking theory to what was a temporary reduction in water." Id. at 538 n.59 (citing, among other things, Michael C. Blumm & Lucas Ritchie, Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses, 29 Harv. Envtl. L. Rev. 321, 329 (2005)). To be sure, a handful of academic commentaries support the Tulare per se theory. But even one of these articles acknowledges that "Commentators have nearly unanimously criticized [the] opinion [in Tulare]." Douglas L. Grant, ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property, 36 Envtl. L. 1331, 1363 (2006).

As Judge Wiese recognized, the Supreme Court's 2002 decision in Tahoe-Sierra further undermines the analysis in Tulare. In Tahoe-Sierra the Court rejected the argument, similar to the argument presented in Tulare and in this case, that a regulatory restriction should be evaluated as a per se taking. The Court emphasized that "[t]he temptation to adopt what amount

to per se rules" should be "resist[ed]," id. at 321, and that the per se physical-occupation test must be reserved for "relatively rare" cases in which the existence of physical occupations can be "easily identified." Id. at 324. The Court also stressed the need to maintain a clear analytical line between physical-occupation claims and regulatory takings claims: in the Court's words, it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." Id. at 323. Casitas's claim certainly cannot be "easily identified" as a physical occupation, and accordingly Tahoe-Sierra calls for rejection of Casitas's per se theory.[5]

Casitas contends other decisions support its per se physical-occupation theory, but they do not. For example, Casitas gains no support from Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003), in

[5] Several of Casitas's amici attempt to distinguish Tahoe-Sierra on the ground that the case involved land use regulation, which produces a "reciprocity of advantage" that benefits all land owners, whereas this case involves water, ostensibly producing no reciprocal benefits. In fact, water use in California is subject to a regulatory regime at least as pervasive, and productive of reciprocal benefits, as that affecting land. In any event, the premise of the argument, that to avoid regulatory takings liability the reciprocal benefits of regulations must exactly outweigh the burdens, is fallacious. See Keystone Bituminous Coal Assn v. DeBenedictis, 480 U.S. 470, 492 n.21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received.").

which this Court rejected the taking claim. The Court cited Tulare, but it went out of its way to observe that the ruling "is not a precedent in this court," Washoe County, 319 F.3d at 1326, and that in any event Tulare was distinguishable on its facts. Id. at 1326-27.

Plaintiff also cannot derive support from Hage v. United States, 35 Fed. Cl. 147 (1996), or Store Safe Redlands Associates v. United States, 35 Fed. Cl. 726 (1996). In neither opinion did the Court actually rule that the takings claim should be governed by a per se rule. Instead, the Court's focus in both opinions was on the threshold question of whether the plaintiffs owned the property rights they claimed. See also Colvin Cattle Co. v. United States, 468 F.3d 803 (Fed. Cir. 2006) (rejecting the takings theory on which these claims were based).

The implausibility of Casitas's taking claim is reinforced by the fact that the Ventura River Project has been the beneficiary of enormous subsidies. Casitas paid nothing to California for its water rights. Logically enough, these rights therefore remain subject to extraordinary state control; for example, Section 1329 of the California Water Code provides that in the event of a sale or purchase of the water rights, through condemnation or otherwise, by a state agency, Casitas would be entitled to no more than reimbursement of its original administrative filing fee. See Andrew H.

Sawyer, Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust, 50 Okl. L. Rev. 311, 329-30 (1997). This provision undermines Casitas's theory that water rights holders should be entitled to special, heightened protection under the Takings Clause.

In addition, Article 5 of Casitas's contract with the Bureau permitted Casitas to reimburse the government for project construction costs allocated to irrigation purposes without interest. According to a 1996 General Accounting Office report, approximately $17.5 million of the project costs were allocated to irrigation, meaning that more than half the project costs were reimbursable on an interest-free basis. See, GAO, Information on Allocation and Repayment of Costs of Constructing Water Projects, GAO/RCED-96-109 (July 1996). The Supreme Court observed in Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958), "[i]t is hardly a lack of due process for the government to regulate that which it subsidizes," id. at 296 (quoting Wickard v. Filburn, 317 U.S. 111, 131 (1942)). In Ivanhoe, the Court rejected various constitutional challenges to the requirement that water from the Central Valley Project not be sold for use on parcels of land larger than 160 acres held by a single owner. The Court noted that Central Valley irrigators' repayment obligation was "without interest charge. In short, the project is a subsidy, the cost of which will never be recovered in full." Id.

The "no interest" subsidy Casitas has received is indistinguishable from the "no interest" subsidy involved in the Central Valley Project. Therefore, the same analysis should apply here: the government should have broad latitude to regulate that which it subsidizes. And, at the very least, a per se takings test cannot apply.

C. Casitas's Taking Claim Does Not Involve an Appropriation.

Nor did application of the ESA result in an "appropriation" warranting per se treatment. As discussed above, the government effects an appropriation when it seizes ownership and/or possession of private property and either uses the property for its own purposes or transfers the property for use by a third party. This case does not involve an appropriation because the ESA restricted Casitas's withdrawals of water from the river, requiring Casitas to leave relatively more water in the river. This type of negative restriction on property use is wholly unlike a condemnation for private development, see Kelo, supra, or a seizure of a private industrial facility. See Pewee, supra.

Using the term appropriation loosely, any government action impairing private property interests could be characterized as an appropriation. For example, it might be contended that the City of New York in Penn Central effected an appropriation of the airspace above Grand

Central Terminal by restricting building in it. But that expansive definition of appropriation would obliterate the category of regulatory takings altogether and convert every property restriction into a per se taking. To preserve appropriations as a distinct category of takings, and to avoid transforming every government action affecting property into a taking, this category must be reserved for cases in which the government actually acquires ownership or possession of property and converts it to some new use.

In an effort to salvage its case, Casitas seeks to minimize the regulatory character of the ESA prescription in this case, describing the regulation as requiring a diversion of a portion of the river's flow in order "to operate the fish ladder." Casitas Brief, at 6. It is questionable whether there is any meaningful distinction between a requirement that water be left in the river and a requirement that water be passed through a fish ladder on its way down the river. Cf. Loretto, 458 U.S. at 436 (stating that a permanent physical occupation is "qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner"). In any event, as explained by the United States, since the historical project flows were more than adequate to operate the fish ladder, the ESA prescription was designed to limit the project's impacts on

water flows below the dam necessary to facilitate fish migration and as habitat. See U.S. Brief at 52 n.16.

As discussed, in Hudson the Supreme Court indicated that a regulatory restriction on water use would rarely if ever result in a compensable taking. See pages 10-11, supra. Just as Hudson contradicts the theory that a restriction on water use should be treated as a per se physical-occupation taking, it also contradicts the theory that a restriction on water use should be treated as an appropriation triggering per se treatment.

To support its appropriation theory, Casitas invokes a trilogy of Supreme Court water cases that it says support use of this per se test. However, these cases do not support Casitas because they involved actual appropriations, in contrast to this case, which involves a restriction on property use.

In International Paper Co. v. United States, 282 U.S. 399 (1931), the plaintiff company successfully claimed a taking of its rights to the water flow of a power canal adjacent to Niagara Falls. The Secretary of War issued an order requisitioning the company's water right for transfer to an electrical power company, which in turn utilized the water to produce power for various other private companies. This case involved a straightforward appropriation of property from A for transfer to B, warranting payment of

compensation under the Takings Clause. International Paper has no relevance to this case involving a regulatory restriction on the use of water.

The other two cases cited by Casitas, Dugan v. Rank, 372 U.S. 609 (1963), and United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), also involved appropriations and are therefore distinguishable as well. In Dugan, the Court said the water rights holders were entitled to bring suit seeking compensation in the claims court for what the Court characterized as an "appropriation," a transfer of water rights from the plaintiffs to the new water users. 372 U.S. at 625. Similarly, in Gerlach, the Supreme Court approved of a taking claim based on the appropriation of water rights for use by other project beneficiaries. See 339 U.S. at 752.

III. THE CLAIMS COURT PROPERLY REJECTED THE CLAIM FOR BREACH OF CONTRACT.

NRDC agrees with the United States that Casitas failed to establish a breach of contract. NRDC will not re-plow that ground, except to add that it would be unfair to the taxpayers if Casitas were to prevail on its contract claim relating to the fish ladder. The State of California, through grants, paid more than half the cost of the fish ladder. See Defendant's Reply in Support of Summary Judgment, at 26-28 (filed June 30, 2006) (describing the grants in detail). Thus, this contract claim represents, in effect, an

unseemly effort by Casitas to use endangered species problems, which it helped create, as an opportunity to reap a windfall at taxpayer expense.

In any event, the claims court properly ruled that the contract claims are barred under the sovereign acts doctrine, which states that the government as contractor cannot be held liable "for an obstruction to the performance of . . . [a] contract resulting from its public and general acts as a sovereign." Horowitz v. United States, 267 U.S. 458 (1925). Application of the doctrine turns on whether a government action was designed to serve a public purpose or was instead "designed to target prior governmental contracts." Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1575 (Fed. Cir. 1997). Cf. City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007) (sovereign acts doctrine does not apply to legislation that "directly and intentionally abrogate[s]" contractual commitments). Assuming an action is sovereign, the government may nonetheless be held liable under the unmistakability doctrine if the government has surrendered the right to exercise sovereign power "in terms which admit of no other reasonable interpretation." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

In accord with the rulings of every other federal court to address the issue, the claims court correctly concluded that application of the ESA

represented a sovereign act barring contract liability. See, e.g., Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999); Klamath Irrigation District v. United States, 75 Fed Cl. 677 (2007), appeal pending, No. 07-5115. Moreover, Casitas has acknowledged that the contract contains no unmistakable commitment by the United States to accept liability if a sovereign act made performance impossible.

The ESA self-evidently qualifies as a public and general act for the purpose of the sovereign acts doctrine. Congress adopted the ESA to preserve species that "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a) (3). The Act has been described by the Supreme Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). "Conversely, nothing in the statute or its legislative history remotely suggests even the slightest intent to relieve the United States of any responsibilities under pre-existing contracts, particularly . . . water . . . contracts . . . ." Klamath, 75 Fed. Cl. at 685.

Casitas asserts that the claims court erred by not addressing whether application of the ESA rendered contract performance "impossible." The argument is specious because the claims court explicitly concluded that the

ESA did render contract performance "impossible." See Casitas Municipal Water District v. United States, 72 Fed. Cl. 746, 755 (2006). This conclusion was certainly well founded because the prescriptions in the National Marine Fisheries Service's biological opinion actually prevented Casitas from exercising its asserted contract rights. See Bennett v. Spear, 520 U.S. 154, 170 (1997) (stressing the "powerful coercive" and "virtually determinative" effect of a biological opinions).[6]

[6] Although the relevance of the argument to this case is quite obscure, Casitas also suggests that the sovereign acts doctrine is not a freestanding defense, but instead should be treated as the "prelude" to application of the traditional common law impossibility doctrine. This argument is mistaken. Applying these doctrines in sequence would be redundant because the sovereign acts doctrine is simply the version of impossibility doctrine that applies in breach of contract suits against the government, See Klamath, 75 Fed. Cl. at 694 n. 27. Furthermore, the sovereign acts doctrine, which is designed "to shield exercises of the lawmaking function," Cuyhoga Metropolitan Housing Authority v. United States, 75 Fed. Cl. 751, 774 n. 31 (2003), provides a broader defense than traditional common law impossibility doctrine. Requiring a government defendant to meet both tests would strip the sovereign acts doctrine of all practical significance. In support of its "prelude" argument, Casitas cites the Court's decision in Carabetta Enters., Inc. v. United States, 482 F.3d 1360 (Fed. Cir. 2007), but that decision does not support the weight Casitas attempts to place on it. In that case the Court assumed that a congressional appropriations rider obstructing contract performance represented a sovereign act. Nonetheless, relying on the Restatement (Second) of Contracts § 270, the Court concluded that the government was liable for breach because the agency could have rendered "substantial" performance and failed to do so. The conclusion that a sovereign act does not excuse the government from failing to render substantial performance does not resolve the question whether a government defendant raising a sovereign acts defense must also establish all of the traditional elements of the common law impossibility defense.

Casitas also contends that the government cannot invoke the sovereign acts doctrine because it allegedly erred in not adopting a more cost-effective strategy for protecting the fish. To the extent Casitas is arguing that the sovereign acts doctrine does not apply to discretionary decision-making by executive branch agencies, that argument is mistaken. The seminal sovereign acts case involved an executive branch action, see Horowitz v. United States, 267 U.S. 458 (1925), and this Court and the claims court have repeatedly applied the sovereign acts doctrine to executive branch actions involving considerable administrative discretion. See, e.g., Derecktor v. United States, 129 Ct. Cl. 103 (1954) (ruling that sovereign acts doctrine barred suit based on Federal Maritime Commission's refusal to approve transfer of a ship when State Department objected that transfer would prejudice U.S. foreign relations); Walter Dawgie Ski Corp. v. United States, 30 Fed. Cl. 115 (1993) (ruling that sovereign acts doctrine barred claim that road repair contract negotiated by federal agency impaired ski operator's license to use federal lands). In these circumstances, when an agency is exercising congressionally delegated authority, "the actions of the agency are to be seen as the actions of Congress." Casitas, 72 Fed. Cl. at 754.

To the extent Casitas is arguing that application of the ESA was arbitrary and capricious, that claim has no place in a breach of contract lawsuit filed in the U.S. Court of Federal Claims. As a matter of general contract law, the issue of whether a supervening legal mandate renders contract performance impossible does not turn on the legal validity of the mandate. See Restatement (Second) of Contract § 264, Comment b. Furthermore, Casitas's challenge to the validity of the biological opinion does not belong in this case because this type of claim belongs, instead, in a suit filed in Federal District Court under the Administrative Procedure Act. See Klamath, 75 Fed. Cl. at 687 (a "contract case should [not] be a vehicle for challenging the provenance and ultimate validity of every action taken by the Bureau and other Federal agencies leading up to and including the application of the ESA").

CONCLUSION

For the foregoing reasons, and for the reasons presented by the United States and the California Water Resources Control Board, the Court should affirm the judgment below.

Respectfully submitted,

_____

John D. Echeverria
Georgetown Environmental Law
& Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850
(202) 662-9005 (fax)

Katherine S. Poole
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, California 94104
(415) 777-0220
(415) 875-6161 (fax)

Counsel for Amicus Curiae
Natural Resources Defense Council

January 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2007-5153

CASITAS MUNICIPAL WATER DISTRICT,

Plaintiff- Appellant

v.

UNITED STATES

Defendant-Appellee,

CERTIFICATE OF SERVICE

I certify that two copies of the "Brief of Amicus Curiae Natural Resources Defense Council in support of the United States" has been served upon counsel by first class mail, postage prepaid, on this 29th day of January, 2008 to:

Nancie G. Marzulla
Roger J. Marzulla
Marzulla & Marzulla
1350 Connecticut Ave., N.W. Suite 410
Washington, D.C. 20036

Katherine J. Barton
Attorney, Environment and Natural Resources Division
Department of Justice
P.O. Box 23795 L'Enfant Station
Washington, DC 20026

_____
John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9863
(202) 662-9005 (fax)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)-(C) and Fed. Cir. R. 32(b), I certify that the text of this brief, including any headings, footnotes and quotations therein, uses a proportionally spaced 14 point font and contains 6997 words.

_____

John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9863
(202) 662-9005 (fax)