UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant.

No. 05-168L

Honorable John P. Weise

BRIEF AMICUS CURIAE OF STOCKTON EAST WATER DISTRICT

IN SUPPORT OF PLAINTIFF CASITAS MUNICIPAL WATER DISTRICT

September 20, 2010

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1, Amicas Curiae Stockton East Water District, a water conservation district organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

STATEMENT OF INTERESTS AND IDENTITY OF *AMICUS CURIAE*

Stockton East Water District ("Stockton East") is a water conservation district located in California's Central Valley. Stockton East encompasses 143,000 acres in San Joaquin County, including 53,000 acres of irrigated farmland and nearly 50,000 acres of urban area encompassing the City of Stockton and surrounding areas. The district supplies surface water to irrigate approximately 10,000 acres of farmland and treated surface water for drinking to approximately 300,000 residents.

Stockton East and one other adjacent water district ("Central") are the only two water service contractors from the United States' New Melones Project. The New Melones Project (including a dam and reservoir) was authorized in its present form in 1962, and is located on the Stanislaus River (a tributary to the San Joaquin River and Bay-Delta) 40 miles east of Stockton, California. New Melones Reservoir holds 2.4 million acre-feet of water.

In the 1960's the United States applied to the California State Water Resources Control Board ("Board") for a water right for the New Melones Project. The Board refused to grant a complete water right to the United States until it had a plan to consumptively use the water from the Project in the local area. That plan led to the two contracts with Stockton East and Central in 1983 for 155,000 acre-feet of water annually. The Board subsequently granted complete water rights to the United States to operate the New Melones Project. Stockton East and Central then embarked on a ten-year, $70 million project to build the required conveyance system to take the contracted water from New Melones to its service area (a requirement of its federal water service contract). This project was completed and ready for water deliveries in 1993.

The first year of implementation of the new Central Valley Project Improvement Act was also 1993. Pub. Law 102-575 Title 34 (CVPIA). One part of the CVPIA directs the Secretary of

the Interior to dedicate between 600,000 and 800,000 acre-feet of water from its Central Valley Project facilities (of which New Melones is one) to fishery enhancement purposes annually. Between 1993 and 2004, the United States dedicated in excess of 1.5 million acre-feet of water from New Melones alone to CVPIA fishery purposes, while providing no water to Stockton East in some years, and less than its contractual amount in all years. Notably, this dedication of water for fish was *in addition to* approximately one million acre-feet of instream fish flows released from New Melones as a condition of the Board-issued water rights for the project.

Stockton East sued the United States for breach of contract and taking. This suit is currently on appeal in the Federal Circuit Court of Appeal, Case No. 2007-5142. In the Court of Federal Claims, the breach of contract and takings claims were segregated. A trial on the liability phase of the breach of contract claim was held in October 2006. On February 21, 2007, the court entered judgment against Stockton East and in favor of the United States on the breach of contract claims, and dismissed the taking claims. Judgment, *Stockton East Water Dist. v. United States*, No. 04-541 (Fed. Cl. Feb. 21, 2007).

On June 27, 2007, Stockton East appealed. On September 30, 2009 the Federal Circuit ruled in Stockton East's favor on appeal, holding that (1) the United States had breached the contracts and (2) the trial court had improperly dismissed plaintiffs' takings claims. *Stockton East Water Dist. v. United States,* 583 F.3d 1344, 1369 (Fed. Cir. 2009). The Federal Circuit remanded the case to the trial court for a determination of contract damages and a trial on the takings claim. *Id.* The United States filed a request for rehearing on November 13, 2009, which is still pending. Combined Petition for Panel Rehearing and Rehearing En Banc, *Stockton East v. United States*, No. 2007-5142 (Fed. Cir. Nov. 13, 2009, *refiled* Nov. 20, 2009).

While not identical, there are obvious similarities between the Casitas and Stockton East takings claims. Both involve a complete evisceration of the plaintiff's right to use a discernable quantity of water effectuated by the federal government's diversion of water for fish – a public use. Both cases also include an autonomous federal agency decision to increase the amount of water released for fish on a stream beyond that required by the Board, to the detriment of the consumptive right holders on the stream, without involvement of the Board.

Moreover, the same "background principles of state law" arguments were made by United States and *amici* in support of the United States in the Stockton East case as are being made in this case. Thus, any decision in this case may affect Stockton East's taking claim.

INTRODUCTION

The right to use surface water in California is unique and valuable. It is not a right that is so inherently conditioned that the federal government can take it as it pleases for public purposes without compensation. Rather, only the California State Water Resources Control Board ("SWRCB"), not the federal government, can allocate California's surface water resources – which it did in this case, for use by Casitas Municipal Water District ("Casitas") in its service area. Absent an order of the SWRCB reallocating Casitas' water to the federal government, the government's appropriation of that water for a public use amounted to a taking.

ARGUMENT

I. In California, the Right to Use a Specific Quantity of Water for a Specific Purpose is a Compensable Property Right

Casitas has an appropriative water right license issued by the SWRCB. The license specifies the source of the water that Casitas can use, how much it can use, where it can use it, and how it can use it. No doubt, the licensed right attaches to the use of the water, not the corpus. Yet, neither the usufructory nature of the right, or the fact that it is subject to conditions imposed by law and license, diminish its character as a property right that cannot be taken without compensation as claimed by the Government and *amici* Natural Resources Defense Council ("NRDC") and the SWRCB.

The SWRCB – the very entity charged with issuing appropriative licenses - argues that licensed appropriative rights are so inherently conditioned and "uncertain" that they cannot serve as the basis for a compensable property right. SWRCB Amicus Br. at 10-12. The authority relied on by the SWRCB for this outlandish argument says no such thing. Rather, the cases cited by the SWRCB merely confirm that water rights in California are usufructory. *See e.g. Eddy v. Simpson*, 3 Cal. 249, 252 (1853); *Kidd v. Laird*, 15 Cal.162, 180 (1860).

The SWRCB, for example, cites to *People v. Murrison,* 101 Cal.App.4th 349, 359 (2002) for the proposition that "water rights are not like real property rights, and by their very nature are 'limited and uncertain'." SWRCB Amicus Br. at 10. Neither this quote, or this premise, is contained in the *Murrison* case. Rather, in *Murrison*, the issue was whether a landowner's compliance with a statutory requirement to notify the Department of Fish and Game before modifying a streambed was an impermissible invasion on the landowner's rights to use water from the stream. The Court explained that it was not. This logical conclusion is not different from, but rather the same as, the normal limits found on our use of real property. For example, the fact that a landowner must notify and obtain a permit from a government transportation authority prior to constructing a driveway on her real property does not in any way diminish the character of the owner's interest in the real property as a compensable property right.

Accepting the SWRCB's arguments as true, one cannot help but wonder how the SWRCB can in good conscience continue to accept millions of taxpayer dollars to administer such a purportedly worthless scheme of applications, permits and licenses, which according to the SWRCB, cannot be relied upon. The answer, of course, is that the SWRCB's argument is meritless. Usufructory water rights are compensable property rights in California, just as they are throughout the United States. *See e.g. Fullerton v. State Water Resources Control Board*, 90 Cal.App.3d 590, 598 (1970):

> Although there is no private property right in the corpus of the water while flowing in the stream, the right to its use is classified as real property (*Locke v. Yorba Irrigation Co.*, 35 Cal.2d 205 [217 P.2d 425]; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716 [93 P. 858]). The concept of an appropriative water right is a real property interest incidental and appurtenant to land (*Inyo Cons. Water Co. v. Jess*, 161 Cal. 516 [119 P. 934]; *Palmer etc. v. Railroad Commission*, 167 Cal. 163, 173 [138 P. 997]; *Silver Lake Power etc. Co. v. Los Angeles*, 176 Cal. 96, 101 [167 P. 697]; *Peake v. Harris*, 48 Cal.App. 363, 379-380 [192 P. 310]).

II. Purported Undefined "Background Principles of State Law" Cannot Serve as a Defense to Taking

There is no question that water use in California must be reasonable and beneficial, consistent with the public trust and comply with all other applicable laws, including California Fish and Game Code section 5937. However, once the SWRCB has evaluated and issued a licensed appropriative right through a public review process, as it has done here for Casitas, the presumption is that the use of water under that right complies with each of these requirements until proven otherwise. Here, the government would like this court to ignore this presumption, and accept as part of the government's defense to taking, that Casitas' valid water right is actually something less than it is because it may be subject, at some time in the future, to restriction under state law. This Court should reject this procedurally irregular and impermissible invitation.

The public trust doctrine, for example, requires the SWRCB to weigh and balance competing interests, guided by California's legislative policy to favor domestic and irrigation uses. A California court explained this in *United States v. State Water Resources Bd.*, 182 Cal. App.3d 82, 103 (1986):

> The nature of the public interest to be served by the Board is reflected throughout this statutory scheme. As a matter of state policy, water resources are to be used "to the fullest extent . . . capable" (section 100) with development undertaken "for the greatest public benefit" (section 105). And in determining whether to grant or deny a permit application in the public interest, the Board is directed to consider "any general or co-ordinated plan . . . toward the control, protection, development . . . and conservation of [state] water resources . . ." (section 1256), as well as the "relative benefits" of competing beneficial uses (section 1257). Finally, the Board's actions are to be guided by the legislative policy that the favored or "highest" use is domestic, and irrigation is the next highest. (Section 1254).

The SWRCB undertook this weighing and balancing when it issued Casitas' license. The government is free to petition the SWRCB to revise a permitted or licensed water right to require

additional fishery releases as a condition of the right. The Board may even revoke a license upon a finding that the water granted under the license has not been put to a useful or beneficial purpose. However, such actions may not be taken under state law without the due process afforded by proper notice and evidentiary hearing requirements. California Water Code §1675. These due process requirements evidence the true real property nature of Casitas' water right.

Here, the federal government seeks to bypass all requirements of state law, eliminating SWRCB's obligation to weigh and balance the need for the water by Casitas' customers and the purported need for the larger fishery releases advocated by the government, and depriving Casitas of its due process rights. Curiously, even the NRDC and the SWRCB amicus briefs, without support in law or fact, cite to the government's biological opinion as somehow "proving" that Casitas' exercise of its licensed water right harms fish. SWRCB Amicus Br. at 19; NRDC Amicus Br. at 14. The hearsay statements contained in the biological opinion are meaningless for this purpose.

In the required SWRCB hearing or California Superior Court trial, a challenger to the water right would have to put forth admissible evidence to prove that Casitas' license should be modified to protect the public trust. This evidence would be contested, and still only one piece of a complicated puzzle that requires California authorities to solve. Simply referencing a staff biologists' conclusion in a biological opinion that fish need more water does not prove that Casitas' use of water under its license is non-beneficial, unreasonable or a violation of the public trust. This is especially inappropriate when the government's determination under the ESA is governed by the requirements of that federal statute, and not by the very different standards imposed by California state law.

The government, SWRCB and NRDC's unique and aggressive arguments regarding "background principles" beg the question - who determines background principles of state law, and who determines whether Casitas' actions are consist with those principles? The government, SWRCB and NRDC would have the federal government independently determine what flows are required by the public trust, what is reasonable under the California constitution, and what is required by state law – all without the benefit of a public hearing process involving interested California parties. Such an approach contradicts both state and federal law.

Section 8 of the 1902 Reclamation Act requires that the Secretary of the Interior proceed in conformity with the laws of the State. In the Reclamation Act Congress acknowledged that it is the State of California, and not the United States, that articulates background principles of state law.

The California Supreme Court has acknowledged that what is required by background principles of state law must be determined on a case by case basis by a careful balancing of state policies and interests. *Environmental Defense Fund, Inc., v. East Bay Municipal Utility District*, 26 Cal.3d 183 (1980). Fishery resources and water quality are but two of many interests protected by the public trust, and each of the competing interest must be carefully considered and evaluated to determine the State's preferred balancing:

> The establishment of bypass terms requires a balancing of the public trust resources being protected and the diversion of water for beneficial uses on a case-by-case basis.

In the Matter of the Petition for Reconsideration of Division of Water Right Decision 99-01, Order WR 99-010, November 18, 1999 at p. 5 fn. 2.

> The public trust doctrine requires the [SWRCB] to protect public trust resources where feasible. The doctrine allows for a balancing of competing uses and recognizes that, in some cases, the public interest served by water diversions may outweigh harm to public trust resources.

In the Matter of Fishery Resources and Water Right Issues of the Lower Yuba River, Order WR 2001-08, May 17, 2001 at p. 6, citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 427.

> Neither the Legislature nor the courts have established a set formula governing the balancing of competing water demands under the public trust doctrine, nor do we believe that such a formula is feasible.

Id at 8.

For the same reasons, California Fish and Game Code section 5937 cannot serve as a "defense" to a taking for the government. As the SWRCB admits, section 5937 codifies the common law public trust doctrine – and thus requires actual admissible evidence and balancing. See SWRCB Br. at 22. The hearsay conclusions in the government's biological opinion, adopted pursuant to the legal standards found in the ESA, cannot serve to establish that Casitas' otherwise lawful exercise of its licensed water right violates section 5937. Rather, the presumption is that Casitas' exercise of its licensed right is consistent with section 5937 until either a California Court or the SWRCB holds otherwise, after a proper complaint against Casitas has been filed, a hearing in which pertinent evidence is considered has been held and the authority or fact finder has undertaken the balancing required by law.

Further, the standard in section 5937 relating to keeping existing fish in "good condition" is a far cry from the objectives sought to be satisfied by the federal government through an ESA recovery plan for steelhead. No court has ever held that section 5937's "good condition" requirement incorporates the far more stringent requirements of the ESA for threatened species. Further, section 5937 is tempered by the California Constitutional requirement that all water use in California be reasonable and beneficial. CAL. CONST. art. X sec. 2.

The determination of what is a reasonable use of water under the California constitution requires a case-by-case determination:

> With respect to the reasonable use requirement, California courts have recognized in numerous instances that a determination of what is 'reasonable' is a question of fact to be determined according to the circumstances of each particular case.

In the Matter of Permit 17287 Order WR 88-14, July 21, 1988, at p. 21, citing *Joslin v. Marin Municipal Water District,* 67 Cal.2d 132, 139 (1967); *People ex rel. State Water Resources Control Board v. Forni,* 54 Cal.App.3d 743 (1976).

> Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved i*n vacuo* isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment [now Article X, Section 2 of the California Constitution].

Joslin v. Marin Municipal Water District, 67 Cal.2d 132 (1967), cited with approval in *Environmental Defense Fund, Inc., v. East Bay Municipal Utility District*, 26 Cal.3d 183 (1980).

Thus, if the amount of water needed from the Ventura River to keep the fish downstream of the dam in "good condition" amounted to an unreasonable use of water in light of society's other demands, the California Constitutional requirement would trump section 5937. The government's biological opinion makes no attempt at this analysis, nor can it under the ESA.

Finally, the fact that federal courts may have concurrent jurisdiction with California courts and/or the SWRCB to determine some of these "background" legal issues, does not help the government. The government has not sued Casitas alleging that its water right needs to be limited based on California law. Rather, the government has acted unilaterally, pursuant to the federal ESA, not pursuant to the different California state law standards, to require that Casitas give up some of its licensed water for the benefit of a steelhead population. In response, Casitas sued the government for a taking. Now, as a defense to taking, the government wants to claim

that Casitas never had a right to the water taken because of state law restrictions. It cannot do so. Casitas has a current water right to divert to the full extent allowed by its license. If the government wanted to limit Casitas' water right the only way to do so was to either sue Casitas for a violation of Fish and Game Code section 5937 or the public trust doctrine, or petition the SWRCB to limit Casitas' license. This has not been done. The government cannot backdoor these restrictions as part of a defense in this case, thereby stripping Casitas of its due process rights under state and federal law.

We cannot stress enough the importance of the procedural irregularity that the government asks this Court to adopt. If the government's arguments prevail it will mean that federal fishery agency staff have become the new authority for defining California appropriative water rights. While the ESA is a powerful statute, it is not – and should never be – that powerful.

CONCLUSION

The ESA directs the federal government to commandeer resources – currently held by others – for a purported public benefit. If this is the will of the people, the people should pay for the use of these resources. To hold otherwise means that small groups of people – such as the rate payers in Casitas or Stockton East – must foot the bill for a public benefit for all. Avoiding this unjust result is the entire basis for our country's prohibition against takings.

For the reasons stated above, Stockton East respectfully requests that this Court discount, as it should, any arguments by the government, the SWRCB or NRDC that either Casitas does not have a compensable property right or that this right is so inherently limited that it could not be "taken" by the government. Once Casitas offers evidence that the government's ESA actions limited the amount of water available under its license, this Court should award appropriate compensation.

Respectfully submitted,

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September 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2010, I electronically filed the foregoing **BRIEF AMICUS CURIAE OF STOCKTON EAST WATER DISTRICT 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/ JULIE M. HASSELL
JULIE M. HASSELL