IS REGULATION OF WATER A CONSTITUTIONAL TAKING?

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INTRODUCTION

The U.S. Supreme Court has recently clarified—and to some degree narrowed—the doctrine of regulatory takings. The Court has determined that most claims should be evaluated using the so-called *Penn Central* framework,[1] a relatively deferential standard that focuses on the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the regulation.[2] The Court also has

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1. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23 (2002) (referring to the *Penn Central* framework as the "polestar" of the Court's takings analysis) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)).

2. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

eliminated the so-called "substantially advance" takings test,[3] which the Court appeared to embrace twenty-five years ago,[4] and which some lower courts, most notably the U.S. Court of Appeals for the Ninth Circuit, had interpreted to support intrusive judicial review of the effectiveness of regulatory policies.[5] Finally, the Court has defined its per se takings rules narrowly by saying that the so-called *Lucas* takings test only applies when a regulation renders private property essentially "valueless,"[6] and that the per se test for physical takings only applies when the existence of a physical occupation or seizure is "undisputed and obvious."[7]

Contradicting the recent trend in the Supreme Court, the U.S. Court of Appeals for the Federal Circuit, which exercises intermediate appellate jurisdiction over takings claims against the United States, recently charted a more expansive course in the case of *Casitas Municipal Water District v. United States*.[8] In its 2008 decision, a divided panel of the Federal Circuit held that a mandate imposed pursuant to the federal Endangered Species Act (ESA) requiring the operator of a dam on the Ventura River in California to pass water through a fish ladder involved a physical taking of the water, potentially triggering per se takings analysis.[9] The panel's decision to apply a physical takings analysis was outcome determinative in the sense that the claimant had no viable claim under the alternate *Penn Central* analysis; the plaintiff conceded before the trial court that it could not possibly make a sufficient showing of economic injury to proceed under *Penn Central*.[10]

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3. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) ("We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that is has no proper place in our takings jurisprudence.").

4. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

5. *See* Chevron USA Inc., v. Bronster, 363 F.3d 846 (9th Cir. 2004), *rev'd* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (holding a Hawaii law that capped the rent that oil companies could charge local dealers to be a regulatory taking because it did not substantially advance the legitimate state interest in lowering the price of gasoline); Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) (using the "substantially advance" test to find a rent control ordinance unconstitutional).

6. *Tahoe-Sierra*, 535 U.S. at 332 (stating that "the categorical rule in Lucas [v. S.C. Coastal Council, 505 U.S. 1003 (1992)] was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value . . . ."); *see* Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (stating that the government cannot evade the *Lucas* rule "on the premise that the landowner is left with a token interest").

7. *Tahoe-Sierra*, 535 U.S. at 322 n.17 ("When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed.").

8. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

9. *Id.* at 1296.

10. *Id.* at 1298 (Mayer, J., dissenting in part).

There are significant questions about whether *Casitas* correctly applies Supreme Court precedent, the scope of the ruling, and how other water users in California and across the West might attempt to use this precedent to mount takings claims based on other water regulations.[11] The decision has also attracted attention because it represents the latest chapter in a convoluted judicial debate over the proper application of the Takings Clause to water interests. The Federal Circuit decision reversed a ruling by Judge John Wiese of the U.S. Court of Federal Claims declining to apply a physical takings analysis.[12] Judge Wiese's decision, in turn, repudiated his own earlier decision in the case of *Tulare Lake Basin Water Storage District v. United States*, in which he had applied a physical takings analysis to a somewhat similar claim.[13] In a controversial move, the Bush Justice Department declined to appeal *Tulare Lake* to the U.S. Court of Appeals for the Federal Circuit.[14] On the other hand, the Obama Justice Department decided against filing a petition for certiorari in the U.S. Supreme Court in the *Casitas* case.[15]

This article contends that *Casitas* represents a relatively narrow ruling that does not govern most other takings claims based on water regulations. The ruling establishes a test applicable only to a regulation requiring that water be passed through a fish-passage ladder or some similar facility, and arguably only a facility that conforms to the specific design of the facility at issue in *Casitas*. As a result, the decision does not support applying a physical takings test to ordinary water regulations restricting water diversions from rivers and other water bodies. Under the Federal Circuit's reasoning, takings claims based on these more garden-variety water regulations should continue to be evaluated under the *Penn Central* framework.

This article also contends that, even read narrowly, the ruling is seriously flawed and should not ultimately stand the test of time. The

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11. *See* Roderick E. Walston & Robert M. Sawyer, *Water Districts Armed to Protect Water Rights*, CAL. DAILY J., Nov. 23, 2009 (advocating a broad reading of *Casitas*).

12. *Casitas,* 543 F.3d at 1296.

13. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001), *judgment entered by* 59 Fed. Cl. 246 (Fed. Cl. 2003), *modified*, 61 Fed. Cl. 624 (Fed. Cl. 2004).

14. *See, e.g.*, Juliet Eilperin, *Water Rights Case Threatens Species Protection*, WASH. POST, Dec. 7, 2004, at A18 ("[S]ome state and federal officials [are] arguing the government would be better off appealing a federal claims judge's decision that the government owes as much as $26 million for depriving San Joaquin farmers of their water rights in the early 1900s"); Dean E. Murphy, *In Fish vs. Farmers Cases, the Fish Loses its Edge*, N.Y TIMES, Feb. 22, 2005, at A15 ("[F]armers and water districts are pushing property-rights claims to the forefront of the debate over how to divvy up water among farms, cities and the environment.").

15. *See* Jennifer Koons, *Obama Admin Declines to Appeal Key Water-Rights Case*, N.Y. TIMES, July 21, 2009 (discussing the Obama administration's decision to not appeal *Casitas*).

ruling is inconsistent with basic principles animating modern takings jurisprudence. It also represents an inexplicable departure from a longstanding judicial consensus, predating the development of modern takings tests, that requiring dam operators to build and operate fish ladders to mitigate the adverse effects of their dams on public fisheries does not unconstitutionally impinge on private property interests. Thus, eventually, the Supreme Court, or possibly the Federal Circuit itself, should repudiate this decision.

Finally, focusing on the future course of this particular litigation, this article contends that, notwithstanding the adverse result in the Federal Circuit, the United States should ultimately prevail based on at least three independent legal arguments: (1) the ultimate question of whether a compensable taking occurred should be resolved based on the *Nollan/Dolan* "exactions" tests, and the United States can easily meet the requirements of those tests; (2) the claim is barred under the public trust doctrine, a background principle of California law for the purpose of takings litigation; and (3) the century-old California statutory requirement that dam operators provide flows via fish ladders to protect fisheries below dams represents a background principle that also bars the claim.

This article proceeds as follows. Section I describes the physical setting for the *Casitas* litigation and the various rulings and opinions the case has produced. Section II explains the evolving character of the "physical taking" argument over the course of the litigation and discusses the differences between the physical takings theory rejected by Judge Wiese and the physical takings theory embraced by the Federal Circuit. Section III focuses on Judge Wiese's opinion and contends that he correctly rejected the physical taking theory presented to him and, perhaps more importantly, that the subsequent Federal Circuit decision does not repudiate his analysis and can be read to implicitly support it. Section IV examines the different physical takings theory embraced by the Federal Circuit on appeal and explains why that theory is indefensible in light of Supreme Court precedent and the animating principles of takings doctrine. Section V turns to the issues likely to be addressed on remand and describes three arguments that the United State can present to defeat the takings claim. A conclusion offers some general observations about the *Casitas* litigation and its larger lessons.

I. BACKGROUND ON THE *CASITAS* LITIGATION

The Ventura River Project was constructed in the 1950s to provide water for irrigation as well as municipal, domestic, and industrial purposes in Ventura County, California, north of Los Angeles.[16] The project includes a large water-storage reservoir, Lake Casitas, which sits astride and impounds most of the flow of Coyote Creek, a tributary of the Ventura River, which empties into the Pacific Ocean. In addition, the Robles Diversion Dam on the main stem Ventura River diverts a portion of the flow of the river into the four and one-half mile long Robles-Casitas canal feeding into Lake Casitas. The critical feature of the project for the purpose of the takings issue is the Robles Diversion Dam, which blocked upstream migration by steelhead trout, once abundant but now at serious risk of being extirpated from the river.[17]

Congress authorized the construction of the Ventura River Project on March 1, 1956.[18] Pursuant to this authorization, the Bureau of Reclamation entered into a contract with the Casitas Municipal Water District that amounts, in effect, to a one-sided grant of various public benefits to the District. Under the agreement, the government financed construction of the project, and the District agreed to repay the construction costs, but over an extended period of forty years, at a below-market rate of interest, and only up to a cap of $27,500,000 (later amended to $30,900,000).[19] The net effect of these provisions was that the cost of constructing the project was shared by the District and its customers, on the one hand, and by the U.S. taxpayers, on the other. In addition, the contract provided that, upon construction completion, the District would "take over and at its own expense operate and maintain the project works" for the benefit of itself and its customers, though title to the project works nominally remained with the United States.[20] Finally, the contract provided that "the District shall have a prior right in perpetuity to the use of the water made available by the

16. Casitas Mun. Water Dist. v. United States, 72 Fed. Cl. 746, 748 (Fed. Cl. 2006), *partial summary judgment granted*, 76 Fed. Cl. 100 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

17. *See* Steelhead Information, http://www.casitaswater.org/ventura%20hcp/steelhead.htm (last visited Mar. 27, 2010) (explaining the history of the steelhead trout in the Ventura and other southern California rivers).

18. Act of Mar. 1, 1956, Pub. L. No. 84-423, 70 Stat. 32.

19. *Casitas Municipal Water Dist*., 72 Fed. Cl. at 747–48; *see* GEN. ACCOUNTING OFFICE, BUREAU OF RECLAMATION: INFORMATION OF ALLOCATION AND REPAYMENT OF COSTS OF CONSTRUCTING WATER PROJECTS 9–11 (1996), *available at* http://www.gao.gov/archive/1996/rc96109.pdf (discussing development, cost allocation, and assignment of repayment responsibilities for federal water projects).

20. *Casitas Municipal Water Dist*., 72 Fed. Cl. at 748.

project works, subject only to existing vested rights."[21] The District, not the federal government, acquired the appropriative water rights for the project from the California State Water Rights Board (now the State Waters Resources Control Board).[22]

Even before construction commenced, a debate arose about whether there was a need for a fish-passage facility to permit fish migration past the Robles Diversion Dam. The California Department of Fish and Game took the position that such a facility should be included in the initial construction.[23] The Department ultimately relented on this demand, however, based on the District's written assurance that "if and when [the] need develops our District will cooperate fully with your Department toward the installation of an adequate fish ladder."[24] Thus, the project as constructed contained no fish-passage facility.

Forty years later, the National Marine Fisheries Service listed the West Coast Steelhead Trout as an endangered species under the ESA.[25] This action launched a lengthy and contentious process to address the harm being inflicted on the steelhead trout by the existence of the Robles Diversion Dam and the District's water diversion practices. In particular, an environmental organization, California Trout, sent a sixty-day notice letter to the District (and the Bureau) contending that the Casitas Project resulted in an illegal "take" under the ESA and threatening to sue to enjoin future project operations.[26] Faced with this threat, the District approached the Bureau (the nominal owner of the project) about developing a strategy for addressing the ESA concerns. The District and the Bureau, in consultation with the National Marine Fisheries Service, ultimately settled on a strategy of seeking a biological opinion pursuant to section seven of the ESA which would permit continued project operations on the condition that the project and its operations were modified to allow fish migration up the river past the dam.[27] The resulting biological opinion called for construction of a fish ladder as well as enhanced stream flows below the

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21. *Id.*

22. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 102 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

23. *Id.*

24. *Id.*

25. *Id.*

26. Letter from Jim Edmondson, Conservation Dir., California Trout, to Bruce Babbit, Sec'y, U.S. Dep't of Interior et al. (Dec. 18, 1998) (on file with The Vermont Journal of Environmental Law).

27. Casitas Mun. Water Dist. v. United States, 72 Fed. Cl. 746, 749 (Fed. Cl. 2006), *partial summary judgment granted*, 76 Fed. Cl. 100 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

dam during migration periods, with part of this minimum flow arriving below the dam via the fish ladder and the rest supplied through a pipe that bypassed the dam.[28]

While the District initiated the process of obtaining authorization pursuant to the ESA for continued project operations, on January 26, 2005, it filed suit in the U.S. Court of Federal Claims alleging that the new conditions resulted in a taking of its water rights.[29] As the case was proceeding to trial, the United States filed a motion seeking clarification about the takings standard the Claims Court intended to apply to resolve the takings issue.[30] For the purpose of the motion, the United States conceded that the District had a property interest in the water affected by the biological opinion and that the District was compelled by the United States to carry out the conditions of the biological opinion.[31] In response to the motion, Judge Wiese ruled that the claim should be evaluated under the *Penn Central* multi-factor analysis, as the United States contended, rather than under a per se physical taking theory, as the District contended.[32] The District then stipulated that it could not make the showing of extreme economic harm necessary to present a viable *Penn Central* claim.[33] At the District's request, the Claims Court proceeded to dismiss the complaint and entered judgment for the United States.[34]

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28. *See* CURTIS E. SPENCER, EXPERT WITNESS REPORT: CASITAS WATER DISTRICT V. UNITED STATES COURT OF FEDERAL CLAIMS NO. 05-168L (2010) (describing in detail the requirements of the Biological Opinion and the operations of the Ventura River Project).

29. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 101 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009). The District also asserted a breach of contract claim, which the claims court rejected. *Casitas Mun. Water Dist.*, 72 Fed. Cl. at 755. One element of the breach of contract claim was that the United States, not the District, should bear the cost of constructing the fish passage. *Id.* at 749. Both the claims court and the Federal Circuit rejected that argument on the ground that these costs fell into the category of "operation and maintenance" costs for which the District was responsible under the 1956 contract. *Id.* at 752; Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1284 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009). In fact, a substantial part of the cost of constructing the facility was paid by taxpayers, as a result of various government grants awarded to the District for this purpose. Brief for the Natural Res. Def. Council as Amicus Curiae Supporting Defendant-Appellee at 25–26, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153), 2007 WL 4984848.

30. Casitas Mun. Water Dist v. United States, 76 Fed. Cl. 100, 101 (Fed. Cir. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

31. Casitas Mun. Water Dist. v. United States, 556 F.3d 1329, 1331–32 (Fed. Cir. 2009).

32. *Casitas Mun. Water Dist.*, 76 Fed. Cl. at 105–06.

33. *Casitas Mun. Water Dist.*, 543 F.3d at 1297.

34. *Id.* at 1283.

On appeal, a divided Federal Circuit panel reversed.[35] In an opinion authored by Judge Kimberly Moore, the majority ruled that the District's case presented a per se physical taking claim based on the allegation that the District was required to pass a portion of the water covered by its state permit through the fish ladder.[36] Judge Haldane Robert Mayer filed a dissenting opinion on the taking issue, arguing that the claim did not involve a physical taking and should instead be analyzed under *Penn Central*.[37]

The United States filed a combined petition for rehearing and rehearing en banc, which both the panel and full twelve-member Federal Circuit rejected.[38] Judge Moore, joined by two other members of the court, defended the panel majority's reasoning but also emphasized that the case turned on certain concessions offered by United States for the purpose of its motion for summary judgment, including that plaintiff held a property right in the water.[39] Judge Arthur Gajarsa filed a dissenting opinion from the order denying rehearing en banc, arguing that the panel should have applied the *Penn Central* framework.[40] Two other members of the court joined in Judge Gajarsa's opinion, and a fourth judge, Judge Richard Linn, noted his dissent without comment.[41] All told, seven active members of the court supported (or at least declined to revisit) the panel ruling and five dissented on the merits and/or voted in favor of rehearing (Judge Mayer dissenting from the panel ruling, plus four judges dissenting from the denial of rehearing en banc). It does not get any closer than that.

After reportedly extensive internal debate, the Solicitor General decided against filing a petition for certiorari, at least at this stage of the case.[42]

II. THE FEDERAL CIRCUIT DECIDED A DIFFERENT CASE THAN THE CLAIMS COURT

The challenge of deciphering the meaning and significance of the Federal Circuit *Casitas* decision is complicated by the fact that the case Judge Wiese thought he decided was quite different from the case the Federal Circuit thought it decided.

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35. *Id.* at 1296.
36. *Id.* at 1295.
37. *Id.* at 1297 (Mayer, J., dissenting).
38. *Casitas Mun. Water Dist.*, 556 F.3d 1329, 1330–31 (Fed. Cir. 2009).
39. *Id.* at 1331–33.
40. *Id.* at 1335 (Gajarsa, J., dissenting).
41. *Id.* at 1330.
42. Koons, *supra* note 15.

To understand the confusing evolution of *Casitas* it is necessary to go back to the U.S. Court of Federal Claims's 2001 decision in *Tulare Lake Basin Water Storage District v. United States*.[43] That case, which also involved a taking claim based on ESA restrictions on water use, was assigned to Judge Wiese, the same judge who heard *Casitas*. The plaintiff's lead counsel was Roger Marzulla, the lead counsel for the plaintiff in *Casitas*; and some of the lawyers on the defense side were repeat players in both cases as well.

In *Tulare Lake*, the California Department of Water Resources, the operator of the California State Water Project, limited water pumping from the Sacramento-San Joaquin Delta to comply with the ESA, reducing the volume of water delivered to the Tulare Lake Irrigation District.[44] The Tulare District alleged that this restriction constituted a taking of its alleged property right to receive water pursuant to its long-term water supply contract with the Department.[45] Judge Wiese ruled in favor of the District, holding that it was entitled to challenge the regulation on the theory that it represented a per se physical taking of its water interest.[46] The doctrinal significance of the conclusion that the case was governed by a per se physical takings analysis, rather than the *Penn Central* framework, was that the so-called "parcel as a whole" rule did not apply. As a result, the court evaluated the taking claim without considering the impact of the regulation in the context of the entirety of plaintiff's contractual right to water, which was substantially larger than the portion of the right affected by the regulation.[47] Judge Wiese eventually entered a judgment awarding the plaintiff over $20,000,000.[48] As discussed, the United States did not appeal this judgment.

In the subsequent *Casitas* case, plaintiff's counsel, not surprisingly, argued the case on the theory that it was a perfect match with *Tulare Lake*. Plaintiff characterized the claim as resting on the fact that the biological opinion called for a certain quantity of water to be provided below the dam

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43. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (Fed. Cl. 2001), *judgment entered by* 59 Fed. Cl. 246 (Fed. Cl. 2003), *modified*, 61 Fed. Cl. 624 (Fed. Cl. 2004).

44. *Id.* at 315–16.

45. *Id.* at 314.

46. *Id.* at 324.

47. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S 302, 322 (2002) (explaining that the so-called "parcel as a whole" rule, applicable to regulatory takings claims based on use restrictions, does not apply to claims based on alleged physical occupations or seizures, and therefore, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof") (citation omitted).

48. Tulare Lake Basin Water Storage Dist. v. United States, 61 Fed. Cl. 624, 626 (Fed. Cl. 2004), *judgment entered by* 59 Fed. Cl. 246 (Fed. Cl. 2003), *modified*, 61 Fed. Cl. 624 (Fed. Cl. 2004).

in order to facilitate fish migration.[49] While some portion of this water arrived downstream via the fish ladder, and another portion arrived via the bypass pipe that diverted water past the dam, plaintiff's allegations placed no particular emphasis on these plumbing details. What mattered according to plaintiff was that it was required, like the District in *Tulare Lake*, to leave a certain quantity of water in the watercourse that it otherwise allegedly would have diverted for consumptive use.[50] It is equally clear that this is how Judge Wiese understood and analyzed the taking claim:

> The revised operating criteria [in the Biological Opinion]—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. . . . The claim we now have before us is grounded on these revised project operating criteria. Specifically, plaintiff contends that the restrictions on water diversion that were adopted in the Biological Opinion have required Casitas permanently to forgo the exercise of a right to divert up to an additional 3,200 acre-feet of water per year from the Ventura River for irrigation purposes.[51]

Notably absent from this summary of plaintiff's allegations was any explicit reference to the requirement that the District run water through the fish ladder.

In an admirably frank opinion, Judge Wiese carefully re-examined his opinion in *Tulare Lake* and declined to follow his previous theory that a restriction on water use should be analyzed as a physical taking. Instead, he concluded, plaintiff's claim must be analyzed under *Penn Central*.[52] This meant that the "parcel as a whole" rule would apply to plaintiff's claim. Therefore, in order to prevail on its claim, the District would have been required to establish that the regulation imposed an extreme economic burden on its entire water interest associated with the project. As discussed

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49. Casitas Mun. Water Dist v. United States, 76 Fed. Cl. 100, 103 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

50. *Id.*

51. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 102 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

52. *Id.* at 103–06.

above, the District's takings case collapsed under this more demanding test, as plaintiff's counsel voluntarily conceded.[53]

To explain his change of heart, Judge Wiese relied heavily on the intervening Supreme Court decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[54] In that case, the Supreme Court drew a sharp distinction between physical takings deserving per se treatment and cases appropriate for regulatory takings analysis; in the Court's words:

> Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it 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.[55]

According to Judge Wiese, *Tahoe-Sierra*:

> [C]ompels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property. Although from the property owner's standpoint there may be no practical difference between the two, Tahoe-Sierra admonishes that only the government's active hand in the redirection of a property's use may be treated as a per se taking.[56]

While *Tulare Lake* was certainly vulnerable to criticisms prior to *Tahoe-Sierra*, as discussed below,[57] for Judge Wiese *Tahoe-Sierra* was the decisive new development that required him to change his position.

In prosecuting its appeal to the Federal Circuit, plaintiff shifted course and presented a new theory of the case. Whereas the requirement that the water pass through the fish ladder on its way to the area of the river below the dam hardly figured in the District's original argument, the fish ladder

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53. *See supra* text accompanying note 10.

54. *Casitas Mun. Water Dist.*, 76 Fed. Cl. at 104–06 (quoting Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323–25 (2002).

55. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 323 (citation omitted).

56. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 106 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

57. *See infra* text accompanying notes 72–93.

became the centerpiece of the District's case on appeal. During oral argument before the Federal Circuit, the District's counsel presented a demonstrative exhibit illustrating the flow of water into and through the fish ladder. The District's case had shifted from the theory that the government had taken the water by requiring that it be left in the river, to the theory that the government had taken the water by requiring that, once it was diverted into the diversion canal, it be directed through the fish ladder. One government counsel long involved in the case at the trial level quipped, following the oral argument: "What was that about? I don't remember this case being about a fish ladder."[58]

The panel decision, authored by Judge Moore, addressed the District's new theory without acknowledging that the District had made a legal pirouette and that the new version of the case differed significantly from the Claims Court version. In contrast to the case before Judge Wiese, which focused on the water that the District was required to leave in the river, the Federal Circuit stated that the crucial fact in its analysis was that the regulation did not merely require that water be left in the river but, instead, required that water, once it was diverted out of the river and into the diversion canal, be channeled through the fish-passage facility.[59] In other words, whereas Judge Wiese believed that a per se test did not apply because the regulation involved a requirement to leave water in the river, the appeals panel believed that a physical takings test did apply because the regulation did not simply involve leaving water in the river, but also involved a diversion of water through the fish ladder.

The upshot of the District's mid-course change in litigation strategy is that the case in the Claims Court was quite different from the case before the Federal Circuit. As a result, the question of whether the Claims Court ruled correctly presents a different question from whether the Federal Circuit ruled correctly. We address these separate questions in the next two sections.

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58. This is based on the author's recollection of the proceedings.

59. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292–93 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009) ("When the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water."). *See* Casitas Mun. Water Dist. v. United States, 556 F.3d 1329, 1333 (Fed. Cir. 2009) (Moore, J., concurring) ("In our case, the government diverts the water out of the Robles-Casitas Canal and sends it down the fish ladder to the Ventura River below the Robles Dam.").

III. THE CLAIMS COURT CORRECTLY RESOLVED THE CASE AS IT UNDERSTOOD IT

Viewing *Casitas* as the District originally presented it to the Claims Court, and as Judge Wiese understood it, Judge Wiese properly rejected plaintiff's per se takings claim. He ruled that a claim under the Takings Clause based on a regulatory restriction on the diversion of water from a river in order to protect fish presents a potential regulatory taking, not a physical taking. For the reasons discussed below, this ruling, even in the aftermath of the Federal Circuit's *Casitas* decision, is clearly correct.

Judge Wiese was correct, first, because there is no distinction between a regulatory restriction on the use of water and a regulatory restriction on the use of land or any other resource that would justify a special per se physical takings rule for regulations affecting water use. Under the decisions of the U.S. Supreme Court, the same regulatory takings analysis applies to regulations affecting a wide panoply of property interests. Thus, the Court has applied the same basic analysis to restrictions on the development of air rights,[60] the exploitation of underground resources such as coal or oil and gas,[61] and to all manner of restrictions on the use of land.[62] Furthermore, there is nothing in the nature of water or regulations affecting water that would justify putting water restrictions in a special, disfavored category for the purpose of takings analysis. As discussed above, the general test for regulatory measures affecting private property is the *Penn Central* analysis. There is no logical reason, as Judge Wiese correctly ruled, why the courts should not apply the *Penn Central* test to water regulation in the same fashion that they apply it to regulation of any other resource.

Indeed, if anything, regulatory taking analysis, as opposed to a physical takings analysis, applies more naturally to interests in water resources than to interests in other types of natural resources. In California and throughout the West, the public owns the water—that is, the physical molecules themselves—while private appropriators possess "usufructuary" interests in the water.[63] As a result, private water appropriators may (subject to relevant

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60. *See e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that New York City's Landmark Preservation Law had not resulted in a taking of Penn Central's air rights by prohibiting it from building an office tower above Grand Central Terminal).

61. *See e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (applying *Penn Central* analysis to a Pennsylvania law requiring coal companies to leave fifty percent of coal intact as subterranean support).

62. *See e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (applying *Penn Central* analysis where Rhode Island prohibited a landowner from building on one part of his land).

63. *See* CAL. WATER CODE § 102 (West 2009) ("All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner

background principles of state water law) claim a right to use the water for certain productive purposes. However, they cannot claim the same dominion over water that other owners can claim over other types of resources, including in particular the right to exclude third parties.[64] Given that regulatory takings analysis focuses on how *use* rights have been restricted, and usufructuary water interests consist only of *use* rights, regulatory takings analysis applies in very straightforward fashion in takings cases involving regulation of water interests. By contrast, the per se physical takings theory is especially inapt in takings cases involving water because a water-right holder has neither a legal right to the physical molecules themselves nor a legal right to exclude others from using the water.

Second, Judge Wiese ruled correctly in *Casitas* because, in contrast to legal rights in land and most other natural resources, legal rights in water have long been regarded as especially attenuated in another sense. Under the California public trust doctrine, no water-right holder can claim an entitlement to use water in a fashion that would be harmful to public trust resources, including fisheries.[65] Similarly, under the California reasonable use doctrine, a water-right holder can claim no vested right to use water in an unreasonable fashion.[66] These state background principles of water law limit private property interests in water to a much greater extent than background principles ordinarily limit private interests in land. Likewise, property interests in water are also uniquely attenuated as a matter of federal law. In particular, under the navigational servitude, the federal government can act to protect navigation at the expense of private property

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provided by law."); Eddy v. Simpson, 3 Cal. 249, 252 (1853) ("It is laid down by our law writers, that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use.") (emphasis in original).

64. *See* John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 2010 (2005) (explaining that an appropriative water right, unlike a fee title interest in land, does not include the "right to exclude others").

65. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983) ("One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.").

66. *See* CAL. CONST. art. X, § 2 ("It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."); United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 129 (Cal. App. 1986) (referring to "the overriding constitutional limitation that water use must be reasonable").

interests without incurring takings liability.[67] Thus, as the Supreme Court declared in *United States v. Willow River Power Co.*, "[r]ights, property or otherwise, that are absolute against all the world are certainly rare, and water rights are not among them."[68] Given the relatively limited nature of private rights in water resources, it would be implausible to suppose that regulation of water interests would trigger especially demanding scrutiny under the Takings Clause. Indeed, it is more plausible to presume that the Takings Clause should be applied with relatively greater deference in the water context.

Finally, Judge Wiese's decision was correct because there is literally no judicial precedent to the contrary (at least after Judge Wiese repudiated his own *Tulare Lake* ruling) and there is venerable Supreme Court precedent to support it. The last time the Supreme Court squarely addressed the issue of how the Takings Clause should be applied to regulatory restrictions on water use was over a century ago in *Hudson County Water Co. v. McCarter*.[69] The Court rejected the claim that a New Jersey law restricting the export of water from a New Jersey river to the neighboring state of New York resulted in a taking of the plaintiff's riparian water right.[70] The Court declared:

> [I]t appears to us that few 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.[71]

While *Hudson County* predates the development of modern takings doctrine and the Court's analysis is difficult to categorize in terms of modern takings

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67. *See* Scranton v. Wheeler, 179 U.S. 141, 163 (1900) ("The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.").

68. United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

69. Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

70. *Id.* at 354–57.

71. *Id.* at 356.

tests, the decision basically comports with modern regulatory takings analysis, not the physical takings theory. The fact that the Court rejected the taking claim in *Hudson County* certainly refutes the notion, embraced in *Tulare Lake*, that any restriction on the use of water constitutes a per se taking. *Hudson County* may be an older Court precedent, but it is directly on point and the Court's resolution of the taking claim has never been questioned.[72]

In his earlier *Tulare Lake* opinion, Judge Wiese presented several arguments for applying a per se physical takings analysis to water regulation. Upon careful examination, none of these arguments is convincing. In other words, quite apart from the subsequent *Tahoe-Sierra* decision, *Tulare Lake* did not rest on precedent or solid reasoning.

Judge Wiese's first argument for applying the per se physical taking test to water regulation was that the application of the ESA "destroyed" the value of the District's water interest in *Tulare Lake*, and that a regulation that destroys all value is equivalent to a physical taking.[73] This argument was mistaken for several different reasons.

First, the premise of the argument, that the ESA restriction destroyed the value of the District's water interest, was flawed. Under the so-called "parcel as a whole" rule in regulatory takings analysis, the economic burden imposed by a regulation must be assessed, not by focusing on the portion of the property affected by the restriction, but in relation to the owner's property as a whole.[74] Applying this rule in *Tulare Lake*, and given the relatively short duration of the restriction, the regulation had only a modest impact on the totality of the District's water interest.[75] Judge Wiese's assertion that the regulation made the District's water interest "valueless" apparently rested on the premise that his analysis should focus on the

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72. On the other hand, the Court in *Hudson County* also rejected a Commerce Clause challenge to the prohibition on export of water out of state and that aspect of the decision is, to say the least, problematic in light of *Sporhase v. Nebraska* ex rel. *Douglas*, 458 U.S. 941 (1982), holding unconstitutional, as against the Commerce Clause, a Nebraska law that barred Nebraskans from taking water to other states unless the other states reciprocally agreed to allow citizens to take water into Nebraska.

73. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001), *judgment entered by* 59 Fed. Cl. 246 (Fed. Cl. 2003), *modified*, 61 Fed. Cl. 624 (Fed. Cl. 2004).

74. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978). While the Court has, on occasion, flirted with the idea of revisiting the "parcel as a whole rule," it is by now part of the bedrock of regulatory takings analysis. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S 302, 327 (2002) (discussing the "parcel as a whole" rule from *Penn Central*).

75. *See, e.g.*, Melinda Harm Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 560 (2002) (discussing how "[t]he restrictions resulted in an overall reduction in water availability of approximately 0.11% and 2.92%" for the two lead plaintiff irrigation districts).

specific portion of the District's water interest that the District was barred from exploiting. That premise would have been correct only if it had been clear to begin with that the case involved a physical taking, in which case the "parcel as a whole" rule would not apply. But Judge Wiese could not properly assume that the "parcel as a whole" rule did not apply. The question of whether or not the parcel rule applies can logically only be addressed after deciding whether the case involves a regulatory taking or a physical taking claim. In short, Judge Wiese mistakenly relied on an implicit *assumption* that the case was governed by a per se physical takings analysis to support the *conclusion* that a per se analysis should apply. This reasoning was hopelessly and fatally circular. Because the premise of the argument for applying a per se test was mistaken, the argument itself collapses.

Second, even if the regulation had destroyed the value of the District's water interest, that would not, strictly speaking, have supported the conclusion that there was a "physical taking." A finding that the regulation destroyed the value of the District's water interest would have led (subject to applicable background principles defenses) to the conclusion that there was a per se regulatory taking under *Lucas v. South Carolina Coastal Council*.[76] It must be acknowledged that *Lucas* states that, "from the landowner's point of view," a denial of all economically viable use as a result of regulation is "the equivalent of a physical appropriation."[77] Nevertheless, even assuming that the regulation destroyed the value of the water interest, this would not have supported a ruling that a physical taking occurred. In *Lucas*, the Court described regulations that deny the owner all economically viable use of property and actions that result in a physical invasion as representing two "discrete categories" of per se takings claims.[78] These two categories may be conceptually related, but, contrary to Judge Wiese's reasoning, they are not legally identical.

Judge Wiese's second, related argument for applying a per se physical takings analysis in *Tulare Lake* was that the case could appropriately be analogized to the Supreme Court case of *United States v. Causby*.[79] The *Causby* case involved private landowners complaining of government

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76. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

77. *Id.* at 1017.

78. *Id.* at 1015.

79. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001), *judgment entered by* 59 Fed. Cl. 246 (Fed. Cl. 2003), *modified*, 61 Fed. Cl. 624 (Fed. Cl. 2004) ("Case law reveals that the distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is 'so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.'") (quoting United States v. Causby, 328 U.S. 256, 265 (1946)).

aircraft flying very low over their property during take-offs and landings.[80] The Supreme Court found a taking, observing at one point in its opinion that "[i]f, by reason of the frequency and altitude of the flights, respondents could not use [the] land for any purpose, their loss . . . would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."[81] Judge Wiese read this language to mean that if a regulation destroys a property interest (which he assumed to be the case in *Tulare Lake*), then a physical taking results.

This interpretation reads too much into *Causby*, especially in light of the gloss the Supreme Court subsequently put on this decision. The language quoted above may be read to suggest that the elimination of economic use is comparable to a physical taking. But the critical element of *Causby* that justified applying the per se physical takings test was the fact that the government's airplanes actually invaded the plaintiff's private airspace. As the Court subsequently explained in *Tahoe-Sierra*, *Causby* stands for the proposition that when government planes "use private airspace to approach a government airport," the government "occupies the property for its own purposes."[82] Contrary to Judge Wiese's reading, *Causby* cannot sensibly be read to support the idea that a limitation on use, standing alone, no matter how onerous, should be regarded as a physical taking of the property.

Third, Judge Wiese believed that his conclusion in *Tulare Lake* that a per se physical taking theory should apply was "confirmed" by a trilogy of older Supreme Court water cases.[83] In those cases, the Court ruled that government actions transferring water from incumbent private water-rights holders and into the possession of new users constituted compensable "appropriation[s]" under the Takings Clause.[84] In *Dugan v. Rank* and

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80. *Causby*, 328 U.S. at 258–59.

81. *Id.* at 261.

82. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002).

83. *Tulare Lake*, 49 Fed. Cl. at 319.

84. *See id*. ("A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land." (quoting Dugan v. Rank, 372 U.S. 609, 625 (1963))); *see also* United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950) (holding that Congress took plaintiff's water rights, established under California law, because "whether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain"); Int'l Paper Co. v. United States, 282 U.S. 399, 407 (1931) ("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. . . . [T]he Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay.").

United States v. Gerlach Live Stock Co., the government deprived owners of riparian water rights by constructing a dam and impounding the water and then conveying the water to new private water users.[85] In *International Paper Co. v. United States*, the government took water that a paper company used to power its mill and transferred it to a utility for the purpose of generating electricity for use by a different industrial firm.[86] In *Tulare Lake*, the United States sought to distinguish these cases on the ground that they involved an actual appropriation of water interests "whereas here, it is claimed, the government has merely regulated the plaintiffs' method of diverting water."[87] But Judge Wiese rejected this argument, observing that "the ultimate result of th[e] rate and timing restrictions on pumping is an aggregate decrease in the water available to the water projects," and that "whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference."[88]

Judge Wiese's reliance on the trilogy to support his per se physical takings theory was plainly mistaken. These cases involved not mere restrictions on water use to protect the public welfare but the actual transfer of water interests from one private owner to a new private owner. In other words, they involved just the kind of property restrictions "of an unusually serious character"[89] which, according to the Supreme Court, warrants per se takings treatment. Furthermore, Judge Wiese's logic would convert every regulatory action into a per se taking. After all, every regulatory action could be described as decreasing some element of an owner's property interest in order to serve some governmental purpose. For example, in *Penn Central*, the historic landmark designation at issue in that case could have been described as appropriating the air rights above Grand Central Terminal in order to confer an aesthetic benefit on the public. The Supreme Court has obviously rejected this expansive reading of the Takings Clause by refusing to apply a per se takings test in *Penn Central* and many subsequent regulatory taking cases.[90]

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85. *Dugan*, 372 U.S. at 610; *Gerlach Live Stock Co.*, 339 U.S. at 730.

86. *Int'l Paper Co*., 282 U.S. at 405–06.

87. *Tulare Lake*, 49 Fed Cl. at 319.

88. *Id.* at 320.

89. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

90. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.").

All of which leads to the last observation to be made about *Tulare Lake*: that the Supreme Court's subsequent decision in *Tahoe-Sierra* made the ruling in *Tulare Lake*, whatever its merit before *Tahoe-Sierra*, completely untenable afterwards, as Judge Wiese himself correctly recognized in his *Casitas* opinion. In *Tahoe-Sierra*, the Court emphasized, in a more forceful way than it had before, the need to maintain the "longstanding" and "fundamental" distinction between regulatory takings claims, on the one hand, and physical takings claims, on the other.[91] The Court also explained that the multi-factor *Penn Central* test should be treated as the default standard in takings cases, with the per se rule for physical occupations reserved for relatively rare, special cases.[92] Judge Wiese's ruling in *Tulare Lake* that a per se physical taking test applies to regulation of water interests was plainly in serious conflict with the Supreme Court's directions in *Tahoe-Sierra*. Thus, in *Casitas*, Judge Wiese quite properly read *Tahoe-Sierra* as commanding him to jettison his earlier ruling in *Tulare Lake*.

Judge Wiese's decision in *Casitas* can and should be viewed as a correct statement of the law despite the fact that the Federal Circuit subsequently overturned his ruling. Nothing in the Federal Circuit's reasoning undermines Judge Wiese's analysis of the claim as he understood it. Judge Wiese analyzed the case, and applied the *Penn Central* framework, on the understanding that the case presented the question of how to apply the Takings Clause to a regulation requiring that a dam operator leave water in the stream rather than divert it for consumptive use.[93] While the Federal Circuit ruled that a requirement to pass water through a fish ladder should be analyzed as a physical taking, it did not say that the same analysis should apply to the kind of regulatory restriction on water diversion that Judge Wiese thought he was addressing. In fact, the Federal Circuit explicitly stated that it was not deciding that different case. In the court's words, the record:

> [M]ake[s] clear that the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal—after the water had left the Ventura River

91. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S 302, 323–25 (2002).

92. *See id.* at 326 ("[W]e still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula.").

93. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 104–06 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

> and was in the Robles-Casitas Canal—and towards the fish ladder, thus reducing Casitas' water supply.[94]

By expressly distinguishing the kind of case Judge Wiese thought he was deciding, the court suggested that it would not apply its physical takings analysis to a case involving a "mere" restriction on diversions.

Furthermore, in a revealing footnote, the Federal Circuit addressed Judge Wiese's earlier *Tulare Lake* decision and stated that it took no position on whether that case was correctly decided.[95] Judge Wiese's analysis in *Casitas* was based on the premise that the issue he was addressing in that case was indistinguishable from the issue addressed in *Tulare Lake*. Thus, the Federal Circuit's statement that it was not resolving whether *Tulare Lake* was correctly decided implicitly indicates that the Federal Circuit was not deciding whether Judge Wiese correctly decided *Casitas* as he understood it. This understanding not only suggests that the Federal Circuit would not necessarily apply its physical takings theory in a case involving a restriction on water diversion, but that a majority of the Federal Circuit may well believe Judge Wiese properly repudiated his *Tulare Lake* ruling.

From the standpoint of Judge Wiese, no doubt the painful irony of the *Casitas* litigation is that, after taking the courageous steps of reconsidering his prior ruling on the taking issue in the controversial *Tulare Lake* case and rejecting application of a per se test, the Federal Circuit reversed his decision based on a different version of the case than the one presented to him at the trial level. At the same time, the Federal Circuit's reasoning suggests that it may believe Judge Wiese correctly repudiated his *Tulare Lake* decision and that he correctly resolved the taking issue in *Casitas* based on the claim as it was presented to him. No good deed, it is sometimes said, goes unpunished, a saying that appears to apply in spades in this instance.

IV. THE FEDERAL CIRCUIT INCORRECTLY DECIDED THE CASE AS IT UNDERSTOOD IT

The Federal Circuit viewed *Casitas* as involving a quite different question: whether requiring water to be passed through a fish ladder constitutes a physical taking of the water. Accepting for the sake of

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94. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1291–92 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

95. *Id.* at 1295 n.16.

argument that this different understanding of the case was a plausible one, given the facts of the case, the Federal Circuit erred in ruling that this version of the case presented a physical taking issue. First, the Federal Circuit erred because modern takings precedents, as well as basic principles of contemporary takings analysis, do not support the view that requiring water to pass through a fish ladder constitutes a physical taking of the water. Second, this ruling contradicts, without explanation, the extensive and essentially uniform authority dating from the beginning of the nineteenth century specifically rejecting takings and other constitutional challenges to fish-passage requirements.

A. The Ruling Is Contrary to Contemporary Takings Doctrine

The Federal Circuit offered a series of overlapping arguments to support its ruling, but none is convincing in light of modern takings precedents and principles.

First, the court, reprising a theme from the repudiated *Tulare Lake* opinion, stated that the fish-passage requirement represented a physical taking because it involved an "appropriation" of the water for a public—i.e., governmental—use.[96] To support this argument, the Federal Circuit relied on the same trilogy of water development cases upon which Judge Wiese had relied in his *Tulare Lake* opinion.[97] In response to this argument, the United States contended, much as it had in *Tulare Lake*, that *Casitas* was distinguishable from the trilogy on the ground that "here, the United States did not appropriate the water for its own use or for use by a third party."[98] The Federal Circuit declared this argument "unpersuasive," reasoning that the ESA was adopted to achieve public conservation goals and there was "little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public purpose."[99] The panel asked rhetorically, "[i]f this water was not diverted for a public use, namely protection of the endangered fish, what use was it diverted for?"[100]

This analysis mistakenly applies the physical appropriations theory far more broadly than the Supreme Court has declared appropriate. *Tahoe-Sierra* explains the distinction between appropriation and regulation of private property by stating that an appropriation "gives the government

96. *Id.* at 1296.
97. *See supra* text accompanying notes 82–85.
98. *Casitas Mun. Water Dist.*, 543 F.3d at 1292.
99. *Id.*
100. *Id.* at 1293.

possession of the property, the right to admit and exclude others, and the right to use it for a public purpose," whereas "[a] regulatory taking . . . does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others."[101] Based on this distinction, the Supreme Court has repeatedly recognized that a per se takings rule applies when the government seizes private property and converts it to its own use or hands it over to third parties for their use.[102] The trilogy of water development cases that the Federal Circuit relied upon fit in this category because they involved actual transfers of water from the original owners to new users. But merely regulating the use of water to protect public fisheries does not constitute an "appropriation" of water in the sense that the Supreme Court has used that term.

Furthermore, interpreting the term appropriation in the broad sense used by the Federal Circuit would, like the comparable analysis in Judge Wiese's *Tulare Lake* opinion, convert virtually every regulation into a per se taking. Under this approach, any regulation serving a public purpose would have to be called an appropriation triggering per se takings liability. This extreme position is untenable. Modern takings doctrine—from the Court's recent reaffirmation of the primacy of the deferential *Penn Central* framework,[103] to Justice Holmes's aphorism in *Pennsylvania Coal Co. v. Mahon* that government "hardly could go on"[104] if it had to pay for every regulatory restriction—refutes the idea that every regulation serving a public purpose "appropriates" private property. In sum, the panel's reasoning in *Casitas* is wildly out of sync with governing Supreme Court precedent and established doctrine.

The Federal Circuit's second, equally unpersuasive argument for applying a physical takings analysis rests on the idea that application of the ESA not only placed a negative restriction on how the District could exercise its water right, but imposed an affirmative mandate on how the District should exercise its water right.[105] In the panel's words, "the United States did not just require that water be left in the river, but instead

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101. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 n.19 (2002).

102. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 484 (2005) ("Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."); United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951) ("Having taken Pewee's property, the United States became liable under the Constitution to pay just compensation.").

103. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 (discussing the *Penn Central* analysis for deciding regulatory takings claims).

104. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

105. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1295 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

physically caused Casitas to divert water away from the Robles-Casitas Canal and towards the fish ladder."[106] This argument at least has the virtue of depending on a factual distinction between the case as described in the Claims Court and the case as described in the Federal Circuit. Yet, upon examination, the purported distinction between negative restrictions and regulations mandating affirmative conduct has no foundation in either precedent or logic.

In *Loretto v. Teleprompter Manhattan CATV Corp*., the Supreme Court recognized that a regulatory takings analysis applies to regulations of property use regardless of whether they impose purely negative restrictions or impose affirmative obligations.[107] In that case, the Court held that a New York law authorizing a cable television company to install, without the owner's permission, equipment on the outside of her building constituted a per se physical-occupation taking.[108] But, the Court explained that this holding would not reach a regulation requiring the owner to herself install cable television equipment on her property.[109] As the Court put it, the holding in *Loretto*:

> [I]n no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the [*Penn Central*] multifactor inquiry generally applicable to nonpossessory governmental activity.[110]

According to this analysis, requiring an owner to make some affirmative use of her property constitutes regulation of the property, not an appropriation of it. As a result, a regulation of the use of property, regardless of whether it is a purely negative restriction or imposes an affirmative obligation, is subject to the same analysis under the Takings Clause.

The discussion on this point in *Loretto* is consistent with numerous other decisions applying a traditional takings analysis to claims based on

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106. *Id.*

107. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (noting that regulations imposing "affirmative duties" may be as severely intrusive as those limiting use).

108. *Id.* at 421.

109. *Id.* at 440.

110. *Id.*

government regulations imposing affirmative obligations on property owners. For example, in the venerable case of *Miller v. Schoene*, the Supreme Court rejected a takings claim based on an official order requiring an owner to destroy trees on his land in order to arrest the spread of a plant pest.[111] There is no indication in the opinion that the Court's analysis was affected by the fact that the regulation required that the trees be cut down rather than left standing. Similarly, in the *Regional Rail Reorganization Act Cases*, the Court rejected the argument that congressional legislation compelling an insolvent railroad to continue providing rail service necessarily resulted in a taking of the railroad's assets.[112] There is, in short, nothing to the Federal Circuit's idea that the involvement of the "active hand" of government in *Casitas* necessarily converted a regulatory action into a physical appropriation.

Apart from precedent, the panel's theory that regulations imposing affirmative obligations deserve special scrutiny under the Takings Clause is inconsistent with the basic purpose of regulatory takings doctrine. The Supreme Court has declared that the goal of the doctrine is to identify regulations that are so burdensome that they are the "functional[] equivalent" of classical physical occupations or direct appropriations.[113] An inquiry that focuses on whether a regulation imposes an affirmative obligation on a property owner rather than a negative restriction on property use sheds no meaningful light on whether the regulation is tantamount to a classical taking. Nor does an affirmative regulatory mandate impair some essential feature of property ownership, such as the right to exclude the public. The government routinely places affirmative duties on property owners to maintain their property in a certain fashion or to install particular equipment on the property without triggering liability under the Takings Clause,[114] much less under a per se takings test. For all these reasons, there is simply nothing to the Federal Circuit's argument.

Several other aspects of the Federal Circuit's decision deserve brief discussion. First, in response to the government's reliance on *Tahoe-Sierra* and its discussion of the narrowness of per se rules, the panel asserted that

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111. Miller v. Schoene, 276 U.S. 272, 281 (1928).

112. Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 154 (1974).

113. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

114. Virtually the entire panoply of federal environmental laws can be characterized as imposing affirmative regulatory mandates on property owners, from requirements to install scrubbers on smokestacks to requirements to install water pollution control equipment. The imposition of these kinds of affirmative obligations has no more given rise to successful takings claims than, at least prior to *Casitas*, requirements that dam owners construct and operate fish-passage facilities. *See infra* text accompanying notes 129–50.

Tahoe-Sierra was distinguishable.[115] The panel said that *Tahoe-Sierra* involved a mere temporary moratorium, whereas the regulation in *Casitas* was permanent in the sense that the water required to be channeled through the fish ladder would be "forever gone."[116] This distinction is completely irrelevant to the issue of which takings test should apply. The Supreme Court has made clear that the same takings analysis applies regardless of whether a regulation is temporary or permanent in nature, and the Court has certainly never suggested that permanent regulations should be regarded as per se physical takings.[117] For example, the Court evaluated the claim in *Lucas* as a regulatory taking claim, even though it assumed that the restriction was "unconditional and permanent."[118] Likewise, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the case that established that financial compensation is the default remedy for a takings violation, the Court said that regulatory takings analysis typically commences with the assumption that the restriction will be "permanent."[119] While the *Tahoe-Sierra* case involved a temporary regulatory restriction, the decision cannot possibly be read to support the radical, novel position that permanent regulatory restrictions all constitute physical takings.[120]

The Federal Circuit also suggested that a finding of a per se taking was supported by the fact that the water was required to be channeled into the fishway after the District had already diverted the water into the canal.[121]

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115. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1295–96 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (2009).

116. *Id.* at 1296.

117. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1033, 1033 (1992) ("It is well established that temporary takings are as protected by the Constitution as are permanent ones.").

118. *Id.* at 1012.

119. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316–17 (1987).

120. The panel majority also may have been persuaded to strive to evade the precedential force of *Tahoe-Sierra* by a law review article cited in the opinion. *See Casitas Mun. Water Dist.*, 543 F.3d at 1296 (citing Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429 (2004)). Professor Eagle severely criticized the Supreme Court's *Tahoe-Sierra* decision for drawing "a strident and bright-line distinction" between physical takings and potential regulatory takings, a distinction he described as "arbitrary" and reflecting a "significant defect" in logic. Eagle, *supra*, at 453, 455–56. Whatever academic interest Professor Eagle's musings may offer, Judge Moore and the other members of the Federal Circuit panel had a judicial responsibility to apply the "bright line" distinction established by the Supreme Court rather than attempt to subvert it.

121. *See* Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1291–92 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (2009) (describing plaintiff's claim as based on the fact that the "government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal—after the water had left the

The thinking underlying this suggestion is apparently that the status of the water changed when it was diverted out of the river and into the canal: that the District may have held a mere usufructuary interest in the water while it was still in the river but, after the water was diverted into the canal, the District gained ownership of the physical water molecules.[122] While this theory is certainly debatable as a matter of California law,[123] the critical point is that the legal status of the water once it was diverted into the canal is irrelevant for the purpose of deciding what takings analysis applies. Even if the District owned the physical water once it was in the canal, the government was still merely regulating use of the water, and not appropriating it.

Lastly, the Federal Circuit blatantly misread the most directly relevant Supreme Court precedent, *Hudson Water Co. v. McCarter*.[124] The panel reasoned that the decision was beside the point because the Supreme Court did not actually reach the issue of the applicable takings test; the panel asserted that the Supreme Court disposed of *Hudson County* on the threshold basis that the plaintiff did not hold a protected property right to sell the water under New Jersey law.[125] In fact, not only did the Court not reject the taking claim on this ground, it explicitly declined to do so. The panel quoted a passage from *Hudson County* that purportedly supported its interpretation,[126] but the quoted passage actually appeared in the Court's discussion of the Commerce Clause issue, and not the takings issue in the case. On the other hand, in the portion of the opinion discussing the takings issue, the Supreme Court noted that the New Jersey court had rejected the

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Ventura River and was in the Robles-Casitas Canal—and towards the fish ladder, thus reducing Casitas' water supply.").

122. *Id.* at 1292; *see Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329, 1332 (Fed. Cir 2009) (Moore, J., concurring) ("[T]he water for the fish ladder comes out of Casitas' allotment of 107,800 acre-feet per year. That is so because, once the water is in the canal, it is water that Casitas has diverted pursuant to its allotment. It thus has become the property of Casitas.").

123. *See* Brief of California State Water Resources Control Board as Amici Curiae Supporting Appellee, United States, at 24, Casitas Mun. Water Dist. v. United States, 556 F.3d 1329 (Fed. Cir 2009) (No. 2007-5153), 2007 WL 4984849 (quoting Cal. Pastoral and Agric. Co. v. Madera Canal & Irr. Co., 167 Cal. 78, 83 (1914) ("[A]n appropriator is not entitled to the quantity of water actually diverted and taken into possession, if he uses only a portion of it, and . . . his right is limited to the amount he actually uses for a beneficial purpose."). Interestingly, in a related case involving the scope of the federal Clean Water Act, the Supreme Court rejected the argument that water flowing down the Presumpscot River loses its status as "waters of the United States" when it is temporarily diverted into a power canal. *See* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 379 n.5 (2006) (disagreeing with the Supreme Judicial Court of Maine's finding that "one can denationalize national waters by exerting private control over them").

124. Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

125. *Casitas Mun. Water Dist.*, 543 F.3d at 1294.

126. *Id.* at 1294–95 (quoting *Hudson County Water Co.*, 209 U.S. at 357).

takings claim based on its understanding that the plaintiff lacked a protected property interest in the water under New Jersey law.[127] But the Supreme Court declined to rest its resolution of the takings claim on this ground, stating, "we prefer to put the authority which cannot be denied to the state upon a broader ground than that which was emphasized below."[128] The Court then proceeded to explain why, in its view, the regulation did not constitute a "taking."[129] In short, the Federal Circuit plainly misread *Hudson County*.[130]

In sum, the Federal Circuit ruling in *Casitas* conflicts with relevant Supreme Court precedent and the broader principles of contemporary regulatory-takings doctrine. Beyond that, however, as discussed below, the ruling is contrary to the overwhelming weight of authority on the constitutionality of fish-passage requirements.

B. The Ruling Is Contrary to Precedents Involving Fish-Passage Requirements

An unfortunate consequence of the plaintiff's change in the focus of its case—from the water left in the stream, to the water channeled through the fish ladder—is that the parties never briefed, and the Federal Circuit did not address, the numerous judicial precedents specifically addressing government mandates that dam owners install and operate fish-passage facilities. The Federal Circuit decision reads as if no court had previously addressed the constitutionality of such requirements. This is plainly implausible, given the obvious, longstanding conflicts between dams and migratory fish. In fact, there is voluminous precedent on the subject and it strongly favors the government rather than the District. Thus, the Federal Circuit's second major error in *Casitas* was to ignore this extensive body of highly relevant precedent.

As Professor John Hart has explained in his leading article on the subject, regulation of dams to protect fish migration has a long and

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127. *Hudson County Co.*, 209 U.S. at 354.

128. *Id.* at 355.

129. *Id.* at 355–57.

130. The panel also sought to distinguish *Hudson County* on its facts, observing that in this case, in contrast to *Hudson County*, "the United States did not just require that water be left in the river, but instead physically caused Casitas to divert water away from the Robles-Casitas Canal and towards the fish ladder." *Casitas Mun. Water Dist.*, 543 F.3d at 1295. But this argument is merely a reprise of the argument that there is a relevant distinction between negative restrictions on the use of property and regulations imposing affirmative obligations on owners. *See supra* text accompanying note 114 (discussing how both types of regulations are governed by the same takings analysis).

instructive history.[131] Most tellingly perhaps, James Madison, the author of the federal Takings Clause, was a principal proponent of fish-passage legislation while a member of the Virginia Assembly—and never suggested that enforcement of such a measure might constitute a taking requiring compensation.[132] Given that the author of the Takings Clause was a fish-passage advocate and never argued that requiring a dam owner to provide fish passage would raise a constitutional problem, it is, at a minimum, ahistorical to apply the Takings Clause in this context.

In addition, Virginia was hardly alone in America's early history in adopting fish-passage legislation. Many colonies adopted fish-passage laws starting in the early eighteenth century, and most of the original states had fish-passage laws.[133] "By 1800, thirteen states had laws prohibiting mill dams on some or all of their rivers from obstructing the passage of fish."[134] With the gradual expansion of the United States during the nineteenth century, more states adopted similar legislation,[135] including—most notably for the purpose of *Casitas*—California in 1870, two decades after it joined the Union.[136]

In keeping with Alexis de Tocqueville's observation about the litigiousness of early Americans, these legislative measures inevitably generated legal claims that they infringed upon dam owners' property rights.[137] These claims were variously presented as involving impairments of contracts, violations of due process, or takings.[138] In the overwhelming majority of cases, the courts rejected these claims. Some of the decisions rested on capacious conceptions of the police power,[139] while others

131. John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 292–306 (2004).

132. *Id.* at 299–306.

133. *Id.* at 289, 292.

134. *Id.* at 292.

135. The leading early-nineteenth century treatise on water resource law stated, "[i]n this country the statute books of almost all the states shew [sic] the solicitude of the legislature to preserve a free passage for the fish, especially in those rivers which are annually visited by fish from the ocean." JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WATER-COURSES 57 (1824).

136. An Act to Provide for the Restoration and Preservation of Fish in the Waters of this State, ch. 457, § 3, 1870 Cal. Stat. 663, 663–64.

137. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (1835).

138. *See, e.g.*, Holyoke Co. v. Lyman, 82 U.S. 500 (1872) (Contracts Clause claim); Parker v. People, 111 Ill. 581 (1884) (Due Process claim); State v. Franklin Falls Co., 49 N.H. 240 (1870) (Taking claim).

139. *See* State v. Beardsley, 79 N.W. 138, 140 (Iowa 1899) ("The law seems to be as definitely settled in favor of the public, to protect fish, and provide for their passage along the streams, as well in unnavigable as in navigable waters."); W. Point Water Power & Land Imp. Co. v. State, 66 N.W. 6, 8 (Neb. 1896) ("That the declared purpose of the act, viz. the preservation of the fish in our streams, is a proper function of the state government, as tending directly to promote the public welfare, is a proposition distinctly recognized by authority . . . .").

stressed the idea of special public rights in—and correspondingly broad government authority to protect—public fisheries.[140] Representative of these decisions is an early case in which the Massachusetts Supreme Judicial Court declared:

> [T]he right to build a dam for the use of a mill was under . . . [an] implied limitation[] . . . to protect the rights of the public to the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish.[141]

Numerous other cases decided by the state courts articulate the same basic principle.[142]

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140. *See* Inhabitants of Stoughton v. Baker, 4 Mass. 522, 528 (1808) (stating that the right to build a dam was subordinate to "the rights of the public to the fishery"); *In re* Del. River at Stilesville, 115 N.Y.S. 745, 750 (App. Div. 1909) ("The people of the state have . . . as an easement in this stream the right to have fish inhabit its waters and freely pass to their spawning beds and multiply, and the right to take and use such fish for food, subject to such regulations as the Legislature may prescribe; and no riparian proprietor upon the stream has the right to obstruct the free passage of fish up the stream to the detriment of other riparian proprietors or the public.").

141. *Inhabitants of Stoughton*, 4 Mass. at 528.

142. *See, e.g.*, Cottrill v. Myrick, 12 Me. 222, 231 (1835) ("The riparian proprietor may erect a dam upon such a stream, without providing therein a passage for fish, so long as he violates no existing law, but subject to the well established right of the legislature to interpose. No individual can prescribe against this right, which is here held to belong to the public."); Commonwealth v. Chapin, 22 Mass. (5 Pick) 199, 205 (1827) (holding dam owner liable for monetary penalty unless he constructs fish-passage facilities as required by state statute); State v. Theriault, 70 Vt. 617, 623, 41 A. 1030, 1032 (1889) ("Not a decision in this country, state or national, has been brought to our attention . . . which holds that such acts of the state legislature, in regard to this class of property, and in restraint of the right of the riparian owner to take and appropriate fish therefrom, are unconstitutional. They have uniformly been held to be, not a taking of private property or private rights for public use . . . but an exercise of the police power of the state."). To be sure, the government did not prevail in every lawsuit challenging fish-passage requirements. *See, e.g.*, People v. Platt, 17 Johns. 195, 215 (N.Y. 1819) (holding that fish-passage legislation violated the Contracts Clause); State v. Glen, 52 N.C. (7 Jones) 321, 334 (1859) (holding that requirement to install fish passage constituted a taking). An article by Professor Eric Claeys states "[d]am owners received just compensation when fish-conservation laws required them to lower their dams so salmon, shad, or other fish could swim upstream to smelt." Eric R. Claeys, *Takings, Regulation, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1591 (2003). But this unqualified statement is obviously an overstatement; to support this assertion he cites only the handful of successful suits by dam owners while ignoring the far larger number of government wins. Furthermore, most of the aberrant decisions reflect special considerations and therefore do not undermine the general judicial consensus that fish-passage requirements are constitutional. *People v. Platt*, for example, depended on a strict reading of the Contracts Clause, which was epitomized by the Supreme Court's decision in *Fletcher v. Peck*, 10 U.S. 87, 138 (1810) (holding that the states cannot rescind grants or contracts without violating the Constitution). That approach was supplanted by a more deferential standard of

By the late nineteenth century, judges, lawyers, and their clients apparently regarded the issue of the constitutionality of fish-passage requirements as largely settled. The Supreme Court's sweeping rejection of a Contracts Clause challenge to a fish-passage requirement in *Holyoke Co. v. Lyman* was particularly important in solidifying this consensus.[143] This 1872 case involved a Massachusetts statute requiring construction of a fish ladder to permit salmon and shad to pass a dam on the Connecticut River.[144] The Court rejected the argument that the law, adopted in 1866, violated the company's charter to build the dam.[145] After citing many of the state court precedents on the issue, the Court declared:

> [W]ater-power is everywhere regarded as a public right, and fisheries of the kind, even in waters not navigable, are also so far public rights that the legislature of the State may ordain and establish regulations to prevent obstructions to the passage of the fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners.[146]

Following this decision, challenges to fish laws apparently largely fell to the wayside, to the point that in 1909 a New York court could state:

> The courts of other states and of the United States have *uniformly* held that a riparian owner has not the right to maintain a dam or other obstruction which prevents the passage of fish up the streams, and that the Legislature may establish regulations to prevent obstructions to the passage of fish.[147]

After this point, there are essentially no reported cases addressing the constitutionality of fish-passage requirements.

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review by the latter half of the nineteenth century. *See* Stone v. Mississippi, 101 U.S. 814, 821 (1879) (identifying the plaintiff's charter as "a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal"); *Beardsley*, 79 N.W. at 140 (noting that the law applies equally to navigable and unnavigable waters); *Glen*, 52 N.C. (7 Jones) at 332–34 (turning on the fact that the claimant's claimed property interest derived from a particularly expansive government grant that included river bottom land); Woolever v. Stewart, 36 Ohio St. 146, 150–51 (1880) (turning on the fact that the dam was constructed on a non-navigable river, a point that most other courts deemed irrelevant in this context).

143. Holyoke Co. v. Lyman, 82 U.S. 500, 511–12 (1872).

144. *Id.* at 509–10.

145. *Id.* at 522.

146. *Id.* at 506.

147. *In re* Del. River at Stilesville, 115 N.Y.S. 745, 750 (App. Div. 1909) (emphasis added).

In the twentieth century, fish-passage requirements largely became the province of federal law. In 1906, in the General Dam Act, Congress directed that, "[t]he persons owning or operating any . . . dam [across any navigable waters of the United States] shall maintain, at their own expense, such . . . fishways as the Secretary of Commerce . . . shall prescribe."[148] The General Dam Act of 1910 amended the 1906 Act but retained the same fishway language.[149] In 1920, Congress enacted the Federal Water Power Act governing the construction and operation of non-federal hydropower projects and creating the Federal Power Commission (later renamed the Federal Energy Regulatory Commission) to oversee the licensing process.[150] Section eighteen of that Act provided that licensed facilities shall be subject to "rules and regulations [that] may include the maintenance and operation by such licensee at its own expense of such . . . fishways as may be prescribed by the Secretary of Commerce."[151] In accord with the consensus that emerged from the state courts in the nineteenth century on the constitutionality of this type of requirement, there is apparently no precedent involving takings or constitutional challenges to these federal law provisions.[152]

In sum, when viewed in larger historical context, *Casitas* represents a dramatic departure from a well-established, longstanding judicial consensus in favor of the constitutionality of fish-passage requirements. Even more remarkably, the Court issued its decision without acknowledging the enormous body of judicial decisions that it was throwing overboard. While the Federal Circuit might fairly be excused for this lapse given the tortured history of the litigation, *Casitas*'s sharp break with the past provides

148. Act of June 21, 1906, Pub. L. No. 59-262, 34 Stat. 386.

149. Act of June 23, 1906, Pub. L. No. 61-246, 36 Stat. 593, 594–95. Neither the 1906 Act nor the 1910 Act was ever included in the U.S. Code; *see* 33 U.S.C. § 546 hist. n. (2006) (noting that these provisions were "apparently omitted from the Code as superseded," presumably as a result of the enactment of the Federal Water Power Act in 1920).

150. Federal Water Power Act, Pub L. No. 66-280, 41 Stat. 1063 (1920).

151. *Id.* at 1073 (codified as amended at 16 U.S.C. § 811 (2006)); *see* 16 U.S.C. § 811 (2006) ("[T]he Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.").

152. Although there are apparently no cases involving challenges to the requirements to construct and maintain fishways, there is extensive precedent upholding the Commission's authority to impose conditions on hydropower licenses requiring the project operator to devote a portion of its project water to mitigation project impacts. *See, e.g.*, Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 782 (1984) (noting the Commission's authority to impose certain conditions upon licenses); California v. Fed. Power Comm'n, 345 F.2d 917, 924 (9th Cir. 1965) ("[T]he Commission had authority to incorporate in the tendered license a condition which could operate to impair the districts' full use of their irrigation water rights in some future year.").

another reason to believe that this decision is ripe for re-examination in the future.

V. THE GOVERNMENT SHOULD ULTIMATELY PREVAIL IN *CASITAS*

Looking to the next steps in the *Casitas* litigation, it appears unlikely that the District will ultimately prevail on its taking claim, even accepting the validity (at least for the time being) of the Federal Circuit's ruling that a requirement to direct water through a fish ladder should be treated as a physical taking. First, assuming that a requirement to divert water is a physical taking that would ordinarily trigger per se takings analysis, the larger regulatory context in which the requirement was imposed on the District suggests that the District's claim should be evaluated as an "exactions" claim in accordance with the standards of *Nollan v. California Coastal Commission*[153] and *Dolan v. City of Tigard*.[154] Applying the "essential nexus" and "rough proportionality" tests that apply to exactions, the Claims Court on remand should conclude that this regulation did not result in a taking.

Second, and in any event, the District's taking claim should fail because the ESA regulatory requirement is consistent with and supported by background principles of California law. When, as in this case, a claimant cannot point to a protected property interest that has been intruded upon by a challenged regulation, the taking claim fails at the threshold, regardless of what takings analysis applies. In this case there are at least two independent grounds for concluding that background principles apply: (1) the California public trust doctrine, and (2) the century-old California statutory requirement that dam owners provide sufficient water via fishways to meet the flow needs of fisheries below dams.

A. Nollan *and* Dolan

The *Casitas* litigation has so far focused on the question of whether a requirement to pass water through a fish ladder should be regarded as a regulation of the water interest or a physical taking of that interest. If the United States had prevailed (as it should have) on the argument that a regulatory requirement to pass water through a fish ladder should be analyzed as a potential regulatory taking, this litigation would be completed and judgment would have been entered for the United States. However,

153. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836–37 (1987).
154. Dolan v. City of Tigard, 512 U.S. 374, 386 (1994).

now that the Federal Circuit has ruled that this requirement should be regarded as involving a physical taking, the question becomes how that conclusion should affect the ultimate resolution of the takings liability issue in the case.

Based on settled takings principles, the taking claim should be analyzed using the exactions framework established in *Nollan* and *Dolan*. An exactions analysis applies in the situation where a government agency grants a property owner permission to exploit some interest, but subject to a condition that imposes a requirement which, considered independently, would constitute a per se taking.[155] In *Nollan*, the California Coastal Commission granted permission to the Nollans to build a larger building on their shorefront property, but on the condition that they grant the public a right of passage along the beach in front of their property.[156] In *Dolan*, the City of Tigard granted permission to Mrs. Dolan to expand her hardware store, but on the condition that she grant the public access to a greenway running through the property.[157] The Supreme Court established that when a condition of this type is not imposed unilaterally, but instead is attached as a condition to a regulatory authorization, the condition does not necessarily result in a taking.[158] Instead, the Court ruled that such a condition will be held to be a taking only if there is no "essential nexus" between the condition and the government's legitimate regulatory purposes, or if the burden imposed by the condition is not "roughly proportional" to the public harm the regulation is designed to avoid.[159]

The *Nolan* and *Dolan* analytic framework logically applies in *Casitas* on remand. The United States did not impose the requirement that water be provided to operate the fishway unilaterally. Rather, this requirement was imposed as a condition included in the Biological Opinion granting affirmative authorization to the District to operate the project in the future without violating the ESA.[160] As discussed above, the purpose of the ESA consultation was to address the claim—initially asserted by California Trout—that operation of the dam without adequate fish-passage facilities would constitute an illegal "take" under the Act. Because the fish-passage requirement was attached as a condition to an affirmative grant of

155. *See Nollan*, 483 U.S. at 836–37 (describing an apparent "lack of nexus between the condition and the original purpose of the building restriction").

156. *Id.* at 827–28.

157. *Dolan*, 512 U.S. at 379–80.

158. *Nollan*, 483 U.S. at 836.

159. *Dolan*, 512 U.S. at 386, 391.

160. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1282 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

regulatory permission, just as in *Nollan* and *Dolan*, the exactions standards apply.

The District might object that, unlike in *Nollan* and *Dolan*, where the conditions were attached to regulatory authorizations to engage in some expanded land use activity, in this case the condition was attached to an authorization for the District to continue operating the dam essentially as it has been doing for the last forty years. However, the Supreme Court has long recognized that the same regulatory takings analysis applies regardless of whether a regulation is being applied to limit some new proposed property use or to constrain some established use.[161] Furthermore, any taking claim arising from any potential regulatory restrictions on the District's ability to divert the Ventura River unquestionably would have to be analyzed as a regulatory taking issue, as discussed above. After Judge Wiese's *Casitas* decision, *no* judicial precedent supports applying the per se physical takings theory to restrictions on water diversions. Given that regulatory takings analysis would apply to any taking claim based on a decision about whether to allow the project to continue to operate or not, a condition imposed on the authorization of continued project operations would have to be tested under *Nollan* and *Dolan*.

Furthermore, regulation of water interests is decidedly less retroactive in operation than regulation of established land use. In this case, the fish-passage requirement has no retroactive effect whatsoever on the District's past exploitation of the water that flowed down the Ventura River. Instead, the ESA imposes a condition on the District's *future* diversions from Ventura River flows. Thus, even if there were a meaningful distinction between regulatory constraints imposed on established property uses and future uses, the regulations at issue in this case are purely prospective in operation.

While the record no doubt will require further development on remand, it appears a virtual certainty that the government can satisfy the essential nexus and rough proportionality tests. The requirement to pass water through the fishway in order to protect the fishery is logically related to the government's regulatory purpose in reviewing the dam operations to reduce harm to the fishery. The relatively modest amount of water the District is

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161. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (stating that the application of a new licensing ordinance to a mining company does not violate the Constitution simply because that company's mining operation was already underway when the ordinance was adopted); Hadacheck v. Sebastian, 239 U.S. 394, 404–05 (1915) (involving a taking claim based on a law prohibiting the claimant from continuing to operate a brickyard); *see also* Yee v. City of Escondido, 503 U.S. 519, 522–23 (1992) (indicating in dictum that taking claims based on rent control ordinance affecting pre-existing landlord-tenant relationship should be evaluated under *Penn Central* standards).

required to devote to fishway operations is certainly roughly proportional to the public harms from the dam operations that the government is attempting to remedy.

B. Background Principles of California Law

Even assuming that the requirement to pass water through the fish ladder would constitute a taking, there remains the threshold question of whether the regulation can be defended against the taking claim on the ground that it parallels background principles of state law defining and limiting private rights in water. If a regulation simply mirrors limitations that are inherent in a claimant's property interest to begin with, a taking claim based on the regulation fails at the threshold.[162] There are at least two potentially relevant background principles in this case: the California public trust doctrine and the longstanding California statutory requirement that dam operators provide water via fishways to support fisheries below dams.

1. Public Trust Doctrine Defense

Under *National Audubon Society v. Superior Court*, no California appropriative water-right holder can claim a property right to exploit water in a fashion that is harmful to public trust resources.[163] By completely blocking upstream passage by steelhead trout, the operation of the Robles Diversion Dam plainly harmed a public trust resource. The installation and operation of a fishway eliminates or at least reduces the harm to the fishery caused by the dam. Because no water-right holder can claim a property right to use water in a fashion that harms the public trust, and because devoting water to the operation of the fish ladder reduces this harm, the requirement to devote water to operation of the fishway does not impinge on any protected property interest in the water.

Notwithstanding the straightforward logic of this position, the District may present several counter arguments. Upon analysis, none of the likely counter-arguments is convincing.

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162. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

163. Nat'l Aububon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983) (discussing how the public trust doctrine bars any person "from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust"). The California reasonable use doctrine represents another background principle of California water law that very arguably parallels the public trust doctrine in this context. *See* California Constitution, Article X, Section 2.

The first potential counter argument is suggested by Judge Wiese's *Tulare Lake* decision. In addition to relying on the physical takings theory to support his conclusion that there had been a taking, he ruled that the United States could not rely on the public trust doctrine or other background principles of California water law to defeat the taking claim.[164] In *Casitas*, Judge Wiese repudiated his physical taking theory,[165] but he has not had occasion to re-examine this other facet of *Tulare Lake*. He will be required to do so on remand in *Casitas*.

In *Tulare Lake*, Judge Wiese acknowledged, as a general proposition, that California background principles limit private rights in water, and that the nature and scope of these background limitations evolve over time based on new knowledge and information.[166] But he also ruled that the California water board has exclusive jurisdiction (along with California state courts) to define how the public trust doctrine or other background principles should be applied in any particular case.[167] He concluded that if a water user has been granted an appropriative water right under California law, a federal court has no authority to determine what limitations on the water interest may exist pursuant to the public trust or reasonable use doctrines.[168] "The public trust and reasonable use doctrines each require a complex balancing of interests—an exercise of discretion for which this court is not suited and with which it is not charged."[169]

This analysis was mistaken, first, because, focusing specifically on the public trust doctrine, it confused the limits on property rights in water imposed by that doctrine with the scope of the water board's regulatory authority under the public trust doctrine. Judge Wiese apparently believed that the terms of a water permit issued by the board define the scope of a permittee's property right in the water.[170] But that understanding is based on a misreading of *National Audubon* because the California Supreme Court made clear that the public trust doctrine imposes more severe limitations on property interests in water than on the board's regulatory

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164. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 322–24 (Fed. Cl. 2001), *judgment entered by* 59 Fed. Cl. 246 (Fed. Cl. 2003), *modified*, 61 Fed. Cl. 624 (Fed. Cl. 2004).

165. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 106 (Fed. Cl. 2007), *aff'd in part & rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

166. *Tulare Lake*, 49 Fed.Cl. at 321. "There is, as an initial matter, no dispute that all California water rights are subject to the universal limitation that the use must be both reasonable and for a beneficial purpose." *Id.*

167. *Id.* at 324.

168. *Id.*

169. *Id.* at 323–24.

170. *Id.* at 322 (stating that the state appropriative water-right permit "define[d] the scope of plaintiffs' property rights").

authority over water rights.[171] On the one hand, *National Audubon* states in unambiguous terms that no water-right holder can claim any property entitlement to use water in a way that is harmful to trust resources.[172] On the other hand, the decision states that the water board has the authority, after giving due consideration to public trust values and other aspects of the public interest, to issue permits authorizing the destruction of public trust resources.[173] The Court explained that the board has "the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, *even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream*."[174]

It follows from the difference between the scope of private rights in water and the scope of the board's regulatory authority over water that a permit issued by the board does not define an appropriator's property interest. As the California Supreme Court put it in *National Audubon*, the state only has "the power to grant *nonvested* usufructuary rights to appropriate water even if such diversions harm public trust uses."[175] The use of the term "nonvested right" indicates that a water permit may grant a water user an interest enforceable, for example, against other competing water users. But it also indicates that an appropriative permit does not create a vested entitlement against the public in the event exercise of the water right will harm public trust resources.

Furthermore, Judge Wiese was mistaken insofar as his ruling in *Tulare Lake* was based on the notion that the U.S. Court of Federal Claims, as a federal court, lacks the authority to interpret and apply the state public trust doctrine in the same fashion that a state court or the state water board would. Under the doctrine of *Erie Railroad Co. v. Tompkins*, a federal court has an obligation to apply state law in the same fashion that a state court would.[176] While *Erie* represents a broad principle of federal-state relations

171. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719–21 (Cal. 1983).

172. *Id.* at 721 ("One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust."); *see id*. at 727 (stating that the public trust doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust"); *see also id.* at 732 ("The public trust doctrine . . . precludes anyone from acquiring a vested right to harm the public trust . . . .").

173. *Id.* at 712 ("The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream.").

174. *Id.* at 727 (emphasis added).

175. *Id.* at 712 (emphasis added).

176. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

within our system of federalism,[177] it certainly applies in the specific context of a federal takings case where the threshold question of the nature and scope of the property interest is generally defined by state law.[178] In accord with this understanding in *National Audubon* the California Supreme Court explicitly recognized that the federal courts would have the authority and responsibility to apply the public trust doctrine.[179]

The Supreme Court has explained the *Erie* doctrine in part as a way of avoiding divergent results based on whether a federal or state court is addressing a state legal issue.[180] That policy consideration certainly applies in this case because there is no just reason why this taking claim should be resolved differently depending upon whether it was filed in federal or state court. At bottom, however, *Erie* reflects the fundamental constitutional principle of federalism:

> Erie ultimately rests on the principle that the federal government as a whole, including Congress and the federal courts, has no more authority than that given it by the Constitution. This fundamental principle, which is inherent in the political theory underlying the very concept and structure of the federal government, is reinforced by the Tenth Amendment, which reserves to the state or to the people those powers "not delegated to the federal government by the Constitution."[181]

The U.S. Court of Federal Claims, as much as any federal court, is bound by the principle of federalism.[182]

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177. *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4520 (2d ed. 1996) ("[T]he Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.") (quoting Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956)).

178. *Id.* § 4520 ("[S]tate law has been applied [under *Erie*] to determine the character of property . . . in federal condemnation actions to determine what property interests are compensable . . . ."); *see, e g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 163–67 (1998) (applying Texas law in a Takings Clause case to determine whether a legal client had a property interest in interest earned by the attorney's IOLTA account); Esplanade Props., L.L.C. v. City of Seattle, 307 F.3d 978, 980 (9th Cir. 2002) (rejecting taking claim based on application of Washington's public trust doctrine).

179. *Nat'l Audubon Soc'y*, 658 P.2d at 731–32.

180. *Erie R.R. Co.*, 304 U.S. at 74–75.

181. WRIGHT, *supra* note 177, at § 4505.

182. *Cf.* Petro-Hunt, L.L.C. v. United States, 90 Fed. Cl. 51, 60–61 (Fed. Cl. 2009) ("[A]s numerous cases attest, questions regarding the existence or loss of most property interests, including those of real property, may be—and often are—litigated in this court in resolving a takings claim. And this occurs even where reference to state law is required—indeed, the latter is usually the case.").

To carry out the *Erie* doctrine, a federal court addressing a state law issue is, "in substance, 'only another court of the State.'"[183] In other words, a federal court addressing a substantive issue of state law in deciding a case within its jurisdiction "functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would have been applied in the state court system."[184]

In the context of this case, this means that the claims court on remand must determine whether the fish-passage requirement was designed to minimize the harm to the public fishery that the project's operation was causing. All or most of the evidence required to support this conclusion has already been collected in the Biological Opinion supporting installing the fish ladder to avoid an illegal "taking" of the fish by the project.[185] Additional relevant evidence could no doubt be marshaled through witnesses presented at trial.

A second potential counter argument to the public trust defense is that there is a decisive difference between a purely negative restriction on water use and an affirmative mandate for the purpose of applying this doctrine as a background principle. In other words, even if the public trust doctrine would bar a taking claim based on a regulation restricting diversions from a stream, it might be contended that it cannot bar a claim based on an affirmative government mandate about how to use or manage water. This potential argument is obviously an echo of the Federal Circuit's reasoning in *Casitas*, discussed above, that there is a distinctive difference, for the purpose of defining a "taking," between a negative restriction on property use and an affirmative direction on how property should be used.

There is no merit, however, to this crabbed view of California background principles. First, it offends common sense. According to this view, the public trust doctrine might bar a taking claim if negative restrictions were imposed on the District by, for example, baring the closing of the gates in the dam or prohibiting water diversions during certain high flow period. If these alternative actions can be defended based on the public trust doctrine, however, it would be nonsensical if the same defense could not be raised to support a fishway requirement that accomplishes the same goal but actually requires less water and imposes more modest interference with project operations. The greater power to drastically curtail project operations for species protection purposes based on the

183. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956) (quoting Guaranty Trust Co. v. New York, 326 U.S. 99, 108 (1945)).

184. WRIGHT, *supra* note 177, at § 4507.

185. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1282 (Fed. Cir. 2008), *reh'g denied*, *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009).

public trust doctrine should logically encompass the lesser power to require water for a fish ladder to accomplish the same purpose.

Relevant California precedent also refutes this suggested distinction. In the venerable case of *People v. Glenn-Colusa Irrigation District*, the California Court of Appeal upheld the right of the state to bring a nuisance action seeking an injunction against an irrigation district diverting water into an irrigation canal "until such time as a fish screen [was] constructed and maintained . . . so as to prevent the destruction of fish in consequences of such diversion."[186] Based on this precedent, surely a regulation imposing a similar screening requirement could be defended against a taking claim on the ground that it parallels background principles of California nuisance law. If so, then it logically follows that the related public trust doctrine should serve to bar takings claims based on either negative restrictions or affirmative mandates designed to protect fish. This reasoning is also supported by the California Supreme Court's decision in *People ex rel. Robarts v. Russ*, in which the court held that a property owner was subject to suit to remove dams he had constructed on a non-navigable waterway that affected navigable waters on the ground that such dams constituted a public nuisance.[187]

2. California Fish-Passage Legislation

A second relevant background principle of California law is the longstanding statutory requirement that dam operators provide water via fish ladders for the protection of public fisheries.[188] This requirement has been in effect for so many years, and its validity is so well established, that it should be regarded as a "common, shared understanding" of the scope of a California appropriative water right that defeats the District's taking claim.

A threshold issue in applying this defense is whether a statutory provision, as opposed to a common law rule, may serve as a background principle of state law for the purposes of takings litigation. While the common law is the more familiar source of background principles, statutory provisions may qualify as well.

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186. People v. Glenn-Colusa Irrigation Dist., 15 P.2d 549, 550 (Cal. Ct. App. 1932).

187. People *ex rel.* Robarts v. Russ, 64 P. 111, 112–13 (Cal. 1901). *Cf.* Qwest Corp. v. City of Chandler, 217 P.3d 424, 437 (Ariz. Ct. App. 2009) (holding that under Arizona's common law property rule, public utility must physically relocate utility infrastructure at its own expense when the public convenience and necessity call for relocation).

188. CAL. FISH & GAME CODE § 5931 (West 1998).

In *Palazzolo v. Rhode Island*, the Supreme Court explicitly embraced, at least in dictum, the notion that some legislative measures can constitute background principles for takings purposes.[189] *Palazzolo* is best known for its rejection of the so-called "notice rule": the view, widely adopted by state and federal courts, "that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment."[190] The Court rejected this "blanket rule," but at the same time implicitly recognized that a claimant's pre-acquisition notice of a regulatory restriction should be a highly relevant factor in takings analysis.[191] Of more immediate relevance for present purposes, the Court also stated: "We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[192] The Court's use of the word "when"—rather than "if"—acknowledges that legislative measures do rise to the level of background principles under some circumstances. Likewise, the Court's remand of the case to determine whether "those circumstances are present here," that is, whether the Rhode Island wetland law might constitute a background principle, also indicates that the Court is prepared to recognize that some statutory measures qualify as background principles.

Assuming statutory measures can constitute background principles, the question becomes which types of statutes qualify. One consideration should be whether the statutory measure has been in place so long that it can be considered part of the state's legal traditions. In *Lucas v. South Carolina Coastal Council*, the Court, without explicitly addressing whether statutory measures can qualify as background principles, emphasized that background principles must be historically rooted.[193] The Court said that regulations eliminating all economically viable use cannot be "newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[194] In *Palazzolo*, sounding the same theme, the Court said that the background principles concept is ultimately "explained in terms of those common, shared

189. Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

190. *Id.* at 629.

191. *See id.* at 633 (O'Connor, J., concurring); *see also id.* at 638–39, 642 (Stevens, J., concurring in part & dissenting in part); *id.* at 634–35 (Breyer, J., dissenting).

192. *Id.* at 629.

193. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

194. *Id.*

understandings of permissible limitations derived from a State's legal tradition."[195]

The dissenting opinion of Chief Justice Rehnquist in *Tahoe-Sierra* provides additional support for this historically rooted conception of statutes as background principles. Speaking for himself and two other Justices, the Chief Justice objected to the majority's rejection of a per se takings test for the development moratorium at issue in that case.[196] In the course of arguing for a per se rule, Chief Justice Rehnquist said the potential severity of this approach would be leavened by treating certain legislative measures as background principles.[197] In particular, he said that his view of background principles would cover "normal delays" in obtaining zoning approvals, observing that "[z]oning regulations existed as far back as colonial Boston, and New York City enacted the first comprehensive ordinance in 1916."[198] Chief Justice Rehnquist's reasoning suggests that statutory measures that are many decades old should qualify as background principles as easily as common law rules.

Another question is whether a statutory provision must be related to or grow out of a common law rule to qualify as a background principle. Everything else being equal, a statute that builds on longstanding common law rules can more readily be described as an expression of the state's legal traditions than a statute that represents a relative novelty. This approach is supported by the decision of the U.S. Court of Appeals for the Federal Circuit in *American Pelagic Fishing Co. v. United States*.[199] In this case, the court rejected a taking claim based on federal legislation barring the claimant from using its vessel to fish for certain species in the Exclusive Economic Zone off the U.S. coast.[200] The court ruled that the 1976 Magnuson Act represented a background principle of law establishing comprehensive federal control over fishing out to the 200-mile limit, precluding claims of private property rights to fish in the area.[201] Significantly, the court observed that its interpretation of the Act was "consistent with the historical role played by the sovereign, state or federal, with respect to its waters," and observed that "[a]s early as 1876, the Supreme Court concluded that '[t]he principle has long been settled in this

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195. *Palazzolo*, 533 U.S. at 630 (citation omitted).

196. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S 302, 347 (2002) (Rehnquist, C.J., dissenting) ("Under the Court's decision today, the takings question turns entirely on the initial label given a regulation, a label that is often without much meaning.").

197. *Id.* at 351–54.

198. *Id.* at 352 (citations omitted).

199. Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1376 (Fed. Cir. 2004).

200. *Id.* at 1366.

201. *Id.* at 1379.

court, that each State . . . own[s] the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running.'"[202] This decision appears to confirm that statutory measures may be more readily treated as background principles when they are consistent with and are derived from common law traditions.

Applying the foregoing analysis, section 5937 of the California Fish and Game Code would certainly qualify as a background principle limiting California appropriative waters rights. Section 5937 provides:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.[203]

This language, with some modest changes in wording, dates back to state legislation originally adopted in 1870.[204] In addition, this statutory requirement appears to parallel limitations on title already established under California common law; indeed, for the reasons discussed above, the public trust doctrine provides an independent defense to the claim that the requirement that water be directed through the fish ladder constitutes a taking. In sum, both ancient pedigree and close consanguinity with the public trust doctrine support the conclusion that section 5937 should be treated as a background principle of California law.

CONCLUSION

If there is merit to the foregoing legal arguments, one might well wonder how the plaintiff in *Casitas* has gotten as far as it has with what is, according to this account, a very weak case. A large measure of credit is due to Roger Marzulla, the experienced private property rights practitioner who has represented the plaintiff with remarkable skill and tenacity throughout this litigation. In particular, Mr. Marzulla deserves credit for his flexibility. After achieving a seemingly major property rights victory in *Tulare Lake* in 2001, he naturally sought to apply and extend that victory in

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202. *Id.* (quoting McCready v. Virginia, 94 U.S. 391, 394 (1876)).

203. CAL. FISH & GAME CODE § 5937 (West 1998).

204. An Act to Provide for the Restoration and Preservation of Fish in the Waters of this State, ch. 457, § 3, 1870 Cal. Stat. 663, 663–64. Fish and Game Code Section 5900(c) defines an "owner" to include a dam operator, such as Casitas Municipal Water District. CAL. FISH & GAME CODE § 5900(c) (West 1998).

this and other litigation. However, in the aftermath of *Tahoe-Sierra*, and in particular following Judge Wiese's well-reasoned decision in *Casitas* repudiating his own ruling in *Tulare Lake*, Mr. Marzulla made the sound tactical decision to abandon his hard won victory in *Tulare Lake* and invent a new theory to present on appeal in *Casitas*. Whether or not the tactic is ultimately successful in obtaining an award for his client under the Takings Clause, Mr. Marzulla's refusal to be tied down by ill-fated consistency is a lesson in excellent lawyering.

More difficult to explain is how this case has proceeded as far as it has in the U.S. Court of Appeals for the Federal Circuit and survived, albeit barely, a vigorously contested petition for rehearing and rehearing en banc. While there are two sides to any argument, it would appear difficult for any objective observer to conclude that the position of the Federal Circuit panel more faithfully applies relevant Supreme Court precedent than the position of the dissenters. In part the explanation lies with the change in the plaintiff's litigating posture, which no doubt deprived the Federal Circuit of the opportunity to receive full briefing on all the relevant issues. Inevitably, perhaps, there also appears to be an ideological component to the decision. The court, at the time the appeal and the petition for rehearing and rehearing en banc were heard, was split eight to four between Republican and Democratic appointees. Of the four Democratic appointees, three dissented on the merits or at least voted to rehear the case.

The last bit of inevitable speculation centers around why the Solicitor General, Elena Kagan, former Dean of Harvard Law School, declined to file a petition for certiorari despite fairly aggressive importuning from various quarters that she do so. Because the Solicitor General does not publicly explain herself on such matters, the answers are a matter of pure speculation. She may have been pessimistic or uncertain about the prospects of success in the Supreme Court. The Solicitor General has an enormous workload and she may have concluded that, relative to all of the other important cases she had to consider, this case did not warrant a major investment of time and effort. She also may have been influenced by the majority's insistence that the result turned on specific concessions the government had made for the purpose of appeal. While the significance of these concessions for any particular issue at stake in the case remains obscure, the mere suggestion that the case involved a fact-specific problem might ultimately have persuaded the court that the case was not "cert worthy." She also may have concluded that resolution of the important question of how the Takings Clause applies to water interests should be reserved for a case involving restrictions on water diversions, not one involving the relatively special problem of requiring that water be passed

through a fish ladder. She may have simply wished to see this case mature before presenting it to the Supreme Court.

In the end, what seems clear is that the Federal Circuit's decision is hardly the last word on how the Takings Clause applies to water interests. There will be extensive litigation on remand in this case that may well yield a determination that the District is not entitled to any recovery. There will be extensive litigation over the potential reach of this new precedent. And, before too long, in either the Supreme Court or the Federal Circuit, the question will be squarely presented whether the Federal Circuit's *Casitas* ruling was correct or not.