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Trout of Bounds: The Effects of the Federal Circuit Court of Appeals’ Incorrect Fifth Amendment Takings Analysis in Casitas Municipal Water District v. United States

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TROUT OF BOUNDS: THE EFFECTS OF THE FEDERAL CIRCUIT COURT OF APPEALS’ INCORRECT FIFTH AMENDMENT TAKINGS ANALYSIS IN CASITAS MUNICIPAL WATER DISTRICT V. UNITED STATES

Raymond Dake*

“The roots of private property in water have simply never been deep enough to vest in water users a compensable right to diminish lakes and rivers or to destroy the marine life within them. Water is not like a pocket watch or a piece of furniture, which an owner may destroy with impunity. The rights of use in water, however long standing, should never be confused with more personal, more fully owned, property.”

I. Introduction

In the cinematic classic A River Runs Through It, the heartfelt voice of narrator Robert Redford proclaims, “My father was very sure about certain matters pertaining to the universe. To him, all good things, trout as well as eternal salvation, come by grace and grace comes by art, and art does not come easy.” Trout are undoubtedly “good things” that deserve protection; especially if one respects them on the same level as eternal salvation. However, the protection of trout does not come easily and much work is needed if endangered species such as the California-native steelhead trout are to survive for future generations.

California has entered another era of dry weather and severely depleted water supplies. While the government and citizens are up in arms over how to manage the state’s growing surface and ground water shortages, the protection of California’s numerous endangered or threatened salmonid species that rely on these waters has been pushed aside. This has come at great costs to the native fishes of California with over twenty-two percent of the state’s remaining 122 native fish species listed under the Endangered Species Act (“ESA”) as threatened or endangered and another forty-five percent meeting the requirements of being listed. Specifically, the steelhead trout faces extinction by the end of the century if drastic changes in habitat protection and restoration are not implemented.

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2 A RIVER RUNS THROUGH IT (Columbia Pictures 1992).
3 Id.
6 Public Policy Institute of California, supra note 4, at 10.
7 Id.
While the ESA offers some protection to the listed steelhead trout, a combination of factors including drought and extreme overuse of California’s limited water supplies have led to a situation where the ESA might just not be enough to protect these fish, even if the ESA is fully enforced. To add insult to injury, the United States Court of Appeals for the Federal Circuit recently handed down a decision making state and federal enforcement of the ESA to its full potential for aquatic species almost impossible and prohibitively expensive. Ultimately, the court carved an inroad for private parties to avoid compliance with the ESA through environmental takings challenges, leaving aquatic species to fend for themselves.

In a decision with no concern for steelhead trout, the Federal Circuit Court used little grace or art when it held a Bureau of Reclamation (“BOR”) directive ordering the Casitas Municipal Water District (“Casitas”) in Ventura County, California, to ensure adequate water flow for the endangered steelhead trout was a physical appropriation of the water, and thus a physical taking. The court ignored the regulatory nature of Casitas’s claims, refusing to apply the more narrow regulatory takings analysis, and instead determined the claim should be considered under the harsh physical takings doctrine.

The court, only ruling what takings analysis should apply, remanded the question back to the Federal Claims Court for consideration on whether a compensable taking occurred under a physical takings analysis. However, the majority made its position clear. The court’s majority found the government had admitted that it required Casitas to construct a fish ladder and divert water to the fish ladder in order for it to operate. Judge Kimberly Moore, writing for the majority found, “[t]his is no different than the government piping the water to a different location. It is no less a physical appropriation.” Thus, the majority, over a strong dissent, held the water use restriction works a categorical (or per se) taking because it involves an exercise of physical control.

In his dissenting opinion, Judge Mayer said under California law, water sources belong to the public and thus, Casitas does not own the water diverted to operate the fish ladder. He continued that even if Casitas does own the water, the BOR’s directive is “plainly regulatory in nature,” and applying the physical takings doctrine is incorrect. Thus, the majority erred in applying a physical takings approach and the Penn Central Transportation Co. v. New York City test for regulatory takings is the proper test to apply.

The court’s ruling is similar to the Federal Court of Claims 2001 case Tulare Lake Basin Water Storage District v. United States. In Tulare Lake, the court ruled that appropriation of

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9 See Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1282 (Fed. Cir. 2008), reh’g and reh’g en banc denied, 556 F.3d 1329 (2009) [hereinafter Casitas III].
10 See id.
11 Id.
12 Id. at 1295 (“Where the government plays an active role and physically appropriates property, the per se taking analysis applies.”).
13 Id. at 1296-97.
14 Id. at 1294; see also id. at 1290, 1291.
15 Id.
16 Id. at 1295.
17 Id. at 1297 (Mayer, J., dissenting).
18 Id.
20 Casitas III, 543 F.3d at 1297 (Mayer, J., dissenting).
water for endangered species is a physical taking. This ruling was widely criticized and even later disclaimed by the Federal Court of Claims in the predecessor to this appeal, in light of the Supreme Court’s decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*. *Tahoe-Sierra* clearly delineates the differences between regulatory and physical takings. Still, the Court of Appeals majority in the *Casitas* case declined to “opine on whether *Tulare* was rightly decided,” and said, “*Tahoe-Sierra* did not depart from the substantial body of precedent dictating that the government’s physical appropriation of a portion of a water right is compensable.”

This article examines the *Casitas* ruling and demonstrates why the Federal Circuit Court of Appeals was incorrect in finding the BOR’s enforcing of the ESA should be analyzed under as a physical taking instead of a regulatory taking. The article advocates for the use of a regulatory takings analysis for partial takings of rights to use water and questions the court’s use of judicial analogy in takings cases, here using mere factual surface similarities of previous cases instead of analyzing important policy considerations to form substantive law in the current case. The article concludes with an examination of the policy implications of the *Casitas* takings framework, including an examination of the effects on ESA takings, groundwater regulation, and a novel analysis of the ruling’s effects on interstate water compacts and general state water law. While other authors have criticized *Casitas*, this article expands those arguments, advocates for the use of regulatory takings analysis for partial water restrictions, argues against the use of judicial analogy in takings cases, and focuses heavily on policy implications, particularly in regards to interstate water compacts, in the aftermath of *Casitas*.

Part II of this article gives a brief background of the *Casitas* case. Part III reviews the important provisions of the ESA for understanding *Casitas* and demonstrates why water rights holders must resort to the Fifth Amendment to seek compensation when water is appropriated. Part IV reviews California water law and details why the *Casitas* court overstepped its boundaries by not determining whether a valid property interest in the water existed at the time of the regulation. This part concludes that Casitas does not own the water in question because water sources in California belong to the public and use of water in contradiction of the ESA violates both the public trust doctrine and the doctrine of reasonable use. Part V gives a detailed overview of Fifth Amendment general takings jurisprudence and takings jurisprudence necessary to understand *Casitas*. This part reviews both the lower court and court of appeals decisions in *Casitas* and argues against the Court of Appeals’ use of analogy in this case. Part V concludes the *Casitas* court was incorrect in holding the diversion of water to the fish ladder should be analyzed under physical takings analysis instead of regulatory takings. Part VI examines the potential policy implications for environmental regulations in the wake of *Casitas*, including the

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22. Id.
25. *Casitas III*, 543 F.3d at 1283.
26. Id. at 1295.
effect on ESA takings, interstate water compacts, groundwater regulation, and general state
water law and concludes the court applied the wrong takings analysis and the repercussions on
environmental regulations are vast.

II. The Historical Refusal of Casitas Municipal Water District to Build a Fish Ladder Sets
the Stage for an Ensuing Conflict

In 1956, Congress authorized the Ventura River Project, which is comprised of Casitas
Dam, Lake Casitas, the Robles Diversion Dam and the Robles-Casitas Canal. The Project
provides water for irrigation, municipal, domestic, and industrial use in Ventura County,
California. Essentially, the dam creates a reservoir, Lake Casitas, on Coyote Creek, and the
four and one-half mile canal diverts water from the Ventura River into Lake Casitas. Before
construction on the project began, the California Department of Fish and Game proposed that a
fish ladder for steelhead trout be included. However, Casitas, working with the BOR, did not
install a fish ladder because it found the ladder prohibitively expensive and said it would install
one later if necessary. In 1959, after project completion, Casitas Municipal Water District took
over operation of the project, even though title remained with the United States, with a state
license granting the district the right to divert up to 107,800 acre-feet of water per year from the
Ventura River through the canal and to use up to 28,500 acre-feet of that diversion annually.

In 1997, the National Marine Fisheries Service (“NMFS”) listed the West Coast steelhead
tROUT as an endangered species under the ESA. Section 9 of the ESA makes it illegal to “take”
any species on the endangered species list. To avoid liability under the ESA, the BOR
requested a biological opinion (“BiOp”) from the NMFS under Section 7 of the ESA. The
BiOp from the NMFS concluded construction of a fish ladder would not endanger the steelhead
tROUT any further and suggested one be put in place on the canal. However, Casitas refused to
comply with the BiOp unless forced by the BOR.

In 2003, after negotiations with the Casitas district, the BOR directed the district to
construct a fish ladder at the intersection of the Ventura River, the diversion dam and the canal,
and to divert adequate water for fish to reach historic spawning and rearing habitat that the water
project had blocked. Casitas built the fish ladder at a cost of nine million dollars under protest

28 Casitas III, 543 F.3d at 1281.
29 Id.
30 Id.
31 Id.; see also Reply Brief of Plaintiff-Appellant at 8-9, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276
(Fed. Cir. Sept. 25, 2008) (No. 2007-5153) (finding remote chance of trout climate changing did not justify the
expenditure of $25,000 for the construction of the fish passage facilities at the time (internal citations omitted)).
32 Casitas III, 543 F.3d at 1282. In reality though, the canal only transferred 14,494 acre-feet of water for use on
average. Id. at 1288.
33 Id. at 1282.
34 16 U.S.C. § 1538 (2006). For a full explanation of Section 9 of the ESA, see infra notes 84-97 and accompanying
text.
35 Casitas III, 543 F.3d at 1282; see also State Water Res. Control Bd., Div. of Water Rights, License for Diversion
and Use of Water No. 11834 (Cal. 1982).
38 Id.
and then sued the federal government in 2005 for breach of contract and a Fifth Amendment taking.\textsuperscript{40}

After filing an answer, the government filed a motion for summary judgment regarding the contract claim, and a motion for partial summary judgment on the takings claim, asking the trial court to determine the correct takings analysis to apply to the claim.\textsuperscript{41} In 2006, the trial court granted the government summary judgment regarding the breach of contract claim.\textsuperscript{42} Partial summary judgment was also granted for the government on the Fifth Amendment takings claim.\textsuperscript{43} The court held that in light of \textit{Tahoe-Sierra}, “only the government’s active hand in the redirection of property’s use may be treated as a per se taking.”\textsuperscript{44} Thus, the court held regulatory takings analysis was appropriate in the current situation.\textsuperscript{45}

Casitas appealed both claims to the Court of Appeals for the Federal Circuit.\textsuperscript{46} The court unanimously upheld Judge Wiese on the contract claim, but split two to one in favor of overturning his ruling that Casitas had presented a regulatory taking claim on which it could not prevail.\textsuperscript{47} Instead, the court found a physical takings analysis was proper for the ESA mandated water reservation and remanded the case back to the trial court to apply this standard.\textsuperscript{48}

The court side-stepped many of the ESA’s most important provisions through its application of a physical takings analysis of the allocation of water to the Casitas fish ladder. This physical takings analysis overlooks the very purpose of the ESA and has the potential to usurp the power of some of the ESA’s most essential provisions regulating critical habitat designation and preventing the direct or indirect taking of ESA-listed species.

III. The Endangered Species Act (“ESA”)—The Great Protector of the Animal And Plant Kingdom Is Not Without An “Achilles’ Heel”

A. The Birth And Growth of the Most Important Environmental Regulation of the Twentieth Century

In 1973, Congress enacted the ESA to “provid[e] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”\textsuperscript{49} Congress, judging the value of threatened and endangered species to be “incalculable,”\textsuperscript{50} made clear it

\begin{footnotes}
\footnotetext{40}{Id.}
\footnotetext{41}{Id.}
\footnotetext{42}{Id. at 755. The court reasoned that the expenditures for the construction of the fish ladder were operating costs under the contract, for which the United States was not responsible. \textit{See id.} at 752. In addition, the sovereign acts doctrine applies, and thus, the United States was not liable for any alleged breach of contract. \textit{Id.} at 755.}
\footnotetext{43}{Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 106 (2007). The judge who wrote this opinion previously held the opposite in \textit{Tulare Lake Basin Water Storage District v. United States}, 49 Fed. Cl. 313, 319 (2001). The judge attempted to distinguish the result by stating \textit{Tulare} did not focus on the governmental action.}
\footnotetext{44}{\textit{Id.} (citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302 (2002)).}
\footnotetext{45}{\textit{See id.}}
\footnotetext{46}{Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1279-80 (Fed. Cir. 2008), \textit{reh’g and reh’g en banc denied}, 556 F.3d 1329 (2009).}
\footnotetext{47}{\textit{Id.} at 1296-97.}
\footnotetext{48}{\textit{Id.}}
\footnotetext{49}{16 U.S.C. § 1531(b) (2006).}
\footnotetext{50}{\textit{See Tennessee Valley Authority v. Hill}, 437 U.S. 153, 154 (6th Cir. 1978) (stating that, in enacting the ESA, Congress intended “to halt and reverse the trend toward species extinction—whatever the cost”).}
\end{footnotes}
“intended to protect and revitalize” such populations.\textsuperscript{51} Thus, the ESA casts a wide net to promote conservation, covering everything from individual species to whole habitats, to protect threats to biodiversity as “a consequence of economic growth and development untempered by adequate concern and conservation.”\textsuperscript{52}

Because of Congress’s recognition that diversity in species of wildlife, plants, and fish is of great value to all of society,\textsuperscript{53} it expanded the ESA to cover not only private parties, but the government as well.\textsuperscript{54} In addition, the ESA contains both federal procedural and substantive mechanisms for controlling land use and water planning; normally state and local governments control land use and water planning regulations.\textsuperscript{55} This expansiveness gives the ESA a unique position in federal environmental legislation, making the ESA one of the “most powerful and comprehensive environmental laws currently on the books.”\textsuperscript{56}

As former Secretary of the Interior Bruce Babbitt observed, “the ESA is undeniably the most innovative, wide-reaching, and successful environmental law which has been enacted in the last quarter century.”\textsuperscript{57} While some critiques question the success of the ESA in promoting private party enthusiasm toward protecting habitat and endangered species themselves,\textsuperscript{58} the ESA boasts a one-hundred percent prevention of extinction for the over 1300 listed species.\textsuperscript{59} A recent study by the Center for Biological Diversity also showed that the populations of ninety-three percent of all the listed species in the Northeastern United States have increased in size or remained stable.\textsuperscript{60} This success is due, in large part, to the overall structure of the ESA and

\begin{footnotes}
\item[53] 16 U.S.C. § 1531(a)(3). Society places great “esthetic, ecological, educational, historical, recreational, and scientific value” in this diversity. \textit{See id}.
\item[54] \textit{See} Botello-Samson, \textit{supra} note 52, at 295.
\item[56] \textit{Id}.
\item[57] Bruce Babbitt, \textit{The Endangered Species Act and “Takings”: A Call for Innovation Within the Terms of the Act}, 24 ENVTL. L. 355, 356 (1994) (crediting the ESA for the resurgence of numerous endangered species, including the American alligator, the bald eagle, the peregrine falcon, and the spotted owl). \textit{Contra} Jonathan H. Alder, \textit{Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls}, 49 B.C. L. REV. 301, 364 (2008) (questioning the success of the ESA by finding in the context of economic theory and empirical evidence, “land use regulations [under the ESA] are likely doing more harm than good”).
\item[59] Center for Biological Diversity, \textit{The Road to Recovery: 100 Success Stories for Endangered Species Day 2007}, http://www.esasucess.org/reports/northeast/default.html (last visited Apr. 9, 2010); cf. Maryann Mott, \textit{U.S. Endangered Species Act Works, Study Finds}, NAT’L GEOGRAPHIC NEWS, Apr. 18, 2005, \textit{available at} http://news.nationalgeographic.com/news/2005/04/0418_050418_endangered.html (“Overall, the study found that the Endangered Species Act [ ] is effective. . . . In particular, species that have had dedicated recovery plans in effect for two or more years showed greater rates of survival and recovery.”).
\end{footnotes}
assistance from voluntary cooperative conservation and restoration programs.\textsuperscript{61} Therefore, a brief overview of the important provisions of the ESA is necessary to understand what is at stake in the \textit{Casitas} case.

\textbf{B. Dissecting the Important Provisions of the ESA}

\textbf{1. Section 4—Critical Habitat Designations}

Section 4 of the ESA gives the Secretary of the Interior, in conjunction with the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”), extensive power to determine species and habitats the government needs to protect.\textsuperscript{62} These powers include listing endangered and threatened species,\textsuperscript{63} promulgating rules for the protection of such species,\textsuperscript{64} and declaring “critical habitat.”\textsuperscript{65} While the Secretary has extensive powers, these powers are not unregulated. The ESA establishes timelines for declaration of petitioned species and opens up declarations to judicial review in certain circumstances.\textsuperscript{66} In addition, the Secretary must make his or her determinations “on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species,”\textsuperscript{67} and he or she may also consider the economic impact of designating “critical habitat” for the species.\textsuperscript{68}

Even though the Secretary’s designation of a species critical habitat is regulated, it may have a significant impact on private property owners. Designation of critical habitat for riparian species, such as fish, is of the utmost importance for not only the species, but also the water users along this riparian corridor.\textsuperscript{69} These designations may significantly affect water allocation and other natural resource decisions.\textsuperscript{70} For example, failure to prevent diminished in stream flows of water due to diversion may subject a diverter to potential violations of the ESA.\textsuperscript{71} Moreover, regardless of whether critical or minimum flow is included in Secretary’s critical habitat designation, “depletion of flows by water rights holders constitutes a Section 9 take under the


\textsuperscript{63} 16 U.S.C. § 1533(a)(1).

\textsuperscript{64} 16 U.S.C. § 1533(d).

\textsuperscript{65} 16 U.S.C. § 1533(a)(3). Under the ESA, “critical habitat encompasses areas essential to the conservation of the species that may require special management considerations or protection.” Parobek, \textit{supra} note 51, at 191; \textit{see also} 16 U.S.C. § 1532(5). The FWS and NMFS further refined the definition, stating “the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs or survival of that species.” \textit{Endangered and Threatened Species, Notice on Critical Habitat Areas}, 40 Fed. Reg. 17.764 (Dep’t of Interior Apr. 22, 1975).

\textsuperscript{66} \textit{See} 16 U.S.C. § 1533(b)(3). Any negative finding of inclusion on the list, after ninety days, is subject to judicial review. \textit{See id.} § 1533(b)(3)(c)(ii).


\textsuperscript{68} 16 U.S.C. § 1533(b)(2).

\textsuperscript{69} For a complete analysis of ESA Section 4’s application to riparian species, specifically addressing minimum water flow levels, see Parobek, \textit{supra} note 51, at 191-92.


\textsuperscript{71} \textit{See}, e.g., Riverside Irrigation Dist. v. Andrew, 758 F.2d 508, 511-14 (10th Cir. 1985) (holding that depletion of stream flow negatively impacting an endangered species’ critical habitat constitutes a take under the ESA).
Thus, Section 4 has many potential implications for private water rights holders and may prove problematic with regard to minimum flow levels.

2. Section 7—Federal Duties

Congress enacted Section 7 of the ESA in order to ensure all federal agencies, not just the FWS, implemented preservation techniques to protect endangered species. The ESA provisions require that all federal agencies “insure that any action authorized, funded, or carried out by such agency . . . [does not] jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.” Thus, Section 7 duties extend to “all activities undertaken by federal agencies and to nonfederal actions undertaken with federal assistance or authorization.”

In the context of water rights, nonfederal projects are any projects having a “federal nexus,” including, but not limited to, federal irrigation projects and water contracts. Because of this definition, water delivery under an existing water contract is a federal action and subject to Section 7 of the ESA, unless “the federal agency [has not] retain[ed] some measure of control over the activity.” Thus, when water usage may significantly affect the population or critical habitat of an ESA-listed species, agencies, such as the BOR, must impose more stringent restrictions on water contracts than normal.

For example, in Barcellos & Wolfsen v. Westlands Water District, the BOR cancelled the irrigation district’s water contract in order to provide necessary water to ensure the survival of the ESA-listed winter-run Chinook salmon and the delta smelt. The Eastern District of California found the BOR, as an arm of the federal government, was required to comply with Section 7 of the ESA and thus was well within its authority to cancel water contracts or make reductions in order to conserve the endangered species. While this seems harsh, the ESA is clear about water priorities and courts have consistently held “the needs of municipal and agricultural water users are secondary to the growing necessity to retain water for the use of aquatic species.”

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72 Parobek, supra note 51, at 191 (citing Melissa K. Estes, Comment, The Effect of the Federal Endangered Species Act on State Water Rights, 22 ENVTL. L. 1027, 1044 (1992), for the proposition that because habitat includes stream flows, the over appropriation constitutes and ESA taking under Section 9).
74 Parobek, supra note 51, at 188.
76 Parobek, supra note 51, at 188.
77 Estes, supra note 72, at 1035.
78 Klamath Water Users Protective Ass’n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999); Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998).
81 Id. at 721.
82 See id. at 732 (“If Congress has directed that the Bureau reserve water for environmental purposes, [m]ovants cannot be heard to insist that their rights require the Bureau to disobey the [ESA].”).
83 Parobek, supra note 51, at 194; see, e.g., O’Neill v. United States, 50 F.3d 677 (9th Cir. 1995) (BOR immune for damages from breach of contract resulting from ESA-forced water shortages); Carson-TRuckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984) (finding the BOR has the authority to prioritize endangered species protection over municipal and industrial water use); Barcellos & Wolfsen v. Westlands Water Dist., 849 F. Supp. 717 (E.D. Cal. 1993). These cases illustrate that ESA Section 7 trumps BOR contract obligations for water delivery.
3. Section 9—Prohibition on the Taking of Endangered Species

Section 9 of the ESA governs the actions of private individuals and prohibits all actions that “take” endangered species. To “take” an ESA-listed species means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct.” The FWS has further interpreted the meaning of “harm” to include any “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” While this reading of section 9 seems extremely broad, section 10 allows for the issuance of “incidental taking” permits in limited circumstances when the take will not appreciably limit the likelihood of recovery of the species. The applicant must demonstrate the taking is incidental to otherwise lawful activity, the alternatives considered were demonstrably less favorable, and procedures will be in place to minimize the taking. In addition, the applicant must detail a mitigation strategy in a Habitat Conservation Plan (“HCP”) that pledges to mitigate the taking to the maximum extent possible. This is not an easy burden to meet.

Furthermore, section 9 applies to all persons, including, but not limited to, individuals, corporations, private entities, and non-federal government actors, such as state and local governments, irrigation districts, or individuals with water contracts with the aforementioned. Because a majority of endangered species are located on private lands or adjacent waters, the expansive definition of “harm” in section 9 opens the door to federal land management. In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, the U.S. Supreme Court upheld the FWS’s definition of “harm” to include adverse habitat modification that kills or injures an ESA-listed species. The respondents, a logging interest group, made a facial challenge to the definition of “harm,” claiming the application of “‘harm’ regulation to the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, had injured them.” The Court found the FWS’s definition of “harm” was appropriate within the statutory framework and the ESA’s broad purpose required a definition protecting habitat destruction and modification to protect the ecosystems of endangered species. As a result, private landowners face section 9 violations through modification of their land in a way that kills or injures an endangered species. By extension, this opinion significantly limits the

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86 50 C.F.R. § 17.3 (2009).
91 See S. Res. 125, 110th Cong. (2007) (enacted), available at http://www.esasuccess.org/reports/ESA-Day-Resolution-2007.pdf (finding two-thirds of endangered and threatened species reside on private lands); see also Barton H. Thompson, Sr., The Endangered Species Act: A Case Study in Takings & Incentives, 49 STAN. L. REV. 305, 310 (1997) (noting in 1993 almost eighty percent of all endangered species were located in habitat on private lands and more than one-third of all protected species were not found anywhere on federal lands, making it impossible to secure recovery habitat with traditional federal land management).
92 Parobek, supra note 51, at 190.
94 Id. at 698.
95 Id. at 691.
96 Id. at 691-92, 695, 698.
control water rights holders have over their rights to use that water if it kills or injures a protected species.97

C. ESA Impacts on Water Allocation and the Turn to Fifth Amendment Takings Claims—
The “Chink” in the ESA’s Armor

Sections 4, 7, and 9 of the ESA have dramatically changed state water rights and water allocation. While the ESA directs the FWS and Secretary of the Interior to cooperate with states to accommodate state water rights, courts consistently hold protection of endangered species under the ESA trumps state water rights.98 In United States v. Glenn-Colusa Irrigation District, the court made it clear that state water rights are subordinate to enforcement of the ESA.100 The court enjoined the irrigation district from pumping its full allotment of water from the Sacramento River in order to protect the ESA-listed winter-run Chinook salmon from pumping speeds that were killing the fish.101 The logic of the ruling was soon followed by many other courts, and has set the stage for the current battle between private landowners advocating for stronger state water rights and federal enforcement of the ESA.103

Glenn-Colusa, Barcellos, and other cases demonstrate that when federal agencies resort to enforcing minimum stream flow levels to protect ESA-listed species, conflict ensues.104 Even though a water diversion might not have any federal connection, the needs of ESA-listed riparian species come before those of both junior and senior private appropriators.105 The Casitas conflict illustrates that competition for water between the ESA, state and local governments, and private appropriators is unavoidable. Because many of the legal questions surrounding the ESA and state water rights battle are resolved—courts have clearly found that the rights of ESA-listed fish trump the rights of agriculture—“irrigators have sought to turn such defeats into victories over the federal government by lodging Fifth Amendment takings claims and demanding just compensation.”106 Because irrigators are left with little hope to defeat the behemoth ESA, an overview of California Water Law and Fifth Amendment takings jurisprudence may illuminate the few inroads for challenging ESA water diversions.

IV. Defining the Property Interest: California Water Law

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97 Parobek, supra note 51, at 190.
99 See, e.g., Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985); United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992); see also Cappaert v. United States, 426 U.S. 128 (1976) (while this case predates the ESA, it paved the way for a presumption that federal interests in protecting aquatic life trumped state water rights).
100 Glenn-Colusa, 788 F. Supp. at 1132.
101 Id. at 1129-31.
103 Parobek, supra note 51, at 199.
104 See Holly Doremus, Water, Population Growth, and Endangered Species in the West, 72 U. COLO. L. REV. 361, 397 (2001) (arguing conflicts between state water rights and the ESA should be avoided at all costs and other protection strategies, besides enforcing minimum stream flows, should be employed first).
106 Parobek, supra note 51, at 199.
Practically, the first inquiry in a takings analysis under the Fifth Amendment requires a determination of whether a cognizable property interest is at stake in the case.\textsuperscript{107} The Fifth Amendment protects, but does not create property rights.\textsuperscript{108} Instead, the existence of property rights are determined by reference to “existing rules or understandings that stem from an independent source such as state law.”\textsuperscript{109} Therefore, before a court reaches a constitutional question, such as a Fifth Amendment takings claim, the court must determine whether the asserted property right exists for purposes of qualifying for a taking. For understanding the Casitas case, an examination of California water law is necessary to ascertain whether the plaintiff had a valid property interest in the diverted water.

### A. Basics of California Water Law

California is a “dual system” water rights state; recognizing both riparian and appropriative rights.\textsuperscript{110} Riparian rights are rights based on the ownership of the adjacent land to a waterway.\textsuperscript{111} Appropriative rights, on the other hand, are rights based on use of water for a beneficial use, following the basic tenant “first in time, first in right.”\textsuperscript{112} Acquiring appropriative rights is far more complicated than riparian rights,\textsuperscript{113} and because appropriative rights are the only ones implicated in Casitas, this process is analyzed.

California statutes declare water as a public resource and therefore the property of the people.\textsuperscript{114} Because of this definition, a water “right” does not convey an actual interest in the water itself, only a right to “use” the water, while the title to the water remains with the state.\textsuperscript{115} Thus, a property right in water in California’s is strictly “usufructuary,” and consists only of the advantage of using the water, not the liquid itself.\textsuperscript{116}

Because the public owns all the water, California has adopted a permitting system as the exclusive way to acquire a right to use (or appropriate) water.\textsuperscript{117} A person must file for a permit with the State Water Resources Control Board (“SWRCB”), which follows statutory procedures to determine whether a permit will be issued.\textsuperscript{118} The SWRCB typically determines whether to

\textsuperscript{108} Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).
\textsuperscript{109} Id.
\textsuperscript{114} United States v. State Water Res. Control Bd., 182 Cal. App. 3d at 99; see also CAL. WATER CODE § 1001 (West 1971) (“Nothing in this division shall be construed as giving or confirming any right, title, or interest to or in the corpus of any water.”).
\textsuperscript{116} See Barton, supra note 113, at 120 (citing CAL. WATER CODE § 1200-1800 (Deering 1977)).
issue a permit based on whether “sufficient water is available to meet the request, [] the applicant’s proposed purpose of use is beneficial, and [] the applicant’s proposed place of use does not violate any watershed or county origin statutes.” The SWRCB issues a permit and license; both “expressly state that the use of water is subject to conditions such as the public trust doctrine and prohibitions against waste and unreasonable use, thus putting right holders on notice that a water right is not absolute.” Once the applicant has acquired a permit and license, the water is appropriated and they have usufructuary, not absolute rights.

B. California’s Reasonable Use and Public Trust Doctrines

Because the state retains title to water in California, both riparian and appropriative rights are subject to certain limitations, including the public use doctrine and the doctrine of reasonable and beneficial use. The public trust doctrine prescribes water uses harming the public trust. The doctrine is grounded in three principles: “(1) the right to use water is contingent on current public values; (2) the right to use water is subject to change; and (3) the right to use water and the public trust doctrine are equally important.” Thus, because the waters of California are held in public trust, state courts and agencies should consider the impact of water diversions upon public trust interests prior to approving these diversions and try to avoid any resultant harms.

The California Constitution, as well as the water code, recognizes the doctrine of reasonable and beneficial use. The doctrine prevents employing water for any unreasonable or unbeneﬁcial use. While it seems straightforward, “reasonable use” has never been deﬁned, and thus, it must be determined using a balancing test of what is reasonable. Reasonable use, therefore, requires case-by-case determinations, and an examination of statewide interests.

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119 Id. While irrigation uses are only second to domestic uses, see Cal. Water Code § 106, regulators must consider the preservation of fish in deciding whether to grant a water use permit, see Cal. Water Code § 1243 (West Supp. 2009) (“In determining the amount of water available for appropriation for other beneﬁcial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.”).

120 Horchem, supra note 27, at 736 (citing Cal. Water Code § 1628 (West 1971)).

121 Id. at 736 n.54 (citing Brian E. Gray, The Property Right in Water, 9 Hastings W.-Nw. J. Envtl. L. & Pol’y 1, 11 (2002)).

122 See Nat’l Audubon Soc’y v. Superior Court, 33 Cal. 3d 419, 426 (1983). The court’s ruling in National Audubon Society, expanded the public trust to include waters that affect navigable waterways instead of just the traditional navigable waterways. Id.

123 Cal. Const., art. X, § 2 (“It is hereby declared . . . that the water resources of the State be put to beneﬁcial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . . The right to water or to the use or ﬂow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneﬁcial use to be serviced, and such right does not and shall not extend to the waste or unreasonable method of diversion of water . . .”); Cal. Water Code § 100 (West 1971).

124 See Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132 (1967) (using river water as medium to transport sand and gravel for a sand and gravel business not a reasonable use of water); see also State Water Res. Control Bd. v. Forni, 54 Cal. App. 3d 743 (1976) (using river water to sprinkle wine crops during a freeze to prevent freezing is beneﬁcial but not a reasonable use of water).

125 See California Trout, Inc. v. State Water Res. Control Bd., 207 Cal. App. 3d 585, 622 (1989) (“We note at the outset that it is an open question whether the test of unreasonable use under article X section 2 refers only to inordinate and wasteful use of water or applies comparatively to preclude any use less than the optimum allocation of water.”).

126 Horchem, supra note 27, at 736 n.54.
C. The Casitas Court Failed to Properly Address California Water Law

The Federal Circuit Court of Appeals in Casitas ignored settled takings jurisprudence and did not first determine whether a cognizable property right existed in the case. California law is clear that water rights are merely usufructuary, and an appropriator holds only the right to “use” a certain amount of water, not the property right over the actual molecules.\(^\text{127}\) While the government conceded Casitas had a valid property right, and this is what the majority relied on to find a property interest, the government was only conceding Casitas’s right to divert and use water, not that he owned the water itself.\(^\text{128}\) Thus, Casitas does not even likely have a cognizable property interest under California law and the case should have been dismissed.\(^\text{129}\)

Even if Casitas has a valid property interest, Casitas does not have the right to use the water in an unreasonable manner detrimental to fish.\(^\text{130}\) Both the public trust doctrine and the doctrine of reasonable and beneficial use apply to Casitas’s appropriative water rights license. Had the court made the required inquiry into Casitas’s use, keeping in mind the public trust doctrine and rule of reasonable use, the court almost certainly would have found the Casitas plaintiffs had no right to use the diverted water in a way that endangered the steelhead trout’s existence.\(^\text{131}\)

Under the public trust doctrine, current public values are in favor of saving the steelhead trout; otherwise, the fish would not have a place on the endangered species list. In keeping with the public trust, an appropriator knows through the permitting process that his rights to water are not absolute and water use rights are subject to change. Here, the government is not interfering with Casitas’s right to divert and use the water from the diversion, it is merely rearranging the amount of water Casitas may use under the public trust doctrine.\(^\text{132}\)

The same applies for the doctrine of reasonable use. California law clearly states the SWRCB must consider other beneficial uses, including the preservation of fish,\(^\text{133}\) when “allocating water for the state’s highest beneficial uses—domestic uses and irrigation.”\(^\text{134}\) Because Casitas’s use of the entire amount of the diversion subjects the trout to harm or death, this is clearly not a reasonable use as contemplated by the California Constitution.\(^\text{135}\)

Furthermore, the court misinterpreted Casitas’s license as an absolute per-year use amount.\(^\text{136}\) The license provided Casitas with the right to divert up to 107,800 acre-feet of water and the right to use was not to exceed 28,500 acre-feet of the diverted water.\(^\text{137}\) It did not


\(^{128}\) Id. at 1288 (finding the government conceded that Casitas had a right to divert 107,800 acre-feet of water and to use 28,500 acre-feet of the diverted water).

\(^{129}\) Id. at 1297 (Mayer, J., dissenting). The Federal Circuit Court of Appeals should have followed California law or certified the question to the California State Supreme Court if it was uncertain about application in this specific case. See Benson, supra note 107, at 566 n.96. See Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983), for an example of the Federal Circuit certifying a state law question to the California Supreme Court.

\(^{130}\) See Benson, supra note 107, at 575.

\(^{131}\) See Horchem, supra note 27, at 744 (citing CAL. WATER CODE § 100 (West 1971)).

\(^{132}\) Casitas III, 543 F.3d at 1299 (Mayer, J., dissenting).

\(^{133}\) CAL. WATER CODE § 1243 (West Supp. 2009).

\(^{134}\) See Horchem, supra note 27, at 745.

\(^{135}\) See CAL. CONST., art. X, § 2.

\(^{136}\) Casitas III, 543 F.3d 1276 at 1288.

\(^{137}\) Id.
guarantee a certain amount of water each year; it merely set a ceiling on the amount Casitas could potentially divert. Reading the license as an absolute amount as the court does gives the absurd scenario of the government having to pay Casitas for lack of water occurring during a drought, a diversion blockage, or some other event causing less than 107,800 acre-feet of water to flow down the diversion channel. Clearly, the license was not meant to ensure Casitas a certain amount of water per year and thus, Casitas has no property interest in the amount of water required to operate the fish ladder.

Because the court erred in failing to address whether a cognizable property right in the water existed under California law at the outset of its analysis and misinterpreted the government’s characterization of Casitas’s property rights under the license, the court proceeded into an unnecessarily complex takings analysis on an otherwise non-issue and thus the Takings Clause of the Fifth Amendment must be explored.

V. Fifth Amendment Takings of Water Rights

The Takings Clause of the Fifth Amendment provides “nor shall private property be taken for public use, without just compensation.” Simply put, if the government takes your property, it must compensate you for it. While this proposition seems straightforward, takings jurisprudence is not. As Justice Stevens stated in his dissenting opinion in Nolan v. California Coastal Commission, “[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.” Because of this, examining the Takings Clause’s guiding principle, to prevent the government from “forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole,” is the best way to understand it.

A “taking” may occur directly through the exercise of the governmental power of eminent domain (condemnation) or indirectly, when the government acts in a manner that causes an inverse condemnation. Inverse condemnation may occur by either direct physical invasion (referred to as a “physical taking”) or by virtue of government restriction on land use (referred to as a “regulatory taking”). The history of the Takings Clause sheds a light on the distinction between physical and regulatory takings.

A. Making Sense of the Nonsense: The History Behind the Uncertainty of Takings Clause Jurisprudence

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140. Id. at 866 (Stevens, J., dissenting).
143. See, e.g., First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 315 (1987). “Inverse condemnation” is defined in Black’s Law Dictionary as “[a]n action brought by a property owner for compensation from a government entity that has taken the owner’s property without bringing a formal condemnation proceeding.” BLACK’S LAW DICTIONARY 310 (8th ed. 2004).
Prior to the Constitution and Bill of Rights, state governments took property for public projects, such as roads, without paying the landowner any form of compensation. Only the constitutions of Vermont and Massachusetts required the payment of compensation for property takings before ratification of the Constitution. A strong resistance to compensation existed in American legal thought, and while some movement towards paying compensation existed in the eighteenth century, most Americans regarded compensation as a “bounty given . . . by the State out of kindness and not out of justice.” While nine of the fourteen states paid some compensation for lands taken for roads in 1791, “until the end of the nineteenth century[,] . . . jurists held that the [C]onstitution protected possession only, and not value [of property].” This is crucial for understanding the Lucas case discussed later.

Important for our discussion is that James Madison, the original author of the Takings Clause, advocated for fish-passage laws in his home state of Virginia that “prohibited obstruction of migratory fish by mill dams.” Nine states had fish passage laws at the time of the ratification of the Takings Clause and none paid compensation for mill takings, partial or full, from these regulations. These regulations show legislators at the time modified a property owner’s use of land when it threatened the habitat of useful animals, without paying compensation, a standard part of the eighteenth century “social compact.”

As originally proposed by James Madison, the Takings Clause designated that a property owner shall not be “obligated to relinquish his property, where it might be necessary for public use, without a just compensation.” However, the First Congress changed the language to the current version of the Clause. As stated above, some scholars argue the Takings Clause only applies to direct, physical takings, while others contend the broader language eventually

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147 Lucas, 505 U.S. at 1057 n.22 (Blackmun, J., dissenting).
149 John F. Hart, Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause, 63 Md. L. REV. 287, 309 (2004). Hart observed: “three states paid only for improved or enclosed land; two states were internally split, in some counties paying for all highway land, but in other counties paying only for enclosed land. Only a minority of states, [five,] then, did outright physical appropriation of even unimproved land occur without compensation. Id. at 309-10. But see William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 695 (1985) (“Except for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land. Legislatures provided compensation only for enclosed or improved land.”).
151 See infra notes 226-234 and accompanying text.
152 Hart, supra note 149, at 313; see also id. at 313-15.
153 Id. at 313-14.
154 Id. at 314-15.
155 Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1579 (Fed. Cir. 1993) (quoting James Madison, Speech Proposing Bill of Rights (June 8, 1789)).
156 U.S. CONST. amend. V, cl. 4.
157 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1057 (1992) (Blackmun, J., dissenting); Joseph L. Sax, Eminent Domain, 74 YALE L.J. 36, 58-60 (1964); Treanor, supra note 149, at 711. According to Professor Treanor:

The federal Takings Clause and its predecessor clauses, as they were originally understood, divided governmental actions affecting property into two groups. When the government physically took property, it owed compensation. Any other governmental action, no matter how severely it affected the value of property, did not give rise to a compensation requirement. This requirement applied to physical takings

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adopted by the First Congress means the framers “embraced direct physical takings as well as other types of Government authorized intrusions.”

Regardless of what the original intent of the framers might be, the Court first recognized regulatory takings in Pennsylvania Coal Co. v. Mahon. Mahon involved the takings challenge of a Pennsylvania statute, the Kohler Act, which required coal companies to leave enough coal in the ground under a surface structure to prevent subsidence (collapse). The Pennsylvania Coal Company claimed the Kohler Act was a Fifth Amendment taking of property and it was therefore entitled to just compensation. The Court agreed, finding that “property may be regulated to a certain extent, [but] if the regulation goes too far it will be recognized as a taking.” This established the general framework for battles over regulatory takings, recognizing the Fifth Amendment requires compensation for regulations that go “too far” and have the effect of taking an owner’s property.

Since Mahon, much of modern takings law is an ongoing attempt to determine the point when a regulation goes “too far” and thus constitutes a taking. Both the physical and regulatory takings doctrines have evolved and an exploration of the interplay between the two is necessary to fully understand Casitas.

1. Physical Takings

Private property rights are often described as a “bundle of sticks.” Each stick represents a right the owner holds against others. Typical rights include the right to exclude others from the property, the right to sell property, the right to transfer property, the right to possess and the right to use property. “[W]hen a state infringes upon or eliminates one of these sticks in the private owner’s bundle, it is considered a taking and the state will be forced to pay compensation.” Physical takings demonstrate this most clearly.

When the government physically occupies or takes possession of an interest in property for some public purpose, the government has taken one of the most cherished sticks in the bundle, the right to exclude, and has thus committed a physical taking. This is true regardless

because the framers believed that majoritarian decisionmaking processes would not give fair consideration to the individuals interest in not having her property physically seized by the government.


158 Skip Kirchdorfer, 6 F.3d at 1579; see Lucas, 505 U.S. at 1028 & n.15.
159 260 U.S. 393 (1922).
160 Id. at 412-13.
161 Id. at 415.
162 See Benson, supra note 107, at 579; Botello-Samson, supra note 52, at 311.
163 See Barton, supra note 113, at 116 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
164 260 U.S. at 415.
165 See Barton, supra note 52, at 311.
170 Barton, supra note 113, at 116.
171 See, e.g., Loretto v. Teleprompter Manhattan CATB Corp. v. United States, 458 U.S. 419, 436 (1982); see also Nolan v. California Coastal Comm’n, 483 U.S. 825, 831 (1987) (Justice Scalia describes the right to exclude as one of the most important in the bundle of property rights).
of the size or nature of the physical interference,\textsuperscript{173} regardless of whether the physical invasion touches the actual property,\textsuperscript{174} and without respect to the public benefit or interest served.\textsuperscript{175} Physical takings are treated as \textit{per se}\textsuperscript{176} and if the court finds a physical invasion of property, or something similar, then just compensation must be paid and the takings analysis is over.

2. Regulatory Takings

Physical invasions of property are not the only form of takings; takings by regulation may also occur. The Supreme Court in \textit{Mahon} recognized that the Fifth Amendment requires compensation for regulations that go “too far” and have the effect of taking the owner’s property.\textsuperscript{177} For years after the \textit{Mahon} decision, the Court had no set standard to determine regulatory takings and instead employed a process of “essentially ad hoc, factual inquiries,”\textsuperscript{178} determining each regulatory takings claim on a fact-based, case-by-case analysis. The Court recognized that without a set formula to determine takings, a high-degree of inconsistency exists in determining when “‘justice and fairness’ require that economic injuries caused by the public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”\textsuperscript{179} Thus, the Court established the three-pronged \textit{Penn Central} regulatory takings test to inform the process.\textsuperscript{180} This test has since been characterized and expanded into a two-tiered regulatory takings process, with \textit{per se} or categorical regulatory takings governed by \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{181} and the three-pronged \textit{Penn Central} test applying to all other regulatory situations.

a. The \textit{Penn Central} Test

Justice Brennan’s \textit{Penn Central} opinion added formalized predictability to otherwise ad hoc, fact-based takings jurisprudence, through identifying several factors of “particular significance” in previous takings cases and grouping the primary ones into a balancing test.\textsuperscript{182} The \textit{Penn Central} test determines whether a government action constitutes a compensable taking through the balancing of three factors: (1) “the economic impact of the regulation on the

\textsuperscript{173} E.g., \textit{Loretto}, 458 U.S. at 436 (finding that landlord allowing cable companies to install equipment in apartment buildings constituted a physical taking, even though the equipment occupied an area less than one and one-half cubic feet).

\textsuperscript{174} United States v. Causby, 328 U.S. 256 (1946) (finding that if noise of aircraft in airspace above property goes so far as to render the land useless, the loss would be complete and “[i]t would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.”).

\textsuperscript{175} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992) (“Where ‘permanent physical occupation’ of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted ‘public interests’ involved . . .”).

\textsuperscript{176} \textit{Black’s Law Dictionary} defines \textit{per se} as, “[o][f], in, or by itself; standing alone, without reference to additional facts” or “[a]s a matter of law.” \textit{BLACK’S LAW DICTIONARY} 1178 (8th ed. 2004).

\textsuperscript{177} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).


\textsuperscript{179} \textit{Id.}; see also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

\textsuperscript{180} \textit{Penn Cent. Transp. Co.}, 438 U.S. at 124. For the full text of the three-pronged test, see \textit{infra} note 183 and accompanying text.

\textsuperscript{181} 505 U.S. 1003 (1992). For a full explanation of categorical and \textit{per se} regulatory takings under \textit{Lucas}, see \textit{infra} notes 226-234 and accompanying text.

\textsuperscript{182} \textit{Penn Cent. Transp. Co.}, 438 U.S. at 124.
Claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action” (ranging from protection of the public good to outright invasion).\(^{183}\) Predicting how courts will weigh each of the factors is difficult, with some courts finding “each one of these so-called ‘factors’ as dispositive of whether a taking occurred.”\(^{184}\) Courts have even defined the factors differently without acknowledging the shifts in the definition.\(^{185}\) Thus, each of these factors depends heavily on interpretation and produce a high degree of variance in court rulings.

i. Economic Impact of the Regulation on the Plaintiff

The “economic impact” prong of the \textit{Penn Central} test, sometimes termed the “diminution in value factor,” looks at how much the property (or parcel) was worth prior to a regulation and how much the property is worth after the regulation.\(^{186}\) To establish a taking, a plaintiff must essentially demonstrate he or she has been denied all, or substantially all, economically viable use of his or her property.\(^{187}\) The less the property is worth after the regulation, the more likely the court is to find a taking.\(^{188}\) However, a “mere diminution” in value, standing alone, is not sufficient to constitute a taking.\(^{189}\) The “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”\(^{190}\) For this reason, denial of the highest, best, or the most profitable use, does not constitute a taking—nor does the fact a property owner is not permitted to reap as great a financial return from his property as he might have hoped.\(^{192}\)

\(^{183}\) Id.

\(^{184}\) See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); see also Botello-Samson, \textit{supra} note 52, at 312.

\(^{185}\) Botello-Samson, \textit{supra} note 52, at 312.

\(^{186}\) Barton, \textit{supra} note 113, at 118. Some plaintiffs argue it is the diminution in profits, or lost profits, that should determine economic impact of the regulation on the plaintiff. \textit{See} Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1267 (Fed. Cir. 2009), \textit{cert. denied}, 130 S. Ct. 1501 (U.S. 2010). However, the Federal Circuit Court of Appeals observed that when the Supreme Court has analyzed the economic impact of a regulation, it talks almost exclusively in terms of lost value rather than lost profits, and this is the consensus in Federal Circuit case law, as well as in other federal circuits and state courts. \textit{Id.} at 1268-69 (collecting and analyzing relevant case law). The Federal Circuit Court of Appeals still examined a “profits-based approach” in \textit{Rose Acre Farms v. United States}, but concluded that with only a ten-percent diminution in value of the designated parcel of eggs, this did not approach the level of severe economic harm. \textit{Id.} at 1275.


\(^{188}\) \textit{Compare} Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178 (Fed. Cir. 1994) (finding a taking with a 99% diminution in value of the property), \textit{with} Maritrans, Inc. v. United States, 342 F.3d 1344, 1358 (Fed. Cir. 2003) (finding no regulatory taking with a 13.1% diminution of value of tanker barges). \textit{But see} Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (finding no taking had occurred even though there was approximately a 100% diminution in value of eagle feathers after the regulation).


\(^{190}\) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).


Another extremely important consideration in evaluating the economic impact of a regulation on a plaintiff is the characterization of the parcel or property taken. The court must focus on the extent and nature of the interference with a plaintiff’s rights in the parcel as a whole. The Court, thus, cannot “divide a single parcel into discrete segments” to determine if a particular segment is entirely taken. In *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, the Supreme Court noted:

A claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question. The Court recently repeated this assertion, finding “where the owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.”

The logic of this approach is self-evident: a property owner that has realized substantial value from the use of most its property is not deprived of fairness and justice because regulations preventing optimum economic use of a relatively small portion of that property are in place. For example, when a landowner owns both wetlands and the adjacent uplands, focusing exclusively on a denial to develop the wetlands, and ignoring the rights remaining in the uplands, is unrealistic. Accordingly, even if a regulation has interfered with a plaintiff’s ability to develop a part of his property, such as a wetland, no compensation is awarded if valuable economic rights remain in the property as a whole.

### ii. Interference with Investment-backed Expectations

In determining regulatory takings, courts must evaluate the extent to which the challenged governmental action has interfered with the reasonable investment-backed expectations of the property owner. The Court has noted that an investment-backed expectation must be reasonable—it “must be more than a ‘unilateral expectation or an abstract need.’” Thus, courts look to whether the property owner had a reasonable expectation to use

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193 Takings cases may depend critically on the judicial demarcation of the “parcel as a whole,” which is defined as “the unit of property whose value is to furnish the denominator of the fraction” that expresses the ratio of post-imposition to pre-imposition value of the property in question. See *Keystone Bituminous Coal Ass’n v. De Benedictis*, 480 U.S. 470, 497 (1987).
194 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002); *Penn Cent. Transp. Co.*, 438 U.S. at 130-31. The Court in *Penn Central* stated: “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .
195 *Id.*
197 *Id.* at 643-44; accord *Keystone Bituminous Coal*, 480 U.S. at 497.
198 *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 327.
199 Of course, the regulations must be advancing a legitimate, well-established governmental interest.
201 See, e.g., *Keystone Bituminous Coal*, 480 U.S. at 495; Rith Energy, Inc. v. United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001).
the property in the manner intended before the regulation stopped him.\textsuperscript{203} A court will be more likely to weigh this factor in favor of the landowner if it appears the government “pulled the rug” out from underneath him.\textsuperscript{204}

In those instances where a regulation limits the owner’s use of his land, a court usually “limits recovery to owners who can demonstrate that they bought their land in reliance on the nonexistence of the challenged regulation.”\textsuperscript{205} If this were not the case, it would turn the government into an involuntary guarantor of the property owner’s gamble that he could develop the land as he wished despite an existing regulatory structure.\textsuperscript{206}

However, this has recently changed in wake of \textit{Palazzolo v. Rhode Island}.\textsuperscript{207} Prior to \textit{Palazzolo}, property owners’ acquisition of title after a regulation’s effective date generally barred takings claims as a matter of law.\textsuperscript{208} In \textit{Palazzolo}, the Court reversed this trend and found a landowner may assert a taking claim even though title is acquired after the effective date of a regulation affecting land use.\textsuperscript{209} The Court held a landowner’s acquisition of property subject to a regulation affecting his or her land use is a factual element for consideration under the \textit{Penn Central} investment-backed expectation inquiry.\textsuperscript{210} Thus, substantively, courts will not dismiss regulatory takings cases merely because the landowner acquired the property after a regulation’s enactment. However, proving interference with reasonable investment-backed expectations will remain extremely difficult, if not impossible, if the claimant had actual or constructive knowledge of the restrictions on the property prior to purchase.\textsuperscript{211}

### iii. Character of the Governmental Action

The “character of the governmental action” factor looks at the intrusiveness, purpose, and importance of the state’s action regulating the property—“the more intrusive and less important the purpose, the more likely a court will find a taking.”\textsuperscript{212} As the Supreme Court noted in \textit{Penn Central}, “[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”\textsuperscript{213} Thus, the court looks at the purpose behind the government action and weighs that against the other factors in the \textit{Penn Central} test to determine if a taking has occurred.

While this seem relatively straight-forward, the use of the “governmental action” prong of the \textit{Penn Central} test was called into question after the ruling in \textit{Lingle v. Chevron U.S.A.}
The Lingle Court overruled the 1980 case Agins v. City of Tiburon, finding the "‘substantially advances [a government interest]’ formula announced in Agins is [no longer] a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation." The Court reasoned the Agins test was actually a substantive due process test and not usable in the context of Fifth Amendment regulatory takings analysis. Thus, Lingle altered the analytical framework of regulatory takings analysis.

In the aftermath of Lingle, judges and scholars alike called into question the proper analysis left for the “governmental action” prong in regulatory takings. Some have argued that “[b]ly recognizing that the character of the government act is largely irrelevant to the takings analysis, Lingle represents a setback to takings opponents who, like Justice Stevens, tend to argue that a government act should not be found to be a taking when it furthers a really important public purpose.” Others scholars have found the value of government action is still inherently weighed within the Penn Central balancing test because regulations achieving wide-reaching public benefits are the most likely to be recognized by courts anyway. Either way, Lingle clearly changed the regulatory takings paradigm.

Recently, the Federal Circuit Court of Appeals addressed the issue in Rose Acre Farms, Inc. v. United States, finding in light of Lingle, courts “can no longer ask whether the means chosen by government advance the ends or whether the regulation chosen is effective in curing the alleged ill.” According to the court, however, the governmental action prong of Penn Central is still applicable, and courts must now consider the imposition of a burden on a particular property and the allocation of that burden instead of looking at the rationality of the regulation. The court emphasized that proper governmental action analysis now weighs heavy on evaluating the distribution of the regulatory burden among all property owners. Interestingly, the court read the holding in Lingle narrowly, holding the case leaves the substantial body of case law dealing with the Penn Central governmental action prong unchanged, especially with regard to public health and safety. In light of this, the court found the governmental action prong weighed even more heavily in favor of the government in the case, where it was regulating the sale of eggs potentially containing salmonella, than it would have before Lingle.

Whether Rose Acre Farms limits the governmental action prong, or simply narrows its scope, is unclear. Regardless, the government no longer must demonstrate the regulation is effective in curing the alleged ill in defending regulatory takings claims.

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217 Id. at 540 (“There is no question that the ‘substantially advances’ formula was derived from due process, not takings, precedents.”).
220 Rose Acre Farms, Inc. v. United States, 559 F.3d 1260 (Fed. Cir. 2009), cert. denied, 176 L. Ed. 2d 109 (U.S. 2010).
221 Id. at 1278.
222 Id. (quoting Lingle, 544 U.S. at 543).
223 Id.
224 Id. at 1279, 1281-82.
225 Id. at 1282.
b. Lucas v. South Carolina Coastal Council Categorical Takings

In Lucas, the Supreme Court considered a challenge from a landowner claiming a South Carolina regulation barring development on his two beachfront lots in a developed area was a Fifth Amendment taking. Lucas purchased the lots with the intent of building single-family dwellings on them, but South Carolina passed the Beach-front Management Act in 1988, barring any permanent structures to be built on Lucas’s lots. The Court found the regulation rendered the lots valueless and held the regulation amounted to a complete deprivation of “all economically beneficial use” of the property. Thus, the Court found the regulation was a categorical taking and treated it, essentially, as a per se physical taking. The basis for the rule is that total deprivation of beneficial use is essentially a physical appropriation of land, and with all use or value taken, the land is now in public service, and therefore compensation is due.

The Lucas categorical takings rule only applies in very rare situations where the regulation results in the loss of all economically beneficial use of property. This means whatever is defined as the property, or parcel, is stripped of all economic value, a one for one taking. However, the Court maintained an exception: even in the instances of total economic deprivation, no taking exists if the regulation itself is grounded in a state’s “background principles of . . . property and nuisance already in place upon land ownership.” The exception exists to prevent the state from having to pay compensation for regulations merely articulating rules applying to the land prior to ownership of the parcel; the landowner never had the right to use the property in that manner in the first place, so no taking exists.

Thus, Lucas makes two things clear: (1) a regulation that deprives a land of all economically beneficial use will be classified as a categorical taking; and (2) the characterization or definition of the parcel taken under the Lucas analysis is crucial to success under the challenge.

B. Environmental Takings Take Center Stage

Several cases are relevant to our discussion of Casitas and provide either important rule determinations or commentary on situations with analogous facts. While the Federal Circuit Court of Appeals majority in Casitas relies on three Supreme Court decisions involving water to

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228 Lucas, 505 U.S. at 1006, 1007.
229 Id. at 1006, 1028.
230 Id. at 1028.
231 Id. at 1017-18.
232 Benson, supra note 107, at 581 (citing Lucas, 505 U.S. at 1017). The Court made clear the rule applies only under the “extraordinary circumstances when no productive or economically beneficial use of land is permitted,” making the key question how the Court defines the parcel of land at issue. Michael C. Blumm, The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 ENVTL. L. 171, 177 (1995).
233 Lucas, 505 U.S. at 1029.
234 Id.
distinguish their position, these are included, more appropriately, in the discussion of the majority opinions in both Tulare Lake and Casitas below.235

1. The Redefinition of Takings: Tahoe-Sierra236

In a case about a temporary moratorium placed on land development,237 the United States Supreme Court further defined the difference in takings jurisprudence between physical and regulatory takings in Tahoe-Sierra.

When the government condemn[s] or physically appropriates [ ] property, the fact of a takings is typically obvious and undisputed. When, however, . . . a law or regulation imposes restrictions so severe [ ] they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.238 Because this was not a “classic taking” scenario, the Court applied the Penn Central factors to determine whether a regulatory taking occurred.239 The Court explained that the destruction of one strand of an owner’s full bundle of property rights is not a taking.240 As discussed above, a court cannot divide single parcels into segments to determine a taking; the court must instead focus on the parcel as a whole.241 The Court found the temporary restriction on land development merely caused a diminution in value and this was not “a permanent deprivation of the owner’s use of the entire area,” and thus, not a taking of the “parcel as a whole” or a compensable taking.

2. The Unanswered Mistake: Tulare Lake242

The Tulare Lake decision is the first case ever to hold an ESA restriction amounts to a Fifth Amendment taking of property.243 Not only was this case the first of its kind, but it has been widely criticized.244 Scholars and courts have chastised Judge Wiese’s245 opinion as “confused,”246 “misunderstand[ing] the physical occupation test and the nature of water

237 Id. at 306.
238 Id. at 321-22 n.17.
239 Id. at 324.
240 Id. at 327 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).
241 See supra notes 193-200 and accompanying text.
243 See Benson, supra note 107, at 586.
245 Judge Wiese also render the preliminary decision in the Casitas case at the Federal Court of Claims, holding a position directly contrary to his position in Tulare Lake. See Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007) [hereinafter Casitas II]. For a full discussion of Judge Wiese’s opinion in Casitas, see infra notes 301-306 and accompanying text.
246 Benson, supra note 107, at 584.
rights,”247 full of “deficiencies,”248 and based on flawed reasoning,249 just to name a few. While
the logic, reasoning, and analogy of Judge Wiese’s opinion in Tulare Lake was even disclaimed
by Judge Wiese himself in light of the Supreme Court decision in Tahoe-Sierra,250 the appellate
majority in Casitas insisted on following the same flawed logic.251

The Tulare Lake case involved the FWS and NMFS listing the delta smelt and the winter-run
Chinook salmon as “in jeopardy of becoming extinct” in the Feather and Sacramento Rivers
in southern California.252 Plaintiffs, California water users with state and county water contracts
allotting them a specified amount of acre-feet of water per year, sought Fifth Amendment
compensation for the loss of their contractually conferred right to use water when the
government imposed water usage restrictions on them under the ESA to protect the delta smelt
and winter-run Chinook salmon.253 The contracts the plaintiffs had with the BOR specifically
stated the “state will not be held liable for shortages due to drought or other causes beyond its
control.”254 The government argued the ESA regulations protecting of the endangered fish fell
within the language “other causes beyond its control,” and the government is not liable for
otherwise lawful actions injuring a contract, thus, no taking is effectuated.255 In addition,
the government maintained the plaintiffs had not met the criteria for a regulatory taking.256

The court, addressing the contract issue, found the plaintiffs’ contracts conferred on them
the exclusive use of the amount of water specified, and thus the government could not be
immune to contract liability, as would be the case if the plaintiffs only had a mere contract
expectancy.257 Thus, the court concluded the plaintiffs had a property interest in the water and
were subject to possible liability for a Fifth Amendment taking.258

The court moved on to a takings analysis and quickly concluded that a physical taking
had occurred.259 Judge Wiese relied on language from Lucas, which said a complete regulatory

247 Parobek, supra note 51, at 213.
250 Casitas II, 76 Fed. Cl. at 106; see also Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1290 (Fed. Cir. 2008), reh’g and reh’g en banc denied, 556 F.3d 1329 (2009) (Mayer, J., dissenting) (“[Tulare Lake’s] author [Judge Wiese] expressly disclaimed in the present case [the contrary holding of Tulare Lake] in light of the intervening Tahoe-Sierra case.”).
251 While the appellate majority in Casitas does not cite to Tulare Lake directly, the court uses the same three Supreme Court cases, analogy, and logic from Tulare Lake to conclude that the partial taking of water due to regulation under the ESA is a physical taking. See infra notes 310-313 and accompanying text.
253 Id.
254 Id. at 315.
255 Id. at 316-17.
256 Id. at 316.
257 Id. at 318. The court interpreted Omnia Commercial Co. v. United States, 261 U.S. 502 (1923), for the proposition that contract expectancy differs from a contract right. Tulare Lake, 49 Fed. Cl. at 317-18. The court then applied Omnia to the Tulare Lake facts, finding the contract at issue had been appropriated and therefore the contract right was more than a mere expectancy. Id. However, this assumes that the plaintiffs in the Tulare Lake case had a cognizable property interest in the water. As discussed above, California water law holds water rights in public trust, and thus the court should have concluded the plaintiffs did not have an actual property right in the water, as argued for the Casitas case. See supra note 122 and accompanying text. Finding the plaintiffs hold no property interest means the plaintiffs only have a mere expectancy for the water amount in the contract and Omnia protects the government from being liable for a taking under the frustrated contract. See supra note 116 and accompanying text. The court erred in their classification and analogy in this case.
258 Tulare Lake, 49 Fed. Cl. at 318.
259 Id. at 319-20.
taking is comparable to a physical taking, to come to the conclusion that the elimination of water use rights is a complete occupation and therefore termed a “physical taking.” However, Judge Wiese, inexcusably overlapping the physical and regulatory takings doctrines, is really finding a “categorical taking” under a regulatory takings analysis. The Supreme Court made clear in Tahoe-Sierra, a case decided the year after Tulare Lake, that physical and regulatory takings doctrines are to be evaluated separately and distinctly. In addition, the Court stated “it [is] inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking.’” Thus, the two doctrines should remain separate.

Using an analogy to the Supreme Court decision Causby v. United States, a 1946 Supreme Court decision finding a physical taking occurred when frequent flights above a landowner’s property scared his chickens to death and made it impossible for him to sleep, Judge Wiese found that “complete occupation of property—an exclusive possession of plaintiffs’ water-use rights for preservation of the fish—mirrors the invasion present in Causby.” Judge Wiese defined the parcel appropriated as the usufructuary right to the water under the contract and found the usufructuary right valueless for the water the government prevented the plaintiffs from using and thus a physical taking. This characterization of the parcel makes it virtually impossible to avoid a Lucas one-for-one categorical taking.

The court relied on three Supreme Court cases to characterize water use rights as subject to physical takings: International Paper Co. v. United States, United States v. Gerlach Live Stock Co., and Dugan v. Rank. International Paper concerned a World War I-era government directive that the Niagara Falls Power Company cut off water to the International Paper plant so that Niagara could boost hydroelectric power production because the war effort required as much power as possible. The rerouted diversion shut down the company for nine months. The Supreme Court determined the government “directly appropriated what International Paper had a right to use.”

In Gerlach, San Joaquin Valley farmers who claimed the BOR’s construction of Friant Dam eliminated their access to overflow water for irrigation petitioned the Court for relief. The dam redistributed the water to other private property owners, taking it away from the plaintiffs. “The Supreme Court analyzed the government’s action as a physical taking,” the

260 Id. at 318.
262 Id. at 323.
263 328 U.S. 256 (1946).
264 Tulare Lake, 49 Fed. Cl. at 319.
265 Id.
266 282 U.S. 399 (1931).
269 International Paper, 282 U.S. at 404-06.
270 Id. at 406.
271 Id. at 408.
272 Gerlach, 339 U.S. at 730.
273 Id. at 752.
appellate panel explained.\textsuperscript{274} \textit{Dugan} also involved Friant Dam and the rights of downstream water users. The Supreme Court concluded the government had physically taken the landowners’ water rights when the dam caused the flow to decrease by three-fourths of its natural flow.\textsuperscript{275}

The \textit{Tulare Lake} court claimed this trio of cases confirmed its characterization of water rights as the subjects of physical takings.\textsuperscript{276} The government tried to distinguish these cases, arguing all three cases included physical government diversions of water for government or third-party use, while the \textit{Tulare Lake} plaintiffs were merely regulated in their “method of diverting water.”\textsuperscript{277} However, the court did not accept the government’s characterization, finding the result of the regulations decreased the water available to the plaintiffs and “[u]nder those circumstances, whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference.”\textsuperscript{278}

The court ultimately held the taking of the plaintiffs’ usufructuary rights to the water in order to protect the endangered species amounted to a physical taking and thus, the government must pay the plaintiff for the water. The amount of damages was deferred because the court said it lacked the ability to determine whether the public trust doctrine or reasonable use doctrine applied, and the case was reserved for SWRCB determination. \textit{Tulare Lake} and the government ended up settling the case for seventeen million dollars.\textsuperscript{279}

\section*{3. Limiting the Application of \textit{Tulare Lake}: Klamath Irrigation District v. United States\textsuperscript{280}}

After finding the ESA-listed Coho salmon, shortnose suckerfish and the Lost River suckerfish were in danger of harm due to unseasonably low water levels on the Klamath River, the FWS and NMFS informed the BOR that stream flows must be maintained to protect the fish under the ESA.\textsuperscript{281} As a result, the biological opinions issued by the FWS and NMFS both concluded that the best solution was to reduce the amount of water available for irrigation on the Upper Klamath Lake.\textsuperscript{282} Because of the lack of irrigation water, thirteen landowners and fourteen irrigation districts brought a Fifth Amendment takings suit in the Federal Court of Claims for the BOR’s reduction of water deliveries during 2001.\textsuperscript{283}

The \textit{Klamath} court held the proper claim to bring was a contract claim and not a takings claim under the circumstances.\textsuperscript{284} The court took a clear stance against its previous holding in \textit{Tulare Lake}. The court rejected the whole notion of the \textit{Tulare Lake} decision: “with all due respect, \textit{Tulare [Lake]} appears to be wrong on some counts, incomplete on others, and

\begin{footnotes}
\item[274] Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1290 (Fed. Cir. 2008), \textit{reh’g and reh’g en banc denied}, 556 F.3d 1329 (2009) [hereinafter Casitas III].
\item[275] \textit{Dugan}, 372 U.S. at 620-21.
\item[277] \textit{Id.} at 319.
\item[278] \textit{Id.} at 320.
\item[280] 67 Fed. Cl. 504 (2005).
\item[281] \textit{Id.} at 512-13.
\item[282] \textit{Id.} at 513.
\item[283] \textit{Id.} at 507.
\item[284] \textit{Id.} at 540.
\end{footnotes}
distinguishable in all events.”

Klamath, rejected Tulare Lake’s process and supporting logic for several reasons, including the court’s: treatment of the contract rights as absolute and conferring a property interest in the water to the plaintiffs, even though there may be conflicting state principles; failure to consider whether the plaintiffs had violated the public trust or reasonable use doctrines designed to protect fish and wildlife before awarding just compensation for a right that may not even exist under state law; and, refusal to rule on how the contract rights should be adjudicated. With all this taken into consideration, the court stated, “like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property—they enjoy no elevated or more protected status.” Thus, the court clearly limited Tulare Lake’s holding and rationale.

4. California Gets It Right: Allegretti & Co. v. County of Imperial

Evaluation of California case law is important for the Casitas case because the Federal Circuit must follow state law in determining whether a valid property right exists in the water at question. The California Court of Appeals for the Fourth District declared no physical or regulatory taking of water had occurred when the state restricted the plaintiff’s groundwater consumption to 12,000 acre-feet per year as part of a conditional use permit. The plaintiff, a farmer owning property located over groundwater basins used for irrigation for him and his tenant farmers, sought compensation under the Fifth Amendment Takings Clause from Imperial County for restricting his right to draw groundwater from the aquifer underlying his property.

The court denied Allegretti’s claim of being “denied all economically beneficial use of its land,” or the equivalent of a Lucas physical taking, finding the plaintiff’s reliance on Tulare Lake and other cases to be misguided and determined California only recognizes “overlying water rights [as] [] usufructuary . . . [and] confers no right of private ownership in public waters,” thus no physical taking may exist. In denying the claim, the court not only distinguished, but also refused to follow the Federal Claims Court case Tulare Lake. The Fourth District Court of Appeals found several deficiencies in the logic of Tulare Lake, as did the Klamath court, and went as far as saying, “Tulare Lake’s reasoning disregards the hallmarks of a categorical physical taking, namely, actual physical occupation of physical invasion of a property interest.” The court found Judge Weise’s reliance on International Paper (complete appropriation where the government diverted all water from plaintiff) and Causby (physical invasion of property where noise and light of low flights made land unusable) misplaced because these cases are not analogous to a government’s “passive” restriction requiring water users to

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285 Id. at 538.
286 Id.
287 Id.
288 Id.
289 Id. at 540.
291 Id. at 1267.
292 Id.
293 Id. at 1271-75.
294 Id. at 1275.
295 Id. at 1271 n.5.
296 Id. at 1275 (“We likewise decline to rely on Tulare Lake’s reasoning to find a physical taking under the circumstances presented by the County’s action.”).
297 Id. at 1275.
leave water in the stream. Thus, the California court, like the Klamath court, seriously limited the precedential value of the holding in Tulare Lake.

The court next found that Allegretti’s regulatory takings claim, analyzed under the Penn Central factors failed as well. The court reasoned that all three factors supported the County, and thus, Allegretti’s claim of a regulatory taking is “not persuasive.” Therefore, Allegretti was not due any compensation from the County for limiting his water consumption.

C. Analysis of Constitutional Takings in the Casitas Case

1. Casitas Municipal Water District v. United States—Federal Court of Claims Decision

After handing down the seminal ruling in Tulare Lake, Judge Wiese faced essentially the same question and fact pattern six years later. Most would expect him to uphold his previous ruling, now precedent for the Federal Court of Claims. However, Judge Wiese did a complete one-eighty and ruled against Casitas on its takings claim against the government for restricting contractual water flows pursuant to the ESA. What exactly caused this shift in thinking?

Judge Wiese admitted that the focus of the Tulare Lake opinion was on the finality of the plaintiff’s loss, instead of the character of the government’s action, as it should have been. The court, after exploring Tahoe-Sierra and both plaintiff’s and defendant’s arguments, found the ultimate question it must answer was: “whether the restrictions on plaintiff’s water diversion, like a permanent physical invasion, and the accompanying loss those restrictions engender, constitute ‘government action of such a unique character that it is a taking without regard to other factors a court might ordinarily examine.’” Judge Wiese answered the question in the negative and found Casitas’s claim could not amount to a physical taking under the circumstances because Tahoe-Sierra counsels against blurring the lines between physical and regulatory takings. As the court noted, “Tahoe-Sierra admonishes that only the government’s active hand in the redirection of a property’s use may be treated as a per se taking.” Thus, the court refuses to follow Tulare Lake in the wake of Tahoe-Sierra.

2. Casitas Municipal Water District v. United States—Federal Circuit Court of Appeals Decision

The appellate panel majority first addressed the contract claims from Casitas. The court upheld the trial court and found the United States cannot be liable for damages for breach of contract because the government is immune under the sovereign acts doctrine.

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298 Id.
299 Id. at 1280.
300 Id. at 1277-80.
302 Id. at 104.
303 Id. at 105 (quoting Loretto v. Teleprompter Manhattan CATB Corp. v. United States, 458 U.S. 419, 432 (1982)).
304 Id. at 106. The court stated that Tahoe-Sierra “compels [the court] to respect the distinction between a government takeover of property (either by physical invasion or by directing the property’s use to its own needs) and government restraints on an owner’s use of that property.” Id.
305 Id.
306 Id.
307 Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008), reh’g and reh’g en banc denied, 556 F.3d 1329 (2009) [hereinafter Casitas III].
Next, the court addressed Casitas’s takings claim. To begin, the court relied on an admission by the government that Casitas has a right to divert 107,800 acre-feet of water and to use 28,500 acre-feet of that diverted water, to establish Casitas’s property right in the diverted water. After giving an overview of takings jurisprudence, characterizing Tahoe-Sierra for the proposition that categorical takings caused by regulations are outside the scope of the Penn Central test, the court relies on the same three Supreme Court cases as Tulare Lake did—International Paper, Gerlach Live Stock, and Dugan—to build analogies for the proposition that diverting Casitas’s water is a physical taking.

The court agreed with both parties in the case that the Supreme Court water takings cases discussed above all caused water to be physically diverted away from the plaintiff’s property where it was dedicated to either government or third-party use serving a public purpose. The government attorneys argued these cases did not apply to the Casitas controversy because they all involved direct appropriation of water, not a restriction on the use of water. However, the appellate panel majority maintained the situations in the Supreme Court water cases were the same as Casitas’s situation and thus, a physical takings analysis applies. The court found the government physically diverted water away from the Robles-Casitas canal towards the fish ladder since the water had already left the Ventura River and was in the canal; thus this diversion reduced Casitas’ available water supply.

The majority found that like the petitioner in International Paper, Casitas’s right was to use the water, and the water was diverted from the canal and sent on to the fish ladder by the government. Thus, the majority concluded, “this case involves physical appropriation by the government. The United States actively caused water to be physically diverted away from Casitas after the water had left the Ventura River and was in the [ ] canal.”

The court directly rejected the government’s contention that in contrast to the other Supreme Court cases, the diversion of Casitas’s water was not for government use or use by a third party. The majority responded that because the ESA’s purpose is to protect endangered species for “the Nation and its people,” no doubt exists that preservation of endangered species habitat serves the government and public—a third party—and thus, the government’s distinction fails. The majority also discredits the government’s theory that in all three of the previous cases the government tried to exercise its power of eminent domain or buy the rights before taking them, because physical takings are obvious.

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308 Id. at 1288.
309 Id.
310 282 U.S. 399 (1931).
313 For an overview of these cases, see supra Part V.B.2, notes 266-278 and accompanying text.
314 Casitas III, 543 F.3d at 1290.
315 Id.
316 Id.
317 Id. at 1291-92.
318 Id. at 1292.
319 Id. at 1294.
320 Id. at 1292.
321 Id.
322 Id. at 1293.
In addition, the government contends this case is “merely a use restriction on a natural resource,” and thus a regulatory takings analysis should apply. The government specifically references United States v. Central Eureka Mining Co., where the government issued an order ceasing a gold mine’s operation, but left all the gold in the ground, and Penn Central, where a private landowner’s airspace was restricted by the government, as being akin to the situation in the present case; both are cases where the Supreme Court applied a regulatory takings analysis.

Central Eureka Mining and Penn Central did not convince the majority to apply a regulatory takings analysis. They found the present case more analogous to both United States v. Pewee Coal Co., where the government took control and possession of the actual coalmine, and Causby, where government planes were flying in private airspace. In both Pewee Coal and Causby, the Court analyzed the government’s action as a physical taking. The Casitas court maintains its position and concludes this case involves the physical appropriation of water by the government through the required diversion, and thus this case closer aligns with Pewee Coal, where the government took physical possession of the mine itself, than Central Eureka Mining, where the government left the gold in the ground.

The court continues on to distinguish one more case the government offers, and then finally concludes by attempting to distinguish Tahoe-Sierra’s strong cry to separate physical and regulatory takings analysis. The majority claims that Tahoe-Sierra did not involve a physical taking or water rights, and therefore does not apply. In addition, the court noted Tahoe-Sierra did not “overrule, modify, or even mention the holdings in International Paper, Dugan, or Gerlich. As such, these cases remain good law.” On top of that, the majority refuses to determine whether Tulare Lake is good law, briefly mentioning it in a passing footnote stating, “[w]e do not opine on whether Tulare [Lake] was rightly decided, but note that [it] has been criticized.”

The court concludes requiring Casitas to divert water to a fish ladder should be analyzed as a physical takings for Fifth Amendment purposes. The majority ruling sends the case back to the Court of Federal Claims for a determination of whether a taking occurred under a physical takings analysis and what compensation, if any, Casitas is entitled.
D. Why the Majority in *Casitas* Got it Wrong

1. The Blind Leading the Blind—The *Casitas* Court’s Misguided Use of Analogy

The Federal Circuit Court of Appeals fell into the trap of reasoning by analogy in the *Casitas* case. While takings jurisprudence is ad hoc and scattered at best, this does not mean the lower court may ignore established policy and cite to largely irrelevant cases to reach its desired outcome in a case. The court ignored *Tahoe-Sierra*’s established separation of regulatory and physical takings claims in favor of picking and choosing cases to analogize that fit the court’s desired result of finding a compensable taking.

Many scholars have commented about the use of analogy in legal reasoning and the views vary greatly. Ronald Dworkin advocates against the use of analogy, concluding “analogy is a way of stating a conclusion, not the way of reaching one.” He finds “analogy without theory is blind . . . . [A] theory to explain why case A is really more like case B than case C” is needed. However, Cass Sunstein disagrees with Dworkin and suggests that, “judges should decide hard cases not by turning to more abstract levels of theory, but in a more lawyer-like way-by analogy.” For Sunstein, this likely means finding cases giving fixed or settled points of law on a particular issue analogous to the case at hand and assuming these cases share the points, without going into a deep theoretical analysis. The settled or fixed point of law may suggest the correct result in the analogous case.

While no way exists to eliminate reasoning by analogy, a concept imbedded in our legal system, analogies relying on mere surface similarities, as the *Casitas* court did, rather than theory or policy implications, weaken not only the concept of analogy but also the precedent it produces. As Judge Richard Posner puts it, “[r]easoning by analogy tends to obscure the policy grounds that determine the outcome of a case, because it directs the reader’s attention to the

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338 “[A]n analogy is a statement of a logical relationship between two similar things that are compared with each other.” Lawyering & Legal Reasoning Skills, Reasoning by Analogy, http://www4.samford.edu/schools/netlaw/dh2/logic/analogy.htm (last visited Apr. 20, 2010).
342 Dworkin, supra note 341, at 371.
343 Kamm, supra note 341, at 412.
344 Dworkin, supra note 341, at 371.
345 Kamm, supra note 341, at 413 (predicting what Sunstein’s recommendation about using analogy would mean in a practical context).
346 Id.
cases that are being compared with each other rather than to the policy considerations that
connect or separate the cases.” 348  Posner argues that all legal analogy has an implicit underlying
policy analysis making explicit recognition of the policy unnecessary. 349  This reasoning,
though, overlooks the possibility that a court not explicitly addressing the underlying policy of
an analogous case could simply be trying to manipulate precedent to fit its desired outcome in
the case.  Posner does, however, recognize how unexplained analogies weaken the use of
analogy in general and question the reasoning of the resulting precedent. 350

Because of the distinct possibility of case analogies overlooking important policy
considerations and weakening precedent Dworkin’s view that analogy requires underlying theory
or policy analysis for justification is the best view of analogy.  Casitas provides a clear example
of why Dworkin’s policy analysis view is preferable when courts use case analogies.  The
Casitas court’s use of analogy not only did not rely on theory or policy, but chose to ignore both
in favor of surface analogies to come to an incorrect outcome that would have been preventable
had a policy-based analysis been employed.

a. The International Paper, Gerlach, and Dugan Trio

The Casitas court uses analogy to categorize all takings cases involving water rights as
physical takings, regardless of whether the petitioner owns the water itself or just has a right to
use the water and regardless of how much of the petitioner’s water the government regulates.
The court compared three Supreme Court cases involving water rights, International Paper,
Gerlach, and Dugan, all of which involved physical takings, to the situation at hand to find a
physical taking analysis applies in the Casitas case. 351  Each of these cases involved the
government appropriating a private party’s water rights through diversion and redistribution of
water for its own use or for use by a third party. 352  The court finds this sufficiently similar to
Casitas’s situation to determine these cases controlling in the situation.  However, the court is
misguided and its analogical use of these case founders.

First, in all three cases on which the court relies, the government either took the diverted
water for its own use or redistributed the water to other private water users. 353  The government

348  Posner, supra note 340, at 765; accord Frankel, supra note 347, at 970 (“Instead of using analogy as a tool for
understanding or applying the purposes and principles of § 1983, the analogy itself takes primacy and becomes the
basis for the court’s decision.”).
349  See Posner, supra note 340, at 768-69.
350  See id. at 768-69 (“Legal thinking in novel cases . . . clearly is driven by policy . . . .  But this undoubted fact
about our courts tends to be obscured in the judicial opinion itself by the judges’ desire to exaggerate the distance
between ‘legal’ and ‘policy’ analysis, between adjudication and legislation, and thus between law and politics, so
that legal decisions will be more acceptable to the laity (more ‘legitimate’) by seeming to be the product of
specialized analysis by a profession set apart, rather than, as they so often are, a product of common sense grappling
with economic, social, and political issues presented by cases. . . . .  We judges could be more candid that most of
us are without sacrificing legitimacy.  Greater judicial candor would make law easier for practitioners to understand
and apply.  Judges actually risk impairing legitimacy by rhetorical excess . . . .” (emphasis added)).
351  Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1289-90 (Fed. Cir. 2008), reh’g and reh’g en banc
denied, 556 F.3d 1329 (2009) [hereinafter Casitas III].  It is worth noting that all three of the Supreme Court cases
were decided before the establishment of modern takings jurisprudence, including the Penn Central regulatory
takings analysis.
352  See id. at 1299 (Mayer, J., dissenting).
353  Dugan v. Rank, 372 U.S. 609 (1963) (government dammed upstream of petitioners, stored the water and
redistributed it for other private landowners’ irrigation and utility projects); United States v. Gerlach Live Stock Co.,
in *Casitas* never “invad[e], seize[d], convey[ed], or convert[ed]” the petitioner’s water for “consumptive or proprietary use.” Instead, the government merely imposed a regulation on Casitas’s water use to comply with the ESA for endangered species preservation. The diversion of some of Casitas’s normal water flow was to a fish ladder and then back to the Ventura River to its natural flow, not to other irrigators, utility projects, or even to the government itself. Thus, the policy reasons behind the decisions in *International Paper*, *Gerlach*, and *Dugan* are based on a completely different set of circumstances than *Casitas*, because the water was redistributed for proprietary use to others and not merely left in its natural state. This type of redistribution of property must be more closely regulated to prevent the classic type of government taking, taking something from A and giving it to B. If the *Casitas* court had considered the underlying policy behind these decisions, preventing unfair redistribution of property, instead of focusing on the fact that the cited decisions involved water rights, the narrow scope of these decisions would have guided the court’s analogies.

Second, in *Gerlach* and *Dugan*, assuming a property right in the use of the water existed, the government redistributed the water to other private appropriators, essentially taking one “stick” in a property owner’s bundle of rights and giving it to another. The government is effectively taking water rights from A and transferring them to B; this is why the Supreme Court evaluated the claim under a physical takings analysis. In *Casitas*, the government did not redistribute any of Casitas’s sticks to anyone else; it merely regulated the use of the water and Casitas’s right to use its “stick” remained, with only a partial restriction. While *Dugan* involved a partial water restriction, and the facts are arguably closer to *Casitas* than the other cases, the government in *Dugan* physically restricted water rights of one riparian owner through building a dam and distributed that water to other private water users. No water rights were redistributed in *Casitas*; the water use was merely restricted. Thus, the underlying policies in *Gerlach* and *Dugan* do not conform to a policy of protecting endangered species in *Casitas*, even though on the surface the facts are similar.

Third, *International Paper* and *Gerlach* both involved the government leaving the petitioners without any water to use. This clearly comes closer to a physical taking than the situation in *Casitas*, where the government only restricted the use of about three percent of Casitas’s right to use his water. Assuming a court defines the parcel to evaluate the taking as the right to use water, the scenarios in *International Paper* and *Gerlach* give the petitioner a one-to-one ratio for a taking analysis, because the entire right to use is eliminated. Thus, under a regulatory takings analysis, this amounts to categorical taking under the *Lucas* scenario because the petitioner is deprived of all economically viable use of the parcel, the right to use water. However, the same parcel in *Casitas* retained ninety-seven percent of its value and usefulness, clearly falling outside the scope of a *Lucas* categorical taking.

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339 U.S. 725 (1950) (same); Int’l Paper Co. v. United States, 282 U.S. 399 (1931) (government cut off petitioner’s water rights and redistributed them to an energy company to use for wartime production and sale of electricity).
354 *Casitas III*, 543 F.3d at 1300 (Mayer, J., dissenting).
355 See *Kelo* v. City of New London, 545 U.S. 469, 477 (2005) (finding that “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”).
356 See *Gerlach*, 339 U.S. at 752; see also *Horchem*, supra note 27, at 747.
357 Approximately one percent of Casitas’s water allotment was diverted to operate the fish ladder. See *Horchem*, supra note 27, at 750.
Regardless, the parcel in question should not be defined even as narrow as the right to use water, but the property as a whole, taking into account only how much the regulation on water restricts the parcel as a whole. While complete elimination of water through government regulation may strip a property of all of its value and amount to a categorical taking, like the parcel in the Lucas case, value may still be left in the property and thus, the proper regulatory takings analysis turns to Penn Central to determine whether a taking occurred.

Last, the court analogizes International Paper to Casitas for the assertion that any regulatory restriction on the right to use water signals the “active hand of [] government” and any time the hand of government turns water elsewhere, partial or whole, a physical takings analysis applies. The court builds the analogy by quoting the International Paper Court, stating “[t]he 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 court finds International Paper controlling in the Casitas situation because (1) “Casitas’ right was to the use of the water,” (2) “water was withdrawn from the [] canal and turned elsewhere (to the fish ladder),” and (3) this was done “by the government.” As stated at the beginning of this section, the court is relying on surface analogies in an attempt to make broad categorical rules without developing the underlying theory, and this is no exception. While all the observations of similarities may be true to some extent, the policies underlying the International Paper decision did not rely on any of these particular factors. The Supreme Court in International Paper was concerned with the fact the government had promised to pay for the taking of the water ahead of time and made clear to International Paper Company it was using eminent domain power to acquire the rights to the water which had been granted to International Paper Company by government contract. In addition, the Court was concerned with the government’s redistribution of the water to a third party electrical company for use in production of electricity to which it made a profit. Thus, the basis of the International Paper Court’s policy was to prevent redistribution of an entire parcel of property specifically taken under the government’s eminent domain power. This is a far cry from the regulatory nature of the ESA and a partial diversion of water to a fish ladder that is not for a third party’s proprietary use.

Because International Paper, Gerlach, and Dugan, only have vague surface similarities to Casitas, the court’s analogical reasoning fails to rely on any underlying theory and misses the mark. This case is much more analogous to cases regulating other ESA-listed species habitat protection regulations challenged as takings or the regulation of other natural resources.

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360 Cf. United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958) (government issued a regulation requiring a gold mine to cease operations; this did not deprive landowner of all economically viable use of property as analyzed under a regulatory takings analysis).
361 Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1292 (Fed. Cir. 2008), reh’g and reh’g en banc denied, 556 F.3d 1329 (2009) [hereinafter Casitas III].
362 Id. at 1292 (quoting Int’l Paper Co. v. United States, 282 U.S. 399, 407 (1931)) (emphasis added).
363 Id.
365 Id. at 407.
366 See, e.g., Seiber v. United States, 364 F.3d 1356, 1366-67 (Fed. Cir. 2004) (finding preventing logging on property to protect endangered spotted owl falls under a regulatory takings analysis and no taking occurred); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1347, 1354 (Fed. Cir. 2002) (same); Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999) (finding the restriction on a development company from filling in wetlands was not a taking under a regulatory takings analysis); Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991) (finding
For example, the Federal Circuit Court of Appeals found the government preventing logging on a petitioner’s land due to the presence of endangered spotted owls did not constitute a physical taking. The Seiber court recognized “the protection of species under the ESA ‘is not comparable to a government authorization to third parties to [utilize] property.’” Thus, the underlying policy behind the decision in Seiber was not to prevent redistribution of property to third parties, like International Paper, Gerlach, or Dugan, but to further the goals of the ESA and protect certain species as a great value to all of society. The theory of Seiber then, logically flows to the Casitas case through analogy. While the surface facts may be different in Seiber, the important policy and theory implications are the same and the Seiber court’s logic is more appropriate for the court to follow than International Paper, Gerlach, or Dugan, merely because those cases involve water rights. In his dissenting opinion, Judge Mayer said it best, “[i]t is logically incongruent to analyze ESA-based land use restrictions as regulatory takings, and ESA-based water use restrictions as physical takings.” This is exactly the kind of illogical jurisprudence that results from the Casitas court’s misguided use of analogy.

Not only did the court’s misguided use of analogy result in failure to apply the appropriate takings analysis, it also caused the court to ignore recent Supreme Court precedent clarifying takings analysis. Preoccupied with surface analogies, the court overlooked the extremely important takings distinction set forth in Tahoe-Sierra.

2. Overlooking Supreme Court Precedent—Failure to Apply Tahoe-Sierra

The court in Casitas failed to recognize the takings clarification set down in Tahoe-Sierra and thus, applied the incorrect takings analysis in the Casitas case. The Supreme Court in Tahoe-Sierra clarified the distinction between regulatory and physical takings jurisprudence.

Land-use regulations are ubiquitous and most of them impact property values in some way. . . . Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. The Court recognized a long-standing distinction between acquiring property for public use (physical takings), on the one hand, and regulating or preventing private uses (possible regulatory takings), on the other, and that these lines are not to be blurred. The Casitas court ignored these lines, finding a physical appropriation and occupation of the water by the government. Here, Casitas “only had the right to use water—a non-possessor property interest—which cannot be physically occupied by a mere restriction on use.” Because no denial of a fill permit for wetlands not to be a regulatory taking because in determining whether the government’s action constitutes a taking, a court must focus on focus on the character of the government action and the nature and extent of the interference with the rights in the parcel as a whole (“In the case of a land owner who owns both wetlands and adjacent uplands, it would be clearly unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands.”).
physical invasion or physical occupation may exist in this situation, the government mandated diversion under the ESA is regulatory in nature and a regulatory takings analysis is proper.\(^{374}\)

To determine whether a regulatory taking has occurred, \textit{per se} or otherwise, the \textit{Tahoe-Sierra} Court emphasized the requirement of evaluating a regulation as it applies to the whole parcel and not dividing a parcel into “discrete segments [to] attempt to determine whether the rights in a particular segment have been entirely abrogated” in what amounts to “conceptual severance.”\(^ {375}\) Thus, when a property owner possesses a full bundle of property rights, the removal of one of the sticks from the bundle does not constitute a taking.\(^ {376}\)

As the Court found in \textit{Tahoe-Sierra}, the proper starting place for a takings analysis is to ask whether the entire parcel was taken and if not then the proper framework for a takings analysis is \textit{Penn Central}.\(^ {377}\) The categorical taking analysis from \textit{Lucas} applies to determine whether the regulation deprives an owner of all economically viable use of his parcel.\(^ {378}\) The holding in \textit{Lucas} is limited to “the extraordinary circumstance when no productive or economically beneficial use of land is permitted.”\(^ {379}\) The \textit{Tahoe-Sierra} Court made clear the categorical rule in \textit{Lucas} would not apply in any case other than a one-hundred percent diminution in value of the parcel in question.\(^ {380}\) “Anything less than a ‘complete elimination of value,’ or a ‘total loss,’ the Court acknowledged, would require the kind of analysis applied in \textit{Penn Central}.”\(^ {381}\) Thus, the \textit{Penn Central} regulatory analysis applies in all but a very limited set of circumstances regarding regulatory takings.

Recognizing this clarification in takings jurisprudence, Judge Wiese from the Federal Court of Claims reversed his course in \textit{Tulare Lake} and found \textit{Tahoe-Sierra} governed in \textit{Casitas} and a \textit{Penn Central} regulatory takings analysis was proper.\(^ {382}\) The Federal Circuit Court of Appeals, however, dismissed Judge Wiese’s use of \textit{Tahoe-Sierra} completely and discarded the case finding \textit{Tahoe-Sierra} did not involve claims of water rights or a physical taking.\(^ {383}\) Thus, the \textit{Casitas} court completely ignored \textit{Tahoe-Sierra}’s clarification, concluding “a requirement under the [ESA] to leave in a river a minimum amount of water that is not itself privately owned must be analyzed as a physical taking of a party’s use of that water.”\(^ {384}\)

The \textit{Casitas} court erred in failing to apply the logic of the \textit{Tahoe-Sierra} decision to this case, as the lower court did. First, the \textit{Casitas} court failed to determine if the regulation was a taking of the parcel as a whole. The court ignored the explicit directive from the \textit{Tahoe-Sierra} Court to evaluate the “parcel as a whole” and not to split it into segments when evaluating the extent of interference of a government regulation. Defining the parcel as just the water diverted to the fish ladder, the court not only separated the “right to use” water into a segment of the parcel as a whole, but also separated that segment into an even smaller piece. Of course,

\(^{374}\) Id.
\(^{375}\) Idaho, 535 U.S. at 327, 331.
\(^{376}\) \textit{Tahoe-Sierra}, at 327 (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).
\(^{377}\) Id. at 331.
\(^{378}\) Id. at 331.
\(^{380}\) \textit{Tahoe-Sierra}, at 1017.
\(^{381}\) Id.
\(^{383}\) \textit{Casitas Mun. Water Dist. v. United States}, 543 F.3d 1276, 1296 (Fed. Cir. 2008), \textit{reh’g and reh’g en banc denied}. 556 F.3d 1329 (2009) [hereinafter Casitas III].
\(^{384}\) Id.
defining the parcel as the property interest taken in the regulation always amounts to a one-to-one deprivation of the parcel and a *Lucas* categorical taking.\(^{385}\) The parcel as a whole should be defined by the court as the entire Casitas property, including the land, the dam, the lake, etc. and the right to use water is merely one stick, which was not even completely appropriated, in the bundle of Casitas’s rights.\(^{386}\)

Even if the court decided the only property right is the usufructuary right in the water in the canal, the parcel as a whole must be defined by the court as the right to use the water as a whole and not merely defined as the right to use the water diverted to the fish ladder.\(^{387}\) In this case, while the ESA-regulation imposes a restriction on the amount of water that can be diverted to the canal, “the parties [] appear to agree [] there has been no taking of the 28,500 acre-feet of water to which Casitas has an appropriative right,”\(^{388}\) and at best only a *three-percent* taking of Casitas’s entire right to divert the water occurred.\(^{389}\) Because either scenario fails to amount to a *Lucas* categorical taking, or one-hundred percent diminution in value of the parcel, the court should have proceeded to a regulatory takings analysis under *Penn Central*.\(^{390}\)

Second, in stressing the significance of preventing the blurring of takings jurisprudence, the *Tahoe-Sierra* Court expressed the importance of “resist[ing] temptation to adopt *per se* rules in [its] cases involving partial regulatory takings, preferring to examine ‘a number of factors’ rather than a simple ‘mathematically precise’ formula.”\(^{391}\) Here, the *Casitas* court adopts a rule designating all regulations of the right to use water, partial or complete, as *per se* physical takings. This type of categorical rule is clearly what the Court sought to prevent. While this statement may be considered *dicta*, the Court, at a minimum, recognizes that courts try to make quick categorical rules in taking analysis, instead of following the *Penn Central* factors. A desire to jump to quick categorical conclusions may be the result of courts’ failed attempts at analogy to out-dated precedent, much like the *Casitas* court, or manipulating the analysis of the case in such a way as to reach the desired outcome; both scenarios are of a type the *Tahoe-Sierra* Court strove to prevent.

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\(^{385}\) *See Tahoe-Sierra*, 535 U.S. at 331. The Court has consistently rejected the one-to-one approach to the “denominator” question this characterization poses. *Id.* (referencing Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 497 (1987)).

\(^{386}\) *Cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (finding the parcel as a whole to be the entire city tax block designated as a historical landmark, *not* just the right to use the airspace above the building); Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991) (“In the case of a land owner who owns both wetlands and adjacent uplands, it would be clearly unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands.”).

\(^{387}\) *Cf.* Keystone Bituminous Coal Ass’n, 480 U.S. at 480-81 (“To focus upon the support estate separately when assessing the diminution of the value of plaintiffs’ property caused by the Subsidence Act therefore would serve little purpose. The support estate is more properly viewed as only one ‘strand’ in the plaintiff’s ‘bundle’ of property rights, which also includes the mineral estate. As the Court stated in *Andrus*, [the] destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety. . . . The use to which the mine operators wish to put the support estate is forbidden. However, because the plaintiffs still possess valuable mineral rights that enable them profitably to mine coal, subject only to the Subsidence Act’s requirement that they prevent subsidence, their entire ‘bundle’ of property rights has not been destroyed.” (internal citations omitted)).

\(^{388}\) *Casitas IV*, 556 F.3d at 1334 n.2 (Gajarsa, J., dissenting).

\(^{389}\) The fish ladder diverted at most, 3,200 acre-feet of water from the canal, which is only three-percent of the entire 107,800 acre-feet Casitas previously had a right to divert. *See Casitas Mun. Water Dist. v. United States*, 72 Fed. Cl. 746, 748 (2006) [hereinafter Casitas I].

\(^{390}\) *Tahoe-Sierra*, 535 U.S. at 331.

\(^{391}\) *Id.* at 326.
Because the government is not taking possession of Casitas’s property, but instead restricting the private use of some of the river’s “natural flow” under a “public program to promote the public good,” evaluating this action as a physical taking, rather than a regulatory taking, “blurs the line Tahoe-Sierra carefully draws between [the two].” Thus, a regulatory takings analysis should apply to the Casitas case. In applying a regulatory takings analysis to the Casitas case, one comes to the quick conclusion no taking has occurred; even the petitioner itself admitted a regulatory takings claim, in light of Tahoe-Sierra, would fail on remand.

3. If It Is Good Enough for James Madison, It Is Good Enough for Me: Finding a Physical Taking Is Inconsistent with the Original Understanding of the Fifth Amendment

As the discussion on the history of the Takings Clause indicates, many states had fish-passage laws protecting the habitat of useful fish species prior to and at the time of the ratification of the Takings Clause of the Fifth Amendment. The original drafter of the Takings Clause, James Madison, introduced and passed a fish-passage bill in his home state of Virginia only four years prior to his introduction of the Takings Clause. These fish-passage laws usually significantly decreased the “capacity [of water] and, therefore, the use-value of mill sites.” However, no compensation was paid to mill owners for the lowered productivity of the mill or the loss of water. This indicates the framers of the Takings Clause, and eventually those who ratified it, did not view such government regulations protecting fish as a violation of property rights. Instead, fish-passage laws were part of the original police powers reserved at the time of adopting the Constitution.

As James Madison himself observed, “mankind’s potential for ‘extirpating every useless production of nature to convert the whole productive power of the earth into a supply of those particular plants [and] animals which serve his own purpose’ is of great concern. Because of Madison’s and eighteenth century legislators’ broad views of “what parts of the natural world were potentially beneficial to man’s well-being,” “the history of the early fish-passage laws should lead [ ] court[s] to hold categorically that habitat-protection laws do not violate the Takings Clause.” The framers, including Madison, likely would not have viewed regulation of water rights under the ESA for the protection fish as a compensable taking. Thus, applying a regulatory takings analysis to the regulation on the right to use water in the Casitas case is far more consistent with the framers view of the Takings Clause than applying a physical takings analysis.

VI. Casitas’s Potential Policy Implications for Water Rights Takings

393 Id. at 1298; see also Brief of Plaintiff-Appellant at 7, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153), 2007 WL 4462885 (“Casitas [] advised the trial court that although there was sufficient evidence to support Casitas’s taking claim under a per se rule, there would be insufficient evidence to support the claim under the three-factor Penn Central test.”).
394 See supra notes 152-158 and accompanying text.
395 Hart, supra note 149, at 318.
396 Id.
397 See id. at 318-19.
398 Id. at 318 (citing Mugler v. Kansas, 123 U.S. 623, 663 (1887)).
399 Id.
400 Id. at 318, 319.
401 Cf. id. at 318; Horchem, supra note 27, at 753.
The majority’s expansion of categorical takings analysis gives broad and unprecedented constitutional protection to one type of property, the right to use water. Its extension of per se analysis to regulatory measures that alter water’s natural movement may affect a number of different environmental programs and activities. “[The Casitas decision] could potentially convert every regulation of water use into an unconstitutional taking and basically freeze the government in its tracks.”

Because of this decision, environmentalists and regulatory agencies fear the government’s reallocation of natural resources for environmental purposes might be hampered. This fear of frustrated government reallocation of resources translates in the areas of water takings under the ESA, interstate water compact disputes, ground water consumption regulations, and general state water law.

A. The “Gutting” of the ESA: Casitas’ Impact on Water Takings and the ESA

First, the impact on water takings under the ESA is obvious. The Casitas court’s recognition of Fifth Amendment takings stemming from ESA regulations on stream minimum flow levels will put great strains on federal treasury. As one commenter observed in the wake Tulare Lake, “there will never be enough money to go around if the federal government is required to remunerate ESA violators every time Section 9 prevents them from taking an endangered species.” This is apparent, considering a loss of approximately one percent of Casitas’s overall water to the fish ladder or 1,349 acre-feet at an estimated $100-1000 per acre-foot totals up to $1,349,000.

With more than two hundred fish and clams ESA-listed, the total possible bill for all water regulation takings is astronomical. Given this cost, regulators will try to find a way to enforce the ESA without paying compensation. If this fails, however, regulators will likely start to “skimp on enforcement because they will not be able to afford, either politically or financially, to regulate anymore.”

One common solution in this case is the decision not to list the endangered species in the first place. While the ESA requires decisions to list species be based only on biological and scientific considerations, the FWS and NMFS have been accused of ditching the ESA in favor

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404 Russ Baggerly, a Casitas board member who has opposed the lawsuit from the outset, proclaimed, “[i]f [Casitas] stands as good law, there isn’t going to be enough money in the treasury to deal with all of the takings claims all across the country.” Shigley, supra note 403.
405 Parobek, supra note 51, at 215.
408 The cost will even be higher later as the fish passage is supposed to receive 2,000 acre-feet of water normally. See Griggs, supra note 406, at 3.
410 Parobek, supra note 51, at 216.
of economic interests of political actors in the past. Another option for delay or evasion of
enforcing the ESA, is failing to designate critical habitat for an ESA-listed species under Section
4. While designation of critical habitat is required, the FWS has consistently failed to do so.
This failure to designate habitat will slow the takings claims against the government because
fewer waterways will be regulated with minimum flows, etc. Thus, ESA regulations for riparian
species will likely slip through the cracks due to the enforcement disadvantage and difficulties
facing a government required to pay mandatory compensation. These avoidance strategies,
however, may be overcome by the citizen-suit provisions of the ESA, ensuring the agency
decisions are monitored and “occasionally forcing federal agencies into enforcing the ESA
against their will.”

One final effect of Casitas on ESA application comes in the form of compensation
policy. As Barton Thompson notes, “compensation policy is likely to affect not only how many
resources in total are devoted to biodiversity protection, but how much land versus other
resources will be used to help protect endangered species, and on an even more discrete level,
which parcels will be set aside as habitat.” The ramifications of making the government foot
the bill for takings liability will narrow what habitat and what species are protected. With a
limited number of monetary resources, the government is forced to weigh choices of habitat
heavily and be highly selective with what resources to allocate to each species.

Inadvertently, this will lead to some irrigators being favored over others, because of the
certainty of their water usage and normal flows. Dissimilar treatment among irrigators will be
rampant, and water amounts will depend on where an irrigator is located, and how much money
each state has allotted toward ESA compensation. Such disparity not only harms the
landowners and species themselves, but also infuriates adjacent property owners, making them
less likely to set aside resources for conservation of endangered species, and even encouraging
those landowners to conceal the existence of endangered species located on their property.

B. “Let’s Agree to Disagree”: The Potential Impacts of Casitas on Interstate Water
Compacts

As water resources become more scarce, many conflicts between states over water usage
are resulting in costly litigation in the Supreme Court. These conflicts have the potential to

412 See, e.g., N. Spotted Owl v. Hodel, 716 F. Supp 479 (W.D. Wash. 1988) (finding the FWS’s decision not to list
the northern spotted owl on the endangered species list was “arbitrary and capricious” because there was not support
for the decision).
413 See supra notes 62-73 and accompanying text.
414 Parobek, supra note 51, at 219 (noting less than fifteen percent of all listed species had specified critical habitat
in 2003).
415 Id.
416 Thompson, supra note 91, at 365.
417 Parobek, supra note 51, at 221.
418 Id.
419 E.g., Arizona v. California, 547 U.S. 150 (2006) (California spent over fifty million dollars in a span of ten years
while litigating its dispute with Arizona); see also Raymond Dake, Note, The Great Compromise: Overcoming
Impasse in Interstate Water Compacts Through the Use of Alternative Dispute Resolution, 77 UMKC L. REV. 789,
809 (2009).
drag out for years in litigation and cost states millions of dollars. I have already recognized the importance of preventing this costly litigation through the use of interstate water compacts.

An interstate compact is an agreement or contract between states to resolve a disagreement, which becomes federal law after approval by the United States Congress. “The goal of interstate [water] compacts is to provide the final division of waters between states and to avoid the lengthy and expensive process of equitable apportionment lawsuits.” Thus, compacts usually designate minimum flow levels required for the lower state(s) from the upper state(s). Over thirty such compacts have been ratified since the Colorado River Compact was enacted in 1922 and they continue to be a popular method of water division, especially among western states.

In the wake of Casitas, interstate water compacts are in danger of losing their effectiveness. Because these compacts rely on minimum flow levels, a change in those requirements due to endangered species habitat preservation has the potential to add fuel to already heated debates between states over water apportionment. The Federal Circuit Court of Appeals in Klamath Irrigation District v. United States recognized that interstate compacts might

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420 See Dake, supra note 419, at 790 n.6 (listing examples of state versus state litigation costs over water resources).

421 See id. at 792 (2009). Specifically, this author advocates for the use of alternative dispute resolution to overcome impasse in interstate water compacts. Id. This will prevent costly litigation and help soothe tensions between states. Id. at 809.


424 When talking about lower and upper states, the author is defining an upper state as one that water passes through first on its way to a lower state, which receives the water from the upper state, regardless of the actual latitude of the state itself.

425 See, e.g., Colorado River Compact, Pub. L. No. 70-642, 45 Stat. 1057, 1058-59, 1064-65 (1922) (The compact divides the river basin into two areas, the Upper Division (comprising Colorado, New Mexico, Utah and Wyoming) and the Lower Division (Nevada, Arizona and California). The compact requires Upper Basin states not to deplete the flow of the river to the Lower Basin below 7.5 million acre-feet during any period of ten consecutive years.).

426 45 Stat. 1057 (1922).


429 See David Hendee, Flows Falling Short, Kansas Says Its Water Czar Says Nebraska’s Plan to Reduce Republican River Use Won’t Work, OMAHA WORLD-HERALD, at B1 (“Nebraska and Colorado each used more than their allocations of Republican River water from 2003 through 2007. . . . ‘Nebraska and Colorado need to do better.’ Barfield said. ‘Compliance is not optional.’” (internal citations omitted)); cf. Dake, supra note 419, at 790 n.6 (examining past conflicts over water rights between states).
be subject to Fifth Amendment takings litigation for failure to provide a certain amount of water guaranteed under an interstate water compact.\textsuperscript{430} While this case presented a challenge by plaintiff irrigation districts against the United States under terms of the Klamath River Basin Compact, potential disputes between states arising from limitations on water imposed by ESA regulations are foreseeable.

For example, if a lower state were required under the ESA to have a greater minimum flow in its river than an upper state provides by mandate of an interstate water compact, the upper state would have to comply with the ESA and leave the requisite amount of water in the river to flow to the lower state or face potential ESA takings violations. Because this reduces the upper state’s appropriative use under the compact, it may potentially sue the federal government or lower state for a Fifth Amendment taking of its right to use water under the new \textit{Casitas} precedent. \textit{Casitas} finds leaving water in a river to protect endangered species amounts to a physical taking, and thus, the government would owe the upper state just compensation for forcing them to leave water in the river they had the right to appropriate.

Another scenario that may occur under the ESA is that the upper state may be forced to allocate water for the protection of endangered species, and while fulfilling the rest of its obligations to water users, take more water than its allocation under the interstate water compact, denying the lower state its required minimum. In this case, the lower state may sue the upper state for a taking ancillary to the ESA. This is a common situation, even if the ESA is not involved. Many states take more than their allotment anyway and this causes the time-consuming litigation discussed above.\textsuperscript{431} Because right to use takings under the ESA are now in the mix with \textit{Casitas}, the potential for minimum flow disputes between states with interstate water compacts will increase exponentially. “[F]ederal agencies face the quandary of deciding between enforcing ESA-fueled infringement[s] of state water rights and recompensing appropriators accordingly, or avoiding compensation by neglecting to protect endangered fish in state streams.”\textsuperscript{432}

In addition, other courts may translate the ruling in \textit{Casitas} to apply to all water diversions, regardless if the diversion was for compliance with the ESA. The rule in \textit{Casitas} would then apply to all water shortages between states with interstate water compacts, regardless of the nature of the water shortage. This has the potential to be devastating to states such as Colorado, New Mexico, Wyoming, Texas, Nebraska, Kansas, Oklahoma, Arkansas, and California, which all have three or more interstate water compacts that govern their water sources.\textsuperscript{433} Litigation over water rights will expand, because it seems that a new cause of action exists, and drought years will be particularly painful on upper states trying to supply their water consumers and still leave the minimum flow designated for the lower state. Lower states will sue upper states with hopes of capitalizing on this new cause of action in right to use jurisprudence, costing both states more time in court and expense than staying within the dispute proceedings under their compact. This also weakens the relations between states and the

\textsuperscript{430} \textit{See} Klamath Irrigation Dist. v. United States, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (“[This case] presents the question of whether the United States violated an interstate compact in failing to provide such water.”).

\textsuperscript{431} \textit{See}, e.g., Hendee, supra note 429, at B1 (“Nebraska oversursed its allocation by nearly 118,000 acre-feet during the [2003-2008] period . . . [and] Colorado exceeded its share by 52,600 acre-feet,” leaving Kansas significantly short of its allotment.).

\textsuperscript{432} Parobek, supra note 51, at 218.

\textsuperscript{433} \textit{See} U.S. Fish and Wildlife Service, Interstate Compacts, supra note 427 (listing most interstate water compacts and the states those compacts govern). Colorado and New Mexico have the largest number of interstate compacts with seven a piece. \textit{Id.}
effectiveness of the compacts in general, bolstering my previous conclusion that interstate water compacts need stronger enforcement mechanisms and a well thought out alternative dispute resolution process to remain effective.\textsuperscript{434} If the \textit{Casitas} court had come to the correct conclusion and applied a regulatory takings analysis, no new issues would exist for states with interstate water compacts. However, the court’s physical takings analysis has many potential ramifications for states trying to follow the Supreme Court’s guidance in \textit{Kansas v. Colorado}.\textsuperscript{435} The Court articulated favor for interstate compacts, explaining, “mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.”\textsuperscript{436} This new cause of action in environmental takings jurisprudence favors states resorting to litigation and dispensing with attempts to settle water disputes amicably under interstate water compacts. This is a very different outcome than the one the Supreme Court was aiming for in \textit{Kansas v. Colorado}.

\section*{C. Has the Well Run Dry?: Groundwater Consumption Regulations and \textit{Casitas}}

“Groundwater is critical to our existence and our economy . . . . It’s the water we drink, it grows the food we eat, and it enables a lot of our recreation.”\textsuperscript{437} Overuse of groundwater, mainly due to excessive irrigation, is causing groundwater decline to outpace the recharge of aquifers at an alarming rate.\textsuperscript{438} The Ogallala Aquifer underlying the Great Plains is a sobering example of groundwater overdrafts, with consumption of the aquifer three to four times faster than the rate at which it recharges.\textsuperscript{439} Because of this alarming rate of decrease and the threat of climate change placing even more pressure on groundwater water sources,\textsuperscript{440} many states are starting to regulate consumption of groundwater.\textsuperscript{441}

\begin{footnotes}
\textsuperscript{434} See Dake, \textit{supra} note 419, at 809.
\textsuperscript{435} See 320 U.S. 383, 392 (1943).
\textsuperscript{437} Kris Kinkade, \textit{Keeping Groundwater Clean is Key}, KALAMAZOO GAZETTE (Michigan), Apr. 7, 2010, at A3.
\textsuperscript{438} See Elizabeth Burelson, \textit{Tribal, State, and Federal Cooperation to Achieve Good Governance, 40 AKRON L. REV. 207, 235 (2007); see also Robert Pore, \textit{Overuse and Climate Threaten Aquifer}, TOPEKA CAPITAL-J. (Kansas), Aug. 6, 2006, at 8A (finding the withdrawal of water from the Ogallala Aquifer has far exceeded its recharge, rendering the aquifer completely exhausted in some areas); Brian Winter, \textit{On the Plains, Concern About Another Dust Bow;} \textit{Droughts Could Test the Lessons of 75 years ago}, USA TODAY, Apr. 9, 2010, at 1A (“[T]he Ogallala Aquifer, the vast underground reservoir upon which the area relies for nearly all of its water, is being depleted by growing demand from commercial agriculture and urban centers.”).
\textsuperscript{439} See Burelson, \textit{supra} note 438, at 235; see also Bryant Furlow, \textit{NM American Water Consolidating Wells, Raising Water Rates}, N.M. INDEP., Apr. 12, 2010 (finding water levels in the Ogallala Aquifer are dropping rapidly, at a rate of ten percent per year). The Ogallala Aquifer is one of the largest known aquifers and supplies the United States with one-third of its water for irrigation. Ryan D. Wilson, \textit{Aquifer Depleted, Rising is Some Parts}, CLAY CENTER DISPATCH (Kansas), Mar. 31, 2010.
\textsuperscript{440} See Horchem, \textit{supra} note 27, at 729 n.2 (finding an increase in temperature in the Western States due to global warming will require an increased use in water from the Ogallala Aquifer); see also Winter, \textit{supra} note 438, at 1A (“[T]he region’s climate is so dry, even in the best of times, that just a small increase in average temperatures could quickly cause critical amounts of moisture in the soil to evaporate.” (internal citations omitted)).
\textsuperscript{441} See, e.g., \textit{GA. COMP. R. & REGS.} 391-3-2-01 (2009) (“The Regulations include implementation of water conservation in conjunction with the withdrawal of ground water.”); \textit{KAN. STAT. ANN.} § 82a-1038 (Supp. 2008) (The Chief Engineer of the Division Water Resources has the power to reduce permissible groundwater withdrawal); \textit{S.C. CODE ANN.} § 49-5-20 (2009) (“The General Assembly declares that the general welfare and public interest
The *Casitas* decision has the potential to disrupt these regulations and cost states millions of dollars in just compensation claims from groundwater appropriators. If limits are suddenly placed on groundwater consumption, water users may use the *Casitas* physical takings rationale to argue restrictions to mitigate excessive levels of groundwater decline are a physical appropriation of water by the government and therefore a taking under the Fifth Amendment. An application of *Casitas* in this fashion would discourage states from imposing groundwater restrictions, preventing curtailment of the problems already facing the Ogallala Aquifer, and others around the United States.

For example, case law currently governs groundwater regulation in Wisconsin. Landowners may withdraw groundwater located under their property for a beneficial purpose, “unless withdrawal causes unreasonable harm through lowering the water table or reducing artesian pressure, or the withdrawal has a direct and substantial effect on surface waters.” In addition to common law regulations, Wisconsin is in the process of enacting a new bill regulating the use of groundwater sources. The bill is designed to solve both current and potential groundwater shortages. The Wisconsin quarry industry is outraged over the legislation, worrying the new permitting requirements and groundwater regulations will significantly decrease production and even end some quarry operations altogether. A water resource specialist for the project explained, “[t]he responsibility to decrease water use would be spread out among many permits, so each one should see only incremental changes.” Because the regulation is spread among different permits, the owners of permits in areas with, or especially without, water shortages might rely on *Casitas* claiming the state of Wisconsin requiring them to leave a portion of their water in the ground for a public use is a physical taking of their right to use groundwater. While the permit holders only see a partial use restriction, Wisconsin would have to foot the bill for all of the permit holders due to the widespread restrictions on groundwater pumping; a cost preventing the Wisconsin government from ever upholding regulations to protect an already depleting aquifer.

While applying *Casitas*, a surface water case, to groundwater regulations seems out of place, several state courts have applied surface water and groundwater precedent interchangeably to determine outcomes in conflicts arising over water use. Because courts blend together water use precedents, *Casitas* may rear its head sooner, rather than later, in the controversies require that the groundwater resources of the State be put to beneficial use to the fullest extent to which they are capable, subject to reasonable regulation, in order to conserve and protect these resources, prevent waste, and to provide and maintain conditions which are conducive to the development and use of water resources.”; see also NATURAL RESOURCES CONSERVATION SERVICE, CHAPTER 4: GROUND WATER LAWS, at 57, available at http://www.nrcs.usda.gov/technical/references/pdf/NRCLawsch4.pdf (outlining seventeen states with groundwater laws and the content of those laws).


Cf. *id.*

surrounding groundwater depletion. This is especially worrisome for states trying to regulate groundwater use, like Nebraska, which rely on the rapidly depleting Ogallala Aquifer for irrigation and drinking water supply.\footnote{Dep’t of Natural Resources Water Task Force, \textit{Conjunctive Use and Management of Surface and Groundwater in the State of Nebraska}, July 3, 2002, available at http://www.dnr.state.ne.us/watertaskforce/Resourcematerials/CONJUNCTIVEUSE.doc. Nebraska relies on the Ogallala Aquifer for over eighty percent of its irrigation needs and drinking water supply. Id. “Today surface water irrigated acreage accounts for only about 1 million of Nebraska’s 7.5 to 8.15 million irrigated acres. Nebraska currently ranks second in the nation in total irrigated acreage and first in the nation in acreage irrigated from wells.” Id. 

\footnote{Horchem, \textit{supra} note 27, at 753 (2009).}

“\textit{If [a] [s]tate is subject to litigation each time the [state] tries to regulate the use of groundwater and require that some [] remain in the ground, the [s]tate could hardly afford to regulate water use.}”\footnote{Connecticut Department of Environmental Protection, Proposed Stream Flow Standards and Regulations, http://www.ct.gov/dep/cwp/view.asp?a=2719&q=434018&depNav_GID=1654 (last visited Apr. 25, 2010) [hereinafter CDEP, Stream Flow Standards]; see 2005 Conn. Pub. Acts 142.}

Thus, \textit{Casitas} may have grave policy implications for states trying to regulate groundwater consumption.

\textbf{D. Move Over Tenth Amendment, There Is a New Sheriff in Town: \textit{Casitas’} Impact on General State Water Law}

The \textit{Casitas} court has redefined the general understanding of state water law in California and many other states following the public trust and reasonable use doctrines. Even though the water in California is held in public trust, once the right to use water is delegated to private appropriators the \textit{Casitas} ruling treats water use as a property right able to be taken under the Fifth Amendment. This new distinction calls into question whether water regulation under the water laws of many states may be classified as a taking.

Connecticut gives a current example where the \textit{Casitas} decision may affect progressive state law undertakings. In 2005, the Connecticut Legislature instructed the Connecticut Department of Environmental Protection (“CDEP”) to develop:

- regulations that would expand the coverage of the stream flow standards and regulations to include all rivers and streams, . . . that balance the needs of humans to use water for drinking, washing, fire protection, irrigation, manufacturing, and recreation, with the needs of fish and wildlife, that also rely upon the availability of water to sustain healthy natural communities.\footnote{See Connecticut Department of Environmental Protection, \textit{Proposed Stream Flow Standards and Regulations, Public Notice, Oct. 13, 2009}, available at http://www.ct.gov/dep/lib/dep/watershed_management/flowstandards/proposedstreamflowstandardsregulation_s_2009oct13.pdf; see also CDEP, Stream Flow Standards, \textit{supra} note 452.}

The CDEP proposed restricting water use of all waterways and groundwater in the state, and requiring minimum flow levels. These requirements are phased in over time to allow current users to adjust their operations of facilities to comply with the new regulations without unduly disrupting the supply of water available for human use. This proposal has met severe opposition from local and state entities, which criticize the regulations as “too restrictive and costly.” Some critics claim the regulations will cause them a ten to twenty percent reduction in their water supply. Assuming these regulations pass, many of the entities and landowners suffering a resulting reduction in water flow now have the Casitas cause of action to pursue a takings claim against Connecticut.

Before Casitas, the Penn Central regulatory takings analysis would apply in this situation and it would be extremely difficult for the landowners and irrigation districts to prevail over the government in this situation. Post-Casitas is an entirely different situation. If a court finds the water regulation amounts to a physical taking, Connecticut has to pay for all of the water lost. Thus, Connecticut may be inclined to exercise caution in enforcing or enacting the regulations or even promoting environmental regulations in general, a grave consequence of the Casitas court’s decision. The potential ramifications of Casitas in Connecticut have the potential to translate to other states’ water regulations as well.

VII. Conclusion

The Casitas Court got it wrong, plain and simple. As early twentieth century ecologist, forester, and environmentalist Aldo Leopold observed, “[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” This maxim holds as true today as it did almost three-quarters of a century ago. With many states facing severe shortages in water due to drought and over consumption, the perils facing the ecological communities and ESA-listed species relying on these water resources is increasing on a daily basis, making water resource protection more important than ever before. This particularly true in the case of the endangered steelhead trout, which faces impending extinction without protection of vital passage ways from the ocean to rivers essential for its reproduction.

The Casitas Court’s ruling not only misapplies California water law, disregards U.S. Supreme Court precedent, ignores underlying theory and policy to justify vague case analogies, and applies a takings analysis inconsistent with the history of the Takings Clause itself, but it does nothing to preserve the integrity, stability, or beauty of the Ventura River or the steelhead trout. If anything, the ruling actually strives to prevent such protection through the court’s use of a takings analysis requiring the government to foot the bill for the steelhead trout’s protection

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456 CDEP, Balancing Water Use, supra note 454.

457 See Mosher, supra note 455.

458 Id.


460 See Tulhoske, supra note 8, at 927-29; see also Dake, supra note 419, at 789.

461 Tulhoske, supra note 8, at 929 n.9.
under the ESA. This flies in the face of the environmental policies and vision set down in the ESA and Aldo Leopold’s goal to protect and preserve America’s many species and ecological communities for the enjoyment of future generations.

The *Casitas* majority’s finding that a physical taking analysis applies to partial restrictions on the right to use water gives unprecedented constitutional protection to the right to use water and will likely have great policy implications for water takings under the ESA, interstate water compact disputes, ground water consumption regulations, and general state water law. Before *Casitas*, the *Penn Central* regulatory takings analysis would apply in situations of water use restriction and landowners and irrigation districts would have an extremely difficult time prevailing over the government in a takings challenge. Post-*Casitas* is an entirely different situation. If a court finds the water regulation amounts to a physical taking, the government—state, local, or federal—has to pay for all of the water “taken.” Thus, governments on all levels may be inclined to exercise caution in enforcing or enacting water use regulations, including environmental regulations, to avoid the exorbitant cost of compensation for water restrictions under a *Casitas* analysis.

The extreme cost of compensating landowners, irrigation districts, and industry, will place great strains on federal and state treasuries, thwarting the incentive for governments to protect endangered species and their habitat under the ESA, reduce alarming groundwater consumption rates, and apply state water laws aimed at promoting a balance between human and ecological interests in waterways. In addition, this new cause of action in environmental takings jurisprudence favors states resorting to litigation and dispensing with attempts to settle water disputes amicably under interstate water compacts. Essentially, the *Casitas* holding may stop years of aquatic species protection and water conservation regulation in its tracks; a grave consequence of the court’s decision.

The *Casitas* decision’s conversion of every regulation of water use into an unconstitutional physical taking will freeze the government in its tracks. With water supplies becoming scarce in many regions, and competition for those water resources increasing daily, no government can afford to regulate water use if courts follow *Casitas* and apply physical takings to partial water use restrictions. As a result, endangered species like the steelhead trout will go unprotected and extinction is a distinct possibility. Therefore, applying a regulatory takings analysis to partial water use restrictions under the ESA, and in general, is not only consistent with years of takings jurisprudence, but in society’s best interest.