

Western Water Law—CLE International

November 15, 2012—Las Vegas

The Casitas Case: Takings Issues before the Federal Circuit (10:45 a.m.)

In his famous song, “Truckin,” Jerry Garcia of the Grateful Dead sang, “What a long, strange trip it’s been.” Well, lately it’s occurred to me that Jerry Garcia could well have been singing about the Casitas case, and with the court’s struggle to deal with the permanent taking of a water right in the context of all of the water policy and water management issues that the Government has raised along the way. My goal today will be to describe for you some of the highlights of this long, strange trip, which began on January 14, 2005 and has included several summary judgment briefings, a 10-day trial, and two trips to the Federal Circuit, including a recent argument in the Federal Circuit on November 6, 2012. But make no mistake about it, this case is far from over. Some people predict that this case is destined for the Supreme Court, and they may be right.

I. HOW IT ALL BEGAN

- **Purpose of the Ventura River Project—Source of emergency back-up water and stable water supply for Ventura County**

In the 1940s, the entire Ventura County was in the midst of a severe drought with dire consequences for agricultural, industrial, municipal, and domestic water users. During this period, two other reservoirs that were intended to provide water for the region went completely dry: Cachuma and Matilija. In addition, countless irrigation wells in the area also went dry.

One newspaper article written during this decade-long drought reported that at one point the city of Ventura was down to its last water reserve:

[T]he cold fact is that we are down, for the present, to our last reserve. . . . For quite a period of years, Ventura, and much of its backcountry, too, has been ‘getting by’ on a water supply in ways that are almost miraculous.

This drought finally ended in 1953, and in 1954 Congress authorized the creation of the Ventura River Project.

In authorizing the project, Congress emphasized that the Project was to do what Cachuma and Matilija failed to do, provide a stable water supply for the city of Ventura and the Ojai Basin, even during periods of severe drought and to ensure that people in this drought-prone region had in place a reliable supply of drinking, industrial, and irrigation water. Congress also specified that the Ventura River Project was to serve as an emergency back-up water for the entire County, including the city of Santa Barbara.

To meet all of these objectives, Reclamation designed the Project to have a large working storage capacity, of 254,000 acre-feet of water, which is significantly larger than Matilija and Cachuma. But rainfall is so unpredictable, it took 20 years to fill Lake Casitas.

- **Although the Ventura River Project is a federal reclamation project, the federal government has no right to any of the water produced or stored by the Project.**

Today the Ventura Project supplies domestic water for 70,000 people on an annual basis. It provides agricultural water to over 65,000 acres of land on which avocados and oranges among other crops are grown. The Project also supplies emergency standby water for surrounding communities during times of drought, during which demand for water from the Project doubles. Finally, over 1 million people a year visit Lake Casitas, where they enjoy many recreational activities including boating and fishing. Although the Bureau of Reclamation built the project, Casitas paid the entire cost of constructing the project—and has paid all operation and maintenance costs of the project for more than 50 years.

The Ventura River Project is unusual in that its water license was issued directly to Casitas rather than Reclamation. Casitas's license has two important numerical limits – Casitas can divert up to 107,800 acre-feet of water annually and it can put to beneficial use up to 28,500 acre-feet of water annually. The 28,500 acre-feet annual beneficial use number was Reclamation's original safe yield calculation for the Project. Finally, the federal government has no right to any of the water created by the Project; to the contrary, under article 4 of Casitas's repayment contract with the United States, Casitas has the perpetual and exclusive right to all water produced by the Project.

So, by virtue of its water license and the terms of its contract, Casitas has a vested property right under California law. California courts have uniformly held that it is "axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation."

- **Listing of the steelhead trout—**

Almost 40 years after the completion of the Project, the National Marine Fisheries Service listed the Westcoast steelhead trout as an endangered species in 1997. In 2003, NMFS issued a Biological Opinion, requiring that Casitas construct a fish ladder and divert water from the Robles-Casitas Canal to the fish ladder resulting in a permanent water loss of 3,492 acre-feet of Casitas's water annually. NMFS's goal was to restore fish in the Ventura River.

II. THE LONG, STRANGE TRIP THROUGH THE TRIAL COURT AND THE COURT OF APPEALS

- **Filing of the lawsuit**

In 2005, Casitas filed this lawsuit in the U.S. Court of Federal Claims, claiming that the mandatory construction of the fish ladder, costing Casitas \$9.3 million dollars, violated the terms of Casitas's contract, and the mandatory requirement that Casitas devote 3,492 acre-feet of its

water annually to make the fish ladder operational took Casitas's water without payment of just compensation.

- First trial court ruling—denying the contract claim—Casitas argued that the requirement that Casitas construct the fish ladder was a construction cost under its contract but the trial court disagreed—holding that the fish ladder construction fell under the operation and maintenance requirements of the contract and thus the federal government was not required to reimburse the \$9.3 million cost of building the ladder. In addition, the federal government was immune under the sovereign acts doctrine from breach of the Article 4 of the contract giving Casitas the perpetual right to all of the water generated by the Project. The trial court concluded that the Endangered Species Act compelled the diversion of the water and the construction of the fish ladder.
- Second trial court ruling—granting the Government's motion for partial SJ on the appropriate takings test. The trial court agreed with the Government's approach to the case—and held that the case should be analyzed as a regulatory takings case and rejected Casitas's argument that the takings test determination should be made in the context of the facts of the case and after the nature of the property right itself had been determined.
 - First Federal Circuit ruling—The Federal Circuit reversed the trial court's ruling, and based on the physical nature of the taking of water for the fish ladder, that the taking should be analyzed under the physical taking rubric—and thus reversed the trial court's ruling.
 - The Federal Circuit also denied the Government's petition for rehearing and rehearing en banc.
 - **Back in the trial court**

On October 18, 2010, Casitas began a 10-day trial in the CFC—and in this trial the Government attorneys proceeded to try the case as if the Federal Circuit had never ruled, explicitly asking the trial court to decide the case under the regulatory takings test not the physical takings test mandated by the Federal Circuit. The Government also argued that the Court should disregard the terms of Casitas’s water license and make an independent determination of whether Casitas’s use of water was reasonable, whether Casitas was making beneficial use of all the water that it was entitled to under its License. Finally, the Government’s defense was more about fish biology than takings analysis, and raised issues related to fish protection under state law including whether Casitas’s use of water violated Section 5937 of the California Fish and Game Code and the state public trust doctrine. Attorneys for the State of California and several environmental groups also joined in, asking the court to balance competing damages for Casitas water—all in the context of what was supposed to be a physical takings case. In short, although the only issue before the court was supposed to be issues related to the takings claim—and determination of just compensation if a taking was found—the Government launched a full attack on the beneficial use of determination made by the state water Board in issuing Casita’s license.

In the end, however, the Government’s approach at trial backfired, because the trial court rejected the Government’s public policy arguments. But the trial court then went on to issue a ruling that neither party anticipated. The trial court held that the takings issue wasn’t ripe based on the fact that Casitas has been able to meet all of its customer demands for water since 2005 or the fish ladder became operational.

Not only had neither party argued that the takings claim should be dismissed as not ripe, but to reach this conclusion the trial court had to leap over the fact that the Ventura River Project

was designed to never run out of water—even during the longest drought on record—and to ignore the fact that Casitas manages the Project using the safe yield methodology, meaning that Casitas budgets how much water it can safely deliver to its customers on an annual basis. This is an odd result for a case that has been in litigation for 7 years, since ripeness is normally a threshold issue. So Casitas’s takings claim under the trial court’s formulation will never be ripe for review

The trial court’s holding that Casitas’s taking claim is not ripe is also especially jarring in light of the Federal Circuit’s holding that the case was to be analyzed under the physical taking rubric. As the Federal Circuit previously held:

By its own admission, the government required construction of the fish ladder and compelled the water to be rerouted to the fish ladder in order for the fish ladder to operate. This is no different than the government piping the water to a different location. It is no less a physical appropriation. . . . In this case . . . the government did commandeer the water for a public use—preservation of an endangered species. When the government diverted the water to the fish ladder, it took Casitas’ water. The water, and Casitas’ right to use that water, is forever gone.⁶³

How can a taking involving water that is now forever gone not be ripe?

So, not surprisingly, Casitas is now back in the Federal Circuit – the sole issue is the ripeness ruling. The Government did not cross-appeal the other issues it lost on at the trial court, including the public policy arguments it raised in the trial court. The first question asked by one of the judges on the panel during oral argument on November 6th was—weren’t you here before in this case? In your materials, you have Casitas’s opening brief in this appeal. As you will see, Casitas has made several important arguments for why the trial court erred in its ruling. Casitas argued, for instances that the trial court’s lack of ripeness holding is hopelessly inconsistent with

the Federal Circuit's rulings on accrual and statute of limitations—which begins at the time of the government action. In addition, the trial court ignored the fact that emergency standby is one of the beneficial uses authorized by Casitas' water license, and that beneficial use has already been impaired by virtue of the fact that that Casitas has less water to divert and thus store for delivery during periods of drought. The trial court also ignored that Casitas recalculated safe yield to account for the lost diversions and thus Casitas' regular customers have already been likewise impacted by the mandatory water diversions to the fish ladder.

In addition, Casitas argued the trial court's ruling is flatly at odds with the water rights takings cases decided by the Supreme Court, and which the Federal Circuit directly relied on in holding that the case was governed by the physical takings rubric, these cases include *International Paper*, *Dugan*, and *Gerlach*. None of these cases applied a ripeness rule like the trial court applied. In fact, in *Dugan v. Rank*, the Supreme Court reversed a ruling by the Ninth Circuit, which is eerily similar to the trial court's ruling in this case. [372 U.S. 609 (1963)]

Now I'd like to be able to tell you how the court is going to rule, but in this case I can't. We'll all just have to wait and see how the Federal Circuit rules on these important issues.

III. Where does all this leave us?

Regardless of how the Court rules, however, I think the real lesson that we can take away from the Casitas saga is that a lawsuit is the wrong vehicle for changing or making water management policy. And more importantly, that a federal court—most especially the U.S. Court of Federal Claims—is the wrong forum in which to be balancing competing demands for water and amendments the terms of a state-board-issued water license. The CFC is a court of limited jurisdiction, and under its jurisdictional statute, the Tucker Act, this court can only award money

damages against the United States for claims based on the statute, contract, or the constitution.

This court can't order anyone to do anything. Nor can this court declare that anything is valid or invalid. Litigation, especially taking litigation, is the wrong place to inject water policy arguments as the Government did in this case.

In fact, during the Casitas trial, the trial judge repeatedly told the Government counsel that he lacked jurisdiction to decide the many policy issues raised by the Government. In other words, even if the trial judge had an opinion about whether Casitas's water license should have been amended, he lacked the authority to do so.

In addition, the judicial system is adversarial, and litigation is conducted in the context of rules of civil procedure and evidence, aimed at reaching a fair resolution of a dispute between the parties and not making water policy decisions. The goal of any given party in a lawsuit is to win that lawsuit—not to balance competing demands for water.

That public policy arguments dominated the Casitas case most certainly played a major role in the bizarre result reached in this case: the case is dismissed on a threshold issue after 7 years of litigation and dismissed as not ripe after the Federal Circuit has already ruled that Casitas water is gone forever.

Conclusion

I guess all of this now brings us back to my opening comment: What a long, strange trip the Casitas litigation has been and continues to be.