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.	)	

APPLICATION OF STOCKTON EAST WATER DISTRICT FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to this Court's Order setting the date for the filing of briefs *amicus curiae* of any interested party regarding the Defendant's Motion for Partial Summary Judgment (the "Motion"), Stockton East Water District ("Stockton East") hereby request leave to file a memorandum as *amici curiae* in support of Plaintiff's Opposition. This case raises a constitutional issue of significance to Stockton East as holders of water rights under California law. In particular, Stockton East's water rights have been limited by the federal government's diversion of water contracted to Stockton East, for the purposes of fishery enhancement. Stockton East has a breach of contract and takings case pending in this Court.

Stockton East is a public water district that supplies surface water to irrigate approximately 10,000 acres of farmland and treated surface water for drinking to approximately 300,000 residents. Stockton East and one other adjacent water district (Central) are the only two water service contractors from the United States' New Melones Project, located on the Stanislaus River. From 1993 through 2004, the United States dedicated in excess of 1.5 million acre-feet of water from New Melones to federal fishery purposes, while providing no water to Stockton East

in some years, and less than its contractual amount in all years. Notably, this dedication of water for fish is *in addition to* approximately 1 million acre-feet of instream fish flows released from New Melones as a condition of the California State Water Resources Control Board issued water rights for the project.

Stockton East sued the United States for breach of contract and taking. This suit is currently pending in the Court of Federal Claims, Case No. No. 04-541 L, Judge Christine Odell Cook Miller. The breach of contract and takings claims were segregated. A trial on the liability phase of the breach of contract claim was held in October 2006. Decision is pending. The takings claim has yet to be tried.

While not identical, there are obvious similarities between the Casitas and Stockton East takings claims. Both involve a complete evisceration of the plaintiff's right to use a discernable quantity of water effectuated by the federal government's diversion of water for fish – a public use. Both cases also include an autonomous federal agency decision to increase the amount of water released for fish on a stream above and beyond that required by the Board, to the detriment of the consumptive right holders on the stream, without involvement of the Board. Any decision in this case may impact Stockton East's taking claim.

The decision whether to allow participation by *amicus curiae* is left to the sound discretion of the court. *Fluor Corp. & Affiliates v. United States*, 35 Fed. Cl. 284, 285 (1996) ("[T]here is no right to file an *amicus* brief in this court; the decision whether to allow participation by *amici curiae* is left entirely to the discretion of the court."); *see also American Satellite Co. v. United States*, 22 Cl. Ct. 547, 548 (1991) ("the practice of this court has been to permit *amicus curiae* participation"). When making such a decision, courts have considered factors such as opposition of the parties, interest of the movants, partisanship, adequacy of

representation, and timeliness. *Fluor Corp. & Affiliates*, 35 Fed. Cl. at 285.

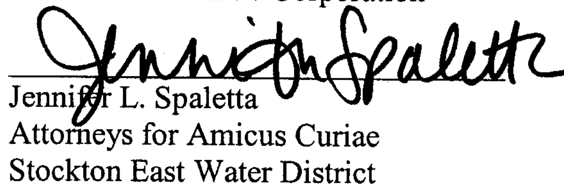
Stockton East's interest in this case is paramount due to its own pending case and the effect that the decision in this case will have on it. Further, counsel for Stockton East is intimately familiar with California water law. Finally, there is no known opposition to the filing of the brief. Stockton East has filed a timely application to appear in accordance with the Court's order. Counsel for the plaintiff has consented to the filing of this brief. Stockton East contacted Counsel for the defendant to request consent to the filing of this brief, and Counsel for the defendant indicated that they do not take a position on the filing of amicus briefs.

For the foregoing reasons, Stockton East respectfully request that it be granted leave to file the attached memorandum.

Dated: January 30, 2007

Respectfully submitted,

HERUM CRABTREE BROWN
A Professional Law Corporation



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

AMICUS CURIAE STOCKTON EAST WATER DISTRICT'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

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January 30, 2007

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I. INTERESTS OF AMICUS CURIAE

Stockton East Water District ("Stockton East"), located in San Joaquin County, is a public agency formed by special act of the California Legislature under Chapter 819, Statutes of 1971, as amended. Stockton East encompasses 143,000 acres in San Joaquin County, including 53,000 acres of irrigated farmland and nearly 50,000 acres of urban area encompassing the City of Stockton and surrounding areas. The district supplies surface water to irrigate approximately 10,000 acres of farmland and treated surface water for drinking to approximately 300,000 residents.

Stockton East and one other adjacent water district ("Central") are the only two water service contractors from the United States' New Melones Project. The New Melones Project (including a dam and reservoir) was authorized in its present form in 1962, and is located on the Stanislaus River (a tributary to the San Joaquin River and Bay-Delta) 40 miles east of Stockton, California. New Melones Reservoir holds 2.4 million acre-feet of water.

In the 1960's the United States applied to the California State Water Resources Control Board ("Board") for a water right for the New Melones Project. The Board refused to grant a complete water right to the United States until it had a plan to consumptively use the water from the Project in the local area. That plan led to the two contracts with Stockton East and Central in 1983 for 155,000 acre-feet of water annually. The Board subsequently granted complete water rights to the United States to operate the New Melones Project. Stockton East and Central then embarked on a ten-year, $70 million project to build the required conveyance system to take the contracted water from New Melones to its service area (a requirement of its federal water service contract). This project was completed and ready for water deliveries in 1993.

1993 was also the first year of implementation of the new Central Valley Project Improvement Act. Pub. Law 102-575 Title 34 (CVPIA). One part of the CVPIA directs the Secretary of the Interior to dedicate between 600,000 and 800,000 acre-feet of water from its Central Valley Project facilities (of which New Melones is one) to fishery enhancement purposes annually. Between 1993 and 2004, the United States dedicated in excess of 1.5 million acre-feet of water from New Melones alone to CVPIA fishery purposes, while providing no water to Stockton East in some years, and less than its contractual amount in all years. Notably, this dedication of water for fish was *in addition to* approximately 1 million acre-feet of instream fish flows released from New Melones as a condition of the Board issued water rights for the project.

Stockton East sued the United States for breach of contract and taking. This suit is currently pending in the Court of Federal Claims, Case No. 04-541 L. The breach of contract and takings claims were segregated. A trial on the liability phase of the breach of contract claim was held in October 2006. Decision is pending. The takings claim has yet to be tried.

While not identical, there are obvious similarities between the Casitas and Stockton East takings claims. Both involve a complete evisceration of the plaintiff's right to use a discernable quantity of water effectuated by the federal government's diversion of water for fish – a public use. Both cases also include an autonomous federal agency decision to increase the amount of water released for fish on a stream above and beyond that required by the Board, to the detriment of the consumptive right holders on the stream, without involvement of the Board. Any decision in this case may impact Stockton East's taking claim.

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II. ARGUMENT

A. The Federal Government Diversion of Another's Water for Fish – a Public Purpose - is a Per Se Taking that Requires Compensation

This case, as well as Stockton East's pending suit, involve classic changes in priorities by the federal government. At the time that Stockton East agreed to contract with the United States to facilitate the permitting of New Melones Reservoir, and at the time that Casitas agreed to contract with the United States with respect to the Venture River Project, the federal government's priority was to build projects and develop western water supplies. Today, priorities have changed. The federal government would rather divert the water for fish – a purely public use.

As this Court correctly held in *Tulare*, the government may change its mind, but it may not require individuals to pay the price for this choice. Stockton East and Casitas both funded the construction of significant facilities, and built entire communities around their water rights, based on the encouragement and inducement of the government. The new choice to take water away and use if for fish leaves Casitas (and Stockton East) paying the bill for over-sized facilities and without sufficient water to meet the demands of their customers.

The United States Supreme Court's analysis in *International Paper v. United States*, 282 U.S. 399 (1931), and its progeny, declared the diversion of water for a federal government use a taking. This precedent has remained sound for seventy-five years. It was followed by this Court in *Tulare Lake Basin Storage Dist. v. United States* (2001) 49 Fed. Cl. 313, and should not be changed in this case. Stockton East will not repeat, but simply note its concurrence with this Court's analysis in *Tulare*, and the analysis of Casitas in its brief in opposition (pages 25-36).

Defendant's assertion that regulations that require the diversion of another's water should be viewed as mere regulatory restrictions on use, rather than a physical invasion, ignores reality.

Casitas and Stockton East have both suffered a complete physical invasion of their right to use a specific quantity of water. The districts cannot make any use of the water that the government takes for fish. If the government had taken this same amount of water and used it to generate power, or to provide water service to a new federal prison, the result would be the same. Casitas' use of this water has not been "restricted" – it has been deprived. Labeled a physical taking or a categorical regulatory taking – the effect is the same. The government has physically controlled the plaintiff's water to the point where the plaintiff can make no use of it, permanently destroying all of its economic value. *See Lucas v. S.C. Coastal Council* (1978) 505 U.S. 1003 at 1019.

Defendant quibbles with the notion that it physically controls the water that is released for fish. If it does not, may Casitas store a like amount of water and release it all at one time? Of course not. The government has dictated the manner, amount and timing of the release, through government facilities – it has physically controlled the release.[1]

The right to use water is a unique form of property right, and Defendant's attempt to analogize this case to other ad hoc regulatory takings cases is simply unavailing. Unlike a regulation that simply delays or restricts the use of a resource which remains in place (such as a wartime order temporarily ceasing gold mining) the government's diversion of surface water permanently eviscerates the owner's right to exclude others from using his property. *See United States v. Central Eureka Mining Co.* (9158) 357 U.S. 155; *Lingle v. Chevron USA Inc.* (2005) 544 U.S. 528 at 539. The water is used by the government for a public purpose, then escapes to the ocean (or in the case of Stockton East, captured by the government's pumps in the Bay-Delta

[1] Amici notes that this fact is disputed between the parties, and believes that this dispute, and others, warrant a trial. See *ante*.

and then sold to other contracts to generate government revenue) and is permanently unavailable to the right holder.

B. California Law Does Not Limit Casitas' Water Right in the Manner Claimed by Defendant

Defendant argues that California water rights are so inherently limited, that the federal government can freely take them for environmental purposes without compensation. Taken to its extreme, this argument would allow the federal government to take water from Casitas, divert it to a water truck, and release it in another river for the benefit of fish – in the name of the public trust. California law does not permit such an absurd result.

The ability to use each acre-foot of surface water in the arid regions of California is valuable and is subject to Board jurisdiction. California Water Code §§ 1200 et seq.; § 1255. In Casitas, and in the case of Stockton East, the federal government has bypassed the Board's jurisdiction, and taken for public use water that the Board has already determined should be consumptively used by Casitas for other, higher uses – including domestic supply.

The Defendant's brief correctly notes that the Board has continuing jurisdiction to impose further limits on the diversion and use of water by the licensee to protect public trust uses (Def. Br. At 6) but ignores the import of this procedure. Defendant would have this Court believe, that it is the federal government, not the Board, that may autonomously decide to take water from water right holders and reallocate it to public uses in the name of the public trust. This is not the law and is a fundamental violation of due process.

As ACWA describes in its amicus brief, the public trust doctrine requires the Board to weigh and balance competing interests, guided by the legislative policy to favor domestic and irrigation uses. See ACWA Brief at p. 5, citing *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 103. The government is free to petition the Board to revise a

permitted or licensed water right to require additional fishery releases as a condition of the right. The Board may even revoke a license upon a finding that the water granted under the license has not been put to a useful or beneficial purpose. However, this may not occur absent due notice and an evidentiary hearing. California Water Code §1675. The federal government has bypassed this due process requirement and robbed the Board of its duty to weigh and balance the need for the water by Casitas' customers and the purported need for the larger fishery releases advocated by the government.

The California legislature has deemed the licensed right to use water of such a value that it requires due process prior to any modification of that right. This is consistent with the overwhelming federal precedent regarding government taking of water rights and this Court's holding in *Tulare*. Other than the unsubstantiated claim that California water rights may be reduced for "public trust" purposes at the whim of a federal fishery agency, the Defendant has provided no authority, or sound public policy rationale to support a change in the law.

C. *Allegretti's* Dicta is Not Useful to this Court – But is a Useful Illustration of Why this Case Should Proceed to Trial

Defendant relies on a California Appellate Court's decision in *Allegretti & Co. v. County of Imperial* (2004) 138 Cal.App.4th 1261, to support its argument. The *Allegretti* decision is puzzling in many ways – most notably its facts. In that case the County imposed a condition on an *alternative* new well drilling permit that limited groundwater extractions to 12,000 acre-feet per year. The Plaintiffs' ranch was only 2400 acres in size, with only 1,600 acres cultivable. 138 Cal.App.4th at 1276, note 8. 12,000 acre-feet is enough water to apply in excess of 7 acre-feet of water per year to each of the 1,600 cultivable acres. If the Court can imagine – this is enough water to cover all 1600 acres, seven feet deep. Allegretti offered no evidence at trial that he had the ability or right to extract more than 12,000 acre/feet absent the County restriction, nor was

there any evidence that he needed more than this amount of water to cultivate the land. *Id.* at 1269.

The opinion notes that the County issued the conditioned permit as an *alternative* to the requested permit, which would have required full compliance with the California Environmental Quality Act (CEQA). *Id.* at 1271-72. CEQA requires that County's prepare an Environmental Impact Report when a project they approve may have a significant effect on the environment. Cal. Pub. Res. Code, Division 13. It appears that the County believed that the permit that Allegretti originally sought would have had an effect on the environment that would have required a CEQA analysis. The County offered Allegretti an alternative to avoid CEQA – the conditioned permit which limited groundwater extraction to 12,000 acre-feet annually. Allegretti chose not to pursue the alternative to perform CEQA for the requested permit and possibly have the pumping restriction removed.

It was this factual backdrop that caused the California Appellate Court to conclude that Allegretti had not suffered a taking. *Id.* Although the *Allegretti* opinion does not articulate it particularly well, Allegretti's right to use groundwater in excess of the 12,000 acre-feet per year was not established at the trial. There was no evidence that Allegretti had used more than 12,000 acre-feet a year, could use this much water, or that he had a right to do so. Overlying owners rights to groundwater are correlative to other overlying owners in the same basin, and are limited by the doctrine of reasonable, beneficial use. *Katz v. Walkinshaw* (1903) 141 Cal. 116, 134-136. This common law of groundwater is enforced by the California Courts, not the Board.

The *Allegretti* dicta regarding the *Tulare* opinion should be given little weight for these factual reasons. That Court did not need to opine about the propriety of the *Tulare* decision, or takings law at all, having found that Allegretti had not proven the extent of his rights, or any

dimunition in them as a result of the County's condition. Moreover, the primary criticism that the *Allegretti* Court made of the Tulare decision was the alleged failure to consider the limits on the water rights at issue under state law doctrines designed to protect fish. *Id.* at 1274-75. Of course, this Court did consider such possible limits in *Tulare* and found that the Board had not imposed limits that coincided with the water that the federal government took pursuant to the ESA. *Tulare*, 49 Fed. C. at 321-24. This Court can make that same inquiry in this case. What this Court cannot do is evaluate the reasonableness of Casitas' exercise of its water right (a right that is established by license and not disputed). That is a role left exclusively to the State of California. *See* Cal. Water Code §§ 104, 105.

The significant factual aspects of both the *Allegretti* case and this case highlight the need for a trial. This Court needs to fully understand the details of the water right, the operations, how the water is taken, and the effect on the Plaintiffs. Summary adjudication on the nature of the takings claim in this case is simply premature.

III. CONCLUSION

Amicus Stockton East has a takings case pending in this Court that will likely be affected by the decision in this case. As the ACWA amicus brief notes, numerous other districts in California face similar predicaments. The right to use surface water in California is unique and valuable. It is not a right that is so inherently conditioned that the federal government can take it as it pleases for public purposes without compensation. That said, the facts and the import of this case warrant a trial. Stockton East respectfully requests that the Court deny Defendant's motion for summary adjudication and set this matter for trial.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 30th day of January, 2007, a true and Correct copy of **APPLICATION OF STOCKTON EAST WATER DISTRICT FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AMICUS CURIAE STOCKTON EAST WATER DISTRICT'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was sent via electronic mail and placed in first-class mail, postage prepaid, to:

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