

ML Marzulla Law Legal Report

When it's Inverse Condemnation, We Help Property Owners Get Paid



Marzulla Law, LLC is the nation's leading law firm for takings claims against the federal government. ML represents landowners, developers, water districts, Indian tribes, business, and corporate interests in litigation of property rights and contract claims. ML also represents clients in environmental enforcement actions, and litigation



involving natural resources and permitting issues, in federal district courts and courts of appeal.

We hope that this Newsletter will serve as a resource for you and help you get to know us better.

Sincerely,

Nancie and Roger Marzulla

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Federal Circuit Rules in Favor of Casitas Water Users

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Testimonials

"We can't fully express our gratitude for all of their help and legal brilliance."

Laura Elkins, plaintiff
in a section 1983 case
against the District of



Lake Casitas with a view of Santa Ynez Mountains.

Last November 2010, Casitas Municipal Water District was in trial in the U.S. Court of Federal Claims in Washington, D.C., seeking damages for the taking of its water, following a dramatic reversal of the takings issue in the U.S. Court of Appeals for the Federal Circuit—in Casitas' favor.

Early in the case, the Government took the position that the taking of any water right was to be analyzed as a regulatory taking—which is an almost impossible standard for the plaintiff to win under—and not as a physical taking—which is the standard that has been historically used in water rights takings case.

Originally, the Court of Federal Claims agreed with the Government, holding that the taking of Casitas' water rights would be determined using the regulatory takings test. But Casitas appealed, and the Federal Circuit agreed with Casitas, entirely reversing the trial court's ruling as to which taking test applied. The Federal Circuit also held that Casitas' operation of the fish ladder—which the National Marine Fisheries Service required Casitas build for the endangered West Coast steelhead trout—requires that Casitas provide a portion of its water—its property:

The biological opinion describes diverting water to create flow through the fish ladder. Of course, the fish ladder cannot become operational as required by the biological opinion unless it is provided with water. That water, as the government admitted in oral argument, comes out of the Casitas-Robles Canal. In other words, the water for the fish ladder comes out of Casitas' allotment of 107,800 acre-feet per year. That is so because, once the water is in the canal, it is water that Casitas has diverted pursuant to its allotment. It thus has become the property of Casitas. The operation of the fish ladder diversion works thus takes property of Casitas.

The court then held that this taking is a physical taking,

Columbia

Expert Witness:

Dr. Rod Smith



Dr. Rod Smith is President and Managing Director of Strategic Water Management LLC, a water supply development company. He is also Senior Vice President of Stratecon, Inc., an economics and strategic planning consulting firm specializing in the economics, finance, law, and politics of water resources. Marzulla Law hired his services as a valuation expert in the Casitas case, which is the lead feature in this month's newsletter.

Rod has consulted extensively for public and private sector clients on business and public policy issues concerning water resources,

explaining:

This is no different than the government piping the water to a different location. It is no less a physical appropriation. ...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.

Background

In 1956 Congress authorized the construction of the Ventura River Project to provide a stable water supply for farmland irrigation and municipal, domestic, and industrial use in Ventura County, California. The Ventura area has a Mediterranean-type climate, meaning that it receives most of its precipitation during the winter and is generally dry during the summer months. Rainfall in the area can vary widely from year to year. Rainfall amounts have been as little as 9 inches in some years and as much as 40 inches in others.

The purpose of the Ventura Project therefore was to provide a stable drinking and irrigation water supply for the Ventura area even through critical drought periods and to augment groundwater supplies during droughts. In fact, Congress authorized construction of the Ventura River Project in 1956 during a period of critical drought conditions in the Ventura River Basin that had existed since 1944. Historical records report the then-existing wide-spread alarm in Ventura County over the seriously depleted water supplies caused by the long-term drought.

In a 1954 feasibility study sent to Congress, the Secretary of Interior and the U.S. Bureau of Reclamation explained why the Ventura Project was urgently needed: "Development of an additional firm water supply is urgently needed in the Ventura River Project area for stabilization of present agricultural and other economic activities, for new irrigated lands, for new industries, a rapidly expanding population, and for new economic opportunities. ...[B]ecause of the precarious supplemental supply that the beach wells provide, and the wide range in the quantity obtainable from the river, the city of Ventura has an immediate need for a firm supplemental water supply."

Today, the Ventura Project provides a dependable water supply for roughly 6,500 acres of highly productive citrus and avocado groves and other crops, drinking water to residents

including California's Drought Water Bank, the government of New South Wales, Australia's effort to privatize irrigation organizations, and the economic, financial, legal, and political dimensions of water transactions in many western states. Rod has also served as an expert witness in the economic valuation of groundwater resources and disputes over the economic interpretation of water contracts.

Rod received his Ph.D. in Economics from the University of Chicago and a Bachelor of Arts in Economics from the University of California at Los Angeles. Prior to making a full time commitment to the private sector, he was a professor of economics at Claremont McKenna College for fifteen years.

Court of Federal Claims Updates and Events



The U.S. Court of Federal Claims' Annual Law Day Observance

of Ventura County, and emergency back-up water to well-water users and to the city of Ventura during droughts.

Listing of the Steelhead Trout as a Federally Endangered Species

In 1997, nearly forty years after the Ventura Project was built, the National Marine Fisheries Service (NMFS) listed the West Coast steelhead trout as an endangered species in the Project watershed. This set into motion a series of events which led Casitas to file a takings suit in 2005 against the United States.

In 2003, NMFS issued a Biological Opinion as required by the federal Endangered Species Act. That Opinion first required Casitas to construct a fish ladder at its Diversion Dam to allow steelhead trout to travel upstream to habitat above the dam. That ladder alone cost Casitas \$9 million to build. In addition, NMFS required Casitas to provide on average approximately 3,500 acre-feet of flows from the Ventura River to operate the fish ladder. This is water that Casitas otherwise would have diverted and stored in Lake Casitas for delivery to its water users.

The mandatory diversion of Casitas' water for fish protection purposes results in a permanent loss to Casitas of its valuable water supply, worth many millions of dollars, and puts at risk the drinking and irrigation water for many thousands of water users in Ventura County. And ironically, as it turns out, the steelhead trout were gone from the portion of the Ventura River where the Ventura River Project is located before the Project was even built. As a result, although Casitas now has a fish ladder and provides its water to make the ladder operational as required in the Biological Opinion, since 2005—fewer than 20 steelhead trout have been documented as having used the ladder!

The Case

In 2005 Casitas filed a takings lawsuit with the U.S. Court of Federal Claims asserting that it should not have to bear the cost of the loss to its water supply. Casitas argued that the Fifth Amendment requires that the cost of the loss to its water supply be borne by the federal government, which took Casitas' water for a public use.

In 2007 the Court of Federal Claims ruled in the government's favor, [holding](#) that the deprivation of water from Casitas was regulatory not physical.

But in 2008 the U.S. Court of Appeals for the Federal Circuit [reversed the decision](#) of the Court of Federal Claims, holding that the taking of Casitas' water to protect endangered fish is to be analyzed as a physical, not a regulatory, taking: "[T]he water from the Robles-Diverson Canal is permanently gone. Casitas will never, at the end of any period of time, be able to get that water back ... The government requirement that Casitas build the fish ladder and divert water to it

Luncheon will be held on May 10, 2011 at the Willard Intercontinental Hotel in Washington, D.C. [More Details Here](#)

Federal Circuit [2011 BENCH & BAR CONFERENCE](#)

June 22nd-25th, 2011
The Ritz-Carlton
Key Biscayne, Florida

should be analyzed under the physical takings rubric."

Significance of the Federal Circuit decision

"The Federal Circuit's decision on the takings test was profoundly important," said Casitas' attorney, Nancie Marzulla. Marzulla further stated that "had the Federal Circuit held that the regulatory takings test applied, it would have been virtually impossible for a water user to prevail in a takings case. In other words, the federal government would have been able to take anyone's water without paying just compensation for the water taken. Thankfully, however, the Federal Circuit agreed with Casitas, recognizing that the unique nature of water means that the only takings test that makes sense is a physical takings test."



Staff Spotlight

Jared Pliner

Jared Pliner is the wonderful voice you hear when you call Marzulla Law. His great speaking voice is no accident. He will graduate this May 2011 from George Washington University (GW), majoring in journalism and mass communication with a minor in political science.



At GW Jared led the news and talk departments of WRGW District Radio and interned at ABC News across a variety of programs based in Washington, D.C. and New York City. Jared aspires to be a network correspondent, and in his spare time he enjoys reading, cooking and listening to opera. In addition to answering the telephone at Marzulla Law, Jared is heavily involved in assisting the attorneys in preparing documents and briefs for trial and pretrial activities.

"If you want to hear a great speaking voice, call the office!" says Brittany Zale, Jared's supervisor. "I even asked him to rerecord our office greeting and message system because we were all so impressed with his great voice."

"It has been a thrill to work alongside such a dedicated, talented and close-knit staff at Marzulla Law," says Jared. "And wherever my career takes me, I owe them much gratitude for such a first-rate start. They are family to me."

About Our Law Firm

Marzulla Law, LLC is a Washington D.C.-based law firm. Nancie G. Marzulla and Roger J. Marzulla help property owners get paid just compensation when the Government takes

their property through inverse condemnation.

ML lawyers practice in the federal courts, especially the U.S. Court of Federal Claims, the Federal Circuit Court of Appeals, and the U.S. District Court for District of Columbia, as well as other federal district courts, appellate courts, and the U.S. Supreme Court. ML also represents clients in administrative agencies, such as the District of Columbia Office of Administrative Hearings or the Interior Board of Indian Appeals.

Chambers has recognized Marzulla Law as one of the top ten water rights litigation firms in the country. Nancie Marzulla and Roger Marzulla have been selected by their peers to be included on the list of Best Lawyers in America, and their firm has the highest AV-rating from Martindale-Hubbe. Nancie and Roger Marzulla are listed in Best Lawyers for environmental law, and Marzulla Law is a member of the International Network of Boutique Law Firms.



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