Teachings of the *Tulare* Decision

By Nancie G. Marzulla

In *Tulare Lake Basin Water Storage Dist. v. United States*,[1] the court affirmed the primacy of California State Water Project (SWP) water users' rights and the California Water Board's public interest in the water allocation decisions over subsequent federal Endangered Species Act water reallocation decision, holding that water rights vested under state law could not be taken by the federal government without payment of just compensation. In large part because the decision required payment of just compensation in the context of endangered species protecting—causing some to question whether the case would undermine the integrity of the important goals and protections of species preservation. But the three main principles of law that came out of the decision have been endorsed by subsequent courts suggesting that the rationale of the *Tulare* decision may in fact stand the test of time.

The three main holdings of the Tulare decision are as follows:

1. The Right to Receive Water is Property Protected by the Fifth Amendment

The court first held that plaintiffs possessed a property right to receive SWP water that is protected against uncompensated taking by the Fifth Amendment's Just Compensation Clause. The Fifth Amendment to the United States Constitution states, in part, that private property shall not be "taken for public use, without just compensation." The Just Compensation Clause, also referred to as the takings clause, requires that if a regulation goes too far, society as a whole, rather than a particular property owner, will

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

bear the burden of the exercise of eminent domain power in the public interest. As the court has often stated, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[2]

The court rejected the government's argument that because plaintiffs' right to receive SWP water was based in part on contract, plaintiffs right did not rise to the level of a protected property interest. The court stated:

> [P]laintiffs can claim an identifiable interest in a stipulated volume of water. While under California law the title to water always remains with the state, the right to the water's use is transferred first by permit to DWR, and then by contract to end-users, such as the plaintiffs. Those contracts confer on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of the permits . . . . Thus, we see plaintiffs' contract rights in the water's use as superior to all competing interests.[3]

B. The Taking of Water Is Properly Analyzed as a Physical Taking

Next, the court held that the taking of water is properly analyzed as a physical, per se taking of property, rejecting the government's argument that the taking should be analyzed as a regulatory taking: "In the context of water rights, a mere restriction on use — the hallmark of a regulatory action — completely eviscerates the right itself since the plaintiffs' sole entitlement is to the use of the water."[4] The court further explained:

> Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise

[2] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[3] *Tulare*, 49 Fed. Cl. at 318.
[4] *Tulare*, 49 Fed. Cl. at 319.

> be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder . . . . To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, has rendered the usufructuary right to that water valueless, they have thus effected a physical taking.[5]

C. The Federal Government Is Obligated to Pay for Any Water It Takes

Finally, the court recognized that the federal government's decision to divert plaintiffs' SWP water was based on the government's concerns that the delta smelt and the winter-run Chinook salmon were in jeopardy of extinction. Under the Endangered Species Act, the U.S. Fish and Wildlife Service and National Marine Fisheries Service are required to protect endangered fish and to "halt and reverse the trend toward species extinction, whatever the cost."[6] The court did not purport to limit the government's ability to carry out its responsibilities under the Endangered Species Act: "At issue, then, is not whether the federal government has the authority to protect the winter-run Chinook salmon and delta smelt under the Endangered Species Act, but whether it may impose the costs of their protection on plaintiffs."[7] The court's answer to this question was simple: "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."[8]

The court grounded its ruling in existing takings jurisprudence, beginning with *International Paper Co. v. United States*:

[5] *Tulare*, 49 Fed. Cl. at 319.
[6] *Tulare*, 49 Fed. Cl. at 315 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 154, 184 (1978)).
[7] *Tulare*, 49 Fed. Cl. at 316.
[8] *Tulare*, 49 Fed. Cl. at 324.

> There, the Supreme Court, in assessing whether the government's acquisition of a corporation's entire right to water power constituted a taking, noted that "the petitioner's right was to the use of water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take that use."[9]

Next, the court cited *Dugan v. Rank*, stating in that case, similar to *International Paper*,

> [T]he Court made approving reference to cases that treated water rights as the object of physical seizure (*e.g., United States v. Gerlach Live Stock Co.*;[10] *Ivanhoe Irrigation District v. McCracken*),[11] before noting that "[a] seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land." The Court went on to conclude that "when the Government acted here 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses 'whenever it saw fit,' 'with the result of depriving the owner of its profitable use [there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made.'"[12]

Thus *Tulare* was founded in three well-reasoned and "conceptually sound" cases.[13] This holding remains good law.

Although the *Tulare* decision was not appealed to the U.S. Court of Appeals for the Federal Circuit, since the case was settled after the trial court ruling, the Federal Circuit did issue a ruling two years citing the Tulare decision. In *Washoe County, Nevada v. United States*, [14] the Federal Circuit cited *Tulare* for the proposition that a taking of water rights may be found either (1) "where the government has physically diverted

[9] *Tulare*, 49 Fed. Cl. at 319 (citing *Int'l Paper Co. v. United States*, 282 U.S. 399, 407 (1931)).
[10] *Gerlach*, 339 U.S. 725.
[11] *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958).
[12] *Tulare*, 49 Fed. Cl. at 319.
[13] Douglas L. Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?* 36 ENVTL. L. 1331, 1366 (2006).
[14] *Washoe County v. United States*, 319 F.3d 1320 (Fed. Cir. 2003).

water for its own consumptive use," or (2) where the government action "decreased the amount of water accessible by the owner of the water rights."[15] Indeed, in *Washoe County* the Federal Circuit employed *Tulare's* analytic framework to distinguish appellants' claim on the ground that unlike the pumping restrictions imposed in *Tulare*, the government's permit denial in *Washoe County* had not reduced the quantity of water physically available to appellants on their ranch:

> In *Tulare*, the plaintiffs included county water districts that had contracted with a state agency for "the right to withdraw or use prescribed quantities of water" stored in a state water project. To protect certain fish species pursuant to the Endangered Species Act, however, federal and state agencies restricted pumping from the water projects. The Court of Federal Claims found that the contracts had conferred on plaintiffs an identifiable property interest in a stipulated amount of water and that the restrictions prevented the plaintiffs from receiving the full amount of water to which they were entitled under the contracts. The court reasoned that the government had physically appropriated the plaintiffs' water because its actions were no different than if the government had physically diverted water for its own consumptive use. In the instant case, the government has neither physically diverted or appropriated any water nor physically reduced the quantity of water that is available to the Appellants from the water source on the Ranch.[16]

Again, two years following *Washoe County*, the Federal Circuit again favorably cited the Tulare decision in *Hansen v. United States*: "This court has concluded that water rights are property protected by the Fifth Amendment in some notable cases."[17] The *Hansen* court also cited *Hage v. United States*,[18] which "involved a claim that the

[15] *Washoe County*, 319 F.3d at 1326 (Fed. Cir. 2003) (citing *Dugan*, 372 U.S. at 625-26 (finding a taking where the government diverted water at a dam from downstream owners of water-rights for public purposes); *Int'l Paper*, 282 U.S. at 407-08 (finding a taking where the government ordered diversion of water from the owners of water-rights for use in government power production); *Tulare*, 49 Fed. Cl. at 320 (stating that a deprivation of water from the owner of the water rights amounts to a physical taking)).
[16] *Washoe County*, 319 F.3d at 1326-27 (internal citations omitted).
[17] *Hansen v. United States*, 65 Fed. Cl. 76, 123 (2005).
[18] *Hage v. United States*, 35 Fed. Cl. 147 (1996) [hereinafter *Hage I*].

government had taken the plaintiff's water rights both by regulatory and physical actions (i.e., 'canceling and suspending [the plaintiffs'] permit and diverting and using their water')."[19] The court continued:

> In *Hage*, this court rejected the argument that water rights were "limited, usufructuary rights" not entitled to Fifth Amendment protection. "[W]ater rights are not 'lesser' or 'diminished' property rights unprotected by the Fifth Amendment." On the contrary, *Hage* concluded: "Water rights, like other property rights, are entitled to the full protection of the Constitution."[20]

The Hansen court then discussed the *Tulare* ruling:

> Likewise, in *Tulare* . . . the plaintiffs claimed that the Bureau of Reclamation's decision to reduce water outflows for the preservation of a few species of fish deprived them of their water rights without just compensation. This court granted summary judgment in favor of the plaintiffs, concluding that "the government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."[21]
>
> Other jurisdictions have relied on the ruling in *Tulare* to reach similar outcomes.

In *Rio Grande Silvery Minnow v. Keys*, for instance, the district court for the District of New Mexico ordered the federal government to "compensate those . . . whose contractual rights to water are reduced in order to meet . . . flow requirements."[22] This issue, however, was found to be moot on appeal to the Tenth Circuit.[23] In Washington State, the Washington Supreme Court in *Public Utility District No. 1 of Pend Oreille County v. Washington Department of Ecology*[24] cited *Tulare* as support for its holding that the government's abrogation of a water right, no matter how minimal, is a compensable

[19] *Hansen*, 65 Fed. Cl. at 123 (citing *Hage I*, 35 Fed. Cl. at 156).
[20] *Hansen*, 65 Fed. Cl. at 123 (citing *Hage I*, 35 Fed. Cl. at 172).
[21] *Hansen*, 65 Fed. Cl. at 123 (citing *Tulare*, 49 Fed. Cl. at 314-15; 324).
[22] *Rio Grande Silvery Minnow v. Keys*, 356 F.Supp.2d 1222, 1237 (D.N.M. 2002).
[23] *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003).
[24] *Pub. Util. Dist. No. 1 of Pend Oreille County v. Wash. Dep't of Ecology*, 51 P.3d 744 (Wash. 2002).

taking: "A governmental abrogation of a preexisting, vested water right is an appropriation of that enhanced minimum flow to a public use and therefore is a taking encompassed in the Fifth and Fourteenth Amendments no matter how minimal the intrusion may be."[25]

In *Allegretti & Co. v. County of Imperial*, California's intermediate appellate court disagreed in dicta with the *Tulare* court's ruling that the water rights holder possessed a property right.[26] But *Allegretti* is easily distinguished from *Tulare*, for the *Allegretti* court never reached the question of whether a per se taking test or the *Penn Central* test should be applied. Instead the *Allegretti* court focused on the lack of identifiable water rights like those created by the *Tulare* plaintiffs' contracts. The *Allegretti* court held "[e]ven if we found it appropriate to consider *Tulare Lake*, we would find it distinguishable by virtue of the existence of identifiable contractual rights between the plaintiffs and water rights holder, rights that are not present in this case."[27] Notably, the *Allegretti* court disagreed with the holding in *Tulare* that the water rights holder possessed a property right, but agreed with the Supreme Court's decision in *International Paper*.

Finally, in *Klamath Irrigation District v. United States*,[28] a decision in which the trial court found that the plaintiffs lacked a property right, the court disagreed with the *Tulare* holding that the plaintiffs had a property right. The *Klamath* court did not address

[25] *Pend Oreille County*, 51 P.3d at 773. (citing *Tulare* as follows: "*See Tulare Lake Basin Water Storage Dist. v. United States* (discussing *United States v. Causby*, 328 U.S. 256 (1946)." Also citing *Int'l Paper*, 282 U.S. 399 and *Dugan*, 372 U.S. 609).
[26] *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 129-32 (Cal. Ct. App. 2006).
[27] *Allegretti*, 42 Cal. Rptr. 3d at 131.
[28] *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005).

the issue of whether the taking of water is properly analyzed as a per se or as a *Penn Central* taking.[29]

To date, there is not a single case from any federal court before or after the *Tulare* ruling applying the *Penn Central* test to determine whether the right to receive water has been taken. Rather, all water rights takings cases apply the per se test used in *Tulare*.

The gathering body of cases that cite the *Tulare* decision in a positive light, combined with the absence of a case that contradicts the *Tulare* analytical framework or holding, is hard evidence that past critics have been wrong when they claimed the ruling would not be endorsed by other courts. On the contrary, this evidence demonstrates that other courts agree with the sound reasoning employed in the *Tulare* decision.

[29] The *Klamath* court's criticisms of the *Tulare* decision in dicta may also have been colored by its erroneous belief that the *Tulare* plaintiffs had a contract remedy against the federal government (they had no contract with the United States) and that the court failed to examine certain aspects of California water law (although it did).