**Common Facts Support a Precedential Ruling Regarding the ESA and Water Rights**

By Nancie G. Marzulla

In *Tulare Lake Basin Water Storage Dist. v. United States*,[1] a federal judge held for the first time that the taking of water for fish protection purposes under the Endangered Species Act (ESA) violated the Just Compensation Clause of the Fifth Amendment, unless compensation was paid to the water rights holder for the value of the water taken. The facts that case leading to that decision could easily be replicated throughout the West.

The central valley of California, where the *Tulare* events took place, is very arid like many places out West. There is a rainy season from early November until perhaps the end of April. The dry season begins in May: the sun comes out, and for the rest of the summer little, if any, rain falls. The result of this weather cycle is that during the summer, when crops grow, there is no rainfall.

Early in the 20th century, the state of California decided to capture the water that falls as snow in the Sierra Nevada Mountains that would otherwise simply run off into the sea through the river systems of California. The State could then distribute that water to the central valley, turning the desert into an area that would become, as it has become, the breadbasket of the United States and the most agriculturally productive region in the world. Nearly half of the fruits and vegetables for the entire country are grown in the

[1] 49 Fed. Cl. 313 (2001).

central valley of California, including the majority of America's tomatoes, almonds, grapes, cotton, apricots, and asparagus.

The California State Water Project (SWP) was created by the Byrne Porter Act of 1959[2] as the state analogue to the federal Central Valley Project (CVP). The SWP consists of dams, canals, pumping plants, and other facilities designed to generate power, provide flood control, and transfer water from the Sacramento-San Joaquin Delta to the more arid regions of central, coastal, and southern California. It is operated by the State's Department of Water Resources while the federal CVP is operated by the United States Bureau of Reclamation.

In 1991, the Bureau of Reclamation initiated consultation discussions with National Marine Fisheries Service to determine the impact of the CVP and SWP deliveries on the Sacramento River winter-run Chinook salmon, a listed threatened species, and the delta smelt, threatened species listed in 1994. These consultations were required by the Endangered Species Act ("ESA").[3] The federal government issued several biological opinions between 1991 and 1994 detailing what the federal government must do to protect the threatened species. The biological opinions found the SWP's proposed water deliveries from the Delta would jeopardize the continued existence of the threatened fish unless the SWP complied with "reasonable and prudent alternatives" prescribed in the Biological Opinion document. In order to maintain downstream flows for endangered fish habitat, the United States imposed escalating

[2] California Water Resources Development Bond Act, CAL. WATER CODE § 12930 (West 2007).
[3] Endangered Species Act, 16 U.S.C. § 1536(a)(2).

restrictions on SWP operations every year from 1992-1994, reducing the amount of SWP water the State could deliver to plaintiffs.[4]

Absent these constraints, the farmers in *Tulare* would have received approximately an additional 300,000 acre-feet of State Water Project water with which to grow their crops. In February of 1998, state contractors Tulare Lake Basin Water Supply District and Kern County Water Agency, along with other California water storage districts, water districts, and water users, sued the United States in the Court of Federal Claims for just compensation for the unconstitutional taking of their water rights in 1992, 1993 and 1994.

April 30, 2001, Judge Wiese on the U.S. Court of Federal Claims heard arguments on the parties' cross motions for summary judgment on the liability issue. The court granted summary judgment in favor of plaintiffs, finding that the government had taken their water rights, holding: "To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking."[5] After a damages trial was held, Judge Wiese concluded that the plaintiffs were entitled to damages in the amount of $13,915,364.78, plus interest, as the fair market value of their water rights taken in 1992, 1993, and 1994.[6] The parties entered into settlement negotiations, and United States agreed to pay the plaintiffs $16,700,000 for the taking of their water rights.

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[4] *See* NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION, 87 (Government Institutes, 1997).
[5] *Tulare*, 49 Fed. Cl. 313, 319 (2001).
[6] *Tulare Lake Basin Water Storage Dist. v. United States (Tulare II)*, 59 Fed. Cl. 246 (2003).

The *Tulare* holding affirmed the primacy of SWP water users' rights and the California Water Board's public interest in the water allocation as property rights--even in the context of important environmental objectives such as fish protection—rights that could not be simply taken by the federal government without payment of just compensation. Subsequent decisions by the Court of Federal Claims and the Federal Circuit leave no doubt that the *Tulare* ruling has broad applicability.