

**CONSTITUTIONAL AND CONTRACTUAL REMEDIES
FOR GOVERNMENT TAKING OF WATER RIGHTS
The Tulare Lake Decision and Beyond**

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I. INTRODUCTION

Litigating water rights cases in federal courts is often a complex and challenging undertaking. First, many judges defer to agency decision-making and rulemaking regarding hydrology and the imperatives of the Endangered Species Act, *PCFFA v. Bureau of Reclamation*, 426 F.3d 1082, 1084 (9th Cir. 2005) (“the ESA obligates federal agencies to afford first priority to the declared national policy of saving endangered species”) (internal quotations omitted), the Clean Water Act, and congressionally imposed limitations on jurisdiction, *see, e.g., Orff v. United States*, 545 U.S. 596 (2005) (holding the Reclamation Reform Act, 43 U.S.C. § 390uu, does not permit a claimant to sue the United States alone). Therefore, a federal district judge may be more inclined to rule for the federal agency (such as the Bureau of Reclamation, the Fish and Wildlife Service, or the National Marine Fisheries Service) and against the water user in an injunctive case. *See, e.g., Klamath Water Users Protective Ass’n v. Patterson*, 191 F.3d 1115 (9th Cir. 1999); *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990).

Fortunately, however, equitable relief in the district court is not the sole remedy available to irrigators and urban water users for, although they may not be able to compel deliveries, they may nevertheless recover damages (sometimes including attorney’s fees and expert witness costs) in the U.S. Court of Federal Claims located in Washington, D.C.

The U.S. Court of Federal Claims has nationwide jurisdiction over monetary claims (other than in tort) founded on federal statutes, executive regulations, government contracts, and the Constitution, and a number of water districts have availed themselves of this jurisdiction to assert monetary claims against the United States for failure to deliver water to which they were entitled under state law. *See Tucker Act of 1887* 28 U.S.C. § 1491(a)(1) (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution”). This article explores several such cases: their legal theories, the government’s defenses and (as of this writing) what the court has ruled. The holdings thus far demonstrate that water users are not entirely without a judicial remedy when the government refuses to make available to them the water to which they are entitled under state law. As one judge ruled, “[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.” *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001).

Likewise, when dealing with water rights claims against another government, certain treaties, such as the North American Free Trade Agreement (NAFTA), provide a basis upon which to seek monetary damages. *See North American Free Trade Agreement ch. 11 art. 1116*, December 17, 1992, 19 U.S.C.

§ 3301 (“An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation”).

II. THE *TULARE LAKE BASIN* CASE

In January 2005, the United States paid \$16.7 million to a group of California water districts for the taking of about 300,000 acre-feet of State Water Project water. The settlement followed several years of litigation in the Court of Federal Claims, resulting in three reported decisions: 61 Fed. Cl. 624 (2004); 59 Fed. Cl. 246 (2003); 49 Fed. Cl. 313 (2001). The lawsuit challenged the restrictions imposed by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service under the Endangered Species Act during water years 1992-1994 on the ground that the water loss was an unconstitutional taking of private property without just compensation. The plaintiffs were Tulare Lake Basin Water Storage District, Hansen Ranches, Kern County Water Agency, Lost Hills Water District, H.P. Anderson & Sons, Wheeler Ridge-Maricopa Water Storage District, and several individual water users. The case was filed as a class action on behalf of all water users in the districts. Both sides filed motions for summary judgment on liability.

In ruling for the plaintiffs on liability, the court held that the plaintiffs possessed a property right to receive State Water Project water, which is protected against uncompensated taking by the Fifth Amendment’s Just Compensation Clause. The court rejected the government’s argument that because the plaintiffs’ right to receive water was pursuant to contract, plaintiffs’ right did not rise to the level of a protected property interest. The court stated:

Plaintiffs 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.

Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 317-18 (2001).

In defense, the federal government argued that its actions taken to protect the salmon and the smelt were consistent with state law, and that the doctrines of reasonable use and public trust barred plaintiffs’ right to divert water to the detriment of wildlife. The court rejected this argument, holding instead that only the State Water Resources Control Board and the California courts, and not the

federal government, have the right to determine “[w]hether a particular use or method of diversion is unreasonable or violative of the public trust.” *Id.* at 321. The court further stated that:

Once an allocation has been made – as was done in D-1485 – that determination defines the scope of plaintiffs’ property rights, pronouncements of other agencies notwithstanding. While we accept the principle that California water policy may be ever-evolving, rights based on contracts with the state are not correspondingly self-adjusting. Rather, the promissory assurances they recite remain fixed until formally changed. In the absence of a reallocation by the State Water Resources Control Board, or a determination of illegality by the California courts, the allocation scheme imposed by D-1485 defines the scope of plaintiffs’ contract rights.

Id. at 322.

Pointing “to a myriad of state and federal actions as evidence that either the SWRCB or the California courts would have deemed plaintiffs’ proposed use unreasonable,” the government urged the court to “step into the shoes” of the State and declare that plaintiffs’ proposed use of the water would have been unreasonable. *Id.* at 322. The court, however, flatly rejected the government’s invitation that it anticipate “how the Board or the California courts would apply the doctrine of reasonable use if the issue were before them.” *Id.* The court instead held that,

[t]he public trust and reasonable use doctrines each require a complex balancing of interests – an exercise of discretion for which this court is not suited and with which it is not charged. To the extent that water allocation in California is a policy judgment – one specifically committed to the SWRCB and the California courts – a finding of unreasonableness by this court would be tantamount to our making California law rather than merely applying it. This is especially true where, as here, the Board charged with such determinations has responded, and continues to respond, to the concerns about fish and wildlife that the government was seeking to address through the implementation of the ESA.

Id. at 323-24.

Finally, the court emphasized the role of the State in determining the allocation of use of SWP water:

D-1485 is a comprehensive balancing of interests that recognized that while the “full protection” of fish was perhaps possible, it was not ultimately in the public interest. The SWRCB chose not to revisit that in-depth balancing of water needs and uses even as it reviewed the salinity standards it had set in response to NMFS’s biological opinion. We need not attempt to discern the state’s response to the threat, then, because the state has in fact spoken.

Id. at 324.

The court recognized that the federal government’s decisions 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.” *Id.* at 315 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 154, 184 (1978)). 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 solely on plaintiffs.” *Id.* at 316. The court’s answer to this question is clear: “The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.” *Id.* at 324.

Following a trial on damages at which both sides presented hydrologic and valuation testimony, the court established a formula for calculating damages:

[t]he first step in calculating plaintiffs’ recovery is determining the quantity of water taken from each of the plaintiffs. That determination in turn depends on three factors: the overall amount of pumping foregone, the portion of that loss properly attributable to ESA restrictions, and the method by which that quantity would otherwise have been distributed.

Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed. Cl. 246, 250 (2003). Following a two-week trial, the court rejected the government’s contention that the plaintiffs had actually lost no water as a result of federal actions, and found plaintiffs’ total water loss to be 307,334 acre-feet. Adopting Plaintiffs’ valuation of approximately \$68 per acre-foot for most of the water, the court awarded \$14,599,164.78 as the value of the water taken.

Finally, rejecting the government’s assertion that Treasury bills provided the appropriate interest rate to provide full compensation, the court adopted

plaintiffs' contention that the interest rate should be based on the "prudent investor rule"—how "a reasonably prudent person' would have invested the funds to 'produce a reasonable return while maintaining safety of principal.'" *Tulare Lake Basin Water Storage Dist. v. United States*, 61 Fed. Cl. 624, 627 (2004) (internal citations omitted). And because a reasonably prudent investor would have diversified, the court concluded "that the best measure of compensation . . . is the rate of return achieved on plaintiffs' state-sanctioned accounts—accounts whose mix of investment interests . . . provides a reasonable rate of return consistent with a high level of safety," and finally awarded nearly \$10 million in interest. *Id.* at 628.

On December 21, 2004, the parties agreed to settle the case for a total payment of \$16.7 million.

III. PENDING CASES

A number of other water rights compensation cases are currently pending in the Court of Federal Claims at various stages of development. In *Klamath Irrigation District v. United States*, case number 01-591L, cross motions for summary judgment on the sovereign acts defense are now pending hearing before Judge Francis Allegra. In *Stockton East Water District v. United States*, case number 04-541L, liability was tried in Sacramento before Judge Christine Miller and is awaiting decision. *Casitas Municipal Water District v. United States*, 05-168L, which is pending before Judge John Wiese (who decided *Tulare Lake*), goes to trial May 7, 2007. Decisions in these cases, will shed additional light on issues of takings liability, damages and interest calculation. Below is a brief description of what is at issue in each case.

A. The *Klamath* Case

In *Klamath Irrigation District v. United States*, the plaintiffs are thirteen individually named agricultural landowners and fourteen water, drainage or irrigation districts in the Klamath River Basin area of Oregon that receive, directly or indirectly, water from irrigation works constructed or operated by the Department of the Interior, Bureau of Reclamation. The fourteen districts, in turn, represent approximately 1,400 families that own farm and ranch land that is irrigated with water from the Klamath Project, some of it for a century. At issue in *Klamath* is the water that was to be used to irrigate 176,000 privately owned acres of land in the western portion of the Klamath Project in 2001. Under the authority of the Endangered Species Act, the Bureau of Reclamation refused to deliver approximately 350,000 acre-feet of water which it retained in Klamath Lake for the benefit of three species of endangered fish.

The parties filed cross motions for summary judgment and, on August 31, 2005, Judge Allegra, of the Court of Federal Claims, issued a decision holding that the plaintiffs did not have a constitutionally protected property interest in the water that the government withheld (*see* 67 Fed. Cl. 504 (2005)), reasoning that the State of Oregon had permanently transferred to the United States all unappropriated waters of the Klamath basin under a 1905 statute. That opinion is the first construction of the 1905 statute and, in the plaintiffs' view, conflicts with the *Tulare Lake* decision discussed above. The court has not yet decided the plaintiffs' breach of contract claims, except to hold that they are third party beneficiaries of the districts' contracts with Reclamation.

B. The *Stockton East* Case

Two California water districts, Stockton East Water District and Central San Joaquin Water Conservation District, along with the County of San Joaquin, City of Stockton, and California Water Service Company, have filed suit against the United States seeking \$500 million in damages and just compensation for the federal Bureau of Reclamation's failure to deliver water to them from New Melones reservoir since 1993. The plaintiffs in this suit together serve over 300,000 urban water users and 130,000 acres of irrigated farmland in California's San Joaquin Valley.

Stockton East and Central assert a breach of contract claim for Reclamation's failure to make available to them approximately 155,000 acre-feet per year from the New Melones unit of the Central Valley Project. The 1983 contracts between the districts and Reclamation obligated the districts to construct a \$70 million water conveyance system which, in most years, has been bone dry. The government defends on the ground that the subsequent congressional enactments, as well as restrictions created by the Endangered Species Act, prevent them from delivering the water.

This case went to trial in late October, and a decision on liability is expected imminently.

C. The *Casitas* Case

Casitas Municipal Water District provides part or all of the municipal water supply for approximately 65,000 residents within the District, and the entire agricultural water supply for 5,668 acres of farm and ranch land. Casitas operates the Ventura River Project under a 1958 contract with Reclamation, and Casitas holds the sole right to use the water of the Ventura River Project (subject only to prior existing rights). In the suit, Casitas asserts a takings claim for the water loss resulting from a change in the operational criteria for the Ventura Project which

was mandated by the federal government's biological opinion for the protection of spawning steelhead trout (a species listed under the Endangered Species Act). The key issue in the case is whether this taking should be analyzed as a per se taking (as the court did in *Tulare*), or under the more restrictive "*Penn Central*" formula. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). See also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 315 n. 10 (2002) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("The *Penn Central* analysis involves a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action). Casitas had also asserted a breach of contract claim for the recovery of \$9.3 million it spent in construction of a fish diversion facility to protect the same fish, but these arguments were dismissed in summary judgment.

The takings claims in this case are set for trial starting May 7, 2007.

IV. CONSTITUTIONAL PROTECTION OF WATER RIGHTS

All of these cases have a venerable pedigree, stretching back to Justice Holmes' opinion in *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931) ("The petitioner's right was to the use of the 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 the use The Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay."); see also *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950) ("[T]his Court has never permitted the Government to pervert its navigation servitude into a right to destroy riparian interests without reimbursement where no navigation purpose existed"); *Dugan v. Rank*, 372 U.S. 609, 625 (1963) ("[T]he United States was empowered to acquire the water rights of respondents by physical seizure . . . such rights could be acquired by the payment of compensation 'either through condemnation or, if already taken, through action [for just compensation] of the owners in the courts'") (internal citations omitted).

Because water rights are a somewhat unusual type of property, these cases have forced the court to reach deeply into the fundamental nature of property rights and to articulate explicitly the kinds of government actions (e.g., "reasonable and prudent alternatives" contained in a biological opinion) that can constitute a taking. See, e.g., *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246 (2003); see also *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996) ("[T]he right to appropriate water can be a property right. *Amici* provide no reason within our constitutional tradition why water rights, which are

as vital as land rights, should receive less protection . . . This court holds that water rights are not ‘lesser or diminished’ property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution”) (internal citations omitted).

The Fifth Amendment to the United States Constitution states, in part, that private property shall not be “taken for public use, without just compensation.” This clause of the Fifth Amendment, referred to as the Just Compensation Clause, requires that society as a whole, rather than a particular property owner, 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Supreme Court has applied a similar principle to statutory provisions (*e.g.*, the Endangered Species Act or Central Valley Project Improvement Act) which purport to abolish the contract rights of private parties. In *United States v. Winstar Corp.*, the Supreme Court stated that just as the Court has recognized that the Constitution prohibits the government from

forcing some people alone to bear public burdens which . . . should be borne by the public as a whole, so we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change.

518 U.S. 839, 883 (1996) (internal citations omitted).

V. INTERNATIONAL WATER RIGHTS: A NAFTA CASE

The North American Free Trade Agreement (NAFTA), signed by the United States, Mexico and Canada on November 17, 1992, is an agreement creating a free trade area among the three countries. Although many such treaties and agreements exist throughout the world (for example, the European Union), NAFTA is unusual in providing foreign investors a private right of action against the host country for certain violations of the treaty. These claims, brought under Chapter 11 of NAFTA, are heard by an arbitration panel rather than a court. Chapter 11 confers on individual investors the right to bring international legal disputes directly against a host nation, a right that traditionally belonged only to other nation states. The cornerstones of Chapter 11’s protections of investors’ rights are its provisions for compensation for expropriation of investments, and its

prohibition of discriminatory treatment for foreign investments. Article 1110, Expropriation and Compensation, provides that NAFTA parties must not expropriate investments, either directly or indirectly, or through a measure tantamount to an expropriation, unless such expropriation is for a public purpose, is non-discriminatory, is in accordance with due process of law and the prescribed international minimum standards of treatment under Article 1105(1), and is accompanied by compensation at fair market value. North American Free Trade Agreement ch. 11 art. 1124(3), December 17, 1992, 19 U.S.C. § 3301.

An expropriation of water rights claim, not dissimilar to the cases discussed above, is now pending arbitration before ICSID in Washington, D.C. *Bayview Irrigation District v. United Mexican States*, No. ARB(AF)/05/1 (ICSID) (filed April 19, 2006). The claim arises out of Mexico's withholding of approximately one million acre-feet of water which, under a 1944 treaty, belongs to the United States (and, under the law of the United States, to those holding water permits from the State of Texas). The claim is brought by a group of water users—which include 17 Texas irrigation districts, 29 independent water rights holders, and the North Alamo Water Supply Corp.—in the Lower Rio Grande Valley. The claim was filed under Chapter 11 of the NAFTA in August 2004.

The Notice of Arbitration states:

From 1992 to 2002, Mexico captured, seized, and diverted to the use of Mexican farmers, an investment (approximately 1,013,056 acre-feet of irrigation water) located in Mexico and owned by Claimants. By diverting Claimants' water to Mexican farmers, Mexico dramatically increased its irrigated agricultural production on the Mexican side of the Rio Grande, while the crops of United States farmers in the Rio Grande Valley shriveled. Mexico thus treated the investments of United States investors less favorably than it treated its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in violation of Article 1102 of NAFTA. Mexico also nationalized or expropriated Claimants' investment within Mexico, or took a measure tantamount to nationalization or expropriation of such an investment, unfairly and without compensation and due process in violation of Article 1110 of NAFTA.

Bayview Irrigation District v. United Mexican States (U.S.-Mex.), No. ARB(AF)/05/1 (ICSID) (filed April 19, 2006) (full text available online at http://www.economia.gob.mx/work/sneci/negociaciones/Controversias/Casos_Mexico/Marzulla/documentos_basicos/esc_excep_mxv_060419_ing.pdf) (last visited Jan. 30, 2007).

The arbitration is expected to commence early in 2007.

VI. CONCLUSION

Water allocation is increasingly a zero-sum game with winners and losers in the competition for this scarce resource. Although water districts and water users may not be able to stop governments (domestic or foreign) from appropriating their water, districts and water users may have damages remedies based on the U.S. Constitution, contract, or (in one case) international treaties. This is a quickly developing field of law which water users should follow closely.