UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT,	No. 05-168L
Plaintiff,	Honorable John P. Weise
v.	
UNITED STATES,	
Defendant.	

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

September 13, 2010

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CORPORATE DISCLOSURE STATEMENT

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 and in the Federal Circuit Court of Appeals in support of Lake Casitas Municipal Water District (Casitas). PLF and its supporters believe that this case continues to be 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

This brief is designed to assist the Court on two critical issues remaining in this case, namely, (1) whether, under California law, Casitas has private property interests in the water it appropriates, stores, and uses pursuant to a valid state license, and (2) if so, whether the government can avoid liability for taking Casitas' water rights under the background principle defense articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

In their effort to acquire Casitas' water without compensation, the government and its amici greatly understate the scope of private rights in water under California law, while simultaneously misapplying the background principles defense to deny property rights in this case. California law is clear that Casitas' water is a protected form of property. *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."). And the government may not undercut these rights, through the vehicle of the background principles doctrine, by pointing to state law principles that never formed the basis for the challenged taking. The government cannot rely on the public trust doctrine and other state law principles when its taking of water is based only on the ESA.

Even if state-law principles were relevant, no California principle of water law divests Casitas of its property in appropriated water. Both the reasonable and beneficial use and public trust doctrines accommodate Casitas' permitted storage and use of water to serve vital human economic needs. No authority holds that this reasonable use of water, in service of a public need, becomes unreasonable or a violation of the public trust doctrine simply because it has some environmental side effects.

ARGUMENT

I

THE RIGHT TO REASONABLY USE CAPTURED RUNNING WATER IS A PRIVATE PROPERTY INTEREST UNDER CALIFORNIA LAW

Private property is not a thing, it is a right over a thing. California common law and statutory law recognizes Casitas' right to divert, store, and use captured water pursuant to license as protected property.

A. The Right To Capture and Use Water Is a Private Property Interest

California operates under an appropriative water rights regime, and the common law undergirding that regime frames the issues here. Under a prior appropriation system, a person acquires an individual right to use a certain amount water once it has been captured and put to a beneficial use within a reasonable time. *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."). When a claim is so established, the water holder has a right of water use superior to later claims; this is what is meant by the appropriation doctrine phrase, "first in time, first in right."

Because drops of water cannot be owned outright, water rights arising under an appropriative regime are sometimes said to be "usufructuary," *i.e.*, revolving around the use of water. But contrary to the government's suggestions, this does not mean that water rights are a flimsy, ephemeral property interest. As with other property, water rights are comprised of a bundle of distinct and

valuable interests. A water right holder can impound, possess, and consume water. *Fullerton v. State Water Res. Control Bd.*, 90 Cal. App. 3d at 599. Upon possession, he may exclude the rest of the world from the water. *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. 8, 26 (1929). The water holder may sell his water right. *Ickes v. Fox*, 300 U.S. 82, 89-90 (1937); Cal. Water Code § 71611 ("A [water] district may sell water under its control, without preference, to cities, other public corporations and agencies, and persons, within the district for use within the district.").

The fact that a water rights holder exercises his rights without ownership is irrelevant. Private property rights have never depended on possession of title, but instead arise from, and exist independently in, many subsidiary interests. *See generally United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (defining property as a "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"). In the real property context, for instance, an easement holder does not own land, but his right to use the land constitutes private property in the land. Real property leases provide another, similar, example.

Appropriative water use rights are similar to easements and leases in that they confer a level of private control over a resource sufficient to qualify as a private property interest. *Fullerton*, 90 Cal. App. 3d at 598;*United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 101 (1986) (It is "axiomatic that once rights to use water are acquired, they become vested property rights . . . .").

It is of no moment that courts sometimes differ on the exact source or nature of property rights in water. What matters is the recognition that water rights acquired under the appropriation system are entitled to legal protection as private property. *Fullerton*, 90 Cal. App. 3d at 597; *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. at 26 ("So far as the rights of the prior appropriator are concerned any use

which defiles or corrupts the water so as to essentially impair its priority and usefulness for the purpose for which the water was appropriated . . . is an invasion of his private rights for which he is entitled to a remedy."); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 374 (1935) ("The preferential and paramount rights of . . . the prior appropriator are entitled to the protection of the courts of law or in equity.").

More specifically, under California property law, usufructuary water rights are property rights that cannot be taken by government without just compensation. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d at 101 (vested water rights "cannot be . . . taken by governmental action without due process and just compensation"); *see id.* at 104 ("[W]ater rights holders are entitled to judicial protection against infringement . . . [including for] inverse condemnation."). *See also Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 143 (1967) (A compensable property interest "consists in [the] right to the *reasonable* use of the flow of the water.").

B. California's Regulatory System Codifies the Common Law of Appropriation and Confirms Property Rights in Water

In the early 20th Century, the State of California passed laws "'to provide an [exclusive], orderly method for the appropriation of [unappropriated] waters.'" *People v. Shirokow*, 26 Cal. 3d 301, 308 (1980) (quoting *Temescal Water Co. v. Dep't of Pub. Works*, 44 Cal. 2d 90, 95 (1955)). Under this regulatory scheme, a would-be water appropriator must apply to the State Water Resources Control Board (Board) for a permit authorizing the taking of a quantity of water. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d at 102. The Board must consider the public interest, especially whether a proposed appropriation is reasonable and beneficial. After the Board issues an appropriative water permit, the person may take and use the water according to the permit

terms. Subsequently, and upon compliance with the permit, the appropriator is issued a license, the final step in the process. *Id.*

This regulatory and permitting process was not intended to eviscerate common law water rights. *People v. Murrison*, 101 Cal. App. 4th 349, 361 (2002) ("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."); *Fullerton*, 90 Cal. App. 3d at 602 ("[C]ourts have consistently held that the 1913 statutory scheme was only a regulation of the existing privilege to appropriate water."). Rather, California's Water Code codifies the common law process for acquiring water rights, *Murrison*, 101 Cal. App. 4th at 361 ("[T]he Legislature codified the process for appropriation of water."), so as to provide a predictable method for people to assert and control an allocation of water. Thus, "appropriative rights become confirmed," not diminished, by issuance of a water use license. *State Water Res. Control Bd.*, 182 Cal. App. 3d at 102.

C. Casitas' Appropriative Property Rights Are Confirmed by Its License

For many decades, Casitas has diverted water from the Ventura River to a canal and then to Lake Casitas, from there sending the water to meet domestic and agricultural demand. Plaintiff's [2007] Memorandum of Contents of Fact and Law (Plaintiff's 2007 Memorandum) at 3, 6. This process of capturing and diverting and using the water for these purposes, within a reasonable time, is consistent with the common law process for acquiring appropriative and protected water rights. *Nebraska*, 325 U.S. at 614.

In 1986, Casitas was issued a currently operative license to use water from the Ventura River. Plaintiff's 2007 Memorandum at 8. The license confirms that Casitas has a right to divert 107, 800-acre-feet of water, and to annually use 28,500-acre-feet of this amount, storing the rest for future domestic, agricultural, and other uses. *Id.* at 8-9. Under California law, this license reflects a determination that Casitas has met the criteria for a reasonable and beneficial appropriative water right in the specified amount of water, and under the conditions imposed. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d at 104. More importantly for present purposes, Casitas' license is confirmation that it has protected property in its use of water. *Yuba River Power Co. v. Nevada Irrigation Dist.*, 207 Cal. 521, 525 (1929); *Miller & Lux, Inc. v. Bank of America*, 212 Cal. App. 2d 719, 726 (1963) (appropriation application confers property right which is perfected when appropriation actually occurs).

II

THE GOVERNMENT HAS FAILED TO PROVE THERE IS A BACKGROUND PRINCIPLE OF CALIFORNIA LAW THAT COULD OR SHOULD DIVEST CASITAS OF ITS PROPERTY RIGHT IN WATER

As the foregoing shows, Casitas' suit for compensation for the loss of previously appropriated water rests on constitutionally protected property rights. To neutralize this reality, the government invokes the background principles defense to takings liability articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029-31. The government effectively claims that, even if Casitas has property rights in its water, the right is so limited by certain "background principles" of California law, that Casitas' property does not include the right to take, store, and use water purportedly needed for ESA purposes. In particular, the government points to three doctrines:

(1) the requirement that water use be for a "beneficial use," (2) the requirement that water use be "reasonable," and (3) the state's public trust doctrine.

This tactic fails for two reasons. First, none of the state law doctrines invoked by the government can qualify as a valid background principles defense for the simple reason that none of them drove the taking of Casitas' water. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 101 (2007). Second, even if the state law doctrines of reasonable and beneficial use and the public trust doctrine were somehow related to the taking, those doctrines substantively do not undermine Casitas' property rights

A. The Government Cannot Show, as It Must, That Its Endangered Species Act-Based Taking Was Designed To Implement Any of the Purported Background Principles It Belatedly Raises Now

By relying on state law doctrines to justify its ESA-based taking, the government seems to believe that the background principles doctrine permits it to posit, and prevail under, any post-hoc state law principle that might conceivably justify its taking, whether or not the taking was premised on such a principle.

Not so. To prevail under the background principles defense, the government has an initial burden to show that the challenged property restriction, here the water deprivation, was actually grounded on the alleged background principle at the time of its application. *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); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1385-86 (Fed. Cir. 2000).

In *Palm Beach Isles*, the Federal Circuit specifically described the nature of the government's burden under the background principles doctrine. In that case, 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, 208 F.3d at 1380, the government claimed 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 in *Palm Beach Isles*) 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).

Thus, in this case, the government must show that its taking of Casitas' water was related to one of the alleged background principles; namely, the beneficial and reasonable use doctrine or the public trust doctrine. *Id.*; *see also Gerlach*, 339 U.S. at 737. It cannot do so. The critical water restriction derives solely from the ESA. *Casitas*, 76 Fed. Cl. at 102. Accordingly, under *Palm Beach Isles*, the government must show that the ESA itself qualifies as "background principle" immunizing it from takings claim. *Palm Beach Isles*, 208 F.3d at 1385. But it has not attempted to make such a showing. Nor could it, if it tried, as no reported cases hold the ESA to be a *Lucas* background principle.

Because the government cannot show that its taking implemented a relevant background principle, its defense fails, without regard to the scope of California's reasonable and beneficial use and public trust doctrines.

B. The Beneficial and Reasonable Use Doctrine Is No Impediment, as Casitas' Storage of Water for Beneficial Uses Is Itself a Beneficial Use Under California Law and the Operation Is Reasonable

Even if the government may invoke California legal principles to support its federally mandated taking of Casitas' water, those principles support, rather than undercut, Casitas' property rights.

1. A Beneficial Use Exists

The government and its amici contend that Casitas does not have a property right in the water it diverts pursuant to its license because it cannot and does not immediately use all the water, but instead stores much of it. Their argument seems to be that only active uses of the water constitute a valid "beneficial use," while storage cannot qualify. This position is easily refuted.

Beneficial use is a broad and flexible concept. Under the common law, the storage of excess water with the intent to actually use it for a separate beneficial use is a reasonable and beneficial use in its own right. *Miller & Lux, Inc. v. San Joaquin Light & Power Corp.*, 8 Cal. 2d at 436 (storage of water in times of normal river flow is a reasonable and beneficial use); *see also Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 449 (1939) (storage to control flows a reasonable and beneficial use).

Consistent with this understanding, the California Water Code explicitly recognizes that municipal water districts, like Casitas, may store water. Cal. Water Code § 71610 states:

> A district may acquire, control, distribute, *store*, spread, sink, treat, purify, recycle, recapture, and salvage any water, including sewage and storm waters, for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district.

Id. (emphasis added). Casitas' storage of water for a future beneficial use is just as permissible under California's beneficial use doctrine as the subsequent active use of it for domestic and agricultural purposes. *Id.* It is part of Casitas' property. *Id.*; *see also* Cal. Water Code § 106.5 ("It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and *future* uses.") (emphasis added).

2. Casitas' Use of Water Is Reasonable Even If It May Have an Environmental Side Effect

Even though Casitas' water uses are beneficial, the government contends it is unprotected from an uncompensated taking because the uses are unreasonable. It more specifically contends that Casitas' water operation is unreasonable because it negatively impacts fish. This is an extreme and untenable construction.

"[W] hat is reasonable use . . . of water is a question of fact to be determined according to the circumstances in each particular case." *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750 (1976) (citing *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d at 139). The inquiry may include examination of "reasonable methods of use and reasonable methods of diversion." *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1242 (2000).

The quintessential unreasonable use of water is "waste." *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 186 Cal. App. 3d 1160 (1986); *Peabody*, 2 Cal. 2d 351. There is no evidence here that Casitas is wasting water or using wasteful methods. Its operation strictly diverts,

confines, and stores water pursuant to a dam, canal, and reservoir system approved by the United States and the State of California.

Indeed, the government is not really asserting a "waste" claim, but that Casitas' permitted water operation is unreasonable because it protects fish at a less than optimum level. *See* Pre-Trial Brief at 14. The government does not claim Casitas' operation is unreasonable for any other reason. Therefore, at its core, the contention is that an otherwise reasonable water use became per se unreasonable (and thus subject to termination) because it does not perfectly protect an environmental resource, here fish. *Id.* This position was basically rejected by the California Supreme Court in *National Audubon*:

> 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 v. Superior Court, 33 Cal. 3d 419, 446 (1983) (emphasis added).

The government's "environmental impact equates to per se unreasonableness" view conflicts not only with *National Audubon* but with the general reasonableness rule, which considers *all* the circumstances. Cal. Water Code § 100.5. Here, reasonableness must take into account the beneficial uses served by Casitas' operation, its permitted nature under federal and state law, its longevity and history, and state policy favoring delivery and use of domestic water. Cal. Water Code § 106. Given the totality of these circumstances, one cannot say that Casitas' municipal water system is an "unreasonable" one.

Finally, the government's position is totally divorced from the reality of water delivery in California. Undoubtedly, almost every municipal water system can be said to have some effect on

public interests in running water, whether fish or recreation. If this were enough to make municipal water delivery unreasonable, the entire domestic water system in California would be illegal. Yet, the fact is that appropriative municipal water systems operate legally throughout the State, including at Lake Casitas. This shows that water capture, use, and storage for important human needs is reasonable despite an environmental effect. *Nat'l Audubon*, 33 Cal. 3d at 446 ("Now that the economy and population centers of this state have developed in reliance upon appropriated water, it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm [environmental] public trust uses."). In sum, the "history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm" to environmental concerns *Id.*

C. The Public Trust Doctrine Allows Casitas Reasonable, Beneficial Use of Water, Even If There Is an Environmental Side Effect, Because It Serves the Overall Public Interest

The last purported background principles defense of the government and its amici is the public trust doctrine. In service of this defense, the government presents the doctrine as a rigid fish preservation rule. But the public trust doctrine is far more balanced and accommodating to human needs.

The public trust doctrine does not just protect fish or other environmental values; it also protects human navigation and commerce. *Marks v. Whitney*, 6 Cal. 3d 251, 259-61 (1971). In the water use context, implementation of the public trust doctrine not only requires the balancing of the various public trust values, but also that those values be weighed and balanced against other, broader public interests. In carrying out the public trust, "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*, 33 Cal. 3d at 446-47 (emphasis added; citation omitted); Cal. Water Code § 1253.

The State Water Resources Control Board must consider the public trust doctrine in the context of the broader public interest when it regulates and permits appropriations of water. *Nat'l Audubon*, 33 Cal. 3d at 445-46; *Fullerton*, 90 Cal. App. 3d at 603-04. It is indisputable that the public has an interest in the efficient and predictable flow of water for domestic purposes. Cal. Water Code § 106; *Prather v. Hoberg*, 24 Cal. 2d 549 (1944). Consequently, when the Board issues a license confirming an appropriative water right, it has necessarily found that the public trust has been protected "consistent with the public interest." *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 778-79 (2006); Cal. Water Code § 1257 (Board must consider all potential interests in water.).

Bringing these principles home, when the Board issued a water license to Casitas in 1986, three years after the *National Audubon* public trust decision, it necessarily had made a determination that Casitas' diversion and use of water protects the public trust to the extent required by the public interest. *Id.*; *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.*, 207 Cal. App. 3d 363, 380-81 (1989).

The government's argument that the State may reconsider past decisions in light of the public trust doctrine is irrelevant because that is not what is occurring here. The taking of Casitas' water

is not based on some, new public trust-inspired state order, but derives solely from a federal, ESA-based mandate.[1] Therefore, California's public trust doctrine is inapposite as a background principles defense in this case.

CONCLUSION

The Court should recognize that Casitas has constitutionally protected property rights in the water taken by the federal government for the benefit of fish under the authority of the ESA.

DATED: September 13, 2010.

Respectfully submitted,

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[1] It is highly doubtful that even the State of California could come in now to limit Casitas' water rights based on some purported new knowledge, as a sudden shift in rights would frustrate Casitas' distinct expectations of water use reasonably developed over many decades.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010, I electronically filed the foregoing 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