

Water Scarcity: The Need to Apply a Regulatory Takings Analysis to Partial Restrictions on Water Use [Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008)]

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*If [the Casitas decision] stands as good law, there isn't going to be enough money in the treasury to deal with all the takings claims all across the country....*¹

I. INTRODUCTION

Imagine you are a farmer in a fertile river valley. For years, you and your family have farmed in the region. In addition to harvesting crops to sell on the market, you also use your crops for food products that you sell in your family-run restaurant. Customers enjoy buying the locally grown products and your business has become quite successful.

Because you live in a semi-arid part of the state, you supplement your farming operations with irrigation. The state has, by statute, dedicated all water within the state for use by the people of the state and granted real property rights to those who appropriate water. A permit is required to obtain a right to use the water. Years ago, the state accepted your application for a permit to appropriate groundwater for irrigation purposes.

Unfortunately, this is the seventh year of what seems to be an unending drought. The local groundwater management district became concerned that increased temperatures caused by global warming would create a greater demand on the aquifer underlying your ground, which has already experienced excessive decline.² Accordingly, the Chief En-

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1. Zeke Barlow, *Ruling Favors Casitas District*, VENTURA COUNTY STAR, Sept. 27, 2008, <http://www.venturacountystar.com/news/2008/sep/27/ruling-favors-casitas-district/>. This statement was made by Russ Baggerly, Director Division 5, Casitas Municipal Water District. *See id.* Baggerly has consistently opposed the *Casitas* lawsuit. *Id.*

2. *See* James Carlson, *Report: Kansas' Climate Changing*, TOPEKA CAPITAL-J., Nov. 12, 2008, at 1A. A recent report published by the University of Kansas indicated that as carbon dioxide emissions increase, overall temperatures in Western Kansas could increase by as much as eight degrees, requiring an additional eight inches of water to be withdrawn from the Ogallala Aquifer each sum-

gineer of the Division of Water Resources established an Intensive Groundwater Use Control Area at the recommendation of the local groundwater management district.³

In an attempt to correct the excessive decline in groundwater, the Chief Engineer has placed daily withdrawal limitations on groundwater. The state grants priority for withdrawal to those right holders who have a senior right, or first applied to appropriate. Unfortunately, as a junior right holder you are required to appropriate about one percent less groundwater than you have been granted under your permit. In an attempt to prevent the Chief Engineer from carrying out the corrective measures, you file suit claiming that a taking has occurred under the Fifth Amendment to the United States Constitution. Essentially, your claim is that because you hold a real property right in the water, the Chief Engineer cannot diminish your water right without just compensation.

Your case, however, is not easy to resolve. A myriad of questions arise, such as, is a water right a property right compensable under the Fifth Amendment's Takings Clause? If a water right is subject to taking, which takings analysis should apply: a physical taking or a regulatory taking? Has there been sufficient interference with your right to constitute a regulatory taking, if that analysis is applied?

To address these questions, this Comment will analyze a recent case from the United States Court of Appeals for the Federal Circuit, *Casitas Municipal Water District v. United States*.⁴ While the case deals with restrictions on the right to use surface water, it has important implications for groundwater management in states like Kansas. Specifically, this Comment will show that the court's should have determined that a valid property right did not exist, and should have affirmed the United States Court of Federal Claims' application of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.⁵ Had the court properly analyzed both issues, it would have reached the proper conclusion: A partial restriction on the right to use water requires a regulatory takings analysis.

II. CASE DESCRIPTION

A brief overview of the history of California reclamation projects is

mer. *See id.* The Climate Change and Energy Project, a creation of The Land Institute, completed the study. *Id.*; *see also* Robert Pore, *Overuse and Climate Threaten Aquifer*, TOPEKA CAPITAL-J., Aug. 6, 2006, at 8A (stating that the rate of withdrawal has exceeded the rate of recharge for the aquifer, resulting in complete exhaustion of the aquifer in some areas).

3. *See generally* Groundwater Management District Act, KAN. STAT. ANN. §§ 82a-1020 to 1040 (1997 & Supp. 2008).

4. 543 F.3d 1276 (Fed. Cir. 2008).

5. 535 U.S. 302 (2002).

crucial to a clear understanding of *Casitas*. In 1902, Congress passed the Reclamation Act.⁶ The Act authorized the Secretary of the Interior to develop existing waters for irrigation purposes.⁷ Pursuant to this Act, Congress authorized the construction of the Ventura River Project (Project) in 1956.⁸

On March 7, 1956, Casitas Municipal Water District (Casitas) of Ventura County, California, entered into a contract with the United States Bureau of Reclamation (BOR) for the construction of the Project.⁹ Contract provisions required Casitas to compensate the BOR for the actual reimbursable construction costs, an amount up to \$30.9 million.¹⁰ Casitas was also required to assume operation and the operating costs of the project.¹¹ The contract granted “a prior right in perpetuity to the use of the water made available by the project works, subject only to existing vested rights.”¹²

Casitas received an appropriative water permit in 1956 from the predecessor to the California State Water Resources Control Board (SWRCB).¹³ Thereafter, in 1986, the SWRCB issued to Casitas a license confirming the previously issued permit.¹⁴ The license provided that Casitas could divert water from the Ventura River and store the water in a diversion dam.¹⁵ The amount diverted was not to exceed 107,800 acre-feet per year.¹⁶ Casitas was also authorized to use an amount not to exceed 28,500 acre-feet per year for beneficial use, but in fact only transferred 14,494 acre-feet of water on average for use.¹⁷ The state-issued license provided that,

Pursuant to California Water Code Sections 100 and 275 and the public trust doctrine, all rights and privileges under this license, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control

6. Reclamation Act, 32 Stat. 388 (1902) (current version at 43 U.S.C. §§ 371-616yyyy (2000)).

7. *Id.* § 2.

8. Pub. L. No. 423, § 1, 70 Stat. 32 (1956).

9. *Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 748 (2006) [hereinafter *Casitas I*].

10. *Id.*

11. *Id.* Although Casitas has taken over operation of the dam, the United States still has title to the project. *Id.*; Brief of Plaintiff-Appellant at 34, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153).

12. *Casitas I*, 72 Fed. Cl. at 748. For an explanation of “prior rights” see discussion *infra* Part III.C.

13. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1282 (Fed. Cir. 2008).

14. Nat'l Marine Fisheries Serv., Sw. Region, Biological Op. 26 (March 31, 2003), <http://www.casitaswater.org/fishpassagefacility/Robles%20BO.pdf> [hereinafter Biological Opinion]. For an explanation of state water licenses see *infra* notes 52-54 and accompanying text.

15. State Water Res. Control Bd., Div. of Water Rights, License for Diversion and Use of Water No. 11834 (Cal. 1982).

16. *Id.* An “acre-foot” is “[t]he volume of water, 43,560 cubic feet, that will cover an area of one acre to a depth of one foot.” AMERICAN HERITAGE DICTIONARY 16 (4th ed. 2000).

17. License, *supra* note 15; Brief of Appellee the United States at 7, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153) (providing information on actual beneficial use). “Beneficial use” is a case specific inquiry, varies based upon the availability of water and is a dynamic consideration. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 1007 (Cal. 1935).

Board in accordance with law and in the interest of the public welfare to protect public trust uses, prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.¹⁸

Before construction began, the California Department of Fish and Game proposed that a “fish ladder”¹⁹ for steelhead trout be included in the Project.²⁰ Casitas did not add the ladder during the construction of the Project, because it stated in writing that it would install a fish ladder if one became necessary during the operation of the project.²¹

In 1997, the following listing of the steelhead trout as an endangered species under the Endangered Species Act (ESA), Casitas responded by proposing to construct a fish ladder in the Project.²² Casitas requested that the BOR “seek an informal consultation with NMFS [the National Marine Fisheries Service] pursuant to Section 7 of the ESA to enlist that agency’s technical assistance in the design, construction, operation, and maintenance of a fish ladder and screen for the project.”²³ The Biological Opinion issued by the NMFS concluded that the construction of a fish ladder would not further endanger the steelhead trout, and made modifications to Casitas’ proposal.²⁴

Casitas refused to comply with the Biological Opinion’s require-

18. License, *supra* note 15; see CAL. WATER CODE § 100 (West 1971) (requiring that waters in the state be put to a beneficial use) and § 275 (West Supp. 2009) (requiring the Department of Water Resources and the State Water Resources Control Board to prevent unreasonable use of water).

19. A “fish ladder” is “[a] series of pools arranged like ascending steps at the side of a stream, enabling migrating fish to swim upstream around a dam or other obstruction.” AMERICAN HERITAGE DICTIONARY 665 (4th ed. 2000).

20. *Casitas I*, 72 Fed. Cl. 746, 748 (2006).

21. *Id.* Casitas believed that a fish ladder was not necessary at the time of construction. Reply Brief of Plaintiff-Appellant at 8-9, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153) (“[T]he somewhat remote possibility of the occurrence of very substantial climatic changes favoring reestablishment of the Ventura River steelhead fishery did not justify the expenditure of \$25,000 for the construction of fish passage facilities at this time.” (quoting Letter from Casitas Municipal Water District to California Department of Fish and Game (July 18, 1956))).

22. *Casitas I*, 72 Fed. Cl. at 749. The threat of a lawsuit by California Trout, an environmental group, prompted Casitas’ proposal to construct the ladder. See *id.*; Zeke Barlow, *Steelhead Advocates Suing 2 Agencies*, VENTURA COUNTY STAR, Jan. 16, 2009, <http://www.venturacountystar.com/news/2009/jan/16/steelhead-advocates-suing-2-02/>.

23. *Casitas I*, 72 Fed. Cl. at 749. Casitas sought the National Marine Fisheries Service (NMFS) consultation in order to obtain an “incidental take statement” pursuant to Section 7 of the Endangered Species Act (ESA). Brief of Appellee the United States, *supra* note 17, at 22 n.6. When a proposed action, which would otherwise be classified as a prohibited “taking” under the ESA, is found to be consistent with the ESA but “incidentally” takes a listed species, NMFS issues a permit called an “incidental take statement” (ITS) to illustrate the impact of that taking on the listed species. See, e.g., 16 U.S.C. § 1539(a)(1)(B) (2006). Without the ITS, civil and criminal liabilities could be imposed for operating the project if the operation “takes” any steelhead trout. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1282 (Fed. Cir. 2008); Brief of Appellee the United States, *supra* note 17, at 26. “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (2006). The ITS allowed Casitas to construct the fish ladder, and thus allowed continuing operations of the Project. See Brief of Appellee the United States, *supra* note 17, at 26-27. The Federal Circuit Court of Appeals observed that the Project had led to the steelhead trout’s endangered status. *Casitas Mun. Water Dist. v. United States*, 543 F.3d at 1286.

24. Biological Opinion, *supra* note 14, at 52-53; Brief of Appellee the United States, *supra* note 17, at 22 n.6.

ments unless ordered to do so by the BOR.²⁵ The BOR thus ordered Casitas to implement provisions of the Biological Opinion, resulting in the construction of the fish ladder.²⁶ The fish ladder cost an additional \$9.1 million to construct and resulted in a loss of 3,200 acre-feet per year of water available to Casitas that would have otherwise gone to the diversion dam.²⁷

Casitas then filed suit in the United States Court of Federal Claims against the United States on two claims: breach of contract and a Fifth Amendment taking.²⁸ In 2006, the court granted partial summary judgment in favor of the United States on the breach of contract claim.²⁹ The Court of Federal Claims also granted the United States partial summary judgment on Casitas' Fifth Amendment takings claim.³⁰ The court reasoned that in light of *Tahoe-Sierra*, "only the government's active hand in the redirection of a property's use may be treated as a per se taking."³¹ Furthermore, the court reasoned that *Tahoe-Sierra* "compels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property."³² Thus, the court held that the proper analysis was that of a regulatory taking.³³

Casitas appealed to the Federal Circuit on both claims.³⁴ The Fed-

25. *Casitas I*, 72 Fed. Cl. at 749. The refusal to comply was pursuant to a resolution adopted by Casitas. *Id.*

26. *Id.* The United States assumed for the purpose of summary judgment that the Bureau of Reclamation (BOR) did in fact order Casitas to build the fish ladder. Brief of Appellee the United States, *supra* note 17, at 22 n.6. The government, however, chose to reserve the right to challenge that fact on remand. *Id.*

27. *Casitas I*, 72 Fed. Cl. at 749. The amount of water lost, however, is unsupported by the Biological Opinion. Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States at 25, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153). Only 1,349 acre-feet, or one percent, loss had resulted as of May 2006. Brief of Appellee the United States, *supra* note 17, at 14; Brief of Plaintiff-Appellant, *supra* note 11, at 7.

28. *Casitas I*, 72 Fed. Cl. at 749. The suit was brought in the Court of Federal Claims because that court has jurisdiction over constitutional claims against the United States. 28 U.S.C. § 1491(a)(1) (2000). The Fifth Amendment takings issue was decided in a separate opinion. *Casitas I*, 72 Fed. Cl. at 748 n.1; see *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (2007) [hereinafter *Casitas II*].

29. *Casitas I*, 72 Fed. Cl. at 755. The court reasoned that the expenditures for the construction of the fish ladder were operating costs under the contract, for which the United States was not responsible. See *id.* at 752. Furthermore, the court held that the sovereign acts doctrine applied, and thus, the United States was not liable for any alleged breach of contract. *Id.* at 755.

30. *Casitas II*, 76 Fed. Cl. at 106. It is necessary to note that the judge who wrote the opinion for this case previously held that a similar regulation of water use constituted a physical taking. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001). The judge attempted to distinguish the result of the controlling precedent, by noting that the *Tulare* court did not focus on the governmental action. *Casitas II*, 76 Fed. Cl. at 104.

31. *Casitas II*, 76 Fed. Cl. at 106 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002)).

32. *Id.*

33. See *id.*

34. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1279-80 (2008). Although Casitas appealed both claims, this Comment will only address the Fifth Amendment takings claim.

eral Circuit affirmed the trial court's ruling on the breach of contract claim, but it reversed the trial court's ruling on the Fifth Amendment takings claim and remanded the case.³⁵

III. BACKGROUND

This section will discuss the background principles and doctrines at play in the Court of Appeals' decision. It will describe the constitutional provision that requires compensation for the taking of private property. Next, this section will discuss the ESA, California water law, and United States Supreme Court jurisprudence regarding water rights takings. This section will also discuss recent Court of Federal Claims decisions regarding the regulation of the right to use water. Finally, this section will discuss a recent California Court of Appeals for the Fourth District decision concerning the regulation of the right to use groundwater.

A. *The Takings Clause of the Fifth Amendment*

The ultimate issue in *Casitas* is which analysis applies to partial restrictions on the right to use water. Thus, the text of the United States Constitution is the starting point for any analysis. The Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."³⁶ The Supreme Court has explained that the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³⁷

This nation's founders did not define either "private property" or "taking."³⁸ Some suggest that James Madison, drafter of the Fifth Amendment, viewed public use of private property differently than regulation of private property for the public interest.³⁹ With respect to property, courts have resolved to use "existing rules and understandings" and "background principles" derived from an independent source, such as state, federal, or common law," to define which interests are compensable if taken.⁴⁰ Accordingly, it is necessary to consider whether

35. *Id.* at 1296-97. The United States petitioned for a panel rehearing and rehearing en banc on December 10, 2008. United States' Combined Petition for Panel Rehearing and Rehearing En Banc, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153). In a *per curiam* decision, the court denied the petition. *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329, 1331 (Fed. Cir. 2009).

36. U.S. CONST. amend. V.

37. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

38. See *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

39. John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 306 (2002); see *infra* notes 198-203 and accompanying text.

40. *Maritrans Inc.*, 342 F.3d at 1352 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)).

federal or state law creates a compensable property interest in water.

B. Endangered Species Act

Congress enacted the ESA as a means to conserve endangered species and their habitats.⁴¹ Congress felt that species conservation was necessary because the species provided numerous benefits to the public.⁴² Thus, federal agencies are required to use their authority to conserve species.⁴³ The ESA also requires that federal agencies cooperate with states in the management of water resources.⁴⁴ In order to carry out these purposes, the ESA prohibits “any person” from “taking” any endangered or threatened species or from undertaking certain other acts.⁴⁵ To reduce or eliminate potential harm to endangered species, federal agencies are also required to consult with the Secretary of Interior before carrying out projects.⁴⁶

C. California Water Law

Even when the federal ESA applies, the existence of compensable rights as well as their scope are issues determined by state water law.⁴⁷ California recognizes a dual system of water rights, utilizing both the riparian doctrine and the prior appropriation doctrine.⁴⁸ Only appropriative rights were at issue in *Casitas*.

Under the prior appropriation doctrine, water rights arise out of actual use of water for a beneficial use and are based on a theory of “first in time, first in right.”⁴⁹ In other words, the first user to appropriate water has a superior right to all subsequent appropriators.⁵⁰ The next appropriator, in turn, is superior to all who follow him.⁵¹

In California, a state statute designates water as the property of the

41. 16 U.S.C. § 1531(b) (2006).

42. *Id.* § 1531(a)(3).

43. *Id.* § 1531(c)(1).

44. *Id.* § 1531(c)(2). In order to achieve the objectives of the ESA, Congress authorized the Secretaries of the Interior and Agriculture to purchase water rights. *Id.* § 1534(a)(2). The Secretaries may purchase water rights with funds from the Land and Water Conservation Fund Act of 1965. *Id.* § 1534(b). Before acquiring any water rights, however, the appropriate Secretary is required to consult with the states. *Id.* § 1535(a).

45. *Id.* § 1538(a)(1); see *supra* note 23 (defining what it means to “take” a species under the ESA).

46. 16 U.S.C. § 1536(a)(2).

47. George A. Gould, *Water Rights Systems*, in WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES 7-8 (Kenneth R. Wright ed., 1990).

48. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 751 (1950). The riparian doctrine relies upon two basic principles. Gould, *supra* note 47, at 8. First, the right to use water is dependent upon land ownership, because riparian rights arise out of ownership of a piece of land that lies adjacent to a body of water. *Id.* Second, all riparian right holders possess equal rights. *Id.* When conflicts between riparian right holders arise, they are resolved by determining what is reasonable. *Id.* at 11.

49. Gould, *supra* note 47, at 9-10.

50. *Id.*

51. *Id.*

people, but permits one to acquire a right to use (or appropriate) the water.⁵² The SWRCB issues permits, and subsequently, licenses that provide licensees with a right to use water.⁵³ Both the permit and license expressly state that the use of water is subject to conditions such as the public trust doctrine and prohibitions against waste and unreasonable use, thus putting right holders on notice that a water right is not absolute.⁵⁴ California law provides a priority for beneficial uses. While irrigation is second only to domestic uses,⁵⁵ regulators must consider preservation of fish in deciding whether to grant a water right.⁵⁶ Moreover, regardless of the purpose, the right to use water is inherently limited to a reasonable use.⁵⁷

D. Supreme Court Takings Jurisprudence

If a valid property right exists under state water law, it is next necessary to analyze whether the governmental action may constitute a taking. In interpreting the Takings Clause, the Supreme Court has developed two analytical frameworks. The first involves some sort of physical “invasion” or “occupation” of the property by the government.⁵⁸ The second applies to regulatory takings, which occur if a “regulation goes too far.”⁵⁹

In *Penn Central Transportation Co. v. New York City*,⁶⁰ the Su-

52. CAL. WATER CODE § 102 (West 1971) (“All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”). The property right in water, however, does not convey a possessory right in the actual “corpus” of water. § 1001 (“Nothing in this division shall be construed as giving or confirming any right, title, or interest to or in the corpus of any water.”). Nevertheless, the Supreme Court has held that the taking of a water right in California is compensable under the Fifth Amendment. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 (1950).

53. *See* License, *supra* note 15.

54. *See* § 1628; *supra* note 18 and accompanying text. Reasonable use is a case-by-case determination and requires an examination of statewide considerations. Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 9 (2002) (citing *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 605 P.2d 1, 6 (Cal. 1980)). The public trust doctrine relies on three principles: (1) the right to use water is contingent on current public values; (2) the right to use water is subject to change; and (3) the right to use water and the public trust doctrines are equally important. *Id.* at 11.

55. § 106.

56. § 1243 (West Supp. 2009) (“In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.”); § 1257 (West 1971).

57. § 100.

58. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982).

59. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Pennsylvania Coal Company*, the coal company had rights to mine coal under a house belonging to the defendant. *Id.* at 412. The Kohler Act prohibited mining of coal if the mining caused structural damage to residential structures. *Id.* at 412-13. The Court held that the regulation was not a valid exercise of the police power and required compensation because the law made mining coal impracticable, thus effectively abolishing the company’s entire rights in the property. *Id.* at 414.

60. 438 U.S. 104 (1978). In *Penn Central*, the Landmarks Preservation Commission rejected Penn Central’s plans to add on to the existing Grand Central Terminal by constructing an office tower. *Id.* at 116-17. Penn Central sued, claiming that the New York City Landmarks Preservation Law had caused a taking of its property. *Id.* at 119. The Supreme Court performed an analysis for

preme Court developed an analysis for regulatory takings based on “ad hoc, factual inquiries” that include: (1) the economic impact of the regulation; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) the character of the government action.⁶¹ Although, under *Lucas v. South Carolina Coastal Council*,⁶² a taking occurs if all economic value in a property right is lost due to a regulation,⁶³ the Supreme Court has made clear that only an examination of the “parcel as a whole” determines whether a taking has occurred.⁶⁴ Thus, a regulatory taking does not occur if economic value remains in part of the property at issue.

In *Tahoe-Sierra*, the Supreme Court held that a temporary moratorium placed on land development did not constitute a “classic taking,”⁶⁵ accordingly, the *Penn Central* analysis was controlling.⁶⁶ The Court reasoned that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.”⁶⁷ The Court noted that “physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.”⁶⁸ Thus, only “a permanent deprivation of the owner’s use of the entire area is a taking of ‘the parcel as a whole,’ whereas a temporary restriction that merely causes a diminution in value is not.”⁶⁹

E. Supreme Court Water Rights Takings Jurisprudence

A “trilogy” of Supreme Court cases has established that a water right may be “taken” within the meaning of the Fifth Amendment.⁷⁰ In

takings claims based on the invocation of a regulation and held that the regulation did not constitute a taking. *Id.* at 124, 138.

61. *Id.* at 124 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

62. 505 U.S. 1003 (1992).

63. *Id.* at 1019 (“[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

64. *Penn Cent. Transp. Co.*, 438 U.S. at 130-31. The Court stated:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole

Id.

65. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002) (“This case does not present the “classi[c] taking” in which the government directly appropriates private property for its own use, instead the interference with property rights ‘arises from some public program adjusting the benefits and burdens of economic life to promote the common good.’” (citing *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998); *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 124 (1978))).

66. *Id.* at 342.

67. *Id.* at 327 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

68. *Id.* at 324.

69. *Id.* at 332.

70. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1289-90 (citing *Dugan v. Rank*, 372 U.S. 609, 625 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 730 (1950); *Int’l Paper Co. v. United States*, 282 U.S. 399, 408 (1931)).

International Paper Co. v. United States,⁷¹ Niagara Falls Power Company diverted water into a canal and International Paper Company had a lease to use some of the water diverted.⁷² The Secretary of War prohibited water diversions to International Paper Company because the war effort required all power and all waters in the power company's canal.⁷³ The halted diversion shut down International Paper Company for over nine months.⁷⁴ The Supreme Court held that there was a taking due to the appropriation of water by the government.⁷⁵

In *United States v. Gerlach Live Stock Co.*,⁷⁶ the claimants brought an action against the United States for a taking after the construction of Friant Dam caused the cessation of all riparian flows on their land.⁷⁷ Friant Dam diverted waters for redistribution to other private landowners.⁷⁸ The government attempted to use its eminent domain powers in order to acquire the water rights, but the negotiations failed.⁷⁹ The Supreme Court affirmed the Court of Federal Claims' application of California law, which allowed compensation.⁸⁰

The final case in this trilogy is *Dugan v. Rank*,⁸¹ a case in which the conflict also arose from the Friant Dam. There, only a partial taking of water rights occurred after the Friant Dam diminished the flow of the San Joaquin River by nearly three-fourths of its natural flow.⁸² The government again attempted to use its eminent domain powers in order to acquire the water rights, but some of the negotiations failed.⁸³ The Supreme Court found a taking because the dam prevented water from flowing to the plaintiff.⁸⁴

F. Recent Court of Federal Claims Water Rights Takings Decisions

In addition to this trilogy of Supreme Court cases establishing a physical takings analysis for water rights, the Court of Federal Claims has more recently had the opportunity to determine which analysis applies to invocations of the ESA that result in the taking of water rights. In *Tulare Lake Basin Water Storage District v. United States*,⁸⁵ Judge

71. 282 U.S. 399 (1931).

72. *Id.* at 404-05.

73. *Id.* at 405-06.

74. *Id.* at 406.

75. *Id.* at 408.

76. 339 U.S. 725 (1950).

77. *Id.* at 730. Friant Dam is an essential feature of the Central Valley Reclamation Project undertaken by the BOR as authorized by Congress. *Dugan v. Rank*, 372 U.S. 609, 610 (1950).

78. *Gerlach Live Stock Co.*, 339 U.S. at 752.

79. *Id.* at 741.

80. *Id.* at 754-55.

81. 372 U.S. 609 (1963).

82. *Id.* at 620-21.

83. *Id.* at 613-14.

84. *Id.* at 625.

85. 49 Fed. Cl. 313 (2001).

John Wiese, the same Court of Federal Claims judge who decided *Casitas*, determined that a restriction on contractual water deliveries from a California State Water Project due to enactment of the ESA was a per se physical taking of water.⁸⁶ The court reasoned that “[u]nlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value.”⁸⁷ Thus, invocation of the ESA rendered the claimant’s entire right to use water worthless.⁸⁸

Four years later, the Court of Federal Claims in *Klamath Irrigation District v. United States*,⁸⁹ substantially questioned the *Tulare* decision.⁹⁰ In *Klamath*, the federal government halted irrigation deliveries for one year due to low water levels that threatened endangered species.⁹¹ The plaintiffs then filed suit claiming that the halted diversions and interference with their water rights resulted in a taking.⁹² The court stated, “Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property—they enjoy no elevated or more protected status.”⁹³ The court held that a temporary regulation of contractual rights to receive water from a federal water project should be challenged as a contract claim and not a takings claim.⁹⁴ One of the *Klamath* court’s points of contention with the *Tulare* court was that the *Tulare* court failed to determine whether the plaintiff’s contractual rights were limited and not absolute.⁹⁵ Had the *Tulare* court done so, like the *Klamath* court, it likely would have ap-

86. *Id.* at 314-15.

87. *Id.* at 319.

88. *Id.* The *Tulare* court found its conclusion supported by the holdings of *International Paper, Dugan*, and *Gerlach Live Stock Co.* *Id.* (citing *Dugan v. Rank*, 372 U.S. 609 (1963); *Gerlach Live Stock Co. v. United States*, 399 U.S. 725 (1950); *Int’l Paper Co. v. United States*, 282 U.S. 399 (1931)). The United States attempted to distinguish *Tulare* from the trilogy of cases because *Tulare* did not involve an actual diversion of water. *Id.* The court reasoned, however, that there was no difference between a diversion of water and the restrictions in the present case that resulted in less water being available to the plaintiffs. *Id.* at 320. Despite the fact that reversal was likely, the United States never appealed this decision, perhaps for political reasons. See Michael C. Blumm & Lucus Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 352 (2005); Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 551 (2002). The government subsequently settled with the Tulare Lake Basin Water Storage District. Blumm, at 352 n.204 (noting that the government settled for \$16.7 million).

89. 67 Fed. Cl. 504 (2005).

90. *Id.* at 538 (“But, with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events.”). The court also noted the amount of criticism that *Tulare* had received for applying a physical takings analysis. *Id.* at 538, n.59 (citing Blumm, *supra* note 88, at 329; Cari S. Parobek, *Of Farmers’ Takes and Fishes’ Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 212-23 (2003); Brittany K.T. Kauffman, *What Remains of the Endangered Species Act and Western Water Rights After Tulare Lake Basin Water Storage District v. United States*, 74 U. COLO. L. REV. 837 (2003)).

91. *Id.* at 513.

92. *Id.* at 513-14.

93. *Id.* at 540.

94. *Id.*

95. *Id.* at 538.

plied the sovereign acts doctrine to the contract rights, and the court likely would have found that no taking occurred, “as it did not take a right that the district possessed (*i.e.*, the right to water as against the enforcement of the ESA).”⁹⁶

G. A Recent Decision by the California Court of Appeals

Because the Federal Circuit must apply state water law in determining whether a valid property right exists, it is also imperative to consider California judicial opinions. In a recent case, *Allegretti & Co. v. County of Imperial*,⁹⁷ the California Court of Appeals for the Fourth District held that a restriction on the right to use groundwater was not a physical or regulatory taking.⁹⁸ There, Allegretti had applied for and received a conditional use permit that limited his withdrawal from the aquifer to no more than 12,000 acre-feet of water per year.⁹⁹

On appeal, Allegretti first argued that the regulation constituted a physical taking.¹⁰⁰ The *Allegretti* court disagreed, reasoning that Supreme Court physical takings cases were distinguishable because limiting the amount of withdrawal in the present case “did not require or authorize any encroachment; it did not appropriate, impound or divert any water.”¹⁰¹ The court found Allegretti’s reliance on *Tulare* unpersuasive, reasoning that *Klamath* had substantially questioned *Tulare*.¹⁰² The court also distinguished *Tulare* from *International Paper* in that the regulation did not amount to a physical invasion or appropriation.¹⁰³

Alternatively, Allegretti argued that even if the restriction on water was analyzed as a regulatory taking, it was still compensable under *Lucas*’ total economic deprivation theory, “because it denied Allegretti all economically beneficial or productive use of its land by ‘preventing the full utilization of water that Allegretti had a right to access.’”¹⁰⁴ Allegretti, however, had conceded that he was still able to irrigate some of his land; thus, the court found that no taking occurred because Allegretti had not lost all economic value in his land.¹⁰⁵ The *Allegretti* court then performed the *Penn Central* analysis for regulatory takings.¹⁰⁶ The

96. *Id.* at 538, n.58.

97. 138 Cal. App. 4th 1267 (2006).

98. *Id.*

99. *Id.* at 1268.

100. *Id.* at 1271. He also posed an argument similar to that relied upon by the *Casitas* court: “when one is precluded from exercising the right to use water today, the right to use that particular water is gone forever.” Compare *id.*, with *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008) (“The water, and Casitas’ right to use that water, is forever gone.”).

101. *Allegretti & Co.*, 138 Cal. App. 4th at 1273.

102. *Id.* at 1273-74 (citing *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005)).

103. *Id.* at 1275 (citing *Int’l Paper Co. v. United States*, 282 U.S. 399 (1931)).

104. *Id.*

105. *Id.* at 1276.

106. *Id.* at 1277.

court held that the withdrawal limitation did not constitute a regulatory taking because Allegretti was unable to establish the three *Penn Central* regulatory takings factors.¹⁰⁷

IV. FEDERAL COURT OF APPEALS DECISION

The above discussion of principles and doctrines provides a backdrop for an examination of the majority opinion in *Casitas*. This Comment will also discuss Judge Haldane Mayer's dissent, which departed from the majority opinion only on the takings issue.

A. Arguments and Majority Opinion

In *Casitas*, the United States argued that the proper analytical framework for use restrictions on natural resources is a regulatory, rather than physical, takings analysis.¹⁰⁸ In support of its argument, the United States relied upon circuit precedent, which held that restrictions on natural resources pursuant to the ESA are not physical takings.¹⁰⁹ The United States also argued that *Allegretti* was persuasive authority.¹¹⁰ *Casitas* maintained, however, that the correct test for a partial taking of water rights is a per se physical takings analysis.¹¹¹ While acknowledging that a water right is unique, and that ownership lies not in the water itself but in the right to its use, the water district nevertheless contended that the right cannot be diminished without just compensation.¹¹² *Casitas* relied upon *Dugan*, *Gerlach Live Stock Co.*, *International Paper Co.*, and *Tulare* in support of its claim.¹¹³

The United States countered that the Supreme Court precedents relied upon by *Casitas* were distinguishable because those cases involved a physical diversion and transfer of water to a third party by the government and the exercise of eminent domain.¹¹⁴ The government's argument failed. The court reasoned that, because of Congress' express policy of protecting species for the public, the diversion of water for the protection of an endangered species was the same as diverting the water

107. *Id.* at 1280. The court found that the character of the governmental action was not a direct appropriation or physical invasion. *Id.* at 1277. In addition, Allegretti did not provide any evidence indicating the economic impact of the withdrawal limitation. *Id.* at 1278. Finally, the court found that Allegretti did not have a distinct investment-backed expectation for the following reasons: Allegretti did not present sufficient evidence illustrating an expectation; the nature of a water right is limited; and Allegretti essentially based his claim on the loss of future profits. *Id.* at 1279.

108. Brief of Appellee the United States, *supra* note 17, at 40-45.

109. *Id.* at 46-47 (citing *Seiber v. United States*, 364 F.3d 1356, 1366-67 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354-55 (Fed. Cir. 2002)). For a description of these cases see *infra* note 173.

110. *Id.* at 47 (citing *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261 (2006)).

111. Brief of the Plaintiff-Appellant, *supra* note 11, at 21-26.

112. *Id.* at 21-22.

113. *Id.* at 25-26, 29-30.

114. Brief of Appellee the United States, *supra* note 17, at 49.

for a public purpose.¹¹⁵

The United States also argued that the Supreme Court precedent required the court to evaluate the nature of governmental action, and not just the effects of the alleged taking.¹¹⁶ The court agreed that the ultimate determination rested upon the value of the government's action in the present case.¹¹⁷ It noted, however, that the government conceded it had ordered Casitas to construct the fish ladder and that the operation of the fish ladder required a physical diversion of water.¹¹⁸ The court observed that the regulation affected only a portion of Casitas' water right, but suggested that under a physical takings analysis any interference was sufficient to establish a taking.¹¹⁹

The United States argued that, because of *Tahoe-Sierra*, the *Penn Central* analysis applies to regulatory takings unless there has been a total deprivation of economic value in a property right.¹²⁰ Casitas disagreed, arguing that *Tahoe-Sierra* was inapplicable because Casitas involved a claim of physical taking of water rights.¹²¹ Furthermore, Casitas argued that *Tahoe-Sierra* did not mention or overrule any of the Supreme Court precedents concerning the taking of water rights.¹²² The court distinguished *Tahoe-Sierra* from the present case, reasoning that "[t]he water, and Casitas' right to use that water, is forever gone."¹²³ Thus, *Tahoe-Sierra* did not apply because, in that case, there was not an appropriation by the government and there was no permanent depriva-

115. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (discussing 16 U.S.C. § 1531(a)(2)-(3) (2006)). In addition, Casitas argued that *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), illustrated that the Supreme Court applied a physical takings analysis even where no physical occupation occurred. Brief of the Plaintiff-Appellant, *supra* note 11, at 28-29. In response, the United States argued that *Brown* was distinguishable from *Casitas* because the government did not require Casitas to divert water and *Brown* involved an actual diversion of private property for a third-party use. Brief of Appellee the United States, *supra* note 17, at 45, 56-57 (citing *Brown*, 538 U.S. at 217-18). In *Brown*, the law required that escrow deposits made to Limited Practice Officers be transferred to interest on lawyer trust accounts (IOLTA). *Brown*, 538 U.S. at 228. The interest earned was transferred to the Legal Foundation of Washington. *Id.* at 230. The claimants filed suit claiming that a Fifth Amendment taking had occurred. *Id.* at 228-29. The Court held that the proper analysis was a per se takings analysis rather than a regulatory takings analysis. *See id.* at 235. The Court reasoned that "the interest earned in the IOLTA accounts 'is the 'private property' of the owner of the principal.'" *Id.* Thus, the Court found that a taking occurred when the interest was transferred to a third party, the Legal Foundation of Washington. *Id.* The Court held, however, that the IOLTA program did not require just compensation. *Id.* at 240 (reasoning that proper application of the law did not cause pecuniary loss to the plaintiff).

116. Brief of Appellee the United States, *supra* note 17, at 57.

117. *Casitas*, 543 F.3d at 1290 (Fed. Cir. 2008). If the government action involved taking "actual possession and control" of the water, then the proper analysis is that of a physical taking. Brief of Appellee the United States, *supra* note 17, at 58 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951)). If the action was only a regulation that prohibited certain uses of property, then the proper analysis is that of a regulatory taking. *Id.* (citing *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958)).

118. *Casitas*, 543 F.3d at 1290 n.10, 1291-92; *see supra* note 26 and accompanying text.

119. *Id.* at 1292.

120. Brief of Appellee the United States, *supra* note 17, at 42 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303 (2002)).

121. Brief of the Plaintiff-Appellant, *supra* note 11, at 28 (citing *Tahoe-Sierra*, 535 U.S. 302).

122. *Id.*

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

tion of the right to use the land or diminution of the land's value.¹²⁴

Finally, the United States argued that there were no material facts that precluded summary judgment.¹²⁵ Casitas, however, claimed that it was an error for the trial court to grant summary judgment because an issue of material fact existed, namely who controlled the operations of the Project.¹²⁶ Casitas contended that if the BOR controlled the Project, then the diversion of water resulted in a "takeover," and thus, under the trial court's analysis, a physical taking occurred.¹²⁷ The court concluded that it did not matter whether the government actually diverted the water or whether the government simply required Casitas to do so.¹²⁸ Either way, a physical takings analysis is proper for governmental actions that result in a diversion of water.¹²⁹

B. Dissent

In a dissenting opinion, Judge Mayer reasoned that under California law, it is questionable whether Casitas even had a property right in the water.¹³⁰ Judge Mayer maintained that *Penn Central* was the correct analysis to apply in the current case.¹³¹ He also reasoned that there could be no physical taking, because no physical invasion or occupation could occur, and the government was not involved in any appropriation of private property.¹³² The dissent distinguished the trilogy of Supreme Court cases by stating that "[h]ere, the government did not invade, seize, convey, or convert Casitas' property to consumptive or proprietary use."¹³³ Judge Mayer also found it significant that the governmental regulation of Casitas' right to use the water was non-possessory in nature.¹³⁴ This fact is significant because *Penn Central*'s regulatory takings analysis applies to "non-possessory government activity."¹³⁵

The dissent also observed that there are multiple ways to supply a fish ladder with water.¹³⁶ A diversion of water occurs by either utilizing one method, which is the current mode of operation, or a second method, which is for Casitas to return some of the water it has diverted

124. *Id.* (citing *Tahoe-Sierra*, 535 U.S. 302).

125. Brief of Appellee the United States, *supra* note 17, at 58-59.

126. Brief of the Plaintiff-Appellant, *supra* note 11, at 32.

127. *Id.* at 34-35; *see supra* note 32 and accompanying text.

128. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1293 (Fed. Cir. 2008).

129. *Id.* at 1295.

130. *Id.* at 1297 (Mayer, J., dissenting) (reasoning that Casitas likely did not possess a property right due to the limited nature of a California water right).

131. *Id.* at 1298 (reasoning that "the relevant takings question for attendant administrative actions that restrict private property use ascertains the extent to which the government action interferes with the economic use of the property—a classic regulatory, not physical, takings problem.")

132. *Id.* at 1298-99.

133. *Id.* at 1300.

134. *Id.*

135. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

136. *Id.*

to the river at some point downstream.¹³⁷ Casitas utilized the former method, which resulted in the alleged taking, because it was presumably the “most economical way to comply with the ESA while still permitting Casitas to divert its maximum allowable allotment of water.”¹³⁸ Judge Mayer also reasoned that “[i]t is logically incongruent to analyze ESA-based land use restrictions as regulatory takings, and ESA-based water use restrictions as physical takings.”¹³⁹

V. COMMENTARY

The following commentary will examine the court’s analysis in reaching a conclusion that is likely to have far-reaching consequences upon the regulation of water rights. First, Section A of the commentary will discuss the court’s failure to determine whether a valid property right existed. Second, Section B will discuss the court’s failure to affirm the Court of Federal Claims’ application of *Tahoe-Sierra*. Section C will then apply the regulatory takings analysis that *Tahoe-Sierra* made clear is the required analysis for the restriction of property rights. Section D will discuss whether the conclusion reached by applying a regulatory takings analysis is consistent with the original understanding of the Takings Clause. Finally, Section E will discuss *Casitas*’ potential impact on other water rights takings claims.

A. *The Court Failed to Determine Whether a Valid Property Right Existed*

Before performing any takings analysis, a court must first decide whether a valid property right exists.¹⁴⁰ While the *Casitas* court noted that the government conceded there was a valid property right, it is important to understand exactly what the government was conceding. The government was only acknowledging that Casitas had a right to divert and use water.¹⁴¹ All water right holders possess these rights, and the government could not contend otherwise. But the government did not, indeed could not, concede that Casitas had a valid property right to use water in an unreasonable manner to the detriment of fish.¹⁴² California

137. *Id.*

138. *Id.* at 1301.

139. *Id.* The dissent also found it significant that it was Casitas, and not the government, who chose to consult with the NMFS. *Id.*

140. *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000); see *Casitas*, 543 F.3d at 1297 (Mayer, J., dissenting); see also Gray, *supra* note 54, at 3 (“The principle that a takings claimant must first establish the existence of a property right against the government is frequently overlooked, or misunderstood, both by courts and litigants.”).

141. *Casitas*, 543 F.3d at 1288 (“Specifically, the government has conceded that Casitas has a right both to divert 107,800 acre-feet of water and to use 28,500 acre-feet of such diverted water.”).

142. See CAL. WATER CODE § 100 (West 1971); Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States, *supra* note 27, at 10 (stating that the right to use water does not extend to harmful uses).

law requires that in allocating water for the state's highest beneficial uses—domestic uses and irrigation—the SWRCB must also consider other beneficial uses, including the preservation of fish when it is in the public's interest to do so.¹⁴³ Thus, it is clear that under California law, Casitas did not have an absolute property right.¹⁴⁴ Accordingly, so long as the government did not interfere with the right to divert and use water, it could restrict water use in the public interest without paying compensation.¹⁴⁵

Furthermore, while the court was correct that Casitas had rights to divert and use water, the court failed to determine whether Casitas had a right to a particular quantity of water per year. The license specifically provided that Casitas' right to divert was *not to exceed* 107,800 acre-feet of water and right to use was *not to exceed* 28,500 acre-feet of such diverted water.¹⁴⁶ In other words, while the license capped Casitas' permitted quantity on an annual basis, it did not guarantee Casitas a specific amount of water each year. Thus, there may not be a property interest in the amount of water that was required to operate the fish ladder.¹⁴⁷

Thus, the court erred in its interpretation of the concessions made by the government. Whether applying a physical or regulatory takings analysis, the court should have first analyzed whether a valid property right existed to use the water in an unreasonable manner.¹⁴⁸

143. § 1243 (West Supp. 2009).

144. See Gray, *supra* note 54, at 2 (noting the various doctrines and other concerns that limit water rights).

145. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (reasoning that a state does not have to compensate for the interference with a right if “the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with”); Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States, *supra* note 27, at 10 (stating that no interference with Casitas’ property right occurred when Casitas was required to divert less water). Regardless of which analysis is applied in *Casitas*, the government may use this “background principles defense.” Blumm, *supra* note 88, at 325-26 (stating that courts have applied this inquiry to both physical and regulatory takings cases).

146. License, *supra* note 15.

147. Whether Casitas is entitled to a precise amount is significant when calculating damages available to Casitas if the Court of Federal Claims determines that there has been a taking. See *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1297 n.17 (Fed. Cir. 2008). As stated by the court:

If the [Court of Federal Claims] determines that a taking occurred, it will be necessary for it to determine the amount of damages to which Casitas is entitled. The damages calculation may take into account the fact that Casitas’ license from the State of California allowed it to divert up to 107,800 acre-feet of water per year from the Ventura River and to put to beneficial use up to 28,500 acre-feet of the diverted water.

Id.

148. The court is likely to have authority on appeal to analyze whether a valid property right existed despite the government’s concession, because the existence of a “taking” is a question of law, based on fact, which is reviewed de novo. *Id.* at 1283 (citing *Stearns Co. v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005)). At the least, the Court of Federal Claims may consider the issue on remand. *Id.* at 1297 n.1 (Mayer, J., dissenting).

B. The Court of Appeals Failed to Affirm the Court of Federal Claims' Application of Tahoe-Sierra

Even if the court had correctly analyzed and determined that a valid property right existed, the court still failed to affirm the Court of Federal Claims' application of *Tahoe-Sierra* despite *Tahoe-Sierra's* "sharp distinction between physical and regulatory takings."¹⁴⁹ The court reasoned that *Tahoe-Sierra* "did not involve a claim of physical taking."¹⁵⁰ *Casitas*, however, did not specify whether it was alleging that a regulatory or physical taking had occurred.¹⁵¹ The Court of Appeals has applied a regulatory takings analysis even when the claimant has not specified what type of taking allegedly occurred.¹⁵² It follows that it is acceptable to apply the reasoning of *Tahoe-Sierra* in order to discern what type of analysis to use in the present case.¹⁵³

The *Casitas* court also attempted to distinguish *Tahoe-Sierra* because *Tahoe-Sierra* involved land and not water rights, and because the restriction involved did not cause the land to decrease in value or cause a physical change in the property.¹⁵⁴ One could imagine, however, that

149. *Id.* at 1296 (majority opinion) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002)).

150. *Id.* The *Tahoe-Sierra* Court made clear that a court should not apply cases involving physical takings as controlling precedent for regulatory takings claims, or, conversely, regulatory takings precedent to physical takings claims. *Tahoe-Sierra*, 535 U.S. at 323. When a non-specific takings claim is involved and it is arguable whether a physical or regulatory taking occurred, however, it would seem irrational not to apply the reasoning of both controlling physical and regulatory takings precedent in order to discern which type of taking actually occurred. *See id.* at 321-25 (examining both controlling physical and regulatory takings precedents before determining that the claim was a regulatory takings claim). Thereafter, the proper "evaluation of a claim" should be limited to the controlling precedent of the nature of the claim. *Id.* at 323.

151. *See Casitas*, 543 F.3d at 1282; Complaint for Breach of Contract and Just Compensation at 8, *Casitas Municipal Water District v. United States*, 72 Fed. Cl. 746 (2006) (No. 05-168L); *cf.* *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1342-43 (Fed. Cir. 2002) (advancing four different legal theories that a taking had occurred); *Seiber v. United States*, 364 F.3d 1356, 1361-62 (Fed. Cir. 2004) (same). The water district conceded that its takings claim would fail under a regulatory takings analysis only after the Court of Federal Claims determined that a regulatory takings analysis was appropriate in *Casitas*. Plaintiff's Status Report, *Casitas Municipal Water District v. United States*, 72 Fed. Cl. 746 (2006) (No. 05-168L).

152. *See Stearns Co.*, 396 F.3d at 1356-58 (applying both a regulatory takings and physical takings analysis to a non-specific takings claim arising from the use of mineral interests); *Washoe County v. United States*, 319 F.3d 1320, 1323, 1326-28 (Fed. Cir. 2003) (applying a physical takings analysis, but not applying a regulatory takings analysis simply because a private property right did not exist); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364-67 (Fed. Cir. 1999) (applying both a regulatory takings analysis and a physical takings analysis to a non-specific takings claim arising from a regulation of the use of wetlands).

153. *See Forest Props., Inc.*, 177 F.3d at 1364 ("[W]hether . . . the Fifth Amendment mandates the payment of just compensation, involves three inquiries: (A) whether the taking alleged was physical or regulatory . . .").

154. *Casitas*, 543 F.3d at 1296. The court also stated that "[t]he regulatory restriction merely maintained the status quo." *Id.* The installation of the fish ladder in *Casitas*, however, could be seen as "merely maintain[ing] the status quo." *See id.*; *United States' Combined Petition for Panel Rehearing and Rehearing En Banc*, *supra* note 35, at 7 (stating that the fish ladder required the same amount of instream flow as *Casitas* had been allowing to remain in the river for five years prior to the

value was lost on developments, property taxes, or rental income during the thirty-two months the developers sat idle while the moratorium was in place. Whatever purpose for which the land could have been used during those thirty-two months “is forever gone.”¹⁵⁵ The same is true of water, and thus, the attempt to distinguish between land and water takings appears to be unwarranted.

Finally, the *Casitas* court stated that it was inappropriate to apply *Tahoe-Sierra* because it “did not overrule, modify, or even mention the holdings of *International Paper*, *Dugan*, or *Gerlach*.”¹⁵⁶ A court of appeals, however, is only required to follow cases that are directly controlling.¹⁵⁷ The trilogy of Supreme Court cases relied upon by the court is distinguishable, and thus the cases are not directly controlling. The Supreme Court decided the trilogy of cases before the Court made the bright line distinction between physical and regulatory takings.¹⁵⁸ *Dugan* and *Gerlach* both involved the redistribution of diverted waters from private landowners to other private landowners,¹⁵⁹ which is clearly prohibited by Supreme Court takings jurisprudence.¹⁶⁰

The most similar case of the trilogy is *International Paper*. There, the Secretary of War was acting pursuant to a presidential order, which required the power company to leave all the water in a canal for war purposes.¹⁶¹ Thus, the power company ceased diversions of water to its lessee, International Paper Company.¹⁶² In *Casitas*, the court reasoned that the operation of the fish ladder caused water to cease flowing into the canal, effecting a diversion.¹⁶³ *Casitas* is still distinguishable, however, because in *International Paper* the government made a proprietary use of the water by providing a third-party company with water.¹⁶⁴ By

installation of the fish ladder).

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

156. *Id.*

157. Brief of Amici Curiae Tulare Lake Basin Water Storage District, Kern County Water Agency, Lost Hills Water District, and Wheeler Ridge-Maricopa Water Storage District in Support of Appellant Casitas Municipal Water District Supporting Reversal at 23, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153) (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (stating that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls . . .”).

158. Brief of Appellee the United States, *supra* note 17, at 49, n.14.

159. *Dugan v. Rank*, 372 U.S. 609, 610 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752 (1950).

160. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (stating that “it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”). *Dugan* is arguably more factually similar to *Casitas* in that it was only a partial taking of water rights. *Dugan*, 372 U.S. at 621. Nevertheless, the water taken was redistributed to other landowners, thus effectively transferring the water rights from *A* to *B*. *Gerlach Live Stock Co.*, 339 U.S. at 752.

161. *Int'l Paper Co. v. United States*, 282 U.S. 399, 405 (1931).

162. *Id.* at 405-06.

163. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1291 (Fed. Cir. 2008) (reasoning that “the closure of the [overshot] gate causes water that would have gone into the Casitas Reservoir via the Robles-Casitas Canal to be diverted into the fish ladder”).

164. *Int'l Paper Co.*, 282 U.S. at 405 (requiring the power company to distribute power to specific

contrast, *Casitas* did not involve the transfer of the water from one party to another, nor did the government redistribute the water or provide third parties with the water.¹⁶⁵ Instead, the government utilized water for the operation of the fish ladder in order to protect the steelhead trout.¹⁶⁶ The Federal Circuit has clearly noted this distinction in *Seiber v. United States*,¹⁶⁷ which held that the protection of species under the ESA “is *not* comparable to a government authorization to third parties to [utilize] property.”¹⁶⁸

A physical takings analysis is appropriate when there has been a physical invasion or a physical occupation of property.¹⁶⁹ Water, unlike land, cannot be physically invaded; therefore a physical takings analysis is only appropriate if there has been a physical occupation of the water.¹⁷⁰ A physical occupation occurs when “the government . . . destroys the owner’s right to possession, use, and disposal of the property.”¹⁷¹ Here, the water district only had the right to use water—a non-possessory property interest—which cannot be physically occupied by a mere restriction on use.¹⁷² Because there has been neither a physical invasion nor a physical occupation, the governmental action is regulatory in nature.

The *Allegetti* decision, which applied a regulatory takings analysis to a regulation of the right to use water, supports this conclusion.¹⁷³ As

companies).

165. See *Casitas*, 543 F.3d at 1298 (Mayer, J., dissenting).

166. *Id.* (stating that “the limitation imposed on the total quantity of water available for *Casitas*’ use is directly correlated to the quantity of water needed to remain in the Ventura River’s hydrologic cycle to preserve the endangered Southern California steelhead . . .”).

167. 364 F.3d 1356 (Fed. Cir. 2004). For a brief description of this case see *infra* note 173.

168. United States’ Combined Petition for Panel Rehearing and Rehearing En Banc, *supra* note 35, at 10 (citing *Seiber*, 364 F.3d at 1367) (emphasis added).

169. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982).

170. *Casitas*, 543 F.3d at 1298 (Mayer, J., dissenting) (stating that, “because *Casitas* possesses a usufructuary interest in the water and does not actually own the water molecules at issue, it is difficult to imagine how its property could be physically invaded or occupied”). As the Court of Appeals has noted on a previous occasion, “there are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property.” *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354 (Fed. Cir. 2002) (citing *Boise Cascade Corp. v. State ex rel. Or. State Bd. of Forestry*, 991 P.2d 563, 570 (Or. Ct. App. 1999)). For a brief description of this case see *infra* note 173. In *Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, the plaintiff filed suit against the Oregon State Board of Forestry for upholding the State Forester’s denial of a logging permit. 991 P.2d at 565. The Oregon Court of Appeals found that the plaintiffs did state a regulatory takings claim, but did not state a physical takings claim because a physical occupation did not occur. *Id.* at 570.

171. *Boise Cascade Corp.*, 296 F.3d at 1353.

172. See CAL. WATER CODE § 1001 (West 1971).

173. *Allegetti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1275 (2006) (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321-23 (2002); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 9-10 (1994)) (stating that “*Allegetti*’s permit on certain water use limitations is of a regulatory nature A government regulation that restricts certain private uses of a portion of an owner’s property does not constitute a categorical taking; *it is to be analyzed under regulatory takings jurisprudence.*” (emphasis added)). The United States briefed this argument, which the court completely ignored. Brief of Appellee the United States, *supra* note 17, at 47. The court only referenced *Allegetti* in

in *Allegretti*, the Biological Opinion issued for Casitas did not require a physical invasion or occupation of Casitas' property.¹⁷⁴ The Biological Opinion only required the use of water in order to fulfill the operating criteria for the fish ladder.¹⁷⁵ As in *Allegretti*, the Biological Opinion did not require a physical appropriation or invasion of Casitas' water right.¹⁷⁶ *Allegretti* is highly persuasive because it is a decision by a California court interpreting California water law.¹⁷⁷ Absent a decision by the Federal Circuit Court of Appeals or the California Supreme Court, *Allegretti* is most instructive.¹⁷⁸

noting that *Tulare* had been subject to criticism. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1295 n.16 (Fed. Cir. 2008). Even though *Allegretti* involved the regulation of groundwater, it is still persuasive by analogy. See Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States, *supra* note 27, at 22 (stating that “[a] regulatory requirement to leave water in the ground is directly analogous to a regulatory requirement to leave more water instream”); Brief of Appellee the United States, *supra* note 17, at 47. Furthermore, *Casitas* is also analogous to other cases that have held that the regulation of a natural resource does not constitute a physical taking. United States’ Combined Petition for Panel Rehearing and Rehearing En Banc, *supra* note 35, at 5 (citing *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004); *Boise Cascade Corp.*, 296 F.3d at 1339; *Forest Props., Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999)). In *Seiber*, the court found that no physical taking occurred when the government prohibited claimants from logging on their property due to the presence of endangered spotted owls. *Seiber*, 364 F.3d at 1366-67. The court recognized that a regulation of the use of a natural resource was different from transferring property from one owner to another. *Id.* at 1367 (distinguishing cases involving natural resources from *Brown*). The *Boise* court similarly found that no physical taking occurred despite a prohibition on logging on private land pursuant to the ESA, because the government merely restricted Boise’s right to make use of a natural resource. *Boise Cascade Corp.*, 296 F.3d at 1354-55. The *Forest* court also found that a physical taking had not occurred when the government prohibited a development company from filling in acres of wetland. *Forest Props., Inc.*, 177 F.3d at 1364. Likewise, *Casitas* is a “classic example of a regulatory takings claim,” because it did not involve a physical occupation or invasion. See *id.*; *supra* notes 170-173 and accompanying text. It was merely a governmental regulation of the right to make use of a natural resource. See *Boise Cascade Corp.*, 296 F.3d at 1355.

174. See *Allegretti & Co.*, 138 Cal. App. 4th at 1273. As discussed above, whether an encroachment could even occur, due to the nature of a water right, is questionable under California law. See CAL. WATER CODE § 1001 (West 1971); *supra* notes 169-172 and accompanying text.

175. See Brief of Appellee the United States, *supra* note 17, at 45.

176. See *supra* notes 170-173 and accompanying text.

177. Because the California Supreme Court has not yet considered this issue, the Court of Appeals for the Federal Circuit may look to the *Allegretti* decision in order to determine how the California Supreme Court might decide the issue. See *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1271 (2006), *rev. denied*, No. D045156, 2006 Cal. LEXIS 9142 (Cal. July 26, 2006); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). As stated by the Court in *West*:

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is *not to be disregarded by a federal court* unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West, 311 U.S. at 237 (emphasis added).

178. In recent years, the court had the opportunity to hear another case regarding the Fifth Amendment Takings Clause and water rights. *Washoe County v. United States*, 319 F.3d 1320 (Fed. Cir. 2003). *Washoe County* involved the denial of a permit to establish a pipeline across federal lands in order to divert water. *Id.* at 1323. The court acknowledged that a physical takings analysis has been applied by other courts when right holders received less water or when the government physically diverted water from the right holder. *Id.* at 1326 (citing *Dugan v. Rank*, 327 U.S. 609, 625-26 (1963); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 320 (2001)). But see *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 540 (2005); *Allegretti & Co.*, 138 Cal. App. 4th at 1273. The *Washoe County* court, however, did not find that a physical taking had occurred because there was not a physical diversion and the plaintiffs still had access to some of their water rights. *Washoe County*, 319 F.3d at 1327. Furthermore, the court found that a regulatory taking had not occurred because a private property right did not exist. *Id.*

Because the Supreme Court precedents are not directly controlling, as noted by *Allegretti* and the Court of Federal Claims, it was permissible for the Court of Federal Claims to apply other decisions, like *Tahoe-Sierra*, that seem to have questioned the reasoning used by the trilogy.¹⁷⁹ Thus, the Court of Appeals erred in failing to affirm the Court of Federal Claims' application of *Tahoe-Sierra*.

C. Application of Tahoe-Sierra

Tahoe-Sierra reinforced *Penn Central*'s use of "ad hoc, factual inquiries" to analyze restrictions on the right to use property.¹⁸⁰ In *Tahoe-Sierra*, the Supreme Court refused to look only at distinct segments of property to determine whether there had been a taking; instead, it reasoned that a takings analysis required an examination of the "entire parcel."¹⁸¹ Furthermore, only when the entire property right is permanently deprived is there a taking.¹⁸²

Here, the license caps the "entire parcel" of Casitas' permitted quantity at a combined total of 136,300 acre-feet of water per year.¹⁸³ As of May 2006, the amount allegedly taken in order to supply the fish ladder was only 1,349 acre-feet of water, approximately one percent of Casitas' permitted quantity.¹⁸⁴ While the one percent restricted is permanently unavailable for diversion and potential distribution to Casitas' customers, ninety-nine percent of the parcel is still available for diversion and distribution.¹⁸⁵ In short, there is not a permanent deprivation of the whole. Clearly, as Casitas conceded, had the court determined that a regulatory takings analysis applied in the wake of *Tahoe-Sierra*, the takings claim would likely fail on remand.¹⁸⁶

179. See *supra* note 157 and accompanying text.

180. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002); see *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 124 (1978).

181. *Tahoe-Sierra*, 535 U.S. at 331. In *Tahoe-Sierra*, the plaintiffs tried to establish a takings claim based on the fact that for thirty-two months the moratorium deprived them of all use of their land. *Id.* The court rejected this argument, because the argument ignored *Penn Central*'s requirement to look at the "parcel as a whole" and a temporary deprivation did not constitute a taking of the whole. *Id.*

182. *Id.* at 332.

183. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288 (Fed. Cir. 2008). Casitas, however, is not guaranteed a specific amount of water each year. See *supra* notes 146-147 and accompanying text.

184. Brief of Appellee the United States, *supra* note 17, at 14; Brief of Plaintiff-Appellant, *supra* note 11, at 7. Furthermore, it is disputed whether the installation of the fish ladder actually reduced the amount of instream flow that Casitas had been receiving prior to the installation. United States' Combined Petition for Panel Rehearing and Rehearing En Banc, *supra* note 35, at 7.

185. One could also argue that enlistment of a species under the ESA is not permanent, and thus, any alleged reduction of the amount of water diverted is not permanent, but only temporary until the removal of the steelhead trout from ESA protection. Even after removal from ESA protection, however, the steelhead trout may need the same amount of water to avoid reenlistment under the ESA.

186. *Casitas*, 543 F.3d at 1298 (Mayer, J., dissenting); Brief of the Plaintiff-Appellant, *supra* note 11, at 7.

D. A Potential Finding That No Taking Occurred Is Consistent with the Original Understanding of the Fifth Amendment

Applying a regulatory takings analysis, Casitas' takings claim would likely fail on remand. One may question whether this result is consistent with the purpose of the Takings Clause, because the plain meaning of the Fifth Amendment is clear that all persons who benefit from the use of the private property, and not just those owning the property, should bear the cost.¹⁸⁷

On one hand, the finding that a compensable taking did not occur seems unjust. According to Casitas' water expert, the value of one acre-foot of water is \$23,500.¹⁸⁸ Assuming arguendo that the water district loses 3,200 acre-feet of water each year due to the installation of the fish ladder, this would result in an annual loss of \$75.2 million. According to Casitas' counsel, the appropriation of water to the fish ladder has caused water shortages, resulting in waiting lists for new customers and water rationing.¹⁸⁹ On the other hand, even Justice Holmes, who found a taking when "a regulation goes too far," realized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹⁹⁰ If the government had to pay for every gallon of water it restricts, the government could not afford to regulate water resources.¹⁹¹

Concentrating on the amount of money that the government would be required to expend for the regulation is shortsighted because it focuses solely upon the effects of the regulation. The effects of the action are not the only factor important in a regulatory takings analysis, which is the proper analysis for this case. Amici seem to miss this point by focusing on the *potential effects* of the regulation of water use on the affected party as opposed to the actual governmental activity.¹⁹² By concentrating on the fact that Casitas' water is "forever gone," the court also seems to focus on the potential effects of the governmental ac-

187. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

188. E-mail from Roger Marzulla, Attorney, Marzulla Law, to Jennifer N. Horchem, Student, Washburn University School of Law (Nov. 13, 2008, 15:40 CST) (on file with author). Marzulla is Casitas' counsel of record.

189. *Id.* *Contra infra* note 194.

190. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

191. Zeke Barlow, *Casitas Suit Could Set Major Precedent*, VENTURA COUNTY STAR, Apr. 25, 2007, <http://www.venturacountystar.com/news/2007/apr/25/casitas-suit-could-set-major-precedent/> ("[Casitas] could potentially convert every regulation of water use into an unconstitutional taking and basically freeze the government in its tracks." (quoting John Echeverria, Natural Resources Defense Council)).

192. Brief Amici Curiae of California Building Industry Ass'n, Building Industry Legal Defense Foundation and Home Builders Ass'n of Northern California in Support of Appellant Casitas Municipal Water District Supporting Reversal at 3, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153) (stating that "[t]his water *could have* supplied over 6,000 single family residences per year." (emphasis added)). In *Casitas*, the court seemingly agreed that the "focus should primarily be on the character of the government action" *Casitas*, 543 F.3d at 1290; see also notes 116-117 and accompanying text.

tion.¹⁹³ Currently, there is no evidence indicating that the water district is unable to fulfill its *current* water contracts, which should be the court's focus if it gives any significance to the effects of the governmental actions.¹⁹⁴ The Supreme Court has made clear that the loss of future profits alone is insufficient to establish a takings claim.¹⁹⁵ Thus, the court's reliance solely on arguments that the regulation will affect Casitas' ability to turn a profit on *future* water contracts is not a sufficient factor to justify applying a physical takings analysis.

Although the ESA authorizes the purchase of water rights to implement species conservation, this is not the only method, or indeed the most important method, of enforcing the provisions of the ESA.¹⁹⁶ Unlike numerous other acts that affect water rights, the ESA does not prohibit the interference with or abrogation of any existing water rights.¹⁹⁷ The absence of this language may indicate that Congress recognized that some rights, if they exist to begin with, may need to be restricted due to enforcement of the ESA.

Finally, a finding that a taking did not occur is consistent with the original understanding of James Madison, drafter of the Takings

193. *Casitas*, 543 F.3d at 1296. Focusing on the potential effects of the governmental action is also indicative that the proper analytical framework is that of a regulatory taking. See *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 124 (1978) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)) (stating that one of the significant factors for analyzing regulatory takings is the economic impact of the regulation).

194. Brief of Appellee the United States, *supra* note 17, at 14 (stating that Casitas' customers have not experienced any actual water shortages). As observed by Alan Sanders, Ventura County Conservation Chair, Los Padres Chapter of the Sierra Club:

[I]f Casitas diverted no water from the Ventura River at all, it could still provide full service to all of its customers for more than two decades, even during a severe drought. Casitas has even sometimes stopped diversions from the Ventura in the recent past because its main reservoir was so full.

Alan Sanders, Op-Ed., *Feds' Casitas Appeal for Steelhead Has Local Support*, VENTURA COUNTY STAR, Dec. 28, 2008, <http://www.venturacountystar.com/news/2008/dec/28/feds-casitas-appeal-for-steelhead-has-local/>.

195. *Andrus v. Allard*, 444 U.S. 51, 66 (1979); see *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1279-80 (2006) (refusing to compensate for "Allegretti's claim of loss of anticipated profits or gain [because] it 'demonstrate[s] no more than a possible restriction upon more economic uses of its property'" (applying *Terminal Plaza Corp. v. City and County of S.F.*, 177 Cal. App. 3d 892, 912 (1986))).

196. 16 U.S.C. §§ 1534(a)(2), 1535(a) (2006); see *supra* notes 45-46 and accompanying text.

197. *Cf.* Federal Power Act, 16 U.S.C. § 821 (2006) (stating that "[n]othing . . . in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein"); Clean Water Act, 33 U.S.C. § 1251(g) (2000) (stating "that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State"); Safe Drinking Water Act, 42 U.S.C. § 300h-6(j) (2000) (stating that "[n]othing under this section shall be construed to amend, supersede or abrogate rights to quantities of water which have been established by . . . State water laws . . ."); *id.* § 300h-7(j) (2000) (stating that "[n]othing in this section shall authorize or require any department, agency, or other instrumentality of the Federal Government . . . to apportion, allocate or otherwise regulate the withdrawal or beneficial use of ground or surface waters, so as to abrogate or modify any existing rights to water established pursuant to State . . . law . . ."); Reclamation Act, 43 U.S.C. § 383 (2000) (stating that "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . .").

Clause.¹⁹⁸ Madison may have viewed the preservation of fish as being more important to river dams.¹⁹⁹ Six years prior to the ratification of the Takings Clause, Madison introduced, in the Virginia Assembly, The Act of 1785, An Act Concerning Mill-Dams and Other Obstructions of Water Courses.²⁰⁰ The Act provided that the public interest in the passage of fish was more important than the need for an operational mill.²⁰¹ While Madison believed the taking of land for federal highways required compensation, the Act did not compensate those who suffered economic loss because of the Act's requirements.²⁰² Thus, some suggest that Madison would not have viewed the regulation of water rights for the preservation of fish as a compensable taking.²⁰³ It follows that applying a regulatory takings analysis to regulations of the right to use water is consistent with Madison's vision for the Fifth Amendment Takings Clause, even if that analysis results in *Casitas*' claim likely failing on remand.

E. Casitas' Potential Impact on Other Water Rights Takings Claims

The potential of *Casitas*' takings claim failing on remand is consistent with the Fifth Amendment and necessary to regulate water resources in times of water scarcity. The *Casitas* decision may have far-reaching consequences for states that authorize regulation of water resources. As illustrated by the introductory hypothetical, the Kansas Groundwater Management Act allows the Chief Engineer of the Division of Water Resources to regulate water use in order to mitigate excessive rates of groundwater level decline.²⁰⁴ If the State is subject to litigation each time the Chief Engineer tries to regulate the use of groundwater and require that some water remain in the ground, the State could hardly afford to regulate water use.²⁰⁵ The consequences of such an outcome would have a harmful impact on an already depleted aquifer.²⁰⁶ Due to the increasing cost of water and demand for its use,

198. See generally Hart, *supra* note 39.

199. *Id.* at 291 (stating that "[d]estruction 'not only of individuals, but of entire species,' Madison insisted, was 'forbidden . . . by the principles and laws which operate in various departments of her [that is, nature's] economy'" (quoting James Madison, *Address to the Agricultural Society of Albemarle, Virginia*, in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 68 (1865)) (alterations in original)).

200. *Id.* at 299, 318 (citing JOURNAL OF HOUSE OF DELEGATES OF VIRGINIA [Oct. 1785-Jan. 1786] 97 (White ed., 1827)).

201. *Id.* at 301 (citing Act of Oct. 1785, 1785 Va. Acts ch. LXXXII). The Act did not allow construction of new mills unless the mills allowed for the passage of fish. *Id.* In addition, repair of existing mills could not occur unless the mill owners reexamined fish passage requirements. *Id.* Thus, the Act rendered mill owners' operations economically impractical. *Id.* at 301-02.

202. *Id.* at 306.

203. *Id.* at 318.

204. KAN. STAT. ANN. § 82a-1038 (Supp. 2008).

205. See *supra* note 191 and accompanying text.

206. Pore, *supra* note 2 (stating that global warming will only intensify the current status of the aquifer, which is already completely exhausted in some areas).

no government could afford to regulate water use if the courts continue to perform a physical takings analysis when the regulation affects only part of the right to use water. Consequently, it is in society's best interest to apply a regulatory takings analysis to partial restrictions on water use to preserve the environment and existing water rights.

VI. CONCLUSION

In finding that a physical takings analysis was appropriate for partial restrictions on the right to use water, the *Casitas* court failed to determine whether a valid property right even existed. Moreover, it failed to distinguish controlling Supreme Court precedents, which established that a water right may be taken within the meaning of the Fifth Amendment. Had the court appropriately distinguished those cases, it would have more likely affirmed the trial court's application of *Tahoe-Sierra*, which requires a *regulatory takings* analysis—rather than a physical takings analysis—for partial restrictions on the use of property. A ruling that no taking occurred in *Casitas* would have been not only consistent with the original understanding of the Fifth Amendment, but also necessary to the effective regulation of water rights.

Water scarcity is not a concern of the past or the future—it is the reality of today. Although the impact of the *Casitas* decision is not yet apparent, it is likely that other courts will follow suit and use a physical takings analysis for partial restrictions on the use of ground and surface water. Due to the expense of litigation, this unfavorable outcome may prevent states from regulating the use of water. For states that are already experiencing a decline of water resources, *Casitas* could threaten the continued existence of their water supply.