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FOUR PROPOSITIONS ABOUT THE *CASITAS* LITIGATION

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On September 25, 2008, in Casitas Municipal Water District v. United States, a panel of the U.S. Court of Appeals for the Federal Circuit ruled, over a strong dissent, that a challenge to regulation of a California appropriative water right pursuant to the federal Endangered Species Act stated a valid per se taking claim. On February 17, 2009, in response to an application for rehearing and rehearing en banc filed by the United States, the full Federal Circuit left the panel decision undisturbed, with four members of the Court dissenting. The Solicitor General, apparently following extended internal debate, declined to file a petition for certiorari.

The questions at this stage of the Casitas litigation are: (1) what exactly did the Federal Circuit decide, (2) will the plaintiff ultimately succeed on its claim against the United States in this case, and (3) did the Federal Circuit decide the case correctly in light of relevant Supreme Court precedent and basic principles of takings law.

To answer these questions it will be useful to lay out – and attempt to explicate – four basic propositions about the Casitas litigation.

1. The case the U.S. Court of Federal Claims decided was not the same case the U.S. Court of Appeals for the Federal Circuit decided.
2. The U.S. Court of Federal Claims correctly decided the case as it understood it.
3. The U. S. Court of Appeals for the Federal Circuit incorrectly resolved the case as it understood it.
4. The United States has several strong defenses to the taking claim available on remand.

I. Background on the *Casitas* Litigation

The Ventura River Project is a water development project on the Ventura River and Coyote Creek in Ventura County, California, north of Los Angeles, designed to provide water for farmland irrigation and for municipal, domestic, and industrial purposes. The project consists of a large water storage reservoir, Lake Casitas, which sits astride and impounds most of the flow of Coyote Creek. The Robles Diversion Dam on the nearby Ventura River diverts a portion of the flow of the Ventura River into the four and one-half mile long Robles-Casitas canal and ultimately into Lake Casitas. The critical feature of the project for the purpose of the takings issue is the Robles Diversion Dam, which completely blocks upstream migration in the Ventura River by steelhead

trout, once abundant in the river and now on the endangered species list and at serious risk of being extirpated from the river.

Congress authorized the construction of the project on March 1, 1956. In a nutshell, the authorizing legislation provides for low-cost U.S. taxpayer financing of project construction while essentially turning over the responsibility for maintaining and operating the project to the Casitas Municipal Water District. The contract provides for the United States to pay for the construction of the project and for the District to repay the United States over a forty- year period at a very favorable rate of interest, providing a large implicit public subsidy. The contract required the District to secure the necessary water permit from the California water board and provided that, following project construction, the District would “take over and at its own expense operate and maintain the project works,” and, “without expense to the United States, . . . care for, operate and maintain the transferred works.”

Approximately forty years later, the National Marine Fisheries Service listed the West Coast steelhead trout as an endangered species. Concerned about potential liability under section 9 of the Endangered Species Act for an illegal “take” of the fish as a result of the dam’s obstruction of upstream passage, and faced with a threat of litigation under the ESA by an environmental group seeking to enjoin project operations, the District approached the Bureau of Reclamation, which remains the nominal owner of the project, about addressing the ESA problems. 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 7 of the ESA which would permit continued project operations on the condition that the project structure and operations be modified to allow fish migration past the dam. Specifically, the biological opinion called for construction of a fish ladder at the dam. In addition, the opinion called for enhanced stream flows below the dam during migration periods, with part of the water supplied to the area below the dam via the fish ladder and additional water supplied through a pipe passing around the dam or by passing through or over the dam.

While this regulatory authorization was obtained at the behest and ultimately for the benefit of the District, the District reserved the right to object to the fish passage requirement and on January 26, 2005, the District filed suit in the U.S. Court of Federal Claims alleging a taking of its water right (as well as a breach of contract, a claim ultimately rejected by both the claims court and the Federal Circuit). As the case was proceeding to trial, the United States filed a motion seeking clarification from the claims court regarding the takings standard to be applied. For the purpose of this motion, the United States conceded for the sake of argument that the District had a property interest in the water affected by the biological opinion and that the District was being compelled by the United States to carry out the conditions of the biological opinion. The court ruled that the claim should be evaluated under the Penn Central multi-factor standard rather than under a per se physical taking theory, as the District contended. The District then stipulated that it could not make the showing of economic harm necessary to present a viable Penn Central claim and requested that judgment be entered for the United States.

On appeal, as discussed, the Federal Circuit, reversed, ruling that the District's allegations presented a viable per se physical taking claim. Importantly, however, the Federal Circuit emphasized that it was resolving only a narrow question of law and that its decision was based on the various simplifying assumptions about the case made by the United States for the purpose of its summary judgment motion.

II. Four Propositions about the *Casitas* case.

I will now proceed to attempt to unpack the meaning of the Federal Circuit decision, its potential long-term significance, the likely future course of this litigation by examining the four propositions identified in the introduction.

A. The Case the U.S. Court of Federal Claims Decided Was Not the Same Case the U.S. Court of Appeals for the Federal Circuit Decided.

The challenge of deciphering the meaning of the Casitas litigation is made somewhat easier if one recognizes that the issue Judge John Wiese thought he was deciding in the claims court is quite different from the issue presented to and decided by the Federal Circuit.

To understand how the Casitas case became transformed over the course of the litigation it is necessary to go back to the U.S. Court of Federal Claims' controversial 2001 decision in Tulare Lake Irrigation District v. United States. That case was also assigned to Judge John Wiese, the judge in the Casitas case; the plaintiff's counsel was Roger Marzulla, who represented the plaintiff in the Casitas case, and some of the lawyers on the defense side, at least among the amici curiae, also turn out to be repeat players. The case represents a matched set with the Casitas case in the sense that both cases involved regulation of water projects based on their impacts on endangered species in California, with the Tulare Lake case arising in the northern portion of the state and the Casitas case arising in the southern portion. In the Tulare Lake case, the California Department of Water Resources, the operator of the California state water project, limited pumping of water from the Sacramento-San Joaquin Delta, reducing the volume of water delivered by canal to the Tulare Lake Irrigation District. The District alleged that this regulation constituted a taking of its alleged property right to receive water from the Department. Judge Wiese ruled in favor of the District, holding that the District was entitled to claim a per se physical taking of its interest in the water. The details of, and the defects with, the reasoning leading to this conclusion are described below

In the subsequent Casitas case, plaintiff's counsel, unsurprisingly, rested his case squarely on the Tulare Lake decision. 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 in order to facilitate fish migration. While some portion of this water arrived downstream via the fish ladder, some portion arrived through a pipe through the dam, and some arrived simply by spilling over the dam, the plaintiff's allegations made no particular reference to these plumbing details. All that mattered was that the plaintiff was

required to leave a certain quantity of water in the river that it presumably otherwise would have diverted to storage and eventual consumptive use.

In an admirably frank opinion, Judge John Wiese carefully reexamined his prior opinion in Tulare Lake and declined to follow his prior reasoning. Rejecting the theory that a per se physical taking rule applied, he concluded that this type of claim must be analyzed under Penn Central. To justify his change of heart, Judge Wiese relied heavily on the intervening Supreme Court decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, in which the Court drew a sharp line between cases appropriate for regulatory takings analysis and those appropriate for per se treatment, and also emphasized the narrowness of the per se rule for physical takings. Thus, in a formal sense, Judge Wiese can be read as changing his position in accord with intervening instructions from the Supreme Court. At the same time, the opinion reflects a change in the direction of Judge Wiese's thinking, as discussed below.

For the purpose of prosecuting its appeal in Casitas to the Federal Circuit, the District made a dramatic change in its 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 became the centerpiece of the District's case on appeal. During oral argument before the Federal Circuit, the District's counsel presented a large demonstrative exhibit illustrating the flow of water into and through the fish ladder. The District's case had shifted entirely, from the theory that the government had effected a taking by requiring that water be left in the river to the theory that the government had effected a taking by requiring that the water, once diverted into the canal, be directed through the fish ladder. One government counsel long involved in the case at the trial level quipped, following the oral argument before the Federal Circuit: "What was that about? I don't remember this case being about a fish ladder."

The panel decision, authorized by Judge Moore, embraced the District's new theory, but without acknowledging that the District had accomplished an astonishing legal pirouette, or that the panel's understanding of the case differed dramatically from that of the claims court. In contrast to Judge Wiese's view of the case, which focused on the water that the District was required to leave in the river, the Federal Circuit insisted that the crucial fact in its analysis was that the regulation did not merely require that water be left in the river and that instead the District was required to direct water, once it was diverted out of the river and into the diversion canal, through the fish passage facility. In other words, the essential understanding that supported Judge Wiese's conclusion that a per se test did not apply was that the regulation involved a requirement to leave water in the river. The essential understanding that supported the panel's conclusion that a per se test did apply was that the regulation did not simply involve leaving water in the river. This suggests that the panel effectively left undisturbed Judge Wiese's resolution of the case he thought he was deciding, while at the same time the Federal Circuit reversed based on its quite different understanding of the case. In a revealing footnote, the Federal Circuit discussed the Tulare Lake case and stated that it took no position on whether that case was correctly decided. But insofar as Judge Wiese

made his ruling in Casitas based on the premise that the case was indistinguishable from Tulare Lake, this footnote implicitly acknowledges that the Federal Circuit was not deciding whether Judge Wiese correctly decided the case he thought he was deciding.

The painful irony of the Casitas litigation from the standpoint of Judge Wiese is that, after taking the courageous step of reconsidering his prior ruling in Tulare Lake and rejecting application of a per se test in Casitas, the Federal Circuit reversed his ruling in the Casitas case while at the same time strongly suggesting that he was correct to repudiate Tulare Lake and that he correctly resolved the issue presented to him in Casitas based on the case as framed by the District. No good deed, it is sometimes said, goes unpunished.

B. The U.S. Court of Federal Claims Correctly Resolved the Case Before It.

Viewing the case in the fashion the District originally presented it and as Judge Wiese understood it, he was correct to rule 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 involves a regulatory taking issue, not a per se physical taking. Despite the fact that the Federal Circuit reversed Judge Wise's ruling in Casitas, nothing in the Federal Circuit decision or any other governing precedent contradicts this conclusion.

There is no relevant distinction between a regulatory restriction on the exploitation of water and a regulatory restriction on the exploitation of any other natural resource which would justify applying a special per se rule to water while traditional regulatory takings analysis applies in other cases. The federal and state courts, including the U.S. Court of Appeals for the Federal Circuit, have said that regulatory takings analysis applies to restrictions on the development of air rights, the exploitation of underground resources such as coal or oil and gas, and to all manner of restrictions on the use of land. There is simply nothing in nature of water or regulations affecting water that would justify putting water regulations in a special, disfavored category for the purpose of takings analysis.

Indeed, if anything, regulatory taking 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 resources, in the sense of the physical molecules themselves, and private appropriators possess mere usufructury interests in the water. Given the limited, usufructury nature of private rights in water, a regulatory takings analysis, which focuses on whether and how property use has been restricted, applies very naturally and logically to regulation of water interests,. By contrast, a per se takings theory, at least one based on the concept of a physical taking, is especially inapt in the case of water. While land can obviously be physically occupied, how, after all, can a usufructury interest in water be physically occupied?

Second, in contrast to land and most other natural resources, rights in water have long been peculiarly attenuated as a matter of property law, based on the public trust doctrine, the reasonable use doctrine, and other similar principles. Given the relatively

limited nature of private rights in water resources, as compared to other resources, it would be surprising if water regulation triggered more rigorous scrutiny based on the Takings Clause than that applied to regulations of other kinds of resource.

As discussed, there is no support in precedent for the idea that a per se taking analysis should apply to regulation of water use. The Supreme Court last addressed the issue over a century ago in Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), rejecting the theory that a state legislative restriction on the export of water to neighboring states effected a taking of a riparian water right. While Hudson County predates the development of modern regulatory takings doctrine, the outcome and analysis in the case are utterly inconsistent with the theory that a regulation of water should be treated as a per se taking.

The only identifiable legal support whatsoever for the per se takings theory for water rights is Judge Wiese's opinion in Tulare Lake, which of course he repudiated in his subsequent opinion in Casitas. Apart the fact that Judge Wiese himself no longer subscribes to his earlier opinion, it does not withstand analysis.

Judge Wiese's several arguments for applying a per se takings analysis to water regulation are unconvincing. First, pointing to the Supreme Court's statement in Lucas v. South Carolina Coastal Council said that a regulation eliminating all property value is "comparable" to a physical taking of property, and based on a finding that the regulation in the case destroyed the value of the District's water interest, he concluded that the regulation represented a per se physical taking. This reasoning was seriously flawed for two independent reasons. First, the fact that the Supreme Court said in Lucas that a "total" regulatory taking can be compared to a physical taking does not mean that a regulation destroying property value is, in fact, a physical taking. Contrary to Judge Wiese's theory, the Supreme Court, while recognizing the comparability of these two types of alleged takings, has affirmed that regulatory takings and physical takings remain "discrete categories" of takings claims. Judge Wiese plainly erred in converting a presumed total regulatory taking into a physical taking.

More importantly, Judge Wiese's premise for equating the regulation in Tulare Lake with a physical taking, that the regulation resulted in the "total" destruction of the value of the plaintiff's water interest, was mistaken. The record showed that the ESA regulation restricted the District's exploitation of water right for only a limited period (less than part of one year), and therefore did not come close to destroying the District's property interest in the water under a traditional property as a whole analysis. Judge Wiese's assertion that the regulation destroyed the value of the District's water right apparently rested on the unstated premise that the takings analysis should focus on the specific quantity of water the District was barred from diverting, rather than its water interest considered as a whole. But that premise would have been appropriate only if it was clear from the outset that a per se takings analysis should apply and therefore it was appropriate to focus only on the portion of the property affected by the government action. In other words, Judge Wiese mistakenly relied on the assumption that the case was governed by a per se analysis (meaning the property as a whole rule would not apply), to

support the conclusion that a per se analysis should apply. This reasoning was hopelessly and fatally circular.

Judge Wiese also erred in concluding that a per se physical taking analysis was justified because the Tulare Lake case could appropriately be analogized to the Supreme Court case of United States v. Causby, 328 U.S. 256 (1946). The Causby case involved a claim by private landowners complaining of government aircraft flying very low over their property during take-offs and landings. The Supreme Court found a taking, observing that “If, 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.” Judge Wiese read this language to mean that if a regulation destroys a property interest (which he assumed to be the case here), then a physical taking results. But this reads too much into Causby, because the decision merely suggests, as the Court suggested in Lucas, that a total elimination of all use is comparable to a physical taking. The critical element of the Causby case that produced a per se physical taking was that the airplanes actually invaded the plaintiff’s private airspace. See Tahoe-Sierra, 535 U.S. at 322 (explicating Causby by stating that when government planes “use private airspace to approach a government airport,” the government “occupies the property for its own purposes.”) Contrary to Judge Wiese’s reading, Causby does not support the idea that a mere limitation on use, no matter how onerous, represents a physical taking.

Finally, as Judge Wiese himself observed in his Casitas opinion, the conclusion that a restriction on water use should be evaluated as a potential regulatory taking rather than a physical taking was reinforced by the Supreme Court’s description of takings doctrine in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency. First, the Court stated that the multi-factor Penn Central test represents the default taking analysis, with special per se rules, such as for physical occupations, reserved for special cases. 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.’”) Second, the Court emphasized what it called the “longstanding” and “fundamental” distinction between regulatory takings claims, on the one hand, and physical takings claims, on the other. While these statements might be dismissed as general statements of law bordering on dictum, they are clearly carefully considered and strongly disfavor Judge Wiese’s original approach of attempting to meld regulatory and physical taking analysis.

C. The U. S. Court of Appeals for the Federal Circuit Incorrectly Resolved the Case Before It.

Viewing the case in the fashion that the Federal Circuit understood it, the Federal Circuit erred in ruling that the requirement to direct water through the fish passage facility constituted a per se taking. Upon analysis, none of the Federal Circuit’s overlapping arguments supports the conclusion that requiring passage of water through a fish passage facility constitutes a per se taking of the water.

First, the District contended that the regulation resulted in a taking because it involved a kind of appropriation of the water for a public – i.e., governmental -- use. More specifically, the Federal Circuit relied on a trilogy of water development cases in which the Supreme Court ruled that government mandates or other actions directing water away from the original water rights holders and into the hands of new users constituted appropriations. The United States contended that the Casitas case was distinguishable from those cases on the ground that “here[] the United States did not appropriate the water for its own use or for use by a third party.” But the panel declared this argument “unpersuasive,” reasoning that the Endangered Species Act 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.” The panel asked rhetorically, “If this water was not diverted for a public use, namely protection of the endangered fish, what use was it diverted for?”

The flaw in this analysis is that it ignores that the Supreme Court has confined the per se appropriations category to a narrowly defined set of cases of a specific character. The Supreme Court has said that a per se rule applies when the government seizes private property and hands it over for actual use by some third party or the government. See, e.g., United States v. Pewee Coal Co., 341 U.S. 114 (1951); Kelo v. City of New London, 545 U.S. 469 (2005). The water development cases relied upon by the Federal Circuit all involved actual transfers of the water from the original owners for exploitation by new owners. Merely regulating the use of water to protect public fisheries, by contrast, does not constitute an “appropriation” of water in the sense that the Supreme Court has used that term. As the Court explained in Tahoe-Sierra, for example, distinguishing between a condemnation of a leasehold interest and a regulation of such an interest, an appropriation “gives the government 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.” The panel ignored the limitations on the concept of an appropriation as that concept has been elaborated upon and applied by the Supreme Court.

Interpreting the term appropriation in the broad sense adopted by the Federal Circuit would convert every regulatory action into a per se taking, contradicting the Supreme Court’s repeated insistence that only a narrow, well defined category of government actions deserves per se analysis under the Takings Clause. After all, every regulatory action could be described as “appropriating” some element of an owner’s property interest if the test were whether the government action served some public purpose. For example in the Penn Central case, the government could have been described as “appropriating” the air rights above Grand Central Terminal in order to confer an aesthetic benefit on the public. Or, in Tahoe-Sierra, the government could have been described as appropriating owners’ development rights in order to confer the benefit of a preserved Lake Tahoe on the public. The Supreme Court obviously rejected this expansive approach, refusing to apply a per se takings approach in these regulatory cases.

The Federal Circuit's second, equally unpersuasive argument for per se treatment rests on the fact that the ESA as applied in this case did not merely place a negative restriction on what the District could do with its water but imposed an affirmative mandate on the District about where the water should go. In the panel's words, "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."

The panel relies on a distinction that has no basis in precedent or common sense. In Loretto v. Teleprompter CATV Corp., 458 U.S. 419, 436 (1982), the Court made plain that a regulatory takings analysis applies to all kinds of regulations of property use, regardless of whether they impose purely negative restrictions on property use or impose affirmative obligations on owners. 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 a building constituted a per se taking. However, the Court explained that the rule it announced in that case would not reach a law requiring an owner to herself install cable television equipment on the property. Thus, the panel stated, the ruling in Loretto:

In 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."

Id. at 440. In sum, contrary to the reasoning of the panel in Casitas, regulation requiring an owner to make some affirmative use of private property constitutes regulation of the property, not an appropriation of it.

The analysis in Loretto is consistent with other Supreme Court precedents as well as numerous lower court decisions. For example, in the venerable case of Miller v. Schoene the Court rejected a taking claim based on an order by a state official that a property owner destroy trees on his land in order to arrest the spread of a plant pest. The Court's opinion contains no suggestion that its analysis was affected in the least by the fact that regulation required that the trees be cut down rather than left standing. Likewise, in Regional Rail Reorganization cases, the Court rejected the argument that congressional legislation compelling an insolvent railroad to continue providing rail service against its will necessarily effected a taking of the railroad's assets. There is simply nothing to the Federal Circuit's notion that the involvement of the "active hand" of government in the Casitas case converted a regulatory action into a direct physical appropriation triggering per se takings analysis.

Apart from precedent, the panel's theory that affirmative regulations are especially problematic under the Takings Clause cannot be reconciled with the basic purpose of regulatory takings doctrine. The Supreme Court has declared that the goal of

the doctrine is to identify those regulations that are so burdensome that they can properly be viewed as the “functional equivalent” of classical physical occupations or direct appropriations. An inquiry that focuses on whether a regulation imposes an affirmative as opposed to a negative restriction on property has no place in takings analysis because it 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, much less under a per se test.

Two other aspects of the Federal Circuit’s analysis in support of its per se test warrant brief mention. First, in response to the government’s reliance on the Supreme Court’s decision in Tahoe-Sierra and its discussion of the narrowness of per se rules, the panel contended that Tahoe-Sierra was distinguishable because it involved a mere temporary moratorium whereas the regulation in Casitas meant that the water required to pass through the fish ladder would be “lost forever” to the District. This analysis completely misses the mark. While Tahoe-Sierra did indeed involve an explicitly temporary regulation, most regulatory takings cases involve regulations that are permanent or at least of indefinite duration and all such cases are evaluated based on the takings tests described in Tahoe-Sierra. Indeed, unless a regulation is expressly made temporary, the Supreme Court’s cases have assumed that they are permanent. Thus, for example, in Lucas the court evaluated a claim on the premise that the restriction on coastal development was “unconditional and permanent.” 505 U.S. at 1012. Similarly, in First English the Court recognized that the government always has the option of rescinding a regulation if it is held to constitute a taking, but said that at the outset a taking claim proceeds on the premise that regulatory restriction is “permanent.” The fact that the Supreme Court has applied regulatory takings analysis in these and many other cases of alleged permanent takings contradicts the novel idea that per se analysis should apply to claims based on regulations that caused property interests to be “lost forever.”

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 diverted into the fishway after the District had already diverted the water into the canal. The thinking underlying this suggestion is apparently that the status of the water was altered when it was diverted, that is, that the District held a mere usufructury interest in the water while it was still in the river but that, after the water was diverted into the canal, the District gained ownership of the physical water itself. While the theory is certainly debatable, it has some support in the language of California and other western water law cases. [citations t/c] Even if this thinking is correct, however, it does not necessarily bolster a claim of a per se taking. Assuming the District owned the water itself, the government was still only regulating the use of the water, not appropriating it.

Finally, in part because of the District’s change in its theory of the case, the Federal Circuit decided this case in apparent complete ignorance of the extensive precedent specifically addressing the constitutionality of fish passage laws. Regulations

requiring fish ladders date back to the nation's early history. While the constitutionality of these laws was extensively litigated, especially in the state courts, during the 19th century, this type of litigation essentially disappeared in the twentieth century following the development of a broad judicial consensus that these laws did not constitute a taking or violate other constitutional provisions. The last Supreme Court decision to address a fish passage requirement was Holyoke v. Lyman, 82 U.S. 500 (1872), in which the Court rejected a Contracts Clause challenge. [More to come] The Federal Circuit effected a revolution in the law governing fish passage requirements without even acknowledging the large body of law it was repudiating.

D. It is Doubtful that the Plaintiff Will Ultimately Prevail on its Claim that it Suffered a Compensable Taking.

Finally, looking to the future of the Casitas litigation, it appears unlikely that the District will ultimately prevail on its claim, even accepting the Federal Circuit's ruling that a per se takings analysis applies to a requirement to direct water through a fish ladder. First, assuming that a requirement to divert water through a fish ladder is properly viewed as a kind of physical taking, the larger regulatory context in which this requirement was imposed indicates that the District's taking claim should be evaluated as an exaction in accordance with the standards of Nollan v. California Coastal Commission and Dolan v. City of Tigard. Applying the "essential nexus" and "rough proportionality" tests applicable to exactions, the claims court on remand should conclude that the regulation did not result in a taking. Second, and in any event, the taking claim should fail because the regulatory requirements at issue in this case comports with background principles of California law. Where, as in this case, a claimant cannot point to a protected property interest that has been intruded upon by the challenged regulation, the taking claim necessarily fails.

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. Now that the Federal Circuit has ruled that the regulation should be regarded as imposing a physical taking the question becomes what is the import of that conclusion for the future course of the litigation.

As obliquely suggested by Judge Arthur Gajarsa in his dissenting opinion from the order denying rehearing, this regulation, conceived of as involving a physical occupation, should appropriately be analyzed using the exactions framework. Nollan and Dolan apply in the situation where a government agency grants a property owner permission to exploit a property interest, but subject to a condition that, considered independently, would constitute a per se taking. Thus in Nollan the coastal commission granted permission to the Nollans to build 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. In Dolan, the City of Tigard granted permission to Mrs. Dolan to expand his hardware store, but on the condition that she grant public access to a greenway running through the property. The Supreme Court established in those cases that an exaction

does not represent a per se taking and instead will be held to be a taking only if the government fails to establish that there is an “essential nexus” between the condition and the government’s legitimate regulatory purposes or fails to show that the burden imposed by the condition is “roughly proportional” to the environmental harm the regulation was designed to avoid.

The Nolan and Dolan framework of analysis should apply to Casitas on remand because the United States did not impose the requirement that water be provided to operate the fishway unilaterally, but rather imposed it as a condition attached to a biological opinion issued by the National Marine Fisheries Service authorizing the District to continue to operate the project in compliance with the Endangered Species Act. Because this requirement was not imposed unilaterally on the District, but instead attached as a condition to an affirmative grant of regulatory permission, just as in Nollan and Dolan, the Nollan and Dolan standards should apply to this case.

It appears a virtual certainty that the government could satisfy the essential nexus and rough proportionality tests on remand. The requirement to pass water through the fish way in order to protect the fishery is obviously logically related to the government’s regulatory purpose in reviewing the dam operations to reduce harm to the fishery. The very modest amount of water the District is required to devote to fishway operations easily meets the test of being roughly proportional to the harms caused by the dam operations that the government is attempting to address through this regulation.

Background Principles of California Law. Finally, 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 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 starting gate. There are two potentially relevant background principles, the California public trust doctrine and the longstanding, even venerable California statutory requirement that dam operators provide water for fishways to avoid obstructing fish migration.

Public Trust Doctrine Defense. Under the Mono Lake decision, no holder of a California appropriative water right can claim a property entitlement to exploit water in a fashion that is harmful to public trust resources. In this case, the operation of the Robles Diversion Dam, by completely blocking upstream passage of the steelhead trout, plainly harmed public trust resources, namely the steelhead trout. The requirement to install and operate a fishway is plainly designed to avoid or at least minimize the harm to the fishery caused by the dam. Because devoting water to operate the fishway serves to protect the fishery, the requirement is within the scope of the public trust doctrine and provides no basis for claiming a taking of a protected property interest.

Notwithstanding the seemingly straightforward logic of this argument, some potential counter arguments are available. Upon analysis, none is convincing.

The first counter argument is suggested by Judge Wiese's decision in Tulare Lake in which he rejected a defense to the taking claim based on the public trust doctrine and other background principles of state water law. While Judge Wiese has repudiated his ruling on the appropriate takings standard in Tulare Lake, he has not had occasion to consider the correctness of this other ruling. Judge Wiese acknowledged in Tulare Lake that, as a general proposition, 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. But, according to his analysis in Tulare Lake, the California water board has exclusive jurisdiction (along with California state courts) to define how the public trust doctrine should be applied in any particular case. Thus, once the board has spoken by issuing an appropriative permit, a federal court, he reasoned, has no authority to review the board's judgment or to conclude that the public trust doctrine permits additional limitation on a private water right beyond the limitations already imposed by the board itself.

The error in this analysis is that it confuses the limitations on property rights in water established by the public trust doctrine with the scope of the California water board's permitting authority in administering the appropriative water rights system in accordance with the public trust doctrine. Mono Lake states in clear and explicit terms that no one can claim a property entitlement to use water in a way that is harmful to trust resources. The only issue in applying this principle is the factual one of whether a particular use is, in fact, harmful to trust resources. A federal court is just as competent to make that determination as the state water board or a California court and, in accordance with the Erie doctrine, has an obligation to apply the state law definition of property rights in water in the same fashion that the state court would.

However, Mono Lake also explained that the water board, consistent with its responsibility under the public trust doctrine, may issue permits authorizing uses of water that actually harm trust resources. The public trust doctrine, the Court explained, imposes requirements that are essentially procedural in nature, not substantive; that is, the board has an obligation to consider and take into account whether and how a proposed use of water would affect public trust resources, not necessarily to avoid the impact. In other words, Mono Lake drew a clear distinction between the limited nature of private rights in water under the public trust doctrine and the broader authority of the board to authorize water uses that are harmful to public trust doctrine. Judge Wiese assumed that the terms of a water permit issued by the board define the scope of the permittee's property right in the water. That reading of state law is simply wrong in light of Mono Lake.

A second potential counter argument is based on the notion that there might be a decisive difference between a purely negative restriction on water use and an affirmative mandate for the purpose of applying the public trust doctrine as a background principle. In other words, even if the public trust doctrine might 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 affirmative direction about how to use or manage water. This argument is obviously an echo of the Federal Circuit's argument 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 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, barring the closing of the gates in the dam or prohibiting water diversions altogether during certain high flows periods. If these alternative actions could be defended against takings claims based on the public trust doctrine it would be nonsensical to not also apply this defense to a fishway requirement that accomplishes the same basic goal and which calls for the use of less water for fish protection and interferes less with project operations. The greater power to drastically curtail project operations for species protection purposes based on the public trust doctrine should be interpreted to encompass the lesser power to require passing water through a fish ladder.

The suggested distinction also appears to be refuted by relevant California precedent. In the venerable case of People v. Glenn-Colusa Irrigation District, 127 Cal. App. 30 (1932), the California Supreme Court 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.” 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 that is the case, 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.

California Fish Legislation. An alternative background defense to the taking claim in Casitas is that the longstanding California statutory requirement that dam operators provide water for the operation of fish passage facilities itself serves as a kind of background principle barring the taking claim. Background principles of state law for the purpose of takings analysis are commonly understood to derive from common law precedent rather than statutory enactments. But Justice Anthony Kennedy in Palazzolo suggested that, at least with the passage of considerable time, statutory measures might appropriately be deemed background principles as well.

If there is merit to this theory, California fish passage legislation would appear to be a perfect candidate for its application. Section 5937 of the California Fish & Game Code 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.

This provision, with some modest changes in language, dates back to 1872 legislation mandating that “every owner of a dam” construct “sufficient fishways or fish ladders”

when requested to do so by state officials. Neither section 5937 nor any of its predecessor versions has ever been successfully challenged on takings grounds. Given the historical pedigree of this statutory requirement, it would be appropriate to give this limitation on California water rights the same force and effect as any background principle based on California common law.

III. Conclusion.

There is no support whatsoever in precedent for the argument that a regulation requiring that water be left in a river or other water body should be evaluated a potential per se taking. Thus, assuming the claimant has a protected property interest in the water, a traditional Penn Central analysis should apply to regulations that, for example, limit pumping of water or bar diversions of water into water supply canals.

The Federal Circuit decision in Casitas establishes a precedent applicable only in the particular situation where a water right holder is subjected to an affirmative mandate to direct water through a fish ladder or some other type of off river structure. The decision was poorly reasoned and conflicts with numerous relevant Supreme Court and Federal Circuit precedent and will hopefully be overturned in time or at least confined to the narrow factual scenario presented in that case.

Despite the adverse ruling on the takings standard to be applied in the Casitas case, the United States has numerous strong arguments against the claim under the Takings Clause and should ultimately prevail in this litigation.