UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. 05-168L

Honorable John P. Weise

POST-TRIAL BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT

May 16, 2011

J. DAVID BREEMER
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

CORPORATE DISCLOSURE

Pursuant to Local Rule 7.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF AMICUS CURIAE

This amicus brief is filed on behalf of Pacific Legal Foundation (PLF). Based in Sacramento, California, and with regional offices in the East and Northwest, PLF is the oldest and largest nonprofit legal organization dedicated to defending private property rights. PLF is supported by charitable donations from individuals throughout the nation who believe in PLF's mission.

For 37 years, PLF attorneys have litigated in state and federal courts in defense of the right of individuals to make reasonable use of their property. PLF attorneys have served as lead counsel in the United States Supreme Court in numerous cases involving the right to use and enjoy private property, and the corollary right to obtain just compensation when those rights are infringed. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

PLF also has participated in numerous water rights disputes between private entities and the government, both before this Court and elsewhere. *See, e.g.*, *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001); and *Hage v. United States*, 35 Fed. Cl. 147 (1996).

In this particular case, PLF previously filed amicus briefs in this Court at the summary judgment stage, in the Federal Circuit Court of Appeals in support of Lake Casitas Municipal Water District (Casitas), and again in this Court prior to trial. PLF and its supporters continue to believe that this case is of tremendous importance to western water users and has far reaching implications for their traditional rights in water. These rights are increasingly under attack from restrictive and sometimes confiscatory government regulation, especially that arising from the Endangered Species Act (ESA). PLF accordingly files this brief in support of Plaintiff Casitas.

INTRODUCTION

The principal purpose of this brief is to demonstrate that the government has failed to articulate a valid background principle defense under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992). The government does not directly dispute that Casitas' water is a protected form of property, for good reason. *Fullerton v. State Water Res. Control Bd.*, 90 Cal. App. 3d 590, 598 (1979) ("The authorities in this state have uniformly defined the right to appropriative water as a possessory property right."). Nevertheless, it seeks to have this Court arrive at the same result through the backdoor; namely, by advocating that background principles of California state effectively render Casitas' property right a hollow, government-controlled asset that is property in name only.

Their tactic fails for two reasons. First, the government fails to meet its threshold background principles burden to point to some rule or law that formed the basis of the water restriction here in making out its defense. Instead, it improperly relies on state law principles that played no part in the original Endangered Species Act (ESA) water deprivation at issue here. Second, even if the government could rely on state law rules after denying Casitas' water on ESA grounds, it has failed to meet it substantive burden to identify some California rule that rise to background principles level. In particular, Section 5937 of the California Fish and Game Code—which requires dam owners to allow sufficient water to pass through to support downstream fish populations—is not a valid defense.

Background principles are common law principles, not statutory limitations on common law property rights. Since the Fish and Game Code provision is the latter, it is not a background principle within the meaning of *Lucas*. A contrary ruling would mean that the government—both federal and California—would have unfettered discretion to take established water rights whenever

it comes up with a post-hoc reason for doing so, without constitutional liability. That is not consistent with private property; it is a theory that makes all water public property. The Court should reject such a position.

ARGUMENT

I

THE GOVERNMENT FAILS TO SHOW, AS IT MUST, THAT ITS ESA WATER RESTRICTION WAS IMPOSED DUE TO THE CALIFORNIA RULES IT NOW INVOKES AS A BACKGROUND PRINCIPLES DEFENSE

The government and its amici pin their hopes of securing a ruling allowing the federal government to take Casitas' water without any liability on Lucas' "background principles" doctrine. *See* United States' Post-Trial Proposed Factual Findings and Legal Conclusions at 60-66. But they operate under a badly misinformed understanding of the doctrine. That doctrine is far less expansive and amendable to use as a blanket takings immunization than the government posits. The Federal Circuit outlined some of the limits of the doctrine in *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1385-86 (Fed. Cir. 2000). Here, the government's background principles defense is fatally flawed because it does not meet the government's initial burden of proof as articulated in *Palm Beach Isles*.

A. Palm Beach Isles Requires the Government To Show That Its Alleged Background Principles Defense Was a Basis for the Denial

In *Palm Beach Isles*, the government caused a taking of real property by preventing the use and development of private wetlands. Although the denial was based on environmental grounds and the Clean Water Act, 33 U.S.C. § 1251, *et seq*., *see Palm Beach Isles*, 208 F.3d at 1380, the government claimed that it was immune from takings liability under a navigational servitude background principle. In considering this defense, the Federal Circuit held that it was the

government's burden to prove that the challenged taking was predicated on the alleged background principle (the navigational servitude) rather than on some other grounds: "[I]t is clear that in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to "'identify background principles . . . that prohibit the uses [the landowner] now intends.'" *Id.* at 1385 (quoting *Lucas*, 505 U.S. at 1031).

The Federal Circuit's reasoning places an initial burden on the government defendant to show that it relied on the alleged background principle at the time of imposing the challenged property restriction. *Id; see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950) (rejecting a governmental attempt to escape liability for taking water rights under a navigational servitude defense, because the taking arose from a reclamation purpose, not navigation).

B. The Government's Water Restriction Was Never Premised on California Rules Until After Litigation, Which Is Too Late

The government clearly cannot meet its preliminary *Palm Beach Isles* burden here. It relied on *none* of the state law doctrines now invoked so heavily when it ordered the taking of Casitas' water. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 101 (2007). The government imposed the challenged water restriction under authority of the ESA alone. *Casitas*, 76 Fed. Cl. at 102. Further, the government has no evidence that the ESA was enacted to codify California's public trust doctrine or any other state common law principle.

As a consequence, if the federal government wants to show its water restriction is shielded from the Constitution under a background principles defense consistent with *Palm Beach Isles*, it must show that the ESA itself qualifies as "background principle." *Palm Beach Isles*, 208 F.3d at 1385. But it has not and cannot make such a showing. The ESA has never been held, by any

court, to constitute a "background principle" of property law under *Lucas*. This is understandable because the ESA is a relatively recent statute, one designed to implement modern understandings of wildlife protection, rather than traditional common law rules. Such a character precludes according background principles status to the ESA. *Lucas*, 505 U.S. at 1029-30.

In any event, the government does not seriously contend that the ESA is a *Lucas* "background principle." Indeed, its reliance on California state law rules is a de facto concession that the ESA is such a principle. This is true, the ESA is not enough to win under a background principle defense. But it is also true that a California-centric background principles strategy cannot bridge the gap and supply a valid defense since California principles did not drive the original water denial. *Palm Beach Isles*, 208 F.3d at 1385.

II

NEITHER THE CALIFORNIA FISH AND GAME CODE NOR THE PUBLIC TRUST DOCTRINE WOULD QUALIFY AS A *LUCAS* BACKGROUND PRINCIPLE IF THEY COULD BE INVOKED AT THIS TIME

Even if the government could invoke California rules to defend its ESA-based taking of Casitas' water, the state law rules it cites most heavily—the public trust doctrine and Fish and Game Code Section 5937—would not rise to the level of a "background principle" absolving the government of takings liability.

A. The Background Principles Defense Requires a Showing That the Governmental Restriction on Property Implements an Equally Restrictive Common Law Rule

At the outset, it is important to understand the limits and purpose of the background principles doctrine. The doctrine does not make any pre-existing limitation on property into a constitutional escape valve for the government. Rather, only certain types of pre-existing limitations

are background principles within the meaning of Lucas; namely, common law-based limitations that pre-date title to the property. *Lucas*, 505 U.S. at 1029 ("A law or decree with such an effect must . . . do no more than duplicate the result that could have been achieved in the courts" under common law nuisance rules); *id.* at 1031 (referring to potential "common law limitation[s]"); *see also Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 427 (1992) (On remand from the United States Supreme Court, state supreme court holds: "We have reviewed the record and heard arguments from the parties regarding whether Coastal Council possesses the ability *under the common law* to prohibit Lucas from constructing a habitable structure on his land.") (emphasis added).

Furthermore, a property restriction aspiring to background principles status can only be as severe as the common limitation it purports to implement. *Lucas*, 505 U.S. at 1030 ("When, however, a regulation that . . . goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."). Thus, if a governmental restriction appears to mirror certain aspects of background common law rules, but yet goes further than the common law in limiting property rights, it is not a valid "background principles" defense. *Id*.

Finally, it bears mentioning that it is the government's burden to demonstrate that it meets these background principles criteria, not the property owner's burden to prove that a restriction is not a background principle. *Id.* at 1031-32 (Defendant "South Carolina must identify background principles of nuisance and property law that prohibit the [private property] uses . . . . Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [challenged regulation] is taking nothing."); *see also Lucas*, 309 S.C. at 427 (Defendant "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land.").

B. The Government Has Not Shown That California Fish and Game Code Section 5937 Codifies the Common Law of Water Rights and Therefore, It Cannot Qualify as a *Lucas* Background Principle

In relying heavily on California Fish and Game Code Section 5937 for their background principles argument, the government and its amici focus on the pre-existence and substance of that code. In so doing, they neglect perhaps the most important factor in the background principle analysis: the origin or source of the law. *Lucas*, 505 U.S. at 1029-30. The Fish and Game Code section is a *legislatively enacted* limitation on property rights. To turn this into a background principles restriction, the government therefore has to show that the legislative enactment simply codifies California's pre-existing common law of water rights. *Id.* at 1030-32.

The problem is that Fish and Game Code Section 5937 does no such thing; it is in derogation of common law water rights. Water rights are, of course, determined under California's common law appropriative system. *See generally Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) ("The property right in the water right is separate and distinct . . . . The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, *i.e.*, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use."). The common law appropriative system is still the baseline California "background principle," notwithstanding enactment of a state water code: "The only substantive difference between appropriative water rights obtained prior to 1914 and those obtained after 1914 is that post-1914 rights must go through the administrative process before the Board." *People v. Murrison*, 101 Cal. App. 4th 349, 361 (2002).

Nothing in the common law of appropriation precludes a private right to use water for a reasonable and beneficial purpose just because it has a side effect on environmental resources. *Antioch v. Williams Irrigation District*, 188 Cal. 451, 464-66 (1922) (common law water

appropriator had a right to continue water use even though it resulted in some pollution downstream). If the Court finds that Casitas' use of water is both reasonable and beneficial under the totality of the circumstances (and it is), then Casitas' water use is consistent with background common law. To the extent California's Fish and Game Code minimizes that right, it does so as a new legislative limit on property rights, not as a codification of common law. *Envtl. Protection Info. Ctr. v. Cal. Dep't of Forestry & Fire Protection*, 187 P.3d 888, 926 (Cal. 2008) ("[T]he duty of government agencies to protect wildlife is primarily statutory."). To be sure, the legislature may alter common law property rights—but it may not do so free of the constraints of the Constitution. *Lucas*, 505 U.S. at 1029 (any property "limitation so severe cannot be newly legislated or decreed (without compensation)"). That is, it may not decree a background principle. *Id.*

Here, as a statutory adjustment of common law water rights, the Fish and Game Code *stands in no better position with respect to constitutionality than the ESA statute*. It would seem strange to recognize that the ESA statute is not a *Lucas* background principle because it establishes restrictions on property use by positive decree, while holding that an analogous state statutory provision is such a principle.

In short, contrary to the government's apparent position, that the Fish and Game Code is a pre-existing statutory regulation of water use does not make it a "background principle" for purposes of *Lucas*. Because the government has failed to show that the Fish Game Code only codifies common law water rights, rather than establishing new limits, it has accordingly failed to carry its background principles burden.

C. The Government Has Not Proven That the Public Trust Doctrine Necessarily Disallows Casitas' Water Use Because There Is an Environmental Side Effect, and Therefore the Doctrine Does Not Defeat Casitas' Claim

The government and its amici do no better with a public trust background principles argument than with the more specific Fish and Game Code contention. Specifically, the government fails to carry its burden to show that the public trust doctrine would prohibit Casitas' use of water as it stood prior to the ESA restriction. The law and evidence in fact show the opposite: that Casitas' use is consistent with public trust considerations.

The central flaw in the government's public trust doctrine argument is the assumption that the doctrine serves as an environmental protection trump card. It does not. The public trust has never just protected environmental values; it also protects navigation and commerce. *Marks v. Whitney*, 6 Cal. 3d 251, 259-61 (1971). Moreover, in the water use context, the doctrine not only requires the balancing of all the various public trust values, but also consideration of the more general public interest served by private utilization of resources: "the state must . . . consider the effect of the taking [of water] on the public trust and . . . preserve, *so far as consistent with the public interest*, the uses protected by the trust." *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 446 (1983); Cal. Water Code § 1253 (2009) (emphasis added).

Given the flexible nature of the public trust and the wide variety of needs it protects, including human needs, the government has simply not shown that California's doctrine inherently and always precluded Casitas' water use because it may impact some fish. The case law is to the contrary:

> As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing

> streams and use that water in a distant part of the state, *even though this taking does not promote, and may unavoidably harm, the trust uses* at the source stream.

Nat'l Audubon Soc'y, 33 Cal. 3d at 446 (emphasis added). *See also Fullerton*, 90 Cal. App. 3d at 603-04. The government also cannot deny that the public has significant interests in an adequate, efficient, and predictable flow of water for domestic and commercial purposes- exactly the interests Casitas' water use advances. Cal. Water Code § 106; *Prather v. Hoberg*, 24 Cal. 2d 549 (1944). In short, the government has not shown that a fish protection aspect of California's public trust doctrine is superior to the other interests (private and public) in Casitas' use of water. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 445-46. Therefore, it has not borne its background principles burden to show a state right to take water for fish inhered in Casitas' water right.

The final nail in the government's attempt to show that the public trust doctrine has always precluded Casitas' water use is the lawful history of Casitas' water use. The California State agency ostensibly charged with implementing the public trust doctrine in water granted Casitas a permit and license, without any qualification suggesting it was subject to a superior public interest in fish. If the Public Trust and/or the Fish and Game Code was a background principle that always limited Casitas' water right if and when fish became impacted, why did the State not apply fish protections and conditions when Casitas got its permit or its license in 1985? The answer is that, in giving Casitas a license, the state necessarily had made a determination that Casitas' water use was *not* contrary to public trust values and *was* in the public interest. Cal. Water Code § 1257 (Board must consider all potential interests in water in granting a license.); *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 778-79 (2006); *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.*, 207 Cal. App. 3d 363, 380-81 (1989).

There is no reason for this Court to come to a different conclusion or alter Casitas' license. Certainly, the federal and state agencies filing briefs in this case have not shown that it is legally and procedurally correct to elevate a controversial courtroom public trust doctrine argument over a carefully vetted state license that incorporated public trust values. Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 Loy. L.A. L. Rev. 943, 944 (1993) ("Simply stated, the *Lucas* rule says that government's right to constrain the use of property without paying compensation is limited by what it withheld from owners at the outset. Government cannot change the rules of the game after the game has started."). The ramifications of the government's background principles argument are startling. If adopted, their position would mean that water rights—declared to be private property by California courts—would not be held at the whim of the State. The State would apparently be able to change its mind, and take back previously recognized rights without compensation, at any time, as long as it can show some effect on fish or other environmental resources. The power to confiscate private water would be unlimited.

This case is a particularly misplaced vehicle for this Court to engage in potentially far reaching extensions of California's public trust doctrine—as the amici urge it to do—because this dispute has never really been about California public trust doctrine. It is about the ESA. If California wants to push the envelope of that doctrine in the private water use context, it should wait for a case that cleanly presents the issue from the start, not one like this, where the public trust doctrine is injected as a last ditch effort to change the rules of the game and save the federal government from an ESA-based taking.

CONCLUSION

The Court should hold that no "background principle" of California law forbids Casitas from claiming just compensation for the ESA-imposed limits on its historical and state-confirmed withdrawals of water.

DATED: May 16, 2011.

Respectfully submitted,

/s/ J. DAVID BREEMER
J. DAVID BREEMER
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011, I electronically filed the foregoing POST-TRIAL BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT with the Clerk of the Court through the CM/ECF system. I further certify that all participants in the case are registered as CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ J. DAVID BREEMER
J. DAVID BREEMER