FIFTH AMENDMENT TAKING CLAIMS ARISING FROM RESTRICTION ON THE USE AND DIVERSION OF SURFACE WATER

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INTRODUCTION

The United States' long involvement in the development and management of California's water system presents innumerable practical and legal challenges. Scarce water resources necessitate difficult water allocation decisions, often pitting environmental needs against agricultural needs. As a multi-year drought continues, the United States has seen a growing number of legal challenges to its water allocation decisions in federal district courts by all impacted interests, including environmental groups, agricultural groups, water districts, and the State of California. These same management decisions have also resulted in litigation in the Court of Federal Claims, as water users argue that federal restrictions on the use and diversion of surface water have taken their property in violation of the Fifth Amendment to the United States Constitution.

In Part I, we begin our consideration of takings cases involving alleged restrictions on the use or diversion of water (which we will term "water taking cases") by discussing the Bureau of Reclamation's management of water through the federal Central Valley Project ("CVP")—the origin of several such cases. The competing demands for a limited and valuable water resource complicate the necessary allocation decisions, prompting numerous lawsuits, including Fifth Amendment takings claims. In Part II, we discuss the three primary water taking cases raised in recent years in the Court of Federal Claims—*Tulare*, *Casitas*, and *Klamath*. In Part III, we outline several defenses raised in these claims, discussing the theoretical background for these defenses and how those theories have been litigated in recent cases. We conclude with a brief discussion of the future of water taking cases.

I. THE CENTRAL VALLEY PROJECT

The United States' involvement in California water issues begins with its management of the Central Valley Project, a massive federal water

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project that spans nearly the entire length of California.[1] The CVP is designed to transport water from northern California to the arid lands in the southern part of the state.

The CVP "was originally conceived as a [s]tate project to protect [California's] Central Valley from . . . water shortages and devastating floods."[2] When the Great Depression in the 1930s dried up state funding, the United States accomplished much of the necessary construction using federal funds.[3] Work began on the CVP in 1937, and water was first delivered in 1940.[4] Various dams, pumps, and conduits were added over the years, and the CVP now includes twenty dams and reservoirs, eleven power plants, and 500 miles of major canals.[5]

The CVP manages an average of nine million acre-feet of water annually, and delivers, on an annual average, seven million acre-feet of water for agricultural, urban, and wildlife use.[6] Additional management challenges arise because the Bureau of Reclamation ("Reclamation") operates the CVP in concert with the State Water Project, a parallel collection of dams, pumps, and conduits.[7] The State of California

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1. For a map of the CVP, see *Project Details-Central Valley Project*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/projects/Project.jsp?proj_Name=Central+Valley+Project (last updated Mar. 15, 2013) [hereinafter *CVP Project Details*]. The CVP is one of several federal water projects in the United States. *See* Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 509 (Fed. Cl. 2005) (describing the Klamath Reclamation Project); *see also Bureau of Reclamation-Projects*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/projects/projects.jsp (last updated Jan. 24, 2008) (listing over 100 federal water projects throughout the United States). We focus here on the CVP due to the several cases stemming from the federal government's management of that project. *See, e.g.*, Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021, 1023 (9th Cir. 2006) (describing a dispute that arose over the Bureau of Reclamation's management of the CVP); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (Fed. Cl. 2001) (noting that the CVP was the focus of a water rights dispute between California water users and the United States).

2. *The Central Valley Project*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/mp/cvp/ (last updated Jan. 3, 2014) [hereinafter *The CVP*].

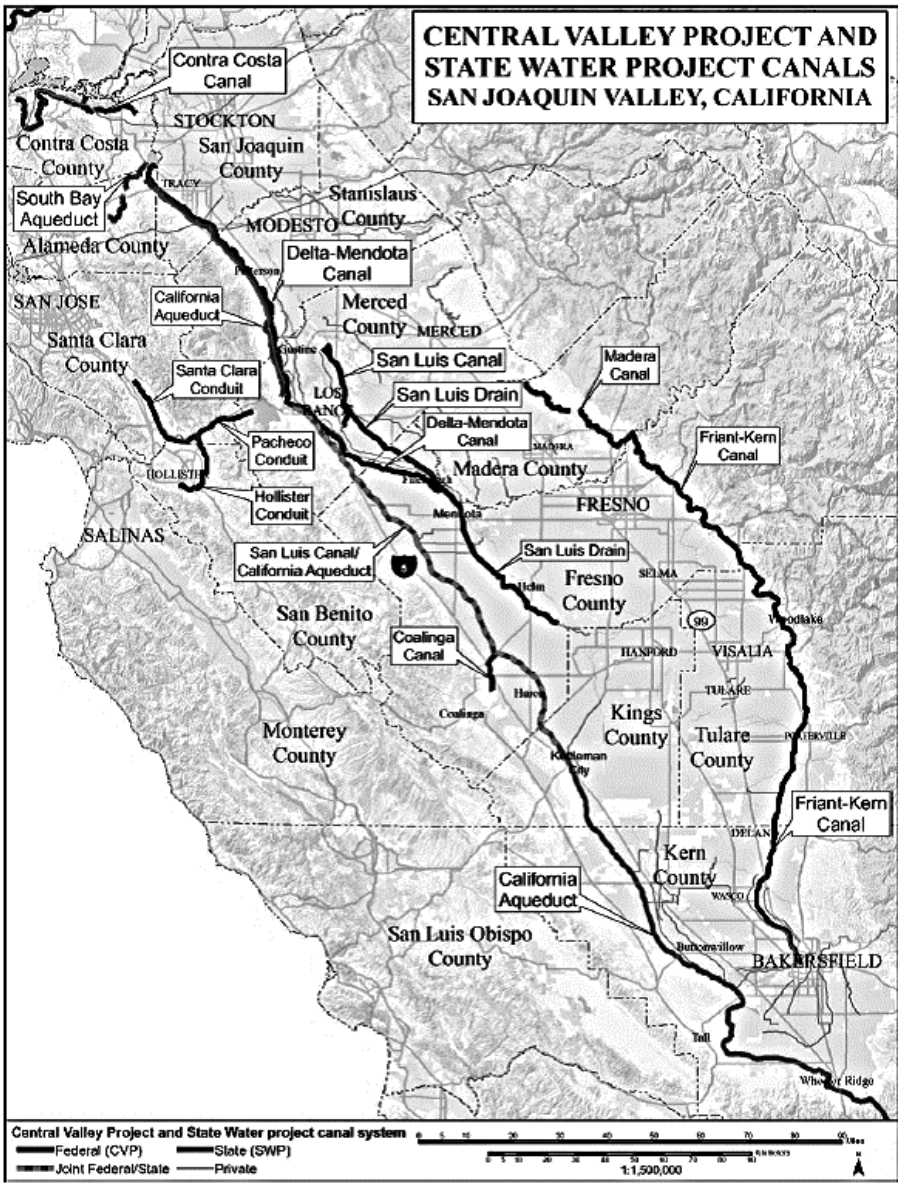
3. *Id.*

4. *Id.*

5. *CVP Project Details*, *supra* note 1. The most recent addition to the CVP, the New Melones Dam, was completed in 1979. *See The CVP*, *supra* note 2 ("The final dam, New Melones, was completed in 1979.").

6. *CVP Project Details*, *supra* note 1.

7. *See, e.g.*, *id.* ("Some CVP facilities (i.e., the San Luis Unit) were developed in coordination with the California State Water Project (SWP). Both the CVP and the SWP use the San Luis Reservoir, O'Neill Forebay, and more than 100 miles of the California Aqueduct and its related pumping and generating facilities.").



Source: CSU Stanislaus, Endangered Species Recovery Program

constructed the State Water Project, and it is managed by California's Department of Water Resources.[8] As CVP and State Water Project water moves across the state, it sustains a vast number of fish species that depend on the water for their survival, and farmers, who depend on the water for their livelihood.[9]

Congress's enactment of the Central Valley Project Improvement Act ("CVPIA") in 1992 greatly complicated Reclamation's management decisions for the CVP.[10] The CVPIA amended the CVP's authorization by adding "fish and wildlife mitigation, protection and restoration" and "fish and wildlife enhancement" to the list of authorized purposes.[11] The CVPIA includes the ambitious goal of developing and implementing a program to double the number of anadromous fish in Central Valley rivers and streams, and sustaining those numbers on a long-term basis.[12] The CVPIA authorizes and requires Reclamation to dedicate 800,000 acre-feet of CVP yield annually for fish purposes.[13]

Although Reclamation is tasked with management of the CVP, its operation of the CVP is further complicated by the need to comply with the Endangered Species Act ("ESA"),[14] a statute designed "to halt and reverse the trend toward species extinction, whatever the cost."[15] Under the ESA, federal agencies like Reclamation must consult with the secretary of the interior or commerce to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."[16] Federal wildlife agencies—the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS")—facilitate implementation of the ESA by issuing biological opinions, which, if adopted by Reclamation, may restrict Reclamation's CVP-related management decisions.

To address agricultural needs (as well as municipal and industrial needs), Reclamation, like the California Department of Water Resources in

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8. *California State Water Project Overview*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/swp/ (last visited Apr. 11, 2015); *see also* Act of Oct. 27, 1986, Pub. L. No. 99-546, 100 Stat. 3050 (explaining the agreement between the United States and the State of California for coordinated operation of the CVP and the State Water Project).

9. *The CVP*, *supra* note 2.

10. Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3406, 106 Stat. 4607 (1992).

11. *Id.* § 3406(a).

12. *Id.* § 3406(b)(1).

13. *Id.* § 3406(b)(1)(B).

14. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

15. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

16. 16 U.S.C. § 1536(a)(2) (1994).

regard to the State Water Project, contracts with various water districts.[17] At least with respect to Reclamation, the terms of the water contracts, including shortage provisions, differ. Currently, there are approximately 250 water service contracts for the CVP.[18]

Although the CVP is a federal project, its operation is impacted by federal and state law. In general, federal law governs construction of CVP facilities and ongoing operations.[19] But California state law matters too because federal law requires the United States to comply with state laws relating to the control, appropriation, uses and distribution of water unless the state law in question is inconsistent with clear congressional directives.[20]

The Ninth Circuit Court of Appeals has accurately described Reclamation's operation of the CVP as "an extremely difficult task: to operate the country's largest federal water management project in a manner so as to meet the Bureau's many obligations."[21] Balancing of its obligations requires Reclamation to make difficult allocation decisions, which rarely leaves all interested parties satisfied.

II. RECENT TAKING CASES ARISING FROM WATER RESTRICTIONS

Several recent cases have raised water taking claims stemming from Reclamation's management of the CVP. We discuss here how these cases arose and were resolved. In Part III, we discuss the several defenses raised in these cases.

A. Tulare Lake Basin Water Storage District v. United States

Tulare Lake Basin Water Storage District v. United States arose when the NMFS of the Department of Commerce, as required by the ESA, initiated discussions with Reclamation and California's Department of Water Resources to determine the impact of CVP and State Water Project

17. *See* Eric A. Stene, *The Central Valley Project*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/history/cvpintro.html (last visited Apr. 11, 2015) ("[During and after the 1960s and 1970s,] Reclamation drew up contracts for releasing the surplus water for irrigation because COE specialized . . . . [M]ost contracts were with water districts . . . .").

18. *Welcome to the CVP Cost Allocation Study Website*, U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/mp/cvp/cvp-cas/ (last updated Jan. 22, 2015).

19. *See* Defendant's Pretrial Memorandum of Contention of Fact and Law at 4, 8–10, Stockton E. Water Dist. v. United States, No. 04-541 L (Fed. Cl. Nov. 10, 2006), ECF No. 122.

20. California v. United States, 438 U.S. 645, 678 (1978).

21. Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021, 1027 (9th Cir. 2006). As the Ninth Circuit has explained, Congress recognized the difficulties presented in operating the CVP and granted Reclamation "considerable discretion in determining how to meet those obligations." *Id.*

operations on winter-run Chinook salmon.[22] In 1992, the NMFS issued a biological opinion concluding that the proposed operation of the State Water Project and CVP was likely to jeopardize the continued existence of this endangered salmon population.[23] The biological opinion included a reasonable and prudent alternative that would protect the fish by restricting the time and manner of pumping water.[24]

In 1993, the USFWS issued a biological opinion that also concluded that the proposed operation of the State Water Project and CVP was likely to jeopardize the continued existence of the endangered delta smelt.[25] The USFWS's reasonable and prudent alternative also restricted the time and manner in which pumping could occur.[26] Reclamation adopted and implemented the so-called jeopardy opinions and restricted pumping operations.

The *Tulare* plaintiffs, four California water agencies and several water users within the water agencies, received water pursuant to State Water Project contracts.[27] Due to the coordinated federal and state operation of the State Water Project and CVP, the State's actions are governed, in part, by the ESA. Upon Reclamation's implementation of the reasonable and prudent alternative, the *Tulare* plaintiffs sued on the ground that the restrictions "deprived Tulare Lake Basin [Water Storage District] of at least 9,770 acre-feet of water in 1992; at least 26,000 acre-feet of water in 1993, and at least 23,050 acre-feet of water in 1994. Kern County Water Agency [allegedly] lost a minimum of 319,420 acre-feet over that same period."[28]

The Court of Federal Claims decided that the reduction in water service resulting from pumping restrictions set forth in a biological opinion issued under the ESA constituted a taking of the contractors' property.[29] The case was subsequently settled without any appeal.[30]

B. Casitas Municipal Water District v. United States

In *Casitas Municipal Water District v. United States*, Casitas Municipal Water District argued that Reclamation violated the Fifth

22. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 315 (Fed. Cl. 2001).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 316.
27. *Id.* at 315.
28. *Id.* at 316.
29. *Id.*
30. Settlement Agreement at 1–3, *Tulare Lake Basin Water Storage Dist.*, 49 Fed. Cl. 313 (No. 98-101L), 2004 WL 3728318.

Amendment when the NMFS issued a biological opinion pursuant to the ESA. Plaintiff alleged that the biological opinion required it to construct and operate a fish ladder at a diversion dam in the Ventura River in order to protect endangered Southern California steelhead.[31] The District claimed that the biological opinion mandated that water be diverted through the fish ladder, which physically appropriated the District's water that would have otherwise been stored at Lake Casitas.[32]

The case raised numerous complex issues, and the United States raised several defenses, including that the biological opinion did not require the District to build a fish ladder (much less require the District to build the particular ladder design that was eventually constructed on the diversion dam); that the District had no right to divert and use water in a manner that harmed the Steelhead; and that the District's claim was not ripe because implementation of the biological opinion had not impaired the District's ability to beneficially use all the water it could use.[33] After trial, the Court of Federal Claims rejected the government's state background principles arguments but concluded that the District's claim was not ripe.[34] The Federal Circuit affirmed the dismissal on ripeness grounds.[35]

C. Klamath Irrigation District v. United States

Klamath Irrigation District v. United States is currently pending in the Court of Federal Claims.[36] The federal Klamath Reclamation Project provides water to approximately 240,000 acres of irrigable land, threatened and endangered fish species, tribal interests, as well as several wildlife refuges.[37] Water is stored in the Upper Klamath Lake, a relatively shallow reservoir, and regulated flow passes through Klamath River.[38]

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31. *See* Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 448–49 (Fed. Cl. 2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013) (explaining that in a 2003 biological opinion, NMFS approved Casitas's plan to construct and operate a fish ladder to protect Southern California steelhead, and that Casitas subsequently opened the fish ladder in 2004).

32. *See id.* at 448–49, 451 (explaining that NMFS's 2003 biological opinion set forth flow requirements to facilitate fish passage through the ladder to upstream spawning grounds, which reduced the amount of water Casitas had previously been able to divert and store pursuant to their existing state license).

33. *Id.* at 451, 471, 474–75.

34. *Id.* at 461, 472.

35. Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1360 (Fed. Cir. 2013).

36. *See* Docket Report, Klamath Irrigation Dist. v. United States, No. 1:01-cv-00591 (Fed. Cl.).

37. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 509 (Fed. Cl. 2005).

38. *Id*.

The Bureau of Reclamation has contracts for delivery of Klamath Project water with several irrigation districts.[39] The contracts have different shortage provisions. Eight of the contracts state that the districts agreed to hold the United States harmless on "'account of drought or other causes.'"[40] Most of the other contracts provide that the "'United States shall not be liable for failure to supply water under this contract caused by . . . unusual drought.'"[41]

Between April and September 2001, Upper Klamath Lake received the smallest amount of inflow on record, and 2001 was classified as a critically dry year.[42] In response to Reclamation's biological assessment of Klamath Project's operations on the coho salmon (which are dependent upon stream flows and water levels in the Klamath River downstream of the project) and the Lost River and shortnose suckers (which are dependent upon water levels in Upper Klamath Lake), NMFS and USFWS prepared biological opinions as required by the ESA.[43] The two biological opinions concluded that the Klamath Project's operations in 2001 would threaten the continued survival of the coho salmon and the suckers.[44] The biological opinions included reasonable and prudent alternatives, the implementation of which resulted in no deliveries of water for irrigation from Upper Klamath Lake during the early part of the 2001 irrigation season, and only limited deliveries of water later in the year.[45]

Several agricultural landowners and drainage and irrigation districts sued for a taking of their claimed water rights in 2001.[46] The individual landowners alleged that they have water rights appurtenant to their land based on a homestead patent and under state law, separate and apart from any rights to receive Klamath Project water that may derive from the contracts between the irrigation districts and the United States.[47] The Court of Federal Claims dismissed the *Klamath* Plaintiffs' takings claims, concluding that Plaintiffs' property right was contractual, and the proper

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39. *Id.* at 511.

40. *Id.*

41. *Id.* (The Court of Federal Claims provided a complete listing of the contracts' shortage provisions in its decision.); *Id.* at 540–41.

42. *Id.* at 513.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 513–14. The individual plaintiffs have brought these claims on their own behalf and on behalf of a proposed class of approximately 1,400 landowners who allegedly should have received irrigation water from Upper Klamath Lake in 2001. The plaintiffs' renewed motion for class certification is presently pending before the Court of Federal Claims.

47. *Id.* at 512.

remedy lay in breach of contract claims, not takings claims.[48] On appeal, the Federal Circuit certified certain questions to the Oregon Supreme Court about the nature of Plaintiffs' property rights.[49] The Oregon Supreme Court answered that Plaintiffs might have some extra-contractual property rights but did not resolve the question.[50] Upon receipt of the Oregon Supreme Court's answers, the Federal Circuit vacated the judgment of the Court of Federal Claims and remanded the case for further proceedings, with instructions to reconsider, *inter alia*, the taking claims in light of the Oregon Supreme Court's responses.[51]

III. ISSUES AND DEFENSES THAT MAY ARISE

Taking cases based on alleged restrictions on the use and diversion of water often present difficult legal and practical challenges. Most fundamentally, the cases often raise questions about whether they can be treated as takings claims at all. If a case can be treated as a claimed taking, the parties often dispute whether the case should be analyzed as a physical or regulatory claim. Once a court resolves those preliminary questions, it must consider the merits of a claim that involves an unusual, and limited, property right under state law. Resolution of the merits may require consideration of extensive documentation and complex expert analyses. We identify several of the issues that have arisen in these cases and how the parties have litigated those issues below.

A. Breach of Contract Claim Cannot Be Brought as a Takings Claim

1. The Theory Behind the Argument

When a claim is based on a restriction of a purely contractual right, the United States may argue that the claim must be analyzed as a claimed breach of contract, not a violation of the Fifth Amendment.[52] As the Federal Circuit has stated, no taking occurs when "expectations under a contract are merely frustrated by lawful government action not directed against the takings claimant."[53] This reasoning is particularly compelling when the claimant's contractual right to water is limited by an express shortage provision.

48. *Id.* at 540.
49. Klamath Irrigation Dist. v. United States, 635 F.3d 505, 514–15 (Fed. Cir. 2011).
50. *Id.* at 515.
51. *Id.* at 507.
52. 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1582 (Fed. Cir. 1995).
53. *Id.* at 1581.

The United States Supreme Court has stated that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment."[54] But the Federal Circuit "has cautioned against commingling takings compensation and contract damages."[55] Efforts to frame cases as contractual claims, rather than takings claims, have succeeded in other contexts. In *Omnia Commercial Co. v. United States*, for example, the plaintiff had a contract with Allegheny Steel Company that allowed Omnia to purchase quantities of steel plate at below-market prices.[56] When the United States requisitioned the steel company's entire production of steel plate, Omnia sued for a taking of its right of priority to the steel plate.[57] The Supreme Court denied Omnia's claim on the ground that the Fifth Amendment "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[58]

2. The Argument in Action

The *Klamath* case is the most recent to discuss this argument. In that case, the United States argued that certain claims—where the plaintiffs' only right stemmed from a contract between the plaintiff and the United States (including those claims where the plaintiffs were allegedly third party beneficiaries of contracts with the United States)—can only be analyzed as breach of contract claims.[59] The Court of Federal Claims agreed and dismissed those takings claims:

> [T]he United States may be viewed as acting in its proprietary capacity in entering into the water contracts in question, and it appears that the affected plaintiffs retain the full range of remedies with which to vindicate their contract rights. It follows that while the contracts between the districts and the United States . . . gave rise to private property rights within the meaning

54. Lynch v. United States, 292 U.S. 571, 579 (1934) (citing United States v. Cent. Pac. R.R. Co., 118 U.S. 235, 238 (1886)).

55. Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001).

56. Omaha Commercial Co. v. United States, 261 U.S. 502, 502 (1923).

57. *Id*. at 504.

58. *Id.* at 510.

59. *See, e.g.*, Defendant's Motion to Stay this Action Pending Completion of the Klamath Basin Adjudication and Motion for Partial Dismissal at 13 n.16, Klamath Irrigation Dist. v. United States, No. 1:01-cv-00591 (Fed. Cl. May 10, 2002).

> of the Fifth Amendment, the proper remedy for the alleged infringement lies in a contract claim, not one for a takings.[60]

In reaching its conclusion, the Court of Federal Claims relied largely on well-established Federal Circuit precedent that "[t]aking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity . . . . Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights."[61]

On appeal, the Federal Circuit did not disturb this existing general case law; presumably, if a claimant alleges an interference with a contractual right, that claim must still be analyzed as a breach of contract and not as a taking.[62] But the Federal Circuit treatment of the appeal in *Klamath* highlights (and complicates) the underlying question: Is the claimant's right only a contractual one? The Federal Circuit certified questions to the Oregon Supreme Court in an effort to ascertain whether Plaintiffs might have some state property right that exists outside the contracts themselves—that is, "whether . . . landowners who receive and put to beneficial use Klamath Project water have a [extra-contractual] beneficial or equitable property interest appurtenant to their land in the water right acquired by the United States."[63]

The Oregon Supreme Court responded that Plaintiffs might have acquired an equitable or beneficial property interest in the water right, but that it could not decide for certain without additional information.[64] The Oregon Supreme Court identified three factors that must be considered to determine the existence of such a property right: "whether plaintiffs put the water to beneficial use with the result that it became appurtenant to their land, whether the United States acquired the water right for plaintiffs' use and benefit, and, if it did, whether the contractual agreements between the United States and plaintiffs somehow have altered that relationship."[65] The Oregon Supreme Court then proceeded to state that:

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60. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 532 (Fed. Cl. 2005). Plaintiffs also raised breach of contract claims, which the Court of Federal Claims dismissed in a separate order. Klamath Irrigation Dist. v. United States, 75 Fed. Cl. 677, 678 (Fed. Cl. 2007).

61. *Klamath Irrigation Dist.*, 67 Fed. Cl. at 531 (quoting Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001)).

62. *See* Klamath Irrigation Dist. v. United States, 635 F.3d 505, 514 (Fed. Cir. 2011) (presenting takings and breach of contract as two separate claims).

63. *Id*.

64. *Id.* at 515.

65. *Id.*

> In this case, the first two factors suggest that plaintiffs acquired a beneficial or equitable property interest in the water right to which the United States claims legal title, but we cannot provide a definitive answer to the court's second question because all the agreements between the parties are not before us.[66]

The case is continuing on remand at the Court of Federal Claims.[67]

Even if a claim must be characterized as a breach of contract claim rather than a takings claim, the United States is not necessarily immune from liability. Depending on the facts, the viability of the United States' defense to a breach of contract claim may turn first on the interpretation of the contract's shortage provision. In *Stockton East Water District v. United States*, for example, the United States defended against a breach of contract claim in part by reliance on the relevant contractual shortage provision.[68] That provision stated, in part:

> In its operation of the Project, the United States will use *all reasonable means* to guard against a condition of shortage in the quantity of water available to the Contractor pursuant to this contract. Nevertheless, *if a shortage does occur during any year because of drought, or other causes which, in the opinion of the Contracting Officer* [i.e., the Secretary of the Interior or his duly authorized representative], *are beyond the control of the United States, no liability shall accure* [sic] *against the United States* or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom.[69]

The Federal Circuit rejected the United States' reliance on this shortage provision, concluding instead that the shortage provision "applies only to drought and other 'acts of God.'"[70]

But not all shortage provisions are alike. In *O'Neill v. United States*, for example, landowners within the Westlands Water District argued that Reclamation breached a contract to provide water from the CVP when it

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66. *Id.*

67. The *Klamath* plaintiffs have since voluntarily dismissed their breach of contract claims, leaving only their takings claims for the remand. Plaintiffs' Motion to Voluntarily Dismiss Third Claim for Relief (Breach of Contract), Klamath Irrigation Dist. v. United States, No. 1:01-cv-00591 (Fed. Cl. Jan. 31, 2014).

68. Stockton E. Water Dist. v. Stockton, 583 F.3d 1344, 1354 (Fed. Cir. 2009).

69. *Id.* at 1360–61.

70. *Id.* at 1361. As of this writing, *Stockton East* is continuing, on a second remand to the Court of Federal Claims to assess damages. *See* Stockton E. Water Dist. v. United States, 761 F.3d 1344, 1353 (Fed. Cir. 2014) (vacating the damage calculation and remanding to the Court of Federal Claims for further proceedings).

delivered less than half of the contracted amount in 1993 due to a multi-year drought and regulatory constraints resulting from implementation of the CVPIA.[71] The shortage provision in the Westland's contract stated:

> There may occur at times during any year a shortage in the quantity of water available for furnishing to the District . . . , but in no event shall any liability accrue against the United States . . . arising from a shortage on account of errors in operation, drought, or any other causes.[72]

Based on the broad shortage language, the Ninth Circuit held that the contract "unambiguously absolves the government from [contractual] liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate."[73]

Even if the shortage provision does not immunize the United States, the sovereign acts doctrine may provide an additional defense in breach of contract claims. The sovereign acts doctrine provides "that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign."[74] The viability of this defense turns on the court's assessment of why the shortage exists and may not be successful if the court determines that the United States could have made different decisions to meet the contractor's needs.[75]

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71. O'Neill v. United States, 50 F.3d 677, 682 (9th Cir. 1995).

72. *Id.* at 682 n.2.

73. *Id.* at 689.

74. Horowitz v. United States, 267 U.S. 458, 461 (1925).

75. *See Stockton E. Water Dist.*, 583 F.3d at 1365–68 (rejecting sovereign acts defense on ground that the United States had not "demonstrate[d] that the agencies' actions made it impossible for Reclamation to deliver to the Districts the full amount of water provided for in the contracts" or that Reclamation's allocation decisions were "public and general" acts); Klamath Irrigation Dist. v. United States, 635 F.3d 505, 522 (Fed. Cir. 2011) (remanding to the Court of Federal Claims to determine whether the United States can demonstrate that "performance of the various contracts at issue was impossible").

B. One Cannot Acquire a Right to Use Water in a Manner that Violates the Public Trust Doctrine or a Right to Use Water in an Unreasonable Way

1. The Theory Behind the Argument

a. The Public Trust Doctrine

In its defense of some water taking cases, the United States has raised the public trust doctrine, a principle that further defines and limits the nature of a state water right.[76] The public trust doctrine in California "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[77] From a property rights perspective, this means that "parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust."[78] Nor can such parties claim a "vested right to bar recognition of the trust or state action to carry out its purposes."[79]

Several authors have discussed the history and application of the public trust doctrine, and we provide only a brief discussion here.[80] The public trust doctrine finds support in the United States Supreme Court's 1892 decision in *Illinois Central Railroad Co. v. Illinois*, which concluded that a state could revoke or limit a grant of land submerged under navigable waters without payment of compensation: "It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[81]

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76. *See* Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty., 658 P.2d 709, 727 (Cal. 1983) (explaining that state water rights are limited by the public trust).

77. *Id.*

78. *Id.* at 721.

79. *Id.* at 723; *see also id.* at 727 (stating that the public trust doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust"); *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 806 n.54 (Cal. Ct. App. 2006) (citing *Nat'l Audubon Soc'y*, 658 P.2d at 728) ("[T]he rights of an appropriator are always subject to the public trust doctrine.").

80. *See, e.g.*, Joseph L. Sax, *The Public Trust in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Professor Sax's 1970 article is rightly considered the most influential article on the public trust doctrine in natural resources.

81. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892). The State of Illinois purported to grant fee title to submerged lands of Lake Michigan to facilitate development of Chicago's harbor and waterfront. The State then changed its plans and filed a quiet title action against the railroad. The Supreme Court sided with the State due to the State's public trust rights to the submerged lands. *Id.* at 439, 460.

National Audubon Society v. Superior Court of Alpine County,[82] considered the seminal public trust case in California, brought

> together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes.[83]

National Audubon involved the City of Los Angeles' right to water from several creeks that fed Mono Lake.[84] The California Supreme Court described the condition of Mono Lake: "The lake is saline; it contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migratory birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of [birds]."[85]

As permitted by the state, the City had been diverting virtually the entire flow of four of the five streams that flow into the lake for several years,[86] resulting in a sustained drop in lake level: "The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled."[87]

Plaintiffs sued in state court to enjoin continued diversions on the ground that those diversions violated the public trust.[88] The "suit was transferred to the federal district court, which requested that the state courts determine the relationship between the public trust doctrine and [California's] water rights system."[89] The state court entered judgment against Plaintiffs on the ground that Plaintiffs had failed to exhaust administrative remedies.[90] The case reached the California Supreme Court on a writ of mandate to review two issues: whether Plaintiffs had to exhaust administrative remedies before filing suit, and what the interrelationship is between the public trust doctrine and California's water right system.[91]

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82. Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty., 658 P.2d 709 (Cal. 1983).
83. *Id.* at 712.
84. *Id.* at 711.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 712.
89. *Id.*
90. *Id.*
91. *Id.* at 712–13.

Regarding the exhaustion of administrative remedies question, the *National Audubon* court concluded that courts had "concurrent jurisdiction in water right controversies."[92] According to the court:

> The Legislature, instead of overturning that precedent, has implicitly acknowledged its vitality by providing a procedure under which the courts can refer water rights disputes to the water board as referee. We therefore conclude that the courts may continue to exercise concurrent jurisdiction, but note that in cases where the board's experience or expert knowledge may be useful the courts should not hesitate to seek such aid.[93]

On the merits, the court concluded that "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries."[94] The court provided an extensive discussion of the development of the public trust doctrine and California's water right system, concluding that "the core of the public trust doctrine [was] the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."[95]

The *National Audubon* court noted, however, that the public trust doctrine had expanded over the years, most particularly in *Marks v. Whitney*,[96] where the California Supreme Court first recognized that the public trust protects environmental and recreational values:

> Public trust easements [were] traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.[97]

In addition, "[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs," including "preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments

92. *Id.* at 713.
93. *Id.*
94. *Id.* at 721 (citations omitted).
95. *Id.* at 712.
96. Marks v. Whitney, 491 P.2d 374 (Cal. 1971).
97. *Id.* at 380.

which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."[98]

The *National Audubon* court stated that "before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests."[99] The court declared that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[100] The court then held that even after a water appropriation is made,

> the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.[101]

The court further opined that

> no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct. This is not a case in which the Legislature, the Water Board, or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin, that the benefit gained is worth the price. Neither has any responsible body determined whether some lesser taking would better balance the diverse interests.[102]

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98. *Id.*

99. *Nat'l Audubon Soc'y*, 658 P.2d at 712.

100. *Id.* at 728.

101. *Id.*

102. *Id.* (citation omitted); *see also id.* at 729 (stating that "[t]he city's need for water, its reliance upon the 1940 board decision, the cost both in terms of money and environmental impact of obtaining water elsewhere . . . must enter into any allocation decision"). After the 1983 decision, the case returned to federal district court, which then remanded the public trust portion of the case back to the state court from which the case had been removed. Nat'l Audubon Soc'y v. Dep't of Water, 869 F.2d 1196, 1206 (9th Cir. 1988). Eventually, additional lawsuits were brought, including claims under California Fish and Game Code § 5937 and § 5946, which imposed conditions on releases from Mono Lake. Cal. Trout, Inc. v. State Water Res. Control Bd., 207 Cal. App. 3d 585, 592 (Cal. Ct. App. 1989); Cal. Trout, Inc. v. Superior Court, 218 Cal. App. 3d 187, 194 (Cal. Ct. App. 1990). Eventually, an agreement was reached, which helped facilitate a decision from the State Water Resources Control Board (known as Decision 1631) about future diversion limits. *See* Craig Anthony Arnold, *Working Out*

Following the *National Audubon* decision, the California Legislature enacted legislation stating that "the public trust doctrine shall be the foundation of state water management policy."[103] California's public trust doctrine is also recognized in state statutory provisions, including California Fish and Game Code § 5937, which governs operation of dams in California.[104]

b. The Doctrine of Unreasonable Use

In 1926, California amended its constitution by expressly limiting the right to use water by the doctrine of reasonable use:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.[105]

From a property rights perspective, this limitation means that "no one can acquire a vested right to the unreasonable use of water."[106]

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an Environmental Ethic: Anniversary Lessons from Mono Lake, 4 WYO. L. REV. 1, 22 (2004) (discussing the aftermath of the decision).

103. CAL. WATER CODE § 85023 (West 2010).

104. CAL. FISH & GAME CODE § 5937 (West 2014). ("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."); *see also* Nat. Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 925 (E.D. Cal. 2004) (finding that the Bureau of Reclamation's operation of Friant Dam, which is located on the San Joaquin River and is part of the CVP, violated § 5937).

105. CAL. CONST. art. X, § 2; *see also* United States v. State Water Res. Control Bd. (*SWRCB*), 182 Cal. App. 3d 82, 105 (Cal. Ct. App. 1986) (explaining that overlaying all appropriative water rights "is the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served"); *Nat'l Audubon Soc'y*, 658 P.2d at 725 (citing Peabody v. City of Vallejo, 40 P.2d 486 (Cal. 1935); People *ex rel.* State Water Res. Control Bd. v. Forni, 126 Cal. Rptr. 851 (Cal. Ct. App. 1976)) (finding that under California law, all uses of water "must now conform to the standard of reasonable use"); Allegretti & Co. v. Cnty. of Imperial, 138 Cal. App. 4th 1261, 1279 (Cal. Ct. App. 2006).

106. *Nat'l Audubon Soc'y*, 658 P.2d at 725 n.23; *see also* Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 898 (Cal. 1967) (explaining that there is "no property right in an unreasonable use" of water); Joerger v. Pac. Gas & Elec. Co., 276 P. 1017, 1024 (Cal. 1929) (explaining that a water diversion in excess of a "reasonably necessary amount . . . confers no title, no matter for how long continued"); Gin S. Chow v. City of Santa Barbara, 22 P.2d 5, 17 (Cal. 1933) (explaining that a riparian right is limited to the reasonable use of water); Peabody v. City of Vallejo, 40 P.2d 486, 492 (Cal. 1935) (explaining that an unreasonable use or method of diversion "does not inhere in the riparian right at common law"); *Forni*, 126 Cal. Rptr. at 857 (explaining that individuals only possess a compensable property interest in

Whether a use is reasonable "is a question of fact to be determined according to the circumstances in each particular case."[107] The "mere fact that a use may be beneficial . . . is not sufficient if the use is not also reasonable."[108] Like the public trust doctrine, the concept of reasonable use may change due to changed circumstances.[109]

2. The Arguments in Action

The United States defended its position in *Casitas* and *Tulare* based, in part, by raising the public trust doctrine and the doctrine of unreasonable use. The *Casitas* court rejected the defenses in dicta, deciding that it could not conclude "that the operating restrictions imposed on plaintiff under the biological opinion duplicate the result that would have been achieved under state law."[110] The *Casitas* court's analysis is curious given the extensive expert trial evidence the United States presented on the subject. To support these defenses, the United States relied on the biological opinion itself and detailed analysis and testimony from a renowned fish biologist. The biologist correlated the flow criteria set forth in the biological opinion and the quantity of water that must pass through the fish ladder in order to keep the steelhead below the dam in good condition, as California law

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the reasonable use of water); *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 661 n.3 (Cal. 1979) ("Thus, to the extent that a future riparian right may impair the promotion of reasonable and beneficial uses of state waters, it is inapt to view it as vested."); *SWRCB*, 182 Cal. App. 3d at 106 ("Thus, the court determined that no one has a vested right to use water in a manner harmful to the state's waters."); Imperial Irrigation Dist. v. State Water Res. Control Bd., 225 Cal. App. 3d 548, 563 (1990) (quoting *Nat'l Audubon Soc'y*, 658 P.2d at 725 n.23); *Allegretti*, 138 Cal. App. 4th at 1279.

107. *Joslin*, 429 P.2d at 894; *see also* Envtl. Def. Fund, Inc. v. East Bay Mun. Util. Dist., 605 P.2d 1, 6 (Cal. 1980) ("[W]hat is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from state-wide considerations of transcendent importance." (quoting *Joslin*, 429 P.2d at 894) (internal quotation marks omitted)); *Peabody*, 40 P.2d at 491.

108. *Joslin*, 429 P.2d at 896.

109. *See Forni*, 126 Cal. Rptr. at 855 ("'What is a [reasonable and] beneficial use at one time may, because of changed conditions, become a waste of water at a later time.'" (quoting Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. 1935))); *see also* Imperial Irrigation Dist. v. State Water Res. Control Bd., 186 Cal. App. 3d 1160, 1171 (Cal. Ct. App. 1986) (pronouncing that appropriate water rights were deemed unreasonable in light of flooding caused by wasteful water delivery and irrigation practices); *SWRCB*, 182 Cal. App. 3d at 129–30 (explaining that longstanding diversion or use is unreasonable to the extent it fails adequately to protect other beneficial uses and avoid violation of state water quality objectives); *Envtl. Def. Fund, Inc.*, 605 P.2d at 6 ("What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes.").

110. Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 461 (Fed. Cl. 2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013).

requires.[111] The expert analysis considered the life history of steelhead trout, the known history of steelhead in the Ventura River, and the flow criteria in the biological opinion. Based on his knowledge of steelhead trout and his analysis of the Ventura River watershed, the United States' expert testified that the flows set forth in the biological opinion represent the minimum flows required to maintain the steelhead in good condition.[112]

The *Casitas* court admitted the United States' expert's analysis into evidence but did not discuss the substance of the expert's conclusion in its decision. Instead, the court concluded, apparently as a matter of law, that a perceived lack of specificity in the text of § 5937 meant there was "no way to assess whether the requirements set forth in the biological opinion are indeed requirements to which Casitas was already subject under either Section 5937 or its streambed alteration agreement."[113] Because the Federal Circuit affirmed the dismissal on ripeness grounds, it did not address the public trust or unreasonable use defenses on appeal.

Prior to the *Casitas* decision, the same judge, Judge Weise, had considered these defenses in *Tulare*. The facts in *Tulare* were perhaps even more favorable to the United States because the State Water Resources Control Board concluded that the water operations must comply with the reasonable and prudent alternatives that NMFS and USFWS established in their biological opinions. But the *Tulare* court believed that the Board's subsequent decision was irrelevant because the Board had not limited the relevant water permits when the two federal agencies issued the biological opinions.[114] The *Tulare* court declined to engage in any analysis of the public trust doctrine or the doctrine of unreasonable use, stating that these doctrines "require a complex balancing of interests," which must be left to the State Board to consider.[115] The *Tulare* court held "that plaintiffs' right

111. United States' Post-Trial Proposed Factual Findings and Legal Conclusions at 45–49, 57–84, Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443 (Fed. Cl. 2011) (No. 05-168L) (discussing the analysis on the biological opinion as evidence); *see* CAL. FISH & GAME CODE § 5937 (West 2014) (clarifying that the owner of a dam must allow sufficient water to flow through the dam to keep the fish in good condition).

112. *See* Expert Report: Southern California Steelhead and Stream Flows in Relation to Robles Diversion Dam, Ventura River, California, Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443 (Fed. Cl. 2011) (No. 05-168L) (the United States' expert report from Dr. Peter B. Moyle); Trial Transcript at 2928–3059, Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443 (Fed. Cl. 2011) (No. 05-168L) (testimony from Dr. Moyle, the United States' expert, at trial). *See also* Peter B. Moyle et al., *Fish Health and Diversity: Justifying Flows for a California Stream*, FISHERIES, July 1998, at 6 (the journal article that the United States cited to support the expert analysis).

113. *Casitas Mun. Water Dist.*, 102 Fed. Cl. at 462.

114. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 322 (Fed. Cl. 2001).

115. *Id*. at 322–23 ("As an initial matter, the responsibility for water allocation is vested in the State Water Resources Control Board."). The *Casitas* court includes a footnote that reveals a similar

to divert water in the manner specified by their contracts and in conformance with [the relevant water permits] continued until a determination to the contrary was made either by the [Board] or by the California courts."[116] Because the case was settled before appeal, the Federal Circuit did not have an opportunity to consider these defenses in *Tulare*.

C. Because One May Acquire a Right to Beneficial Use of Water but Not the Water Itself, Particular Attention Must be Paid to Ripeness

1. The Theory Behind the Argument

In California, "[a]ll 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."[117] Thus, "the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."[118] "Hence, the cases do not speak of the ownership of water, but only of the right to its use."[119] Because water rights are usufructuary rights, they are "limited and uncertain. The available supply of water is largely determined by natural forces."[120]

A takings claim "does not accrue until the claimant suffers damage."[121] Thus, a "possible future taking of property cannot give rise to a present action for damages."[122] Taken together, the peculiar usufructuary water

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position. *See Casitas Mun. Water Dist.*, 102 Fed. Cl. at 462 n.20 ("To be sure, the SWRCB must enforce Section 5937. But it cannot do so in a vacuum. . . . As a consequence, Section 5937 cannot be viewed as an absolute or in isolation, but must be subject to the same considerations that underpin the other, fundamental water doctrines: the desire to balance competing needs for the good of the whole.").

116. *Tulare Lake Basin Water Storage Dist.*, 49 Fed. Cl. at 324.

117. CAL. WATER CODE § 102 (West 2010).

118. Eddy v. Simpson, 3 Cal. 249, 252 (1853); People v. Murrison, 101 Cal. App. 4th 349, 358 (Cal. Ct. App. 2002) (quoting People v. Shirokow, 605 P.2d 859, 864 (Cal. 1980)) (explaining that appropriative water rights in California "are usufructuary only and confer no right of private ownership in the watercourse").

119. Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty., 658 P.2d 709, 724 (Cal. 1983). The Court of Federal Claims largely misapplied these principles in *Tulare*, concluding that the plaintiffs' State Water Project contracts "confer[red] on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of [the applicable] permits." *Tulare Lake Basin Water Storage Dist.*, 49 Fed. Cl. at 318.

120. *Murrison*, 101 Cal. App. 4th at 359 (quoting *SWRCB*, 182 Cal. App. 3d 82, 104 (Cal. Ct. App. 1986)).

121. Nw. La. Fish & Game Pres. Comm'n v. United States, 446 F.3d 1285, 1291 (Fed. Cir. 2006).

122. *Id.*

right and general ripeness principles mean that a claim is not ripe until he has experienced an actual loss in beneficial use.[123]

2. The Argument in Action

The United States successfully raised a ripeness defense in *Casitas*, obtaining a dismissal on the ground that "[b]ecause the relevant property interest is plaintiff's right to beneficial use, that right cannot be taken until defendant's action encroaches on plaintiff's ability to deliver water to its customers. Since that condition has not occurred, plaintiff's cause of action is not ripe."[124]

The parties in *Casitas* presented competing expert analyses by civil engineers to address the issue of how, if at all, the implementation of the biological opinion impacted water levels in Lake Casitas and the District's ability to make beneficial use of the water.[125] The District focused its presentation on the amount of water that went down the fish ladder, while the United States focused its presentation on the water levels in Lake Casitas and the District's ability to meet its water needs during the relevant time period.[126] The United States also presented expert testimony from an economist, who prepared extensive mathematical analyses of the District's water use records and critiques of the District's in-house supply and demand estimates.[127]

The United States' expert civil engineer prepared extensive spreadsheets showing actual and hypothetical water levels under different scenarios, including water levels with and without the fish ladder present.[128] The United States' expert analysis, together with admissions by the District's managers at trial, showed that there was enough water in Lake Casitas to allow the District to meet all of its beneficial use needs in every relevant year.[129] Although the water levels at Lake Casitas were marginally

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123. *See* Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 471 (Fed. Cl. 2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013) (explaining that Casitas's Fifth Amendment takings claim was not ripe because Casitas had not suffered a loss in its beneficial use of water for delivery to customers).

124. *Id*.

125. *Id.* at 463, 466.

126. *See id.* at 462 ("The parties each submitted a damages model to quantify and value the amount of water lost, with plaintiff's model reflecting its position that it should be compensated for the impact of the operating restrictions on its ability to *divert* water and defendant's model focusing instead on the effect of the biological opinion, if any, on Casitas's ability to *deliver* water.").

127. *Id.* at 469.

128. *Id.* at 466–69.

129. *Id.* at 469; *see also* United States' Post-Trial Proposed Factual Findings and Legal Conclusions at 26–28, 102–108, Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443 (Fed. Cl. 2011) (No. 05-168L) (showing admissions of District Court's manager, Steve Wickstrom).

lower with the fish ladder in place, the Court of Federal Claims concluded that the fish ladder had not impacted the District's actual property right—the right to beneficial use of the water.[130] The Federal Circuit affirmed on appeal, confirming that the focus must be on beneficial use.[131] Significantly, the Federal Circuit agreed that "the state of California does not categorize storage or diversion for storage, in and of themselves, as beneficial uses."[132] Thus, "the diversion of water down the fish ladder to date has not impinged on Casitas's compensable property interest—the right to beneficial use."[133]

D. In Appropriate Cases, the Taking Claim Should be Examined as a Regulatory Claim, Not a Physical Claim

1. The Theory Behind the Argument

Litigants in taking cases often dispute whether a particular claim should be analyzed as a physical claim or a regulatory claim.[134] The outcome of a taking case can sometimes be predicated by how the court resolves this issue, as the plaintiff's burden is usually much higher if the claim is characterized as a regulatory claim.[135] California cases have sometimes treated water claims under a regulatory taking rubric, concluding that restrictions on the diversion of water from a creek for the protection of fish "is of the regulatory variety, as opposed to a physical taking."[136]

In many cases, there will be a reasonable argument that the claim should be analyzed as a regulatory claim. That conclusion is suggested by the fact that a claimant lacks a possessory interest in water in a stream; as discussed above, it has only a right to beneficially use the water.[137] In addition, if the claim arises from a regulatory restriction on diversions or

130. *See id.* at 467 (explaining that although the United States' civil engineer concluded that Casitas had less water, as a result of the biological opinion, that difference had not impacted Casitas's water deliveries to date).

131. Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1353–55 (Fed. Cir. 2013).

132. *Id.* at 1356 (citing Lindblom v. Round Valley Water Co., 173 P. 994 (Cal. 1918)).

133. *Id.* at 1360.

134. *See, e.g.*, Allegretti & Co. v. Cnty. of Imperial, 138 Cal. App. 4th 1261, 1271 (2006) (discussing Allegretti's initial argument that the county's actions constituted a physical taking).

135. *See id.* at 1269–71 (discussing the different elements plaintiffs must prove in physical and regulatory takings actions).

136. People v. Murrison, 101 Cal. App. 4th 349, 362–63 (Cal. Ct. App. 2002); *see also Allegretti*, 138 Cal. App. 4th at 1275 (concluding that the government's "act in conditioning Allegretti's permit on certain water use limitations is of a regulatory nature").

137. *See supra* note 106.

contracted amounts—as is often the case—that government action is a regulatory act, not even remotely similar to a physical appropriation.[138]

2. The Argument in Action

The question of how to characterize the plaintiff's claim arose in both *Tulare* and *Casitas*. In *Tulare*, the court concluded that the claim was properly analyzed as a physical appropriation, akin to a claimed permanent physical occupation, in large part because "[i]n the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water."[139] That decision is suspect because the court's reasoning means that uncertain usufructuary water rights would be granted more protection than corporeal types of property. The Federal Circuit did not have an opportunity to review this decision on appeal.

Reversing course from the court's conclusion in *Tulare*, Judge Weise concluded that the *Casitas* plaintiff's claim should be analyzed as a regulatory claim, not a physical claim.[140] The *Casitas* court relied heavily on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, which it concluded "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."[141] On appeal, the Federal Circuit reversed.[142] In the Federal Circuit's view, the physical layout of the particular fish ladder at issue controlled the characterization of the claim:

> [T]he government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal—after the water had left the Ventura River and was in the Robles-Casitas Canal—and towards the fish ladder, thus reducing Casitas' water supply.[143]

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138. *Cf.* Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359, 1366 (Fed. Cir. 2009) (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537–40 (2005)) (instructing the trial court to analyze plaintiff's challenge to development restrictions imposed by the USFWS under the regulatory takings analysis announced in *Lingle*).

139. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001).

140. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 106 (Fed. Cl. 2007).

141. *Id.*

142. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

143. *Id.* at 1291–92.

The United States revisited this argument on remand, arguing that the Federal Circuit's understanding of the diversion process and the government action was incomplete.[144] Among other points, the United States argued that it did not "actively cause[]"[145] any reduction in diversions; rather, Casitas approached the federal agencies with a fish ladder proposal and the federal agency "approved" that proposal. The United States presented evidence that the District had other means to comply with the ESA, but the District decided to forego those other possibilities and built a particular type of fish ladder.[146] At trial, for example, the United States demonstrated that the District could have satisfied the ESA in other ways, including constructing a fish ladder within the active portion of the stream itself. The Court of Federal Claims rejected that argument in dicta on the ground that "it dramatically underplays the coercive effect of the ESA."[147] According to the Court of Federal Claims, "[s]o long as plaintiff's response to the federal listing was reasonable (and there is nothing in the record to suggest that it was not), the consequences of that response are chargeable to the United States."[148]

To support that conclusion, the Court of Federal Claims cited "the basic principle contained in both contract and tort law that requires a party harmed by the actions of another to undertake 'reasonable' efforts to mitigate the harm likely to be sustained."[149] While it is telling that the court cites no taking cases to support its conclusion, the court's analogy to contract and tort principles is not convincing. Casitas did not design and propose a fish ladder to mitigate a breach of contract or a tort; it designed and proposed the fish ladder so that the operation of the diversion dam on the Ventura River would comply with the ESA.[150] The court's analogy to mitigation principles, which apply where a breach or tort has occurred, presumes the United States was at fault for listing the endangered species, a position that cannot be supported.[151]

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144. *See* Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 476 (Fed. Cl. 2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013) (explaining that the United States argued that the Federal Circuit's decision was based on an erroneous assumption regarding the diversion process).

145. *Id.* at 476 n.49.

146. *Id.* at 474–75.

147. *Id.* at 475 (citing Bennett v. Spear, 520 U.S. 154, 169–70 (1997)).

148. *Id.*

149. *Id.* at 475 n.48 (citing RESTATEMENT (SECOND) OF CONTRACTS § 350(2) (1979); RESTATEMENT (SECOND) OF TORTS § 918(1)(1997)).

150. *See id.* at 446–47 (explaining that Casitas elected to construct a fish ladder in direct response to the steelhead listing under the ESA).

151. *Cf. id.* at 475 n.48 (characterizing Casitas's decision to construct the fish ladder as a reasonable mitigation measure). In addition, the court's analysis ignores the undisputed fact that Casitas

Because the appeal focused on ripeness issues, the United States did not assert this argument on the second appeal to the Federal Circuit. Therefore, the Federal Circuit did not address the question.[152]

CONCLUSION

On January 14, 2014, California Governor Edmund G. Brown proclaimed a state of emergency as the effects of an historic drought continued to impact nearly the entire state.[153] As he signed the document, Governor Brown noted that "we can be much better prepared for the terrible consequences that California's drought now threatens, including dramatically less water for our farms and communities and increased fires in both urban and rural areas."[154]

As the year continued, Governor Brown's sentiments seemed overly optimistic, as conditions rapidly deteriorated. In May 2014, the United States Drought Monitor Report showed 100 percent of California was in a drought condition.[155] By mid-August, that condition improved to 99.8%.[156] In mid-July 2014, the State Water Resources Control Board approved an emergency regulation "to ensure water agencies, their customers and state residents increase water conservation in urban settings or face possible fines or other enforcement."[157] The regulation provided that "[l]ocal agencies could ask courts to fine water users up to $500 a day for failure to implement conservation requirements in addition to their existing authorities and processes."[158]

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knew, decades before the steelhead were listed under the ESA, that it would eventually have to construct a fish ladder or take some other action to protect impacted fish species.

152. The Federal Circuit did reject Casitas's argument that the first appeal had resolved liability against the United States. *See* Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1353 (Fed. Cir. 2013) (explaining that the first appeal had left many substantive issues unresolved). In that analysis, the Federal Circuit stated that "[t]he precise scope of Casitas's property right was, in fact, not addressed until the trial leading to the opinion now on appeal. . . . Thus, on remand, the Court of Federal Claims was correct to perform a full physical takings analysis, beginning with the assessment of the scope of Casitas's right to the diverted water." *Id.* (citations omitted).

153. Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Declares Drought State of Emergency (Jan. 17, 2014), *available at* http://gov.ca.gov/news.php?id=18379.

154. *Id.* (internal quotation marks omitted).

155. Veronica Rocha, *'Severe' Drought Covers Nearly 99.8% of California, Report Says*, L.A. TIMES (Aug. 18, 2014, 11:43 AM), http://www.latimes.com/local/lanow/la-me-ln-severe-drought-california-20140818-story.html.

156. *Id.*

157. Press Release, Cal. State Water Res. Control Bd., State Water Board Approves Emergency Regulation to Ensure Agencies and State Residents Increase Water Conservation (Jul. 15, 2014), *available at* http://www.waterboards.ca.gov/press_room/press_releases/2014/pr071514.pdf.

158. *Id.*

As the drought continues, demand for this limited resource has expanded. A recent study by two University of California researchers showed that water rights issued on California's major rivers amount to roughly five times the state's average annual runoff.[159] The most extreme example is the San Joaquin River, the site of a multi-million dollar river restoration near Friant Dam, which has water allocations that are 861% greater than the runoff from that river.[160]

The Bureau of Reclamation, together with the United States Fish and Wildlife Service and National Marine Fisheries Service, thus finds itself having to weigh important competing interests in a setting with several difficult legal questions. If a takings claim is brought, a judge on the Court of Federal Claims will often find herself evaluating unfamiliar state property law. Because many of the water takings cases are of recent vintage, some of the issues and defenses that may arise are unresolved. Many of the issues involved in these cases are fact-specific, and most require the services of multiple experts. The cases are not resolved quickly, and two of the three primary cases discussed above (*Casitas* and *Tulare*) have required a trial setting before they were resolved (the third case, *Klamath*, remains pending and may require a trial before it is resolved). One thing that is clear is that reduced supply and increased demand for water will result in increased litigation in this field. Additional issues and defenses will almost certainly arise as this area of the law develops.

159. Theodore E. Grantham & Joshua H. Viers, *100 Years of California's Water Rights System: Patterns, Trends and Uncertainty*, 9 ENVTL. RES. LETTERS 1, 2 (2014), *available at* http://iopscience.iop.org/1748-9326/9/8/084012/pdf/1748-9326_9_8_084012.pdf; *see also* Bettina Boxall, *Rights to California Surface Water Far Greater Than Average Runoff*, L.A. TIMES (Aug. 19, 2014, 11:00 AM), http://www.latimes.com/science/sciencenow/la-sci-sn-california-water-rights-20140819-story.html.

160. Boxall, *supra* note 159.