

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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CASITAS MUNICIPAL WATER	)	
DISTRICT,	)	No. 05-168 L
	)	
Plaintiff,	)	Hon. John. P. Wiese
	)	
v.	)	
	)	
UNITED STATES,	)	
	)	
Defendant.	)	

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**MEMORANDUM OF *AMICI CURIAE* TULARE LAKE BASIN  
WATER STORAGE DISTRICT, KERN COUNTY WATER  
AGENCY, LOST HILLS WATER DISTRICT, AND WHEELER  
RIDGE-MARICOPA WATER STORAGE DISTRICT IN OPPOSITION  
TO DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

KUHS & PARKER

By  
William C. Kuhs, Attorney for  
Tulare Lake Basin Water Storage District,  
Kern County Water Agency, Lost Hills  
Water District, and Wheeler Ridge-Maricopa  
Water Storage District

P. O. Box 2205  
Bakersfield, CA 93311  
(661) 322-4004  
(661) 322-2906 (fax)  
wckuhs@lightspeed.net

Of Counsel  
MICHAEL N. NORDSTROM  
944 Whitley Avenue  
Corcoran, CA 93212  
(559) 992-3118

(559) 992-3119 (fax)

JOHN F. STOVALL  
Kern County Water Agency  
P. O. Box 58  
Bakersfield, CA 93302-0058  
(661) 634-1400  
(661) 634-1428 (fax)

ERNEST A. CONANT  
Law Offices of Young Wooldridge  
1800 30th Street, 4th Floor  
Bakersfield, CA 93301  
(661) 327-9661  
(661) 327-1087 (fax)

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## TABLE OF ABBREVIATIONS AND ACRONYMS

1. “Agency” means the Kern County Water Agency.
2. “BOR” means the Bureau of Reclamation of the Department of the Interior.
3. “Casitas” or the “District” means the plaintiff CASITAS MUNICIPAL WATER DISTRICT.
4. “D-1485” means the Board’s Water Right Decision 1485.
5. “Delta” means the Sacramento-San Joaquin Delta.
6. “DWR” means the California Department of Water Resources.
7. “ESA” means the Endangered Species Act, 16 U.S.C., §§ 1531-1544 (2000).
8. “Lost Hills WD” means Lost Hills Water District.
9. “NMFS” means the National Marine Fisheries Service.
10. “Project” means the Ventura River Project.
11. “SWP” means the State Water Project.
12. “SWRCB” or “the Board” means the State Water Resources Control Board.
13. “Takings Clause” means the last clause of the Fifth Amendment of the United States Constitution.
14. “*Tulare I*” means this Court’s opinion reported at 49 Fed. Cl. 313 (2001).
15. “*Tulare II*” means this Court’s opinion reported at 59 Fed. Cl. 246 (2003).
16. “*Tulare III*” means this Court’s opinion reported at 61 Fed. Cl. 624 (2004).
17. “Tulare Lake Basin WSD” means Tulare Lake Basin Water Storage District.
18. “*Tulare litigation*” means this Court’s Case No. 98-101L.
19. “USFWS” means the United States Fish and Wildlife Service.
20. “Wheeler Ridge-Maricopa WSD” means Wheeler Ridge-Maricopa Water Storage District.



## I.

### INTRODUCTION

Tulare Lake Basin Water Storage District (“Tulare Lake Basin WSD”) and Wheeler Ridge-Maricopa Water Storage District (“Wheeler Ridge-Maricopa WSD”) are California water storage districts organized and existing under the California Water Storage District Law.<sup>1</sup> The Kern County Water Agency (“the Agency”) is a body politic and corporate organized and existing under the Kern County Water Agency Act.<sup>2</sup> Lost Hills Water District (“Lost Hills WD”) is a California water district organized and existing under the California Water District Law.<sup>3</sup> These public agencies were the public agency plaintiffs in *Tulare Lake Basin Water Storage District v. United States*, this Court’s Case No. 98-101L (“the *Tulare* litigation”). These public agencies respectfully submit this memorandum *amici curiae* in opposition to the defendant’s motion for partial summary judgment.

The defendant has moved for partial summary judgment on the plaintiff’s takings claim under the Fifth Amendment. The question presented, says the defendant, “is whether the nature of the taking alleged by plaintiff is physical or regulatory.”<sup>4</sup> The defendant’s motion attacks this Court’s decision in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (April 30, 2001) (“*Tulare I*”) where this Court held, among other things, that the action of the

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<sup>1</sup> Division 14 (commencing with section 39000) of the California Water Code.

<sup>2</sup> Cal. Wat. Code–Appen., ch. 99.

<sup>3</sup> Division 13 (commencing with section 34000) of the California Water Code.

<sup>4</sup> Defendant’s Memorandum, p. 2.

United States effected a physical taking of the plaintiffs' rights to the use of water from the State Water Project ("SWP").<sup>5</sup> The defendant argues, among other things, that (a) *Tulare I* may be distinguished on its facts, (b) *Tulare I* is no longer good law in light of subsequent decisions, and (c) judges and commentators have criticized this Court's analysis in *Tulare I*. We believe that *Tulare I* was corrected decided and is still good law.

In part II we present a summary of our argument that the taking of a right to the use of surface water is a physical, not regulatory, taking. We present a brief statement of the facts in part III. Part IV contains our expanded argument. Our conclusion is in part V.

## II.

### SUMMARY OF ARGUMENT

The plaintiff CASITAS MUNICIPAL WATER DISTRICT ("Casitas" or "the District") holds two licenses issued by the State Water Resources Control Board ("SWRCB" or "the Board") to use the waters of Matilija Creek, the Ventura River, and Coyote Creek in Ventura County, California. Casitas has the right to divert water from the Ventura River at Robles Diversion Dam for conveyance through the Robles-Casitas Canal to Casitas Dam and Reservoir on Coyote Creek for several beneficial uses.

The National Marine Fisheries Service ("NMFS") listed the West Coast steelhead trout as an endangered species in 1997 under the Endangered Species Act ("ESA"). The NMFS issued a biological opinion in 2003, the effect of which requires Casitas to forego the diversion of some

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<sup>5</sup> See 49 Fed. Cl. at 318-320. This Court rendered three decisions in the *Tulare* litigation. *Tulare I* was this Court's decision on liability. This Court decided the just compensation phase of the litigation on December 31, 2003, 59 Fed. Cl. 246 ("*Tulare II*") and modified *Tulare II* regarding the appropriate rate of interest on August 18, 2004, 61 Fed. Cl. 624 ("*Tulare III*"). The litigation was settled on December 20, 2004.

water in the Ventura River at Robles Diversion Dam that it is otherwise entitled to divert under its licenses. The water that flows past Robles Diversion Dam flows to the Pacific Ocean and cannot be recaptured by Casitas.

The facts in this case are similar to the facts in the *Tulare* litigation with respect to the nature of the taking. The “water right” at issue in the *Tulare* litigation was a “contract water right” based on post-1914 appropriative rights. The NMFS listed the winter-run chinook salmon and the United States Fish and Wildlife Service (“USFWS”) listed the delta smelt under the ESA. Both agencies issued biological opinions, the effect of which was to (a) reduce the amount of SWP water that the California Department of Water Resources (“DWR”) could otherwise divert from the Sacramento-San Joaquin Delta (“the Delta”) in 1992, 1993 and 1994 for delivery to SWP contractors south of the Delta, and (b) increase fresh water flows to the Pacific Ocean for the winter-run chinook salmon and delta smelt. This Court held in *Tulare I* that the plaintiffs’ rights to the use of SWP water had been physically taken since the closure of the Delta Cross Channel gates and other restrictions on diversions from the Delta completely eviscerated the plaintiffs’ right to the use of such water.

Under the last clause of the Fifth Amendment (“the Takings Clause”), the word “taken” means a loss suffered by the property owner rather than the accretion of a right or interest in the government. Government action short of the acquisition of title or occupancy will constitute a taking if its effects are so complete as to deprive the owner of all or most of his interest in the property.

The water rights held by Casitas are post-1914 appropriative rights. A post-1914 appropriative water right is property, the most important “strand” of which is **the right to use the water — divert it from its natural course**. A restriction on the diversion of surface water

completely deprives the appropriator of all of his interest in the water that flows past the point of diversion and constitutes a physical taking.

*Tulare I* was decided in 2001. None of the decisions of the Supreme Court or the Federal Circuit since *Tulare I* was decided has changed or otherwise modified the law in effect in 2001. *Tulare I* was correctly decided and is still good law. Any criticism of *Tulare I* is uninformed and unfounded.

We now turn to a brief statement of the facts.

### III.

#### STATEMENT OF THE FACTS<sup>6</sup>

Casitas holds two licenses issued by the SWRCB to use water of Matilija Creek, the Ventura River, and Coyote Creek in Ventura County, California, namely Licenses 11311 and 11834. License 10133 has a priority date of March 11, 1946 and authorizes Casitas to use water of Matilija Creek for irrigation, domestic, and municipal purposes with an authorized point of rediversion at Robles Diversion Dam. License 11834 has a priority date of August 16, 1954 and authorizes Casitas to use water of the Ventura River and Coyote Creek for municipal, domestic, irrigation, industrial, recreational and standby emergency purposes with an authorized point of diversion at Robles Diversion Dam.<sup>7</sup>

Congress authorized construction of the Ventura River Project (“the Project”) on March

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<sup>6</sup> Most of the facts stated in this part are taken from this Court’s October 2, 2006 opinion reported at 72 Fed. Cl. 746 and the Biological Opinion of March 31, 2003. We have obtained copies of Licenses 11311 and 11834, including the amendment thereto and the Order dated July 15, 1999, from the Board.

<sup>7</sup> License 11834 was amended by Order dated May 13, 1993 to authorize incidental power as a permitted use and by Order dated July 15, 1999 which authorized a transfer of 8,000 acre-feet per annum to the City of Ventura.

1, 1956. The Project works include the Robles Diversion Dam on the Ventura River, the Robles-Casitas Canal, and Casitas Dam and Reservoir on Coyote Creek. On March 7, 1956 the defendant, acting by and through the Bureau of Reclamation (“BOR”) of the Department of the Interior, entered into a contract with Casitas for the construction of the Project. Under the contract Casitas agreed to operate and maintain the Project works, at its own expense, and the defendant agreed that “the District shall have a prior right in perpetuity to the use of the water made available by the project works, subject only to existing vested rights.” Title to the Project works remains with the defendant.

Congress passed the ESA in 1973.<sup>8</sup> The NMFS listed the West Coast steelhead trout as an endangered species on August 18, 1997. Thereafter, Casitas, the BOR, and the NMFS held informal consultation meetings under section 7 of the ESA to develop the design of a fish passage facility at Robles Diversion Dam and new operating criteria for the Project that would meet the needs of the steelhead trout. The NMFS issued its final Biological Opinion (“Biological Opinion”) on March 31, 2003. The BOR then directed Casitas to comply with the Terms and Conditions of the Biological Opinion. The Biological Opinion requires Casitas to forego the diversion of some water at Robles Diversion Dam that it could otherwise divert under Licenses 11311 and 11834. Casitas claims that the revised operating criteria results in a water loss of more than 3,000 acre-feet each year.

We now turn to our argument.

#### **IV.**

#### **ARGUMENT**

##### **A. Introduction.**

Some advocates, commentators, and judges discuss or analyze the “taking” of a “water right” under the Takings Clause without any apparent understanding of the type of “water right” at issue or the nature of the property right allegedly taken. Accordingly, we briefly discuss in part IV(B) several types of “water rights” recognized under California law. We next discuss in part IV(C) the nature of the water right at issue in the *Tulare* litigation and this Court’s analysis in *Tulare I* and *Tulare II*. We discuss in part IV(D) the applicable authority which compels a holding in this case that the defendant’s conduct has or will result in a physical taking of Casitas’ right to the use of water under its licenses from the Board. Finally, we point out in part IV(E) that any criticism of the Court’s holding in *Tulare I* is, quite simply, uninformed, unfounded, or partisan bias.

**B. California “Water Rights” Come in Many Forms, Each of Which Has Different Characteristics.**

**1. Introduction.**

Chief Judge Smith observed in *Store Safe Redlands Associates v. United States* that “[w]estern water law is far from transparent.”<sup>9</sup> Littleworth and Garner describe water law in California as “complex.”<sup>10</sup> Part of the complexity stems from the California Supreme Court’s decision in *Lux v. Haggin*<sup>11</sup> which established California’s dual system of riparian and appropriative rights.<sup>12</sup>

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<sup>8</sup> 16 U.S.C. §§ 1531-1544 (2000).

<sup>9</sup> 35 Fed. Cl. 726, 736-737 (1996).

<sup>10</sup> Littleworth and Garner, *California Water* (1995), p. 27.

<sup>11</sup> 69 Cal. 255 (1886).

<sup>12</sup> See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-751 (1950) for a

California recognizes many types of water rights.<sup>13</sup> Water rights to surface waters are generally classified as riparian, appropriative, or prescriptive. Water rights to underground waters are generally classified according to the hydrogeologic character of the water, that is, whether the water is “percolating,” the underflow of a surface water stream, or a subterranean stream flowing through a known and defined channel, and the nature of the use, that is, overlying, appropriative, or prescriptive.<sup>14</sup> The state has a nonproprietary right to regulate the exercise of some water rights.<sup>15</sup>

The water right at issue in this case is a post-1914 appropriative right. The water right at issue in the *Tulare* litigation was a contract water right based on a post-1914 appropriations. The water right at issue in a case cited by the defendant, *Allegretti & Co. v. County of Imperial*,<sup>16</sup> was an overlying right to the use of percolating water in a regulated groundwater basin. A discussion of the differences between a post-1914 appropriative right to the use of surface water and an overlying right to the use of percolating water in a regulated groundwater basin follows.

## **2. The Appropriative Right to the Use of Surface Water.**

The appropriative right exists without regard to the contiguity of land to the water and is

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thorough discussion of the development of California water law from 1850 through the adoption of article XIV, section 3 (now article X, section 2) of the California Constitution in 1928.

<sup>13</sup> See, generally, Littleworth and Garner, *California Water Law* (1995); 1 Slater, *California Water Law and Policy* (“Slater”).

<sup>14</sup> E.g., *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240 (2000).

<sup>15</sup> The defendant’s assertion that the “people of the State” own all water within the state (defendant’s Memorandum, p. 5) demonstrates a lack of understanding of California water law. The state’s interest is to make water policy that preserves and regulates the use of water. The state has no ownership interest in water, “but rather a nonproprietary, regulatory one.” *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1237, n. 7 (2000); see also Trelease, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638 (1957).

based on the taking of possession of the water for a beneficial use.<sup>17</sup> Common law appropriation originated in the gold rush days when miners diverted water necessary to work their placer mining claims.<sup>18</sup> The first appropriation statute was enacted in 1872 and provided for the initiation of the appropriative right by the posting and recordation of notice.<sup>19</sup> Both methods of appropriation were superseded by the enactment of the Water Commission Act on December 19, 1914. Since such date the exclusive procedure for obtaining an appropriative right to the use of surface water is compliance with Part 2 (commencing with section 1200) of Division 2 of the California Water Code.<sup>20</sup>

The principle of first in time, first in right, prevails in determining the priority between appropriators.<sup>21</sup> The appropriator possesses a right to the use of a specific quantity of water if the water supply is adequate to meet the needs of the appropriator and all other water users with prior vested rights.<sup>22</sup> The appropriative water right “is the right to **use** the water — to divert it from its natural course.”<sup>23</sup> An appropriative water right is “property” under the Takings

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<sup>16</sup> 138 Cal.App.4th 1261 (2006).

<sup>17</sup> 1 Slater, § 2.01.

<sup>18</sup> See address entitled “The Development of the Law of Waters in the West” by Lucien Shaw, Chief Justice of the Supreme Court of California, to the joint session of the American Bar Association and the California Bar Association on August 9, 1922 for an excellent history of California water law from 1850 to 1922, 189 Cal. 779 (1922).

<sup>19</sup> Former Cal. Civ. Code, §§ 1410-1422.

<sup>20</sup> *People v. Shirokow*, 26 Cal.3d 301 (1980).

<sup>21</sup> Cal. Civ. Code, § 1414; see 1 Slater, § 2.19.

<sup>22</sup> 1 Slater, § 2.20.

<sup>23</sup> *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 100

Clause.<sup>24</sup>

### 3. **The Overlying Right to the Use of Percolating Waters.**

The owner of land which overlies percolating water in a groundwater basin has the right to use such water for reasonable beneficial purposes on the overlying land. As between overlying owners, the rights are correlative and each owner is entitled to an equitable apportionment if the supply is insufficient to meet the needs of all.<sup>25</sup> An overlying landowner is not entitled to a specific quantity of water.<sup>26</sup> In the event of a shortage, each overlying owner is limited to his or her reasonable share of the supply.<sup>27</sup>

Overlying rights to the use of percolating waters are not subject to regulation by the SWRCB but may be regulated, to some extent, by county ordinance. California has 58 counties<sup>28</sup> about half of which have adopted some form of ordinance purporting to regulate the extraction of percolating water.<sup>29</sup> At least one ordinance has withstood a facial challenge.<sup>30</sup>

#### C. **The Tulare Litigation.**

The nature of the “water right” at issue in the *Tulare* litigation was, in the words of David N. Kennedy, the Director of the DWR from mid-1983 through 1998, a “contract water right”

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(1986).

<sup>24</sup> *Id.* at 101.

<sup>25</sup> E.g., *Katz v. Walkinshaw*, 141 Cal. 116 (1902).

<sup>26</sup> 1 Slater, § 3.15.

<sup>27</sup> *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1253 (2000); *Tehachapi-Cummings County Water Dist. v. Armstrong*, 49 Cal.App.3d 992, 1001 (1975).

<sup>28</sup> Cal. Gov. Code, §§ 23101-23158.

<sup>29</sup> 2 Slater, § 11.07[3].

based on post-1914 appropriative rights. Tulare Lake Basin WSD has a water supply contract with the DWR which provided for a maximum annual entitlement of 118,500 acre-feet; the Agency has a water supply contract with the DWR which provided for a maximum annual entitlement of 1,153,400 acre-feet. The DWR held permits issued by the Board which authorized the diversion of water from the Delta to the California Aqueduct for delivery to SWP contractors south of the Delta, including Tulare Lake Basin WSD and the Agency. The DWR's operating criteria required compliance with the Board's Water Right Decision 1485 ("D-1485"). Water that is not diverted from the Delta flows into San Francisco Bay and thence to the Pacific Ocean.

The NMFS listed the winter-run chinook salmon and the USFWS listed the delta smelt under the ESA. Both agencies issued biological opinions, the effect of which was to reduce the amounts of SWP water that the DWR could otherwise divert from the Delta in 1992, 1993 and 1994 under D-1485. The biological opinions required, among other things, the closure of the Delta Cross Channel gates and a reduced level of pumping from the SWP pumping plant. This Court discussed the physical effect of the closure of the Delta Cross Channel gates on diversions from the Delta in these terms:

“When the Delta Cross Channel gates are closed, fresh water from the Sacramento River is no longer diverted into the Delta, leading to an increase in both the salinity levels of the water and the pollution from agricultural drainage. This increase in turn leads to a deterioration of the water quality at the CVP and SWP pumping plants, a situation that could, over time, prevent the water

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<sup>30</sup>

*Baldwin v. County of Tehama*, 31 Cal.App.4th 166 (1994).

projects from complying with state water quality standards that establish maximum salinity levels.”<sup>31</sup>

The net effect of the biological opinions was to reduce deliveries of SWP water to SWP contractors and increase fresh water flows to the Pacific Ocean for the winter-run chinook salmon and delta smelt.

This Court in *Tulare I* held that the plaintiffs’ rights to the use of SWP water had been physically taken:

“While water rights present an admittedly unusual situation, we think the *Causby* example is an instructive one. In the context of water rights, a mere restriction on use — the hallmark of a regulatory action — completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water. *See Eddy v. Simpson*, 3 Cal. 249, 252-253 (1953) (“the right of property and water is usufructuary, and consists not so much in the fluid itself as the advantage of its use.”). Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus by limiting plaintiffs’ ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete

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<sup>31</sup> 59 Fed. Cl. at 249, n. 3.

occupation of property — an exclusive possession of plaintiffs’ water-use rights for preservation of the fish — mirrors the invasion present in *Causby*. To the extent, then, that the federal government, by permitting plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus affected a physical taking.”<sup>32</sup>

We now turn to a discussion of the authorities which the defendant claims have undermined the precedential authority of this Court’s holding in *Tulare I*.

**D. Tulare I Was Correctly Decided And Is Still Good Law.**

The answer to the question of whether a “taking” is physical or regulatory turns on what constitutes “property” and the manner in which the property is “taken” by the government. “Property” is, “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”<sup>33</sup> The right to exclude others is a fundamental element of “property.”<sup>34</sup> “Taken” means the loss suffered by the property owner “rather than the accretion of a right or interest in the sovereign . . .”<sup>35</sup> Government action short of the acquisition of title or occupancy will constitute a taking if its effects are so complete as to deprive the owner of all

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<sup>32</sup> 49 Fed. Cl. at 319.

<sup>33</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), quoted with approval in *Loretto v. Teleprompter Manhattan CATV Corp.*, 358 U.S. 419, 435 (1982) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

<sup>34</sup> E.g., *Loretto*, 358 U.S. at 433; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).

<sup>35</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), quoted with

or most of his interest in the property.<sup>36</sup> And, while the destruction of one “strand” of the “bundle” of property rights may not constitute a taking,<sup>37</sup> the taking of a slice of every strand of the bundle is a physical taking.<sup>38</sup>

The defendant cites two decisions of the Supreme Court, four decisions of the United States Court of Appeals for the Federal Circuit, and one California appellate court decision<sup>39</sup> in support of its claim that *Tulare I* is no longer good law.<sup>40</sup> None of these cases, however, overrules or otherwise modifies the precedent relied upon by this Court in *Tulare I*. We now discuss each of these federal cases in chronological sequence; we discuss *Allegretti* in part IV(E).

The plaintiff in *Tahoe-Sierra* made a *facial* attack on an ordinance and resolution adopted by the defendant which effected a moratorium on development.<sup>41</sup> The question presented was “whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings

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approval in *Ruckelshaus*, 467 U.S. at 1004-1005.

<sup>36</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), quoted with approval in *Ruckelshaus*, 467 U.S. at 1005.

<sup>37</sup> E.g., *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

<sup>38</sup> *Loretto*, 358 U.S. at 435.

<sup>39</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Tuthill Ranch v. United States*, 381 F.3d 1132 (Fed. Cir. 2004); *Stearns Co. Ltd. v. United States*, 396 F.3d 1354 (Fed. Cir. 2005); *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004); and *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261 (2006).

<sup>40</sup> Defendant’s Memorandum, p. 22.

<sup>41</sup> 535 U.S. at 320.

Clause of the United States Constitution.”<sup>42</sup> Justice Stevens, writing for the majority of the Court, noted, in response to the dissent of the Chief Justice, that the moratorium “does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.”<sup>43</sup> The Court then held that *Penn Central* was the appropriate framework for analysis by affirming the judgment of the Court of Appeals.<sup>44</sup>

The plaintiff in *Boise Cascade* advanced four theories to support its takings claim, one of which was a physical taking based on a denial of its right to exclude spotted owls from its property and the requirement that it allow government personnel to enter its property to conduct owl surveys during the pendency of a preliminary injunction. The government obtained an injunction to prevent the plaintiff from logging a 65 acre tract of old-growth forested land known as the Walker Creek Unit absent an incidental take permit under section 10 of the ESA. The plaintiff then applied for an incidental take permit. The USFWS, after subsequent surveys found no living owls in the area, advised the plaintiff that an incidental take permit was no longer required. The district court lifted the injunction. The court noted that the government’s intrusion into the plaintiff’s property “is more in the nature of a temporary trespass — though, obviously, sanctioned by the district court and therefore not unlawful — rather than a permanent physical occupation or an easement of some kind” and distinguished its earlier holding in *Hendler*<sup>45</sup> on the ground that in *Hendler* the government had installed groundwater monitoring wells which it permanently maintained and, as such, its physical occupation was “permanent” and a *per se*

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<sup>42</sup> *Id.* at 306.

<sup>43</sup> *Id.* at 324, n. 19.

<sup>44</sup> *Id.* at 343.

taking under *Loretto*.<sup>46</sup> The court held that the plaintiff had not alleged facts sufficient to support a physical takings claim under *Loretto*.<sup>47</sup>

In *Seiber* the plaintiffs claimed that the government effected a physical or regulatory taking as a result of the refusal of the USFWS to issue an incidental take permit under section 10 of the ESA to authorize the logging of a 40 acre tract of land in Oregon. The plaintiffs submitted an application to the USFWS on November 24, 1999 which was rejected on July 6, 2000 on the ground that the application did not satisfy applicable criteria for mitigation. The plaintiffs filed an action in the Court of Federal Claims on July 26, 2001. On June 3, 2002 the USFWS advised the plaintiffs that an incidental take permit was no longer necessary. The plaintiffs elected to pursue their claims “in the context of temporary rather than permanent takings.”<sup>48</sup> The plaintiffs presented no evidence of any economic loss during the relevant period, from November 9, 2000 through June 3, 2002.<sup>49</sup> The court suggests that it might have been more sympathetic to a physical taking claim if the plaintiffs had produced evidence of the loss of timber during the relevant period.<sup>50</sup> Under the circumstances, the court followed its decision in *Boise Cascade* and held that there had been no physical taking.

In *Tuthill* the court was concerned with the question of whether the government had physically taken an interest in the plaintiff’s property by installing more fiber optics cables

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<sup>45</sup> *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

<sup>46</sup> 296 F.3d at 1355.

<sup>47</sup> *Id.* at 1357.

<sup>48</sup> 364 F.3d at 1362.

<sup>49</sup> *Id.* at 1371.

within the government’s existing easement than currently required by the Bonneville Power Administration for communication purposes and the leasing of such excess capacity to third parties. The plaintiff conceded that the fiber optics cable itself, “which occupies physical space, is not the source of its complaint.”<sup>51</sup> The court agreed with the lower court’s conclusion that “leasing fiber strands to third parties does not increase the burden on the servient estate.”<sup>52</sup> The court concluded there was no physical taking since the plaintiff’s complaint related to the *use* of the fiber optics cables, not the cables themselves.<sup>53</sup>

The court in *Stearns* was concerned with the plaintiff’s claim that the government had effected a physical or regulatory taking under the Surface Mining Control and Reclamation Act of 1977. The plaintiff sold the surface rights to lands within the Daniel Boone National Forest, reserving to itself the mineral rights and the implied appurtenant easement to use the surface for the purpose of removing minerals. The court held that the regulatory taking claim was not ripe since the plaintiff had not sought permission from the Office of Surface Mining Reclamation and Enforcement to develop the minerals.<sup>54</sup> As to the physical taking claim, the court noted that the government neither occupied the mineral estate nor the implied appurtenant easement and had not required the plaintiff “to accept the physical presence of a third party on any of the

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<sup>50</sup> See *id.* 1371, n.9

<sup>51</sup> 381 F.3d at 1138.

<sup>52</sup> *Id.* at 1139.

<sup>53</sup> *Ibid.*

<sup>54</sup> 396 F.3d at 1358.

property.”<sup>55</sup> The court noted that the question was not whether the government can regulate, but whether “government regulation produces a taking” — “a classic example of a regulatory taking problem . . .”<sup>56</sup> The court held there was no physical taking.

In *Lingle* the question presented was whether the “substantially advances” formula announced in *Agins v. City of Tiburon*<sup>57</sup> was an appropriate test to determine whether a regulation effects a Fifth Amendment taking.<sup>58</sup> The Court answered the question in the negative. The Court did not address whether the regulation effected a physical or regulatory taking, noting that the “substantially advances” inquiry “probes the regulations underlying validity,” not whether the regulation effects a taking.<sup>59</sup>

None of the six cases discussed above changes or otherwise modifies the law in effect at the time this Court decided *Tulare I*.<sup>60</sup> In *Tahoe-Sierra*, *Boise Cascade*, *Seiber* and *Stearns*, no plaintiff was permanently deprived of his or her property during or after the moratorium or the conclusion of the permitting process and he or she continued to have the “right to possess, use and dispose” of the property. In *Tuthill*, there was no impact to the plaintiff’s property. And, the Court in *Lingle* did not address whether the regulation effected a taking. By contrast, the effect of the biological opinions in the *Tulare* litigation was to completely deprive the water users of all

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<sup>55</sup> *Id.* at 1357.

<sup>56</sup> *Ibid.*

<sup>57</sup> 447 U.S. at 255 (1980).

<sup>58</sup> 544 U.S. at 532.

<sup>59</sup> *Id.* at 543.

<sup>60</sup> We note that *Tahoe-Sierra*, *Boise Cascade*, and *Sieber* were all decided while the *Tulare* litigation was pending in this Court, but at no time did the United States urge this Court to

of their rights to the use of the SWP water that flowed past the point of diversion and thence to the Pacific Ocean.

In conclusion, *Tulare I* was correctly decided and is still good law. Nevertheless, says the defendant, this Court's decision in *Tulare I* has been the subject of analysis and criticism.<sup>61</sup> Let's discuss this "analysis and criticism."

**E. The Criticism of *Tulare I* Is Uninformed and Unfounded.**

The defendant refers to two decisions and a law review article which have criticized this Court's decision in *Tulare I*.<sup>62</sup> The criticism in the two decisions is dictum and based on a misunderstanding of the facts in the *Tulare* litigation. The criticism in the law review article is merely partisan advocacy.

In *Klamath* the court was primarily concerned with claims made by the plaintiffs who were parties to federal, not state, water supply contracts. Judge Allegra held that the plaintiffs had no property rights under their federal water supply contracts and distinguished *Tulare I*.<sup>63</sup> Judge Allegra went on to observe, by way of dictum, that this Court in *Tulare I* failed to consider whether (1) "prior contracts, prior appropriations or some other state law principle" qualified the plaintiffs' rights under their SWP water supply contracts, (2) the Coordinated Operating Agreement limited the plaintiffs' rights, (3) some "accepted state doctrines, including those designed to protect fish and wildlife," limited the plaintiffs' rights, and (4) the "sovereign acts

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reconsider *Tulare I* in light of those decisions. See note 5, *ante*.

<sup>61</sup> Defendant's Memorandum, p. 21, n. 13.

<sup>62</sup> *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005); *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261 (2006); and Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 *Envtl. L.* 551 (2002).

<sup>63</sup> 67 Fed. Cl. at 538.

and unmistakability doctrines” might apply.<sup>64</sup> However, this Court did consider whether any state law principle qualified or otherwise limited the plaintiffs’ rights and noted that the SWRCB did carefully considered fish and wildlife interests in D-1485 after 11 months of evidentiary hearings.<sup>65</sup> And, no provision of the Coordinated Operating Agreement limited the plaintiffs’ rights. Finally, the sovereign acts and unmistakability doctrines have no applicability to contracts in which the federal government is not a party. In short, Judge Allegra’s criticism was unfounded.

The defendant also cites and discusses *Allegretti & Co. v. County of Imperial*,<sup>66</sup> and makes several bold and unfounded assertions, including a claim that “the individual drops of water would be ‘gone forever,’ . . .”<sup>67</sup> The flaw in the defendant’s analysis of *Allegretti* is its failure to understand the difference between an appropriative right to the use of surface water under a license issued by the SWRCB and an overlying right to the use of percolating waters in a

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<sup>64</sup> *Id.* at 538.

<sup>65</sup> This Court correctly observed that it would be inappropriate for a federal court to *make* California law rather than merely apply it since “water allocation in California is a policy judgment — one specifically committed to the SWRCB and the California courts . . .” 49 Fed. Cl. at 324. Judge Allegra apparently feels that this Court should have substituted its judgment for that of the Board or a California court. The Supreme Court appears to side with the views of this Court:

“The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations — a task for which courts are not well suited. Moreover, it would empower — and might often require — courts to substitute their predictive judgments for those of elected legislatures and expert agencies.” *Lingle*, 554 U.S. at 544.

<sup>66</sup> 138 Cal.App.4th 1261 (2006).

regulated groundwater basin.

In *Allegretti* the court considered the plaintiff's claim that a limitation in a conditional use permit limiting the plaintiff to the extraction of no more than 12,000 acre-feet per year of water from an aquifer effected a physical or regulatory taking. The plaintiff was an overlying owner<sup>68</sup> of 2,400 acres of land, only 1,800 acres of which were cleared for farming and 1,600 acres were cultivatable.<sup>69</sup> The plaintiff filed an application with the county for a conditional use permit to redrill an inoperable well. The county approved the conditional use permit subject to a condition limiting the plaintiff's total extractions to 12,000 acre-feet per year. The plaintiff did not accept the permit, the limitation never took effect, and the plaintiff acknowledged that there were no "present restrictions on the use of water from its existing wells."<sup>70</sup> The plaintiff offered no evidence that it had the ability to extract water in excess of 12,000 acre-feet per year.<sup>71</sup> The county did not "physically encroach" on the plaintiff's property or the "aquifer," did not require or authorize any encroachment, and did not "appropriate, impound or divert any water."<sup>72</sup> Not surprisingly then, the court held that there was no physical taking. The court correctly distinguished this Court's decision in *Tulare I* on the basis that the claims of the plaintiffs in the *Tulare* litigation were predicated on contractual water rights based on a post-1914 appropriations while the plaintiff's claim in the case at bar was based on overlying rights to extract water from a

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<sup>67</sup> Defendant's Memorandum, p. 28.

<sup>68</sup> 138 Cal.App.4th at 1271, n. 5.

<sup>69</sup> *Id.* at 1276, n. 8.

<sup>70</sup> *Id.* at 1268.

<sup>71</sup> *Id.* at 1269.

regulated groundwater basin.<sup>73</sup>

The court in *Allegretti* nevertheless undertook, by way of dictum, to criticize this Court's holding in *Tulare I* without understanding the facts in the *Tulare* litigation. First, the court incorrectly believed that the restrictions imposed on the SWP under the ESA were imposed by the SWRCB, not the federal government.<sup>74</sup> Next the court incorrectly believed that the water supply contracts in the *Tulare* litigation were water supply contracts between the plaintiffs and the federal government, not the State of California.<sup>75</sup> Finally, the court, without logic or analysis, concluded that the ESA-imposed restrictions at issue in the *Tulare* litigation were different from the government imposed restriction in *International Paper*<sup>76</sup> where the water was taken for the production of electricity by a third party.<sup>77</sup> In short, the court didn't understand the facts in the *Tulare* litigation.

The court in *Allegretti* correctly determined that there was no physical taking since (1) the plaintiff, as an overlying owner, had no right to any specific amount of percolating water, and (2) the County of Imperial never reallocated or used the percolating water in the aquifer underlying the plaintiff's property — the water remained in underground storage for the use of

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<sup>72</sup> *Id.* at 1273.

<sup>73</sup> *Id.* at 1274.

<sup>74</sup> *Id.* at 1273.

<sup>75</sup> *Id.* at 1274.

<sup>76</sup> *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931).

<sup>77</sup> 138 Cal.App.4th at 1275. The only difference between the facts in *Tulare I* and the facts in *International Paper* is that in the former the government effected a reallocation of the use of water from irrigation and municipal uses to the protection of fish while in the latter the government effected a reallocation of the use of water from the production of newsprint to the

all overlying owners, including the plaintiff.<sup>78</sup> The county's regulation of the basin conserved percolating water. By contrast, a post-1914 appropriator has a right to a specific amount of water and water that flows past an appropriator's point of diversion to the Pacific Ocean because of ESA-imposed restrictions is lost to the appropriator forever.

Finally, the defendant cites a law review article published in 2002.<sup>79</sup> The late Justice William O. Douglas cautioned against commentators aligned with special interest groups who fail to disclose that they might have "axes to grind."<sup>80</sup> Justice Douglas did not propose a law, rather he proposed "an editorial policy that puts in footnote number one the relevant affiliations of the author."<sup>81</sup> The author's first footnote discloses that she was in law school when the *Tulare* litigation was commenced and that she received "advice and contributions" from several persons, including Fred Disheroon, trial counsel in the *Tulare* litigation, and Brian Gray and Gregory A. Thomas, two of the counsel on the *amicus curiae* brief of the Natural Heritage Institute and others who supported the United States in the *Tulare* litigation. Indeed, the "discussion" in the article essentially repeats the arguments in that brief. For example, the author argues that the "government did not seize the water or divert it for government purposes, as it did in International Paper" and "did not extinguish the plaintiffs' water rights to create its own, as it did

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production of electricity.

<sup>78</sup> The defendant argues that the "individual drops of water would be 'gone forever' . . ." but the defendant is incorrect. An aquifer is a geologic formation that contains sufficient saturated permeable material to yield significant quantities of water to wells and springs. Todd, *Groundwater Hydrology* (2d ed. 1980) p. 25; Department of Water Resources Bulletin 118-80 (1980) p. 59. The unextracted water stays in the aquifer, it doesn't flow to the Pacific Ocean.

<sup>79</sup> See note 62, *ante*.

<sup>80</sup> Douglas, *Law Reviews and Full Disclosure*, 40 Wash. L. Rev. 227, 229 (1965).

<sup>81</sup> *Id.* at 232.

in Dugan” — it merely “regulated how the plaintiffs could apply it to their uses . . . .”<sup>82</sup>

The author’s arguments are factually and legally flawed. First, the plaintiffs never asserted in the *Tulare* litigation that the government took their “water rights,” they claimed that the government took their rights to the use of specific amounts of *water*. Second, the government did divert SWP water by closure of the Delta Cross Channel gates which caused the water at the SWP pumping plant to go saline and become non-exportable from the Delta. Third, the government took the water in implementation of the Magnuson Act<sup>83</sup> and the ESA — clearly government purposes. Finally, the government completely deprived the plaintiffs of all of the right to the use of their share of the SWP water that was diverted from the SWP pumping plant — the hallmark of a physical taking.<sup>84</sup> In short, the author is not factually correct and should have fully disclosed her “partisan bias . . . .”<sup>85</sup>

In conclusion, the “analysis” in *Klamath* and *Allegretti* is flawed and the criticism is unfounded; the author of the law review article simply echos the losing argument in *Tulare I*.

## V.

### CONCLUSION

A water right is a very precious property right in the West. To quote Justice Racanelli,

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<sup>82</sup> 32 *Envtl. L.* at 584.

<sup>83</sup> The United States has exclusive management authority over all anadromous species throughout their migratory range under the Magnuson Act, 16 U.S.C. § 1811(b)(1) (2000); see *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004).

<sup>84</sup> See notes 33-38, *ante*, and accompanying text.

<sup>85</sup> 40 *Wash. L. Rev.* at 228.

“ . . . a water right is the right to **use** the water — to divert it from its natural course.”<sup>86</sup> The right to the use of surface water is completely eviscerated when the government restricts the diversion thereof under the ESA and the water flows to the Pacific Ocean. To quote Justice Holmes, “its hard to see what more the Government could do to take the use.”<sup>87</sup> The taking of surface water

under these circumstances is a physical taking and this Court should confirm its holding in *Tulare I*.

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Respectfully submitted,

KUHS & PARKER

By

William C. Kuhs, Attorney for Tulare  
Lake Basin WSD, the Agency, Lost Hills  
WD, and Wheeler Ridge-Maricopa WSD

P. O. Box 2205  
Bakersfield, CA 93311  
(661) 322-4004  
(661) 322-2906 (fax)  
wckuhs@lightspeed.net

Of Counsel

MICHAEL N. NORDSTROM  
944 Whitley Avenue  
Corcoran, CA 93212  
(559) 992-3118  
(559) 992-3119 (fax)

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<sup>86</sup> *United States v. Sate Water Resources Control Board*, 182 Cal.App.3d 82, 100 (1986).

<sup>87</sup> *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931).

JOHN F. STOVALL  
Kern County Water Agency  
P. O. Box 58  
Bakersfield, CA 93302-0058  
(661) 634-1400  
(661) 634-1428 (fax)

ERNEST A. CONANT  
Law Offices of Young Wooldridge  
1800 30th Street, 4th Floor  
Bakersfield, CA 93301  
(661) 327-9661  
(661) 327-1087 (fax)

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