

UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT,

No. 05-168 L

Plaintiff,

Hon. John P. Weise

v.

UNITED STATES,

Defendant.

**MOTION OF PACIFIC LEGAL FOUNDATION
TO FILE A BRIEF AMICUS CURIAE IN SUPPORT
OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT**

January 30, 2007

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Amicus Pacific Legal Foundation hereby moves the Court for an order allowing the filing of a short (12 pages) brief amicus curiae, conditionally submitted with this motion. Amicus has received the consent of Plaintiff Casitas Municipal Water District, but has been unable to confirm the consent of Defendant United States.

Pacific Legal Foundation (PLF) is the largest and oldest nonprofit legal organization dedicated to preserving traditional and valuable private property rights, including those associated with the use of water. The Foundation has long championed the principle that the government must pay just compensation under the Fifth Amendment's Takings Clause when it appropriates a property owner's ability to use and enjoy private property. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (PLF attorneys successfully argue that an order conditioning a permit on dedication of public access across private property is a taking); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (PLF attorneys reverse lower court decision barring a regulatory takings claim on the ground the property owner acquired the property subject to the challenged regulatory regime).

PLF attorneys have participated before this Court in a direct capacity or as amicus on a number of occasions. *See, e.g., Morris v. United States*, 58 Fed. Cl. 95 (2003) (lead counsel); *Evans v. United States*, 2006 WL 3754812 (Fed. Cl., 2006) (amicus); *Klamath Irrigation Dist. v. United States*, 69 Fed. Cl. 160 (2005) (amicus).

In this case, PLF attorneys seek to file an amicus brief that will address a single important aspect of this litigation: whether the deprivation of Plaintiff Casitas' water rights is to be analyzed as a physical occupation or as a regulatory taking. Although this subject will undoubtedly be

addressed by the parties to some degree, PLF hopes to give the Court a fuller picture of the relevant considerations and precedent in this area. The brief ultimately demonstrates that the diversion of Castitas' water for public use is best treated as a physical invasion, as that concept has been articulated by the United States Supreme Court, and therefore that physical, not regulatory, takings principles apply.

This is an important case that has the potential to impact the livelihood and interests of many persons and organizations beyond the parties. It is appropriate in this situation to permit the filing of amicus briefs.

PLF accordingly respectfully requests that the Court grant this motion and allow the filing of the submitted amicus brief.

DATED: January 30, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing MOTION OF PACIFIC LEGAL FOUNDATION TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT was served this 30th day of January, 2007, by first-class mail, postage prepaid upon the following:

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States, incorporated for the purpose of litigating in the public interest. For more than 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between government efforts to protect the environment and the other necessary and proper functions of government and of a free society.

PLF attorneys have on several occasions appeared before the United States Supreme Court to interpret and defend property rights protected by the United States Constitution. PLF attorneys were counsel of record in landmark property rights cases, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated in numerous cases concerning water rights, both before this court and elsewhere. *See, e.g., County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081 (9th Cir. 2003), *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), and *Hage v. United States*, 35 Fed. Cl. 147 (1996).

INTRODUCTION

The purpose of this amicus brief is to assist the Court in determining the appropriate mode of analysis under the Takings Clause of the Fifth Amendment for addressing the deprivation of Plaintiff Casitas' (Casitas) water rights. In so doing, Amicus PLF adopts Casitas' statement of the case, and agrees with Casitas that it has a property right in the water diverted from its use and control, either through contract or under state common law, that entitles it to the protections of the Takings Clause. Amicus PLF will accordingly limit its participation to the issue of liability and especially whether the taking of Casitas' property interest is analyzed as a physical invasion/occupation or as a regulatory taking.

At first blush, it may seem difficult to neatly fit the taking in this case into either physical or regulatory takings categories. Yet, when the nature of the government's diversion of Casitas' water is scrutinized more closely, and the full body of the Supreme Court's physical taking jurisprudence is considered, it becomes apparent that the compelled diversion of Casitas water out of its control and to a government fish facility must be viewed as a physical occupation. The Court is, after all, not just dealing with a limitation on one potential use of Casitas' water rights; it is faced with an act that has eliminated all the private rights associated with that property, and a transfer of those rights to the public. Therefore, contrary to the government's position, the diversion of Casitas' water is not analyzed under the complex principles applicable to a regulatory taking; it is reviewed under bright line physical occupation rules. Ultimately, this means that it is irrelevant to the government's liability that Casitas retains some water for its exclusive use and enjoyment after the taking of 3200 acre-feet of water.

ARGUMENT

I

PHYSICAL INVASION/OCCUPATION AND NOT REGULATORY TAKINGS STANDARDS APPLY TO THE DIVERSION OF CASITAS' WATER AND THE ASSOCIATED DEPRIVATION OF ITS RIGHT TO EXCLUDE, USE, OR SELL ITS WATER

A. The General Framework for Physical Takings

Before more carefully considering the taking here, it is useful to review the basic principles relevant to physical occupations and invasions, beginning with the understanding that the government is categorically liable for compensation when it is deemed to cause a physical invasion or occupation of private property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435-37 (1982).

The size and scope of an invasion is immaterial; even if the government only occupies a tiny slice of a person's holdings, it is subject to liability under physical occupation rules. *Id.*; *Palazzolo v. Rhode Island*, 533 U.S. at 617 (even a "minimal" occupation is a taking). Similarly, the period

of an occupation is irrelevant; a temporary occupation without provision of compensation is just as much a violation of the Constitution as a permanent one. *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (“[T]he concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted.”).

Unlike in some regulatory takings contexts, the government’s purpose and the owner’s reasonable expectations—the circumstances under which the property was acquired—have no impact on the government’s liability for a physical occupation. See *Loretto*, 458 U.S. at 426 (public purpose irrelevant); *Presault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996); (expectations not considered in physical invasion case); *Petro v. United States*, 47 Fed. Cl. 136, 146-47 (Ct. Fed. Cl. 2000) (same).

Still, the “physical” invasion concept can be deceptive because a completed intrusion or appropriation by the government itself is not required to trigger strict physical invasion standards. An invasion by a third party acting under color of law is enough. See *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003); *Nollan v. California Coastal Commission*, 483 U.S. at 832. Similarly, the government’s *authorization* of the use of property by or for the public, whether by regulation, official decree, or order, is the same for takings purposes as if the machinery of government had itself actually invaded or confiscated private property. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979); *Hendler*, 952 F.2d at 1369 (a physical occupation taking effected by a regulatory order intended to enforce CERCLA, commonly known as Superfund, and which gave the authority to enter plaintiff’s land). When a landowner is required to open his property for others’ use, physical invasion rules apply. *Id.*

A physical invasion or occupation subject to the foregoing rules is typically characterized by a severe impact on private rights. An occupation of property, even a temporary one, does not just

harm one aspect of private ownership; it cuts across almost all the sticks in the bundle of private property rights. As the Court said in *Loretto*:

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. . . . Second, 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. . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36.

B. The Diversion of Casitas' Water Has the Character of a Physical Occupation as That Concept Is Generally Understood

1. The Order Impedes on Casitas' Rights of Use, Possession, and Exclusion

Although the government would like to dress up the diversion of Casitas' water rights to a public facility in the garb of land use regulation, the nature of its act refutes this strategy. This is not an instance where the government has simply told Casitas that it must refrain from using its water for some forbidden purpose; it seeks to compel Casitas to affirmatively send its use right elsewhere, to a public fish protection project. That the water may not be physically impounded does not change the fact that water which Casitas previously controlled is now controlled by the public.

The impact of the government's action here has all the earmarks of a physical occupation. Casitas cannot sell or lease the use rights to the 3,200 acre-feet per year of water diverted by the government. It cannot give away the right to use the water. Casitas cannot use the water itself. And finally, Casitas is prevented from excluding the government from the use of the water. That the water has not been opened up for general public use, but only for governmental purposes, makes no difference; the right to exclude applies to the government and its agents, and that right is accordingly deprived when, as here, the government uses property for its own ends. *Hendler*, 952 F.2d at 1374 ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but *especially the Government.*") (emphasis added).

In sum, the diversion of Casitas' water rights has the same impact on property interests as the placement of a cable box on the property in *Loretto*. For this reason, the challenged action here is subject to the same physical occupation analysis adopted and applied in *Loretto* and its progeny.

2. *Webbs* and *Brown* Affirm That the Diversion of a Property Interest Is Generally a Physical Occupation

Although the rationale of *Loretto* indicates that this case is analyzed as a physical invasion, the Supreme Court's decisions in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216, come even closer to the mark.

In *Webb's*, the issue was whether a taking occurred when a local government applied a statute that allowed it to keep the interest earned on private funds required to be deposited in court accounts. After a potential buyer of Webb's Fabulous Pharmacies filed an action against the company, and tendered the almost two million dollar purchase price to a County court, the court deposited the money in an interest bearing account while it considered claims on the funds. *Webb's*, 449 U.S. at 156-57. A year later, Webb's demanded access to the held funds. The county turned over the remaining principal only after keeping \$100,000 in accrued interest pursuant to a statute. *Id.* at 158.

In considering whether the County's retention of the interest was a taking, the *Webb's* Court analogized to *United States v. Causby*, 328 U.S. 256 (1946), a physical invasion precedent, rather than to existing regulatory takings standards. *Webb's*, 449 U.S. at 163-64. The *Webb's* Court emphasized that the statutorily mandated transfer of funds "has the *practical effect of appropriating* for the county the value of the use of the [money] for the period" of the taking. *Id.* at 164 (emphasis added).

Brown also involved an alleged taking of interest earned on private funds. The case hinged on the state bar's practice of requiring lawyers to deposit client funds in interest bearing accounts, from which the state bar would then take the interest to fund legal services for the indigent. 538 U.S. at 220. The Court had to decide whether the rules requiring diversion of the client's private interest

funds to a public use were to be considered under regulatory taking or physical takings principles. *Id.* at 233. The *Brown* Court opted for physical takings standards because “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, than to a regulatory restriction on property use.

Webb's and *Brown* establish that a requirement that a property owner transfer a discrete private property interest into public control is to be viewed as a physical invasion. Here, of course, the Court is faced with just such a transfer requirement. Indeed, the diversion of privately controlled water in this case is no different in effect than the diversion of private money in *Webb's* and *Brown*. As in those cases, Casitas is denied access and use of its property so that another entity may have access and use. The compelled transfer of 3,200 acre-feet of Casitas' water to an endangered fish facility has “the *practical effect of appropriating* for the [government] the value of the use of the [water] for the period” in which the government requires the diversion. *Webb's*, 449 U.S. at 164 (emphasis added).

The only obvious difference between the diversion here and that in *Webb's* and *Brown* is that this case involves water, while the others involved money. This is, however, a distinction without a difference. Physical occupation standards have never been held to vary based on the property at hand. Instead, the Court has articulated physical takings rules as a doctrine applicable to any sort of interest that can be classified as private property. See *Brown*, 538 U.S. at 233 (“When the government physically takes possession of *an interest in property* for some public purpose, it has a categorical duty under the Just Compensation Clause, to compensate the former owner.”) (emphasis added). Indeed, as shown more fully below, the Court has specifically applied physical takings rules to interference with water rights.

3. The Government Cannot Avoid Physical Occupation Analysis by Labeling Its Action as “Regulation”

Despite the broad application of physical invasion rules, the government seems to believe it is entitled to regulatory takings review on the ground that the diversion of Casitas' water arises

from “regulation” under the Endangered Species Act. *See, e.g.*, Motion for Partial Summary Judgment at 11 (“Any regulatory restriction on plaintiff’s ability to divert water from the Ventura River resulting from the application of the ESA to plaintiff’s property interest must be analyzed under the regulatory takings [i.e., *Penn Central*] framework.”). But the label the government gives its own actions is wholly irrelevant to the determination of whether physical invasion/occupation standards apply. What matters is how the government’s action affects the property owner.

When governmental action, whatever its authority, impedes the owner’s rights to possess, enjoy, use, sell, and control property, the government can call its action anything it likes, but the law calls it a physical taking. This is so even if it is correct in some sense to say that a “regulation” causes the severe impact. *See, e.g., Hendler*, 952 F.2d at 1367, 1370. Thus, physical takings analysis has been applied to a statute authorizing placement of cable boxes on private property, *Loretto*, 458 U.S. at 423, a regulatory scheme requiring transfer of interest to public bodies, *Brown*, 538 U.S. at 220, and an administrative order giving the public access to private property. *Nollan*, 483 U.S. at 831-32. In all of these cases, it might have been said that the property owner was the victim of “regulation,” but physical takings rules nevertheless applied, and the same is true here.

To allow the government to avoid physical occupation standards merely because a “regulation” was involved is not only improper, it would have a draconian effect on the historical protections of the Takings Clause. After all, such a holding would create a gaping loophole in physical invasion principles, and open the door for the government to attempt more uncompensated invasions under the guise of “regulation.”

C. The Supreme Court’s Older Precedent, Including Important Water Rights Cases, Confirm the Physical Invasion Approach

As shown above, the Supreme Court’s most prominent and most recent physical occupation cases indicate that the compelled diversion of Casitas’ water is best characterized as a physical invasion and, in fact, the Court’s older cases have specifically viewed the diversion of private water

rights in this way. Of particular relevance are *Dugan v. Rank*, 372 U.S. 609 (1963), and *International Paper Co. v. United States*, 282 U.S. 399 (1931).

1. *Dugan* and *International Paper* Long Ago Established That Requisition of Water Rights Works a Physical Taking.

In *Dugan v. Rank*, 372 U.S. 609, the Court found that the federal government had effected a taking when it extinguished the use rights of various water districts by diminishing their access to the water of the San Joaquin River by collecting it behind Friant Dam. *See Dugan*, 372 U.S. at 613-14. The government's action did not involve a "physical invasion" of any private land. As the *Dugan* Court explained, however, this fact was immaterial to the finding of a taking.

The right claimed here is to the continued flow of water . . . and to its use[.] A seizure of water rights need not necessarily be a physical invasion of land. . . . 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 [Citations omitted.]. Therefore, when the Government acted here with the purpose and effect of subordinating the respondents' water rights to the [federal] 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. at 625 (internal quotation marks and parentheses omitted).

While in *Dugan* agents of the government themselves manually diverted the water, this too was an incidental characteristic. *International Paper Co. v. United States*, 282 U.S. at 404-06. In the *International Paper* case, the government incurred physical takings liability from the issuance of an order that allowed a power plant to draw the whole of a river's flow. *Id.* at 404-06. As a result of the order, a paper mill was deprived of water to which it held water rights; the government, meanwhile, gained collateral benefit from increasing the power plant's draw. *Id.* The order itself represented an exercise of the eminent domain power and required the government to pay compensation. "The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use." *Id.* at

407. “Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfill its purposes rather than to machinery of its own.” *Id.* at 408.

Viewed together, *Dugan* and *International Paper* illustrate in the water rights context what the Court’s other physical takings decisions plainly imply, namely, that physical occupation rules control when the government commands the diversion of water, the rights to which are held by a private party. No physical invasion of land or impoundment of water need occur, and an order requiring a diversion for a public use is the same as the government actually scooping up the water and disposing of it. *See, e.g., Washoe Co. Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003). Perhaps most importantly, *Dugan* shows that a diversion of *any part* of the takings claimant’s water rights triggers physical invasions analysis; that the owner retains full control of some of its water is of no import. *Dugan*, 372 U.S. at 620 (requiring compensation for “a partial taking of respondents’ claimed rights”).

2. *Eureka* Is Not Applicable Here

United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), does not undercut the application of physical invasion standards here. In *Eureka*, “the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations for the purpose of conserving equipment and manpower for use in mines more essential to the war effort.” *Loretto*, 458 U.S. at 431. As the *Eureka* Court explained, in clarifying why there was no taking, the directive that temporarily closed the mines arose because

the WPB [War Production Board] made a reasoned decision that, under existing circumstances, the Nation’s need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended. . . . In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. *It makes demands which otherwise would be insufferable.* But wartime economic restrictions,

temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands.

Eureka, 357 U.S. at 168 (emphasis added; citations omitted).

In reaching this position, the *Eureka* Court underscored that the challenged temporary restriction, urged by the necessity of war, “did not occupy, use or in any manner take physical possession of the gold mines or of the equipment connected with them.” *Eureka*, 357 U.S. at 165-66. The *Eureka* Court did not take issue with the principle that, if such occupation and use had occurred, as in *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), a physical taking analysis would apply. See *Loretto*, 458 U.S. at 431.

Eureka is not applicable here because it is best read to involve a restriction on use, rather than a diversion of resources to the public, as in this matter. Moreover, even if the circumstances here could be analogized to those in *Eureka*, Casitas’ claim could not be disposed of under *Eureka* given the emergency, wartime conditions that drove that decision. Here, the government cannot point to a dire and unique emergency to excuse its diversion of Casitas’s water rights: wildlife protections are pedestrian and ubiquitous. When, as here, such protections eviscerate an owner’s rights, they are subject to the same physical taking rules applied to other overreaching invasions of private property.

Finally, even if the wartime circumstances are ignored and *Eureka* is viewed as a case that allows the government to escape liability for certain “temporary” property restrictions, this approach cannot be followed. First, there is no compelling indication that the diversion of Casitas’ water will have a definite end in the near future, as in *Eureka*. Second, and more significantly, the taking of water rights for a finite period can never be plausibly viewed as a “temporary” deprivation because the special nature of water rights render them amenable only to permanent takings.

It helps to recall that: (1) water rights are use rights, and (2) water is a flow, not a stock. Both concepts are aptly encompassed by the description of the property interests here: acre-feet *per year*, cubic-inches *per second*. To take the use of X acre-feet of water for a given year (for instance)

is to take wholly that water right, and the loss caused thereby is permanent, not temporary—a permanent taking of a discernable, measurable, distinct part of the whole right. *Dugan*, 372 U.S. at 620. A one-year restriction on the right to use one's water rights cancels forever every atom of that right for that year, eviscerates the value of the water right over a period, and permits no possibility of later compensatory use. The water to be used after the restriction period does not include the water lost during the period, it does not make up for it; the water is simply *lost*.

Consequently, in the water rights context, the proper analogy to *Eureka's* temporary restriction on mining is not a temporary diversion of water use, but a temporary diversion of water use *followed by a replacement* of the lost water for the period of the restriction (i.e., a two-month restriction followed at its end by the delivery of two acre-feet/month water in compensation). Of course, here, there is no replacement of water available to Casitas; it is simply told to forego control of the diverted water forever. This is entirely different than what occurred in the *Eureka* case.

It was with these realizations in mind that this Court explained in *Tulare Lake*, 49 Fed. Cl. at 319, that

[i]n the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. *See Eddy v. Simpson*, 3 Cal. 249, 252-253 (1853) (“the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.”). Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete occupation of property—an exclusive possession of plaintiffs' water-use rights for preservation of the fish—mirrors the invasion present in *Causby*. To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.

Tulare Lake, 49 Fed. Cl. at 319.

There are, in short, good reasons for the *Tulare Lake* Court's decision to apply physical occupation standards to a forced diversion of water rights. Physical invasion precedent is broad

enough to encompass such a situation. On the other hand, it makes little sense to say that regulatory takings tests applicable to use restrictions that leave control of property in private hands apply where, as here, a governmental command not only bars use, but denies all incidents of private ownership.

CONCLUSION

For the foregoing reasons, the Court should review the alleged taking in this case as a physical occupation and therefore deny the government's attempt to avoid liability under regulatory takings rules.

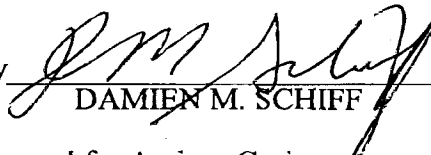
DATED: January 30, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT was served this 30th day of January, 2007, by first-class mail, postage prepaid upon the following:

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