IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant.

No. 05-168 L

Honorable John P. Weise

STOCKTON EAST WATER DISTRICT'S POST-TRIAL *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT

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I. INTRODUCTION and SUMMARY OF ARGUMENT

The right to divert and use water under a State Board issued license is a compensable property right subject to a per se takings analysis. When the government takes that right for a public purpose – to protect fish – the government is constitutionally mandated to pay fair compensation for the right taken. This basic holding is already the law of this case. *See Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288-1296 (Fed. Cir. 2008).

The United States and its *amici*, Natural Resources Defense Council ("NRDC") and the State Water Resources Control Board ("State Board") (collectively referred to as "Government"), however, propose to re-litigate this issue. They ask that this Court create an *unprecedented* rule that completely eviscerates takings jurisprudence with respect to protected property rights in the use of water. According to the Government - while an appropriative license should be viewed as a property right *vis-a-vis* other consumptive water users on the same stream system, such that the holder can assert its right to use the water before others, the same license should not be viewed as a protectable property right when the government takes the water under it to give to an environmental purpose. In other words, the government, ostensibly on behalf of the environment, can always take the water for free even though no one else can.

Such a novel rule would create enormous chaos and uncertainty in California water rights law, debilitating the functionality of the system. Every dam in California "harm" fish (at least in the eye of federal agency staff or environmental organizations) in one way or another by simply blocking access to historic habitat. Yet, the owners and operators of these dams have spent small and large fortunes to construct and maintain them. Why? Because farms, industry and communities rely on the water supplies these dams provide and literally cannot exist without them. Yet, if the Government's arguments prevail, the federal government could tear down each

of these dams to improve conditions for fish without paying one dollar of just compensation because the dam owners never had a compensable property right to use water in a way that merely "harms" fish.

This preposterous rule is not and should not be the law – whether applied to a taking of one or one hundred thousand acre-feet of water. Rather, California's water rights system has meaning and those who have obtained water rights under that system can rely on those rights. This is not to say that the water right cannot be regulated – it can and the State Board did when it conditioned the permit and license issued to Casitas. However, this case is not about a regulation of the right – it is about a later taking of the right by a federal fishery agency to dedicate the water to a different public purpose.

The litany of cases the Government cites to support its novel position simply illustrate a point not in dispute – that the public trust doctrine applies to all water use in California and what it requires may change over time. The dispute arises when the Government asks this Court to apply the doctrine *retroactively* to reduce a licensed right to avoid having to pay compensation for a taking. The doctrine, however, provides no such defense. As we explain below, the Government and its *amici* cannot point to a single court or State Board decision advancing such a rule. Rather, in the very few instances where a court has been asked to apply either the public trust doctrine, or California Fish and Game Code section 5937, the actual remedy obtained is a future study or interim relief measure with *prospective* application.

Stockton East is embroiled in its own litigation with the United States involving the New Melones dam and reservoir on the Stanislaus River. The Government and its *amici* have made the same arguments in the Stockton East case as they have made here. This Court's decision will have broad reaching implications. We respectfully ask that the Court wade cautiously into this

unchartered territory and avoid accepting the Government's defense so as to unravel the water rights system upon which the human population in the state of California depends.

II. ARGUMENT

A. No Court Has Ever Used the Public Trust Doctrine to Retroactively Reduce a Licensed Water Right and this Court Should Decline to be the First.

The Government invites this court to create by judicial fiat a new and ill-advised rule regarding the public trust doctrine and its effect on established California water rights. The court, however, should decline the Government's invitation to rewrite California water law.

1. The Government Reads Too Much into *National Audubon*. The Case *Does Not* Hold that a Water Appropriator May Never Harm Fish.

Despite the broad language the California Supreme Court used to confirm the general applicability of the public trust doctrine to water allocation decisions in *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983), the opinion's precise facts and more importantly, its *actual* holding, cannot be overlooked. The case reached the California Supreme Court after an environmental group sought declaratory relief in superior court seeking a determination that the Department of Water and Power of the City of Los Angeles' ("DWP") diversion of water from streams feeding Mono Lake violated the public trust doctrine because it adversely affected the lake's scenic and ecological values. Yet, the Supreme Court did *not* grant the plaintiffs the relief they sought.

Rather, the Supreme Court clarified that DWP's water right permit (not license) remained subject to the public trust and that either the State Board or a court could reconsider water use under that permit to determine the effect on the public trust. *See National Audubon, supra*, 33 Cal.3d at 447-48. The Court expressly *rejected* the plaintiffs' position (which mirrors the Government's position here) that "the public trust is antecedent to and thus limits all

appropriative water rights, an argument which implies that most appropriative water rights in California were acquired and are presently being used unlawfully." *Id.* at 445.

Indeed, the Court noted economic necessity requires that the State Board have the power to grant usufructuary licenses permitting an appropriator to use water from a stream in a manner that does not promote, *and may even unavoidably harm*, the trust uses at the stream. *Id.* at 446. Despite recognizing the state's continued duty to protect public trust uses, the high court ultimately acknowledged: "[n]ow that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppels." *Id.* at 446.

In this case, the Government attempts to stretch the holding in *National Audubon* to the very place the California Supreme Court wisely refused to take it in 1983. In so doing, the Government ignores fundamental case law relating to the public trust and takings that the California Supreme Court relied on in its historic opinion.

In explaining the state's continuing duties as trustee of the public trust, the court referenced the situation in *People v. California Fish Co.*, 166 Cal. 576 (1913), which dealt with tidelands subject to the public trust for navigation and fishery. *See National Audubon* at 438-440. In *California Fish*, tidelands purchasers sought compensation when the state tried to require the purchasers to allow public uses on these lands within the public's navigational easement. The court rejected the compensation claim because the public trust use was merely a shared use with the purchaser, who remained the fee owner of the soil and who could utilize the property in any manner not inconsistent with the public's easement. The court, however, emphasized that the state could not "retake absolute title without compensation" because this

would deprive the purchaser of all property use. *California Fish* at 599. Notably, *National Audubon* cites this language with approval. *National Audubon* at 438-39.

Thus, under *National Audubon*, while the water appropriated to Casitas by the State Board remains subject to the public trust and subject to reconsideration or even reallocation in the future, nothing in that case either hints or holds that Casitas' use of water has always been unlawful or was never a compensable property right. Further, where, as here, the Government has "taken absolute title without compensation" of the water Casitas is required to divert down the fish ladder to comply with the biological opinion by completely depriving Casitas of all use of such water, even *National Audubon* supports an award of just compensation.

2. The *Joslin* and *Allegretti* Cases are Inapplicable and Do Not Support the Government's Unjustified Expansion of the Public Trust Doctrine as a Takings Defense.

The State Board cites *Joslin v. Marin Water District*, 67 Cal.2d 132 (1967) and *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261 (2006), as purported authority for this court's ability to deny a taking here. Neither case, however, is factually analogous. Nor do the cases justify unnecessarily expanding the public trust doctrine as a defense for all takings claims based on appropriative water rights.

In *Joslin*, the owner of a sand and gravel mine sued the water district for inverse condemnation after the district built a dam upstream preventing river water from carrying additional sand and gravel onto the mine owners' property. The court denied the claim because the mine owner could not establish a property right at all. No State Board issued appropriative water right was involved in the case. Rather, unlike here, the mine owner claimed a riparian water right which had not been previously confirmed by any court or agency. The Court thus found that the use of water from the stream to carry and deposit sand and gravel was not a

reasonable use of water on riparian lands sufficient to *establish* a riparian water right in the first instance. *Joslin, supra*, 67 Cal.2d at 143. Here, by contrast, Casitas' water right was not only a reasonable and beneficial use of water, but was already established through a State Board permit and license.

Similarly, in *Allegretti,* the Court refused the inverse condemnation claims of a landowner who applied for and received approval for a well drilling permit that was never recorded and did not take effect. The landowner sued because the County limited total extractions of groundwater for all wells on the property to 12,000 acre-feet as a condition to approving the new drilling permit. The landowner argued compensation was due because the condition made it impossible to farm all his property. Because the county had not taken any land or water belonging to the landowner for another purpose, the Court disagreed. Indeed, because the permit never took effect, there were no pumping restrictions on any of the landowner's existing wells. *Allegretti, supra,* 138 Cal. App.4th at 1273. Here, on the other hand, the federal government has taken a discrete quantity of water away from Casitas' use even though Casitas has a valid license to use the water.

3. The *Glenn-Colusa Irrigation District* Case Does Not Help the Government.

The State Board cites *People v. Glenn-Colusa Irrigation District*, 127 Cal. App. 30 (1932), for the proposition that a court may enjoin water diversions that harm fish because the activity is a nuisance despite the validity of the water right. Again, the law is not in dispute, but the facts and ultimate result of this case must be examined. In *Glenn-Colusa* the district was killing thousands of fish by diverting water with an unscreened pumping facility. The court's order did no more than require that the district spend $11,000 to install a fish screen before diversions continued. *Glenn-Colusa* at 37-38. Once the screen was installed, the district's

diversions could continue unabated and at the same rate as before. Thus, the court's order had zero impact on the *quantity of water* the district could obtain under its water right. Rather, it impacted only the method of diversion.

This result is in stark contrast to the situation here – where the federal government has come in and ordered a reallocation of the quantity of water available under Casitas' license. Further, in *Glenn-Colusa* there was no question that the pumps were directly killing the fish and that screening the pumps would solve the problem. Here, it is not at all clear that the dam itself is killing any fish or that the dedication of water down the fish ladder will avoid injury to the steelhead.

4. *NRDC v. Patterson* and Fish and Game Code Section 5937 Do Not Help the Government.

Despite the importance the Government places on California Fish and Game Code section 5937, it has had little import in the actual allocation of water in California – for good reason. Section 5937 cannot be read in isolation – it must operate in conjunction with California's existing water rights structure – including the appropriative water rights process at the State Board, the mandates of California Constitution article X section 2 regarding maximizing reasonable and beneficial use of scarce resources, and finally, where applicable, the mandates of federal law.

Only one federal case and one state case have addressed Fish and Game Code section 5937's impact on existing water projects – each with limited results. In *NRDC v. Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004), a federal district court held that the Bureau of Reclamation was subject to Fish and Game Code section 5937 in operating Friant Dam on the San Joaquin River, but *did not* go so far as to actually *apply* the statute to those operations. Rather, the court noted that whether the statute could be applied consistent with the mandates of federal

reclamation law, and thus avoid federal preemption, was a question that could only be addressed in the remedy phase of the case. *NRDC* at 920-21. While there was no dispute that the Bureau's operations of Friant dam had failed to release sufficient water to maintain historic fisheries the court only ruled on liability, and did not try to construct a remedy. *NRDC* at 924-25. Ultimately, the parties settled making it unnecessary for the court to undertake this incredibility difficult job. Notably, the settlement has two co-equal goals – restoring salmon and avoiding water supply impacts to contractors from the project. *See* http://www.restoresjr.net/background.html (official website for the San Joaquin River Restoration Program).

The state court decision addressing Fish and Game Code section 5937 is *California Trout, Inc. v. State Water Resources Control Board*, Cal. App. 207 3d 585 (1989) ("*Cal Trout I*"). In *Cal Trout I* the court found that the State Board was mandated to address fishery flow needs pursuant to section 5937 when it licensed Los Angeles' water rights to divert from four creeks in Mono County. Notably, the court's ruling was not based on Section 5937's inherent operation, but rather on the effect of a separate statute – Fish and Game Code section 5946 – which was specially enacted to forbid the issuance of a license to divert water from these very streams unless and until the State Board conditioned the license on compliance with Section 5937. *Cal Trout I* at 589-612.

There is no similar provision mirroring Fish and Game Code section 5946 applicable to Casitas' diversion at issue in this case. Further, even in the *California Trout* matter, the actual application of Section 5937 was prospective only and problematic in implementation. In *Cal Trout I* the appellate court remanded to the trial court to issue writs to the State Board to mandate that the State Board appropriately condition the water right license (of course the court did not specify the precise conditions required). *Cal Trout I* at 632-33. The State Board wanted to study

the matter to come up with appropriate conditions. This was too slow for Plaintiffs, who returned to court and obtained a second ruling directing the trial court to determine interim flow measures while the State Board completed its study. *See California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187, 212-13 (1990) ("*Cal Trout II*").

What *NRDC*, *Cal Trout I* and *Cal Trout II* teach us is that applying Fish and Game Code section 5937 in the real world is rare, cannot be summarily done by a court and will only operate prospectively. Understanding this history makes clear how extraordinary the Government's request is in this case.

B. When the Federal Government Takes Water for Fish under the Guise of the ESA it Constitutes a Taking Regardless of whether the Water Could Potentially be Reallocated in the Future by a California State Agency under Other Laws.

The United States or NRDC could have asked the State Board to reallocate the water supplies of the Ventura River or could have sued Casitas in a California court for allegedly violating Fish and Game Code section 5937. At the conclusion of such proceedings, after the presentation of evidence and balancing of competing needs, decisions would have been made that *might have* reduced the amount of water available to Casitas under its water right *going forward*. But no such proceedings occurred. Rather, not surprisingly, the United States avoided them and the inherent risk that they would not result in a reallocation of water to fish, by taking a more direct approach to insure NMFS could have the precise amount of river water it wanted for fish – it proscribed a release in a biological opinion under the authority of the ESA. In short – it took what it wanted for the public purpose without regard for the impact on other competing demands for and rights to the water.

Now, to avoid having to pay for the take, the Government argues Casitas' water use *could have* been reduced under nuisance law, the public trust doctrine or Fish and Game Code

section 5937 to the same extent, and therefore was never "vested". This is an intellectual leap. What a NMFS staff biologist determines is needed under ESA standards (to avoid jeopardy) is *not* equivalent to what a fact finder would find is necessary to keep fish in "good condition" under California Fish and Game Code section 5937, while still complying with the reasonable and beneficial use requirements of Article X, section 2, of the California Constitution and the balancing of competing demands required by the public trust doctrine.

Not only is this court not in a position to make this factual determination on the record before it, but the time for making such a determination to impact this case has passed. Unlike takings cases where the plaintiff cannot establish a compensable property right to begin with, Casitas has such a right in its license. That right is good until its license is reconsidered or revoked under California law – which has not occurred and did not occur before the United States decided to take Casitas' water.

Moreover, the fact that the right to use water in California is not "vested" for all time against modification does not mean that the right is not a compensable property right for the purposes of a takings analysis. The right is sufficiently cognizable and certain that it supports investment backed expectations of millions of people who rely on the right of use to build homes, operate businesses, and grow crops. This is a critical distinction – it is the distinction between determining if the right to use the water existed in the first place versus whether the state has the power to modify the right to accomplish a reallocation to different purposes sometime in the future. The fact that the state has the reserved right to reallocate the resource does not diminish the character or the value of the right of use for the time period in which it was allocated to Casitas. Nor does it mean that the decision to reallocate the resource, even if made by the State, is not compensable.

C. Because the State Board has Already Determined Casitas Put the Full Amount of its License to Beneficial Use, *Amici Curiae's* Beneficial Use and Ripeness Arguments are Meritless.

The State Board's argument that Casitas cannot prove any of its water was actually taken until it shows that the obligation to send water down the fish ladder actually reduces the amount it is able to deliver to customers for beneficial use is specious. *See* State Board Post-Trial Amicus Brief at 41-46. The argument, moreover, lacks a real world understanding of how water suppliers function. And it ignores the findings the State Board itself has already made.

First, a water supplier such as Casitas manages its water supplies (which fluctuate from year to year) to provide a consistent supply to its customers every year. This is why dams are built – to store water from one season to the next to help even out the supply. Thus, simply because Casitas does not deliver all of the water it stores in one year does not mean that it will not deliver that water the next year, or the year after that, or the year after that. Requiring the court to wait to determine damages in this case on such a basis is simply unworkable.

Second, as the State Board explains on page 32 of its post-trial brief, *the State Board had to find that Casitas was applying all of the water applied for in its permit to beneficial use* before the State Board converted the permit to a license. *See* Water Code §§1600, 1605, 1610 (if the State Board determines that the construction of the diversion works has been satisfactorily completed and the water has been applied to a beneficial use, then it "shall issue a license which confirms the right to the appropriation of such amount of water as *has been determined to have been applied to beneficial use*"). The State Board did so when it licensed Casitas' right for the full amount in 1986. For this same entity to stand before this court and now argue against its own finding is suspect.

This same fact defeats NRDC's ripeness argument. The court need not defer determining damages for the taking of Casitas' water until Casitas' water sales are more concretely impacted as NRDC suggests. *See* NRDC Post-Trial Amicus Brief at 17-25. The State Board has *already* determined Casitas has put the full amount of its license to beneficial use. While the specific amount of water stored and delivered each year will vary, the fish ladder will reduce the long-term yield of the project for Casitas. This court thus has the information it needs to make a damage determination now.

D. Law of the Case Requires the Court to Apply a Physical Takings Analysis to Casitas' Claim. The Nollan/Dolan Regulatory Exaction Framework Does Not Apply.

On appeal, the Federal Circuit specifically held that upon remand this case should be determined under the physical takings rubric. *See Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008) ("The character of the government action was a physical diversion for a public use – the protection of an endangered species...The government requirement that Casitas build the fish ladder and divert water to it should be analyzed under the physical takings rubric."). In an attempt to circumvent the Federal Circuit's holding on appeal, however, NRDC nevertheless argues that the government's dedication of some of Casitas' water to the fish ladder should be viewed as a proportionate exaction associated with regulating Casitas water diversion. *See* NRDC Post-Trial Brief at 25-29. This argument lacks merit.

The State Board, not the federal government, regulates Casitas' ability to divert Ventura River water, and the State Board did not impose the "exaction" at issue in this case. Contrary to NRDC's assertions, Casitas did not seek regulatory approval from NMFS to continue to operate the dam to store water. Rather, Reclamation's ownership role with the dam structure itself triggered the consultation requirements under the ESA forcing Casitas into a consultation process

to obtain an incidental take permit so that its already licensed water diversions would not result in criminal and/or civil penalties for taking a threatened fish under the ESA.

Nothing in Casitas' water license issued by the State Board, or even its contract with Reclamation, required Casitas to obtain regulatory approval from NMFS for its water diversions at all – which is precisely why the Federal Circuit held that the biological opinion in this case was a sovereign act which excused Reclamation from contract liability to Casitas. *See Casitas, supra,* 543 F.3d at 1287-88. The Federal Circuit's finding that the directive to send water down the fish ladder was a "public and general" act of the federal government precludes any finding that the direction was so closely related to this project as to amount to a non-compensable regulatory exaction.

E. The State Water Resources Control Board Is Not Truly an Amicus Before this Court.

The State Board's most recent application to file a post-trial amicus brief confirms that the State Board's involvement in this case was not actually requested by or even directly authorized by the board members who comprise the State Board. Rather, the State Board's amicus briefs are being filed when the State Board's Executive Director (a staff position) decides to do so. Thus, the briefs reflect the political and policy positions of this staff person, rather than the board members as a whole.

The State Board's most recent application includes the declaration of Thomas Howard, the Board's Executive Director. Mr. Howard explains that the decision to participate as an amicus in this case was not made by the Board. Rather, staff has interpreted a general board resolution delegating various duties to the Executive Director to authorize the director to decide

when and how to file amicus briefs. Notably, the very resolution relied on includes the following provision:

> In exercising the authority herein delegated, the Executive Director is directed, without restricting the authority specified, to bring the following matters to the attention of the members of the Board at a workshop or by other appropriate communication...(10.2) Matters that appear to depart from the policies of the Board; (10.3) Matters involving significant policy questions; (10.4) Highly controversial matters...

See Howard Declaration at Exhibit A, ¶10.

Yet, the State Board has not presented any information to this Court indicating the important policy issues and positions raised in this case were ever discussed with the board members pursuant to this provision, before the State Board appeared as an amicus and articulated them. It is particularly troubling that the policy positions advanced by the State Board in its brief are not even supported by citations to prior decisions of the State Board, let alone findings of the current board members that they agree with the positions advanced.

For these reasons, and the obvious irony involved in accepting the State Board's position that the water rights it has granted essentially authorize unlawful activity, this Court should give the State Board's briefs little credence.

III. CONCLUSION

Casitas spent significant resources to obtain a licensed water right from the State Board *before* the Robles dam was constructed. The State Board did not impose the release requirement in this license when it was issued, or thereafter, despite ample opportunity to do so. Relying on the amount of water licensed, and the projected conservation yield of the project, Casitas has made water supply commitments to its service area. The residences and businesses in the Casitas

service area have built out in reliance on these commitments. No one has alleged, nor could they reasonably do so, that the businesses and residences served by Casitas should not have relied on this water supply. Rather, the appropriative licensing process administered by the State Board is designed to serve that very purpose. In short, even though the process cannot remove the appropriated water from the public trust for all time, it can and must be used to allocate the water to consumptive purposes with a sufficient level of certainty to allow for economic development and human sustenance. This licensing creates a cognizable property interest in the use of the water.

The federal government's ESA mandate that some of this water be released down a fish ladder, and not used by Casitas, does not just burden the manner in which Casitas can use the water – it *physically takes* the water away from Casitas so that it cannot be used by Casitas at all. Although the federal government may take such water – the Constitution *mandates* that it pay fair compensation before so doing.

Respectfully submitted,

Dated: March 25, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2011, I electronically filed the foregoing **STOCKTON EAST WATER DISTRICT'S POST-TRIAL *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT** with the Clerk of the Court through the CM/ECF system. I further certify that all participants in the case are registered as CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ JULIE M. HASSELL
JULIE M. HASSELL