

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER  
DISTRICT,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 05-168 L

Hon. John P. Wiese

**THE ASSOCIATION OF CALIFORNIA WATER AGENCIES,  
STATE WATER CONTRACTORS, SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY, KERN COUNTY WATER AGENCY, WHEELER RIDGE-  
MARICOPA WATER STORAGE DISTRICT  
POST-TRIAL AMICI CURIAE BRIEF**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Local Rule 7.1, Amici Curiae Association of California Water Agencies, State Water Contractors, San Luis & Delta-Mendota Water Authority, Kern County Water Agency, and Wheeler Ridge-Maricopa Water Storage District hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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**I. INTRODUCTION**

Amici the Association of California Water Agencies, State Water Contractors, San Luis & Delta-Mendota Water Authority, Kern County Water Agency and Wheeler Ridge-Maricopa Water Storage District (“Amici”) submitted a brief before trial, on September 20, 2010. That brief described their interests and addressed various arguments raised in the pre-trial briefs by the United States, the California State Water Resources Control Board (“SWRCB”), and the Natural Resources Defense Council (“NRDC”). As these Amici explained in their pre-trial brief, California water rights are property, there is no per se rule that renders diversions that harm fish unlawful, the requirements of the federal Endangered Species Act do not “mirror” the requirements of California water law, a SWRCB license to appropriate water is not “vested” only in the sense that it can be reconsidered and altered prospectively after due process, and until such reconsideration a licensee has a right to divert water in accordance with its license. These Amici will not repeat these arguments here, as the SWRCB brief, in particular, largely repeats arguments from the pre-trial briefs.

In this brief, Amici focus on two issues. First, the arguments advanced by NRDC, and less directly by the SWRCB, that under the public trust doctrine, Casitas has “never had” a right to divert water if doing so harms fish, notwithstanding the express terms of its license. This theory, that the traditional public trust doctrine applies fully in this context and has primacy over California’s appropriative water rights system, was expressly rejected by the California Supreme Court in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983). Instead, the *National Audubon* court held that the population and economy of the state depend upon rights to divert and use water

notwithstanding harm to public trust uses, and that accordingly a SWRCB license can may grant such rights.

Second, the SWRCB argues that Fish and Game Code section 5937 imposes a “baseline” requirement to release water to keep fish in good condition, and that this requirement takes primacy over competing needs for water. But Fish and Game Code section 5937 is subject to the requirement of Article X, section 2 of the California Constitution for reasonable and beneficial use, and it has been declared a “codification” of the public trust doctrine. Both of these principles of law require balancing and a consideration of a broad set of interests when applying section 5937, not the per se priority for baseline flows presumed in the SWRCB’s brief.

**II. CASITAS’ LICENSE IS A PROPERTY RIGHT TO DIVERT WATER IN ACCORDANCE WITH ITS TERMS NOTWITHSTANDING HARM TO FISH**

As Amici explained in their pre-trial brief at pages 8 to 12, under California law water rights are protected as private property. NRDC nonetheless contends that the United States has a “complete defense” to Casitas’ takings claim under the “traditional California public trust doctrine.” (NRDC Br. at 4.<sup>1</sup>) NRDC contends that “no holder of an interest in water can claim a property right to use water in a fashion that is harmful to public trust resources.” (*Id.*) According to NRDC, this means that notwithstanding what Casitas’ license says, Casitas “never had a property right to divert water” if doing so would harm fish. The fatal difficulty with this argument is that it is squarely contradicted by the teaching of *National Audubon*. The full scope of the “traditional” public trust

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<sup>1</sup> Corrected Memorandum Amicus Curiae of Natural Resources Defense Council in Support of the United States, filed February 24, 2011 (Doc. 220-1).

doctrine does not apply in the context of appropriative water rights granted by the SWRCB through California's appropriative water rights system.

The court in *National Audubon* explained the application of the public trust doctrine in the context of California's appropriative water rights system as a "collision" between "two systems of legal thought." *National Audubon*, 33 Cal. 3d at 425. The plaintiffs in *National Audubon*, like NRDC here, argued that "the public trust is antecedent to and thus limits all appropriative water rights." *Id.* at 445. The City of Los Angeles, in contrast, argued that as to stream water, the doctrine had been "'subsumed' in the appropriative water rights system," and hence under its license it had a "vested right in perpetuity to take water without concern for the consequences to the trust." *Id.* The *National Audubon* court was "unable to accept either position." *Id.* Instead, the *National Audubon* court decided upon an "accommodation" that would make use of "the pertinent principles of both the public trust doctrine and the appropriative water rights system." *Id.*

Based on the public trust doctrine, the court held the state as sovereign retains "continuing supervisory control" over rights to flowing waters, and that no one can acquire a "vested" right in perpetuity to appropriate water in a manner harmful to interests protected by the trust. *Id.* Thus, past water allocation decisions may be reconsidered, "in light of current knowledge" and "current needs." *Id.* at 447.

The *National Audubon* court, however, declined to apply a principle of the traditional public trust doctrine that NRDC attempts to apply here – that the state generally cannot grant rights to public trust resources free of the trust except to serve trust purposes. The court explained:

The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. 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. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses.

*National Audubon*, 33 Cal. 3d at 426.

NRDC's argument that Casitas "never had" a right to make the diversions authorized by its license mistakenly depends upon full application of this "corollary rule." But as *National Audubon* explains, that rule from the public trust doctrine does not apply in the context of the appropriative water rights system. Thus, the SWRCB "has the power "to grant usufructuary licenses that will permit an appropriator to take water from flowing streams . . . even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." *Id.* at 446, emphasis added. The court distinguished grants for the diversion of water from grants in other contexts involving public trust resources: "In contrast, the population and economy of this state does *not* depend on the conveyance of vast expanses of tidelands or other property underlying navigable waters. [citation omitted] Our opinion does not affect the restrictions imposed by the public trust doctrine upon transfer of such properties free of the trust." 33 Cal.3d at 446, fn. 26. Under NRDC's proposed application of the public trust doctrine, the SWRCB would not have the power to grant rights to divert water that would harm public trust resources. NRDC's



position is directly contrary to the express holding of the *National Audubon* court. While under *National Audubon* such grants are subject to reconsideration and potential reallocation of the water involved, until such a reconsideration a license confers a right to divert water according to its terms.

**III. FISH AND GAME CODE SECTION 5937 DOES NOT REQUIRE A SET OR MINIMUM BASELINE FLOW**

The SWRCB argues that Fish and Game Code section 5937 “imposes a foundational, baseline requirement on Casitas to release enough water to keep fish below its dam in ‘good condition’ – a minimum requirement that Casitas must meet at all times, regardless of the terms and conditions of its license.” (SWRCB Post-Trial Br. at 18-19.<sup>2</sup>) Under the SWRCB’s theory, this “foundational, baseline requirement” takes automatic primacy over Casitas’ competing needs for water and the terms of its license. This theory should be rejected.

First, Fish and Game Code section 5937 is much too indefinite to establish any specific “baseline requirement.” Fish and Game Code section 5937 simply provides that:

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. . . .

Cal. Fish and Game Code § 5937. The section does not define “good condition,” nor identify which species of fish that are planted or exist below the dam must be kept in “good condition.” Different flow regimes may benefit different species. Increased flows may provide little or no benefit in some streams, because of other conditions or

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<sup>2</sup> Post-Trial Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States, filed February 18, 2011 (Doc. 218-1).

constraints. Further, section 5937 does not define how far below the dam fish must be kept in “good condition.” It does not specify whether the requirement applies only immediately below the dam, to the next major tributary, or any other distance. Likely, these factors will vary from stream to stream. In sum, there is nothing definite about Fish and Game Code section 5937, and the Court should reject the SWRCB’s argument that Fish and Game Code section 5937 imposes some defined “baseline” flow requirement on Casitas that is higher than the releases required by its license.

Furthermore, Fish and Game Code section 5937 is subject to the requirement of Article X, section 2 of the California Constitution for reasonable and beneficial use. In determining whether a use is reasonable, Article X, section 2 requires balancing and consideration of all interests. Fish and Game Code section 5937 cannot require the release of water if that release constitutes waste or an unreasonable use of water. The “determination of reasonable use depends upon the totality of the circumstances presented.” *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 129 (1986); *see also Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 26 Cal. 3d 183, 194 (1980) (“[W]hat is a reasonable use of water depends upon the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from statewide considerations of transcendent importance.”). Thus, Fish and Game Code section 5937’s requirement that a dam owner allow sufficient water to keep fish below the dam in “good condition” is not absolute. The release of water to keep fish in good condition must instead be reasonable, pursuant to a balancing and consideration of all interests.

Any implication that Fish and Game Code section 5937 imposes a defined or minimum baseline requirement is contrary to case law. California courts have held, and

the SWRCB has acknowledged here, that “[s]ection 5937 is a statutory codification of the common law public trust doctrine.” (SWRCB Pre-Trial Br. at 22 (citing *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal. App. 3d 585, 631 (1989)).<sup>3</sup>) Indeed, if it imposed the sort of absolute requirement argued for by NRDC, there would have been no need for the legislature to have enacted Fish and Game Code section 5946, which did impose such an absolute requirement. Such a nullification of a companion statute contravenes general principles of statutory construction.

The SWRCB has administratively adopted the position that section 5937 embodies the public trust doctrine, stating that “Fish and Game Code section 5937 is a legislative expression concerning the public trust doctrine that should be taken into account when the SWRCB acts under its public trust authority.” Revised Decision No. 1644, 2003 WL 25920999 (July 16, 2003) at \*18; Order No. WR 95-17, 1995 WL 694381 (Oct. 26, 1995) at \*6. The SWRCB has recognized that the public trust doctrine “allows for a balancing of competing uses and recognizes that, in some cases, the public interest served by water diversions may outweigh harm to public trust resources.” Order Amending Decision 1644 and Dismissing Petitions for Reconsideration, WL 2001-08, 2001 WL 36253339 (May 17, 2001) at \*6 (citing *Nat’l Audubon Society v. Superior Court*, 33 Cal. 3d 419, 427 (1983)). As a codification of the public trust doctrine, section 5937 must be applied in the context of competing uses.

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<sup>3</sup> Pre-Trial Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States, filed April 19, 2010 (Doc. 155).

**IV. CONCLUSION**

In California, water rights are protected as private property. Under *National Audubon*, a license for the appropriation of water can be reconsidered, and, following the proper procedure and consideration of all factors affecting the public interest, license terms may be altered prospectively to reflect changed needs or circumstances. But also under *National Audubon*, the SWRCB has the power to grant rights to divert water notwithstanding harm to trust resources. Absent reconsideration and adjustment, a water right holder has a protected property interest in its right to use water in accordance with the terms of its license.

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Respectfully submitted,

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