

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

**DEFENDANT'S REPLY IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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February 6, 2007

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Exhibit No.	Description	Beginning Bates No.
19	Letter from Bureau of Reclamation to Board of Directors of Ventura River Municipal Water Dist., dated Aug. 28, 1959.	US007044
20	Excerpts of Deposition Transcript of Steven E. Wickstrum (January 23, 2007)	
21	Excerpts of Deposition Transcript of John Johnson (Jan. 9, 2006)	
22	Letter from John Johnson to Darren Brumbach, dated March 3, 2000	US002236
23	Expert Witness Report of Curtis Spencer, dated Nov. 8, 2006	
24	Letter from John Johnson to Jim McNamara, dated Feb. 4, 1999	US000294
25	Hydrology Report - Water Year 2005 by Casitas Municipal Water Dist., dated Dec. 6, 2005 (excerpts)	

## INTRODUCTION

On November 22, 2006, the United States moved for partial summary judgment on the question of the nature of the taking alleged by plaintiff. Defendant explained that since there has been no physical occupation of plaintiff's property interest, any regulatory restriction on the use of plaintiff's property must be analyzed as a regulatory taking. On January 5, 2007, plaintiff opposed defendant's motion for partial summary judgment, arguing that there were issues of fact in dispute and that "water rights takings cases" should be analyzed as *per se* physical takings.

For the reasons discussed in our opening brief, and further elaborated on below, resolution of the nature of the taking is not only appropriate as there are no material issues of fact in dispute, but it also is essential as it would be impossible to proceed to trial without knowing which legal standard should be applied. Plaintiff alleges that regulatory restrictions "imposed under the authority of the ESA" have interfered with its ability to divert water from the Ventura River. Def. Ex. 1 (Pl.'s Resp. to Interr. No. 3). More specifically, plaintiff contends that the March 31, 2003, Biological Opinion ("BO"), effected a physical taking of a portion of its water right because it requires plaintiff to leave additional water in the Ventura River which it otherwise would have diverted to its storage facility pursuant to its water license. Since accepted principles of takings jurisprudence hold that regulatory restrictions on the use of property – here, plaintiff's water license issued from the State of California – must be analyzed as regulatory takings, as opposed to physical takings, defendant's motion for partial summary judgment must be granted.

## ARGUMENT

### I. THERE ARE NO MATERIAL ISSUES OF FACT IN DISPUTE THAT WILL PRECLUDE THE ENTRY OF SUMMARY JUDGMENT IN DEFENDANT'S FAVOR

#### A. Summary Judgment Standard

Plaintiff attempts to avoid summary judgment by arguing that it is inappropriate at this time because of a handful of allegedly disputed facts. Plaintiff has variously failed to provide proof of its alleged facts or conversely failed to identify how the facts allegedly in dispute are material to the outcome of this motion. As Rule 56 and Supreme Court precedent instructs, such attempts to defeat summary judgment are not valid and may not derail a well-pled motion for summary judgment.

Rule 56(c) provides that summary judgment may be granted if there are no genuine issues as to any material fact. In a trilogy of cases decided in 1986, the Supreme Court encouraged more frequent use of summary judgment by easing the burden on the moving party and making more exacting the burden on the party opposing the motion. In Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), the Court indicated that when defendants had adequately supported their Rule 56(c) motion, the non-moving plaintiffs had the burden of coming forward with “specific facts showing that there is a *genuine issue for trial*.” (emphasis in original). In Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), the Court stated that the moving party’s burden “may be discharged by ‘showing’ – that is, pointing out to the [Court] – that there is an absence of evidence to support the nonmoving party’s case.” Finally, in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986), the Court pointed out that “only disputes over facts that might affect the outcome of the suit under governing law will properly preclude entry

of summary judgment.”

In these cases, the Supreme Court has made it clear that summary judgment is “an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” Celotex, 477 U.S. at 327. In this case, as discussed in detail below, plaintiff has failed to identify any material issues of fact in dispute that will affect the Court’s determination of the nature of the taking alleged by plaintiff. Moreover, if the Court finds that plaintiff has alleged a regulatory takings claim, as opposed to a physical takings claim, defendant’s motion for summary judgment must be granted.

**B. Defendant Does Not Dispute That Plaintiff Has a Property Right Entitled to Protection Under the Fifth Amendment**

Defendant has never disputed that plaintiff holds a water license under state law to appropriate water from the Ventura River and Coyote Creek, which is a protected property interest under the Fifth Amendment. Therefore, plaintiff is incorrect when it states that defendant disputes the *nature* of the property right allegedly taken. See Pl.’s Br. at 8. However, as defendant pointed out in its opening brief, it could not agree with plaintiff’s characterization of the *scope* of its property interest, because at the time defendant filed its motion, plaintiff had set forth at least three different characterizations of the scope of its property interest.<sup>1/</sup> See Def.’s Br. at 2, note 1, 2. Plaintiff now adds a fourth characterization in its opposition brief: “In this case,

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<sup>1/</sup> Compare Compl. ¶ 23 (alleging that its “right to receive the entire water supply of the Ventura River Project,” had been taken); with Def. Ex. 1 (Pl.’s Resp. to Interr. No. 2) (alleging that the nature of its property interest taken was “the right to use the entire yield of the Ventura Project, together with additional water rights described in California Water License Nos. 11834 and 10133”); with Def. Ex. 2 (Pl.’s Supp. Resp. To Interr. No. 2) (alleging that “[t]he property right at issue is not the ‘entire yield’ of the Ventura River Project,” but instead, “is the volume of water belonging to the Plaintiff, which the United States appropriated for the benefit of the Southern California Evolutionarily Significant Unit (ESU) of west coast steelhead trout.”).

Casitas claims the right to divert through the Ventura River Project 107,800 acre-feet of water from the Ventura River per year and the right to put 28,500 acre-feet of water to beneficial use each year (subject only to prior existing rights and other limitations not relevant here).” Pl.’s Br. at 8-9; see also Def.’s Ex. 4.

Although plaintiff’s fourth interpretation of the scope of its water license is once again not quite accurate,<sup>2/</sup> that does not preclude the entry of summary judgment in defendant’s favor since the scope of plaintiff’s property right is a question of law. Moreover, as defendant explained in its opening brief, the key distinction between physical and regulatory takings is based on the nature of the government action, without regard to the extent of the taking, and therefore, whether the parties agree on the scope of plaintiff’s property right is irrelevant to the outcome of this motion.

Nevertheless, in order to streamline this summary judgment process, and to avoid any unnecessary confusion in the resolution of the nature or type of taking at issue in this case (i.e., physical or regulatory), defendant will assume for purposes of this motion that plaintiff’s fourth characterization of the scope of its property interest is correct.<sup>3/</sup> Accordingly, since there is no material issue of fact in dispute regarding the scope of the property interest alleged to be taken by

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<sup>2/</sup> The plain language of Water License 11834 makes clear that plaintiff’s right to the use of water from the Ventura River and Coyote Creek is “limited to the amount actually beneficially used for the stated purposes.” Def.’s Ex. 4. Moreover, the license does not state that plaintiff has a right to “divert through the Ventura River Project,” 107,800 acre-feet of water per year from the Ventura River. Instead, the license states that “[t]he total amount of water to be taken from the sources (direct diversion plus collection to storage) shall not exceed 107,800 acre-feet per year.” Id.

<sup>3/</sup> Defendant reserves the right to challenge plaintiff’s characterization of the scope of its property interest in future proceedings in this case.

defendant, summary judgment is appropriate.

**C. Plaintiff Has Operated and Maintained the Ventura River Project Since 1959**

Plaintiff's counsel asserts that it will "prove at trial," that the Bureau of Reclamation ("Reclamation") "control[s] the flow of water through the Ventura River Project." Pl.'s Br. at 12. What is noticeably lacking from counsel's assertions are citations to the record, or declarations supporting such statements. It is black-letter law that assertions of counsel are not evidence, and therefore, are insufficient to defeat a summary judgment motion.<sup>4</sup> See Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 626-27 (Fed. Cir. 1984); RCFC 56(e).

As discussed during the breach of contract phase of this litigation, title to the project works constructed by the United States in the 1950s remains with the United States. See Def.'s (Contract) Ex. 1. However, operation and maintenance of the project works were transferred to plaintiff effective October 1, 1959. See Def. Ex. 19. Under the terms of the Repayment Contract, plaintiff agreed to accept "the care, operation and maintenance of the transferred works and any existing works of the District and deliver water therefrom in full compliance with the Federal reclamation laws, the terms of this contract, and in accordance with such reasonable regulations furnished by the contracting officer. . ." Def.'s (Contract) Ex. 1 at 12.

Although Reclamation has a contractual right to "take back and operate and maintain such works" if the "contracting officer determines that the District has not cared for, operated, maintained, or delivered water from transferred works in the manner as aforesaid. . .," it is

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<sup>4</sup> Plaintiff's counsel also makes the unsupported assertion that "the government in fact owns and controls the operation of . . . [the] fish ladder." Pl.'s Br. at 11. As discussed supra, unsupported assertions by counsel are not evidence. In any event, the United States does not own the fish ladder (this was paid for by plaintiff with state and federal grant money), and there is certainly no evidence that Reclamation controls the operation of the fish ladder.

undisputed that Reclamation has never exercised this contractual right in the over 46 years since the contract was executed. Id. Moreover, according to plaintiff's principal civil engineer, Steve Wickstrum, *he* is responsible for "directing Robles diversion operations." Pl.'s Exhibit 1 at 1; Def. Ex. 20 at 11. Mr. Wickstrum testified that Reclamation does not provide day to day operational direction to plaintiff concerning diversions into Robles-Casitas canal, Reclamation does not have any input into the yearly hydrology reports prepared by Mr. Wickstrum, Reclamation does not have any input into the water supply and demand reports that Mr. Wickstrum prepared for plaintiff, and Reclamation only visits the project facilities once every three to five years. Id. at 6-12.

Moreover, Reclamation cannot legally appropriate or control the flow of water from the Ventura River since it is undisputed that Reclamation does not have a water license under state law to use the waters of the Ventura River for any purpose.<sup>57</sup> Therefore, Reclamation cannot "control" the operation of the Project so as to appropriate water from the Ventura River and physically divert it into Lake Casitas, or conversely, divert water away from Lake Casitas. Further, the BO does not require the physical appropriation or occupation of water. Instead, the BO criteria calls for water to be left in its natural state – i.e., flowing down the Ventura River.

Plaintiff's unsupported assertions to the contrary are unavailing. First, plaintiff contends that Reclamation established the "operations criteria" for the Ventura River Project through the 1959 "trial operation criteria for Robles Casitas Diversion Facilities" ("1959 criteria"). Plaintiff contends that the 1959 criteria were "created by Reclamation." Pl.'s Br. at 13. However, the

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<sup>57</sup> Accordingly, plaintiff's argument that "[t]he parties disagree on whether the government has physically appropriated Ventura River Water for its own use," is not a factual issue but a legal issue that must be decided by the Court. See Pl.'s Br. at 10.

1959 criteria clearly state that the agreement was “determined jointly” by the “Ventura River Municipal Water District,<sup>9</sup> as operator of the Ventura River Project facilities” and the Ventura County Department of Public Works, in order to assure that plaintiff’s operation of the project did not interfere with “prior vested rights in the Ventura River, downstream from the Robles Diversion Dam.” Def.’s Ex. 6; see also Def. Ex. 21 at 137 (plaintiff’s general manager testifying that “[t]he District put together” the 1959 criteria).

Second, plaintiff contends that in “2000, Reclamation prescribed new criteria to protect the recently listed steelhead.” Pl. Br. at 13. Since no citation to support this statement was provided in plaintiff’s opposition brief, defendant can only assume that plaintiff is referring to the February 25, 2000 agreement – memorialized in a March 3, 2000 letter from plaintiff’s general manager to the National Marine Fisheries Service – in which plaintiff agreed to keep 50 c.f.s of water in the Ventura River in order to ensure passage for steelhead prior to the installation of the fish passage facility. See Def. Ex. 22. As the plain language of this letter shows, this was an agreement reached between plaintiff and the National Marine Fisheries Service, and was clearly not “prescribed” by Reclamation.

Third, plaintiff contends that the May 2, 2003 letter from Michael Jackson to plaintiff’s general manager proves that Reclamation controls the flow of water through the Ventura River Project. See Pl.’s Br. at 13. This letter was discussed in detail during the breach of contract portion of this case. As the Court has already determined, Reclamation was acting in its sovereign capacity to implement the Biological Opinion when it wrote the May 2, 2003 letter, not as a contractor with a contractual right to take back operation and maintenance of the project

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<sup>9</sup> Plaintiff was formerly known as the Ventura River Municipal Water District.

under the circumstances outlined in the Repayment Contract. See Casitas Municipal Water Dist. v. United States, 72 Fed. Cl. 746, 753, 755 (2006).

Therefore, there is an absence of evidence to support plaintiff's assertion that Reclamation "controls" the operation of the Project and therefore, plaintiff has not met its burden to oppose defendant's motion for partial summary judgment. See Celotex, 477 U.S. at 325.<sup>7</sup>

**D. Immaterial Facts in Dispute Do Not Preclude the Entry of Summary Judgment**

In an attempt to avoid entry of summary judgment, plaintiff presents several facts that are allegedly in dispute. Because these facts are not material to the motion before the Court, they are nothing more than red herrings. For example, and as explained above, the amount of water, if any,<sup>8</sup> that has been allegedly taken by the government is not material to the Court's determination of this motion. See Pl.'s Br. at 14. Simply put, the *nature or type* of taking (i.e.,

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<sup>7</sup> Moreover, even if the Court finds that Reclamation somehow "controls" operation of the Ventura River Project, as discussed infra, this case does not fall "squarely within the rule of Dugan v. Rank, 372 U.S. 609 (1963), and United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). . .", (Pl.'s Br. at 11), since Reclamation cannot legally appropriate or control the flow of water from the Ventura River. For this and other reasons, Dugan and Gerlach are distinguishable from this case and partial summary judgment should be granted on defendant's behalf. See infra page 18-21.

<sup>8</sup> Plaintiff is correct that the parties do not agree on whether the operational criteria in the BO has resulted in the loss of any beneficial use of water by plaintiff. See Def. Ex. 23 at 47 (defendant's expert concluding that plaintiff has not lost the ability to beneficially use water for the purposes provided in its water license). However, this is not material to the Court's determination of this motion. For example, if the Court determines that plaintiff has alleged a physical taking of its water license, the amount of water, if any, which has been physically taken will only need to be determined in the context of just compensation at trial. If the Court determines that plaintiff has alleged a regulatory taking of its water license, the amount of water, if any, that has been taken will be factored into the Penn Central analysis at trial. Thus, while material to the final outcome of this case, it is not material to the limited issue before the Court on this motion for partial summary judgment.

physical or regulatory) is not determined by the *extent* of the taking. Since plaintiff has provided no basis for why the amount of water, if any, that has been allegedly taken by the government is relevant to the issue of whether the taking alleged by plaintiff is physical or regulatory in nature, summary judgment is appropriate.

Similarly, the parties do not dispute that a Section 7 consultation occurred, a BO was issued on March 31, 2003, and plaintiff has substantially complied with the operations criteria in the BO.<sup>9</sup> Therefore, who initiated the Section 7 consultation, and whether plaintiff “authorized” the operations criteria in the BO, are not material issues of fact that are outcome determinative of this motion. See Pl.’s Br. at 14-16. Since plaintiff has provided no basis for why these alleged factual disputes are relevant to the issue of whether the taking alleged by plaintiff is physical or regulatory in nature, summary judgment should be entered on behalf of defendant.

**II. BECAUSE THE GOVERNMENT ACTION UNDER THE ESA IS A REGULATORY RESTRICTION ON USE, AS OPPOSED TO A PHYSICAL OCCUPATION, THERE CAN BE NO PHYSICAL TAKING AND DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE GRANTED**

Plaintiff spends most of its brief arguing that *per se* rules can apply in situations other than permanent physical occupations by the government (otherwise known as a physical taking). Pl.’s Br. at 17 (contending that even if the Court finds that a physical taking did not occur in this

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<sup>9</sup> Although it is true that Reclamation initiated the Section 7 consultation with NMFS, plaintiff *requested* that Reclamation initiate the consultation and represent it during the consultation. Def. Ex. 24; see Casitas, 72 Fed. Cl. at 749 (“To address the concerns by California Trout, Casitas requested BOR to seek an informal consultation with NMFS pursuant to Section 7 of the ESA to enlist the agency’s technical assistance in the design, construction, operation, and maintenance of a fish ladder and screen for the project.”). Moreover, plaintiff was an active participant in the consultation and in fact, plaintiff’s general manager testified that Reclamation was “rarely in the room” during the Section 7 consultation meetings. Def. Ex. 21 at 101.

case, a *per se* rule may still apply). Most of plaintiff's discussion regarding *per se* rules is directly contrary to Supreme Court precedent.<sup>10</sup> Regardless, the discussion is irrelevant to this motion. The only issue that defendant has presented to the Court in this motion for summary judgment is whether the taking alleged by plaintiff is regulatory, as opposed to physical, in

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<sup>10</sup> Plaintiff contends that “[e]ven a cursory review of takings cases show that many cases have employed a *per se* takings standard even where a physical occupation has not occurred, depending on the type of property involved in the case.” See Pl.’s Br. at 17 (emphasis added). The cases cited by plaintiff do not support this argument; nor is there *any* precedent for the assertion that different legal standards should be applied based on the *type* of property allegedly taken. For example, in Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003), the Court was asked to decide whether a state law that mandated the transfer of interest from lawyers’ trust accounts (IOLTA accounts) to the Legal Foundation of Washington to pay for legal services for the needy amounted to a Fifth Amendment taking. First, the Court began its analysis where it must always begin: “we must [first] address the type of taking, if any, that this case involves.” 538 U.S. at 233. Second, after describing the well accepted distinction between physical and regulatory takings – *i.e.*, the nature of the government action – the Court applied that distinction to find a physical taking of property. *Id.* at 233-34. The Court held that since the transfer (or “confiscation”) of interest to the Foundation “seems more akin to the occupation of a small amount of rooftop space in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)” the case should be analyzed as a physical taking. *Id.* at 235. The other cases cited by plaintiff also do not support the proposition that courts apply *per se* rules depending on the type of property involved. Compare Hodel v. Irving, 481 U.S. 704 (1987) (analyzing whether a regulation abolishing both the descent and devise of a particular class of property was a regulatory taking under *Penn Central*) with Pl.’s Br. at 18 (improperly citing Hodel for the proposition that regulation that ‘abolishes both descent and devise’ of interests in land is a *per se* taking); compare Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (analyzing whether disclosure of a trade secret amounted to a taking of property based on reasonable investment-backed expectations and economic impact) with Pl.’s Br. at 18 (improperly citing Ruckelshaus for proposition that “taking of a trade secret” is a *per se* taking); compare Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 596-602 (1935) (finding that the Frazier-Lemke Act “as applied has taken from the bank without compensation, and given to Radford, rights in specific property which are of substantial value”) with Pl.’s Br. at 18 (“taking of real estate lien analyzed as *per se* taking”). See also Lingle v. Chevron USA, Inc., 544 U.S. 528, 538 (2005) (noting that “[o]ur precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes,” which include a permanent physical invasion of property and regulations which completely deprive an owner of all beneficial use of property). Thus, contrary to plaintiff’s assertions, just because a court finds that a regulatory taking has occurred after an analysis of the facts of the case does not mean that it has applied a *per se* takings rule.

nature. What test to apply – *per se* or *Penn Central* – can only be decided after this crucial decision is made. For example, if the Court finds that the taking alleged is physical, then the Court will apply a *per se* rule at trial. If the Court finds that the taking alleged is regulatory, the Court must then decide at trial whether to apply the *Penn Central* test or whether to apply the *Lucas*-categorical regulatory taking test. Whether the Court applies the *Penn Central* factors or the *Lucas per se* test to determine whether a regulatory taking has occurred will depend entirely on whether plaintiff has been deprived of “all economically beneficial use” of its water license. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

Accordingly, whether courts may apply a *per se* rule in contexts other than a permanent physical occupation is a theoretical question not relevant to this motion. Instead, the Court must decide through this motion whether regulatory restrictions imposed on plaintiff’s ability to divert water from the Ventura River pursuant to its water license should be considered a physical taking, or a regulatory taking, based on the facts of this case and precedential case law.

**A. Traditional Principles of Takings Jurisprudence Apply to All Forms of Property**

Contrary to plaintiff’s assertions, there are accepted principles of takings jurisprudence that courts apply to *all* cases when determining whether or not a taking has occurred. As explained above, the first step is to determine the nature or type of taking involved in the case – namely, physical or regulatory. Brown, 538 U.S. at 233; Tahoe-Sierra Pres. Council, Inc. V. Tahoe Regional Planning Agency, 535 U.S. 302, 321-22 (2002); Tuthill Ranch, Inc. v. United States, 381 F.3d 1132, 1135 (Fed. Cir. 2004) (“We must therefore begin our analysis, as did the Court of Federal Claims, by considering whether or not the government took physical possession

of [plaintiff's] property.”); see also Tulare Lake Basin Water Storage v. United States, 49 Fed. Cl. 313, 318 (2001) (“Turning then to the merits of plaintiffs’ claim, we begin by determining the nature of the taking alleged. Courts have traditionally divided their analysis of Fifth Amendment takings into two categories: physical takings and regulatory takings.”).

The hallmark distinction between physical and regulatory takings is whether or not a physical occupation of property has occurred (and plaintiff does not appear to dispute this distinction in its opposition brief). See Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (“The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.”) (emphasis in original); Lingle, 544 U.S. at 539 (“The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property. . .”). Moreover, “[p]hysical invasions short of an occupation and regulations that merely restrict the use of property may qualify as regulatory takings, but not as physical takings.” Tuthill Ranch, 381 F.3d at 1137. Further, “[t]he Supreme Court has long held that regulatory restrictions on the use of property do not constitute physical takings.” Seiber v. United States, 364 F.3d 1356, 1366 (Fed. Cir. 2004), cert. denied, 543 U.S. 873 (2004)).

Once the nature or type of the taking has been established, courts will then determine whether to apply a *per se* rule or the Penn Central ad hoc factual inquiry test. The Supreme Court has made clear that there are only “two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.” Lingle, 544 U.S. at 538. The first is “where government requires an owner to suffer a permanent physical invasion of her property –

however minor,” and the second “applies to all regulations that completely deprive an owner of ‘all economically beneficial us[e]’ of her property. . .” *Id.* The first category refers to physical takings and the second category refers to categorical regulatory takings under Lucas. Outside these two categories of *per se* takings, regulatory takings challenges are governed by the “essentially ad hoc, factual inquiries” set forth in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *Id.*

These accepted principles of takings jurisprudence must be applied in the Court’s analysis to determine the nature or type of the taking alleged in this case.

**B. Cases Involving the Alleged Taking of Water Rights Must Be Analyzed in Light of All Supreme Court Cases, Not Ones Hand-Picked by Plaintiff**

Plaintiff appears to be trying to persuade this Court to disregard all of the Supreme Court cases involving takings of real property since plaintiff believes that these cases are “meaningless” when analyzing whether a taking of water rights has occurred. Pl.’s Br. at 25. Plaintiff’s desire to ignore the holdings of Tahoe-Sierra and Lingle, for example, and to pick and choose which principles of takings jurisprudence to apply to the facts of this case is nonsensical, and not surprisingly, plaintiff offers no case law to support this argument. Therefore, plaintiff’s argument that “real property takings tests cannot be squared with takings tests utilized for other forms of property,” should be disregarded. Moreover, plaintiff’s alternative, to apply a *per se* rule to alleged takings of water rights cannot be correct since it is directly contrary to Tahoe-Sierra’s admonition regarding the creation of *per se* rules. See Tahoe-Sierra, 535 U.S. at 324. Further, as Allegretti & Co. v. County of Imperial, 138 Cal.App.4th 1261 (2006), readily demonstrates, accepted principles of takings jurisprudence are perfectly amenable to being

applied to alleged takings of California-based water rights.<sup>11/</sup>

1. Alleged Takings of Water Rights are Not “Per Se Takings”

Plaintiff contends that “when the government inversely condemns a water right, it essentially takes every stick in the bundle of rights associated with water right ownership. . . and thus constitutes a per se violation of the Just Compensation Clause.” Pl.’s Br. at 26; see also Pl.’s Br. at 27 (“In the case of water, whenever the use of water is diverted or not provided to the owner, and taken for another use, the bundle of sticks in a water right are also chopped through.”). Of course, plaintiff carves out this new “per se rule” for water rights by ignoring all the “land use” cases, including Tahoe-Sierra, which specifically admonishes against the creation of *per se* rules since it “would transform government regulation into a luxury few governments could afford.”<sup>12/</sup> 535 U.S. at 324. Moreover, as defendant pointed out in its opening brief, there are numerous examples of courts finding no physical taking even when the primary stick in the bundle – namely a “use” right – has been restricted. See Keystone Bituminous Coal Ass’n v.

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<sup>11/</sup> Inexplicably, plaintiff contends that Allegretti “involved an alleged taking of land,” and the California Appellate Court’s holding that no physical taking occurred is “dicta.” Compare Pl.’s Br. at 3, 32 with Allegretti, 138 Cal.App.4th at 1267 (emphasis added) (“Allegretti contends County’s action . . . constituted a physical taking of its *water rights*, mandating just compensation under the federal and state Constitutions.”) with Allegretti, 138 Cal.App.4th at 1273 (“The County’s permit decision does not effect a per se physical taking under any reasonable analysis.”).

<sup>12/</sup> Plaintiff contends that “none of the cases cited by Defendant support its argument that the law regarding the taking of water rights has changed since *Tulare* was decided and that it now requires that all water rights takings cases be analyzed under a *Penn Central* standard.” Pl.’s Br. at 2. Defendant made no such argument in its brief. What defendant clearly has argued is that based on Supreme Court and Federal Circuit precedent, regulatory restrictions on the use of water rights, such as the BO in this case, must be analyzed as a regulatory takings claim, as opposed to physical taking, and that the analysis does not change simply because the property interest involved is water. Def.’s Br. at 14-18.

DeBenedictis, 480 U.S. 470 (1987), and Rith Energy v. United States, 270 F.3d 1347 (Fed. Cir. 2001), to name just a few.

Further, plaintiff's "bundle of sticks" analogy is faulty because it assumes that plaintiff's "use" right is absolute, which it is not. Water rights, like all property rights, are subject to regulation. See Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 502, 540 (2005) ("[W]ater rights, though undeniably precious, are subject to the same rules that govern all forms of property. . ."); People v. Murrison, 101 Cal. App. 4<sup>th</sup> 349, 361 (2002) ("Just as a real property owner does not have an unfettered right to develop to any manner he or she sees fit, an owner of a water right may be similarly restricted."). Therefore, plaintiff never had the right to divert water from the Ventura River free from regulation, and therefore, this "stick" has not been "chopped through." Pl.'s Br. at 27.

As a first step pursuant to well-settled takings jurisprudence, this Court must determine whether or not plaintiff has alleged a physical taking of its property interest, or a regulatory taking of its property interest.<sup>13</sup> Since plaintiff's takings claim stems from regulatory restrictions on use and not the physical occupation of water, plaintiff's takings claim must be analyzed as a

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<sup>13</sup> Plaintiff also appears to argue that courts cannot determine the relevant parcel for water rights under a regulatory taking analysis. See Pl.'s Br. at 25. However, that is not true. See Allegretti, 138 Cal.App.4th at 1277 (the relevant parcel "is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion"); Tahoe-Sierra, 535 U.S. at 330-332. Here, plaintiff's property right, at a minimum, is its water license which entitles plaintiff to divert and collect to storage up to 107,800 acre-feet per year of water and to beneficially use up to 28,500 acre-feet of water. Def. Ex. 4. Plaintiff does not allege that the government has taken all of its water right; instead, it contends that the government will take (at some unknown point in the future), on average 1,915 acre-feet of water per year as a result of plaintiff operating the Project according to the BO criteria. See Pl.'s Ex. 1. This is a small fraction of the amount of water on average plaintiff diverts and collects to storage in its reservoir, as well as a small fraction of the amount of water it beneficially uses. See Def. Ex. 25; Def. Ex. 23 at 36-37.

regulatory takings claim and not a physical takings claim.

2. Allegretti Applies Accepted Principles of Takings Jurisprudence to Alleged Takings of California-based Water Rights

In Allegretti, plaintiff Allegretti & Company (“Allegretti”) owned land in Imperial County over groundwater basins, which Allegretti accessed through deep-water wells and pumps. Allegretti, in order to increase its crop production, sought a conditional use permit from the County to redrill an inoperable well on its property. The County approved the permit subject to certain conditions, including limiting Allegretti’s right to draw groundwater underneath its property to 12,000 acre-feet per year. Allegretti contended that the County’s actions effected a physical taking of its water rights, mandating compensation as a per se taking, and in the alternative, that the County’s actions were either a categorical regulatory taking under Lucas, or a regulatory taking under Penn Central’s ad hoc factual determination.

After reiterating the accepted principles of takings law – including reiterating the “hallmarks of a categorical physical taking, namely actual physical occupation or physical invasion of a property interest” – the Court held:

County’s action with respect to Allegretti in the present case - imposition of a permit condition limiting the total quantity of groundwater available for Allegretti’s use – cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. The County did not physically encroach on Allegretti’s property or aquifer and did not require or authorize any encroachment (e.g. *Yee v. City of Escondido, supra*, 503 U.S. 519, 112 S.Ct. 1522); it did not appropriate, impound or divert any water. The County’s permit decision does not effect a per se physical taking under any reasonable analysis.

138 Cal. App. 4<sup>th</sup> at 1273.

Here, too, regulatory restrictions on plaintiff’s ability to use water from the Ventura River

“cannot be characterized or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking.” Id. The restrictions on use stem from the implementation of the ESA to the Project, and specifically, are conditions plaintiff must follow in order to maintain incidental take coverage for its operation of the Project. As a result, in order to maintain incidental take coverage, plaintiff diverts less water, under certain circumstances, from the Ventura River than it otherwise would have under the 1959 criteria. Neither Reclamation nor NMFS has physically appropriated or occupied any water that plaintiff contends has been “lost.” Instead, as a result of the BO criteria, water that plaintiff may have diverted to its storage facility continues to be left in its natural state to flow down the Ventura River to the Pacific Ocean. Accordingly, such regulatory restrictions on plaintiff’s use of its water license that requires plaintiff to leave water in the Ventura River must be analyzed as a regulatory takings claim.<sup>14</sup>

### 3. Tulare Lake Is Distinguishable From the Facts of This Case

Plaintiff contends in the first sentence of its opposition brief that “Defendant asks this Court to repudiate its decision in Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313, 319 (2001), which held that the government’s physical retention and diversion of plaintiffs’ State Water Project water was a per se taking. . .” Pl.’s Br. at 1. Although for the reasons discussed in defendant’s opening brief, defendant disagrees with the holding in Tulare Lake, defendant has not asked the Court to “repudiate its decision,” because the Tulare Lake

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<sup>14</sup> See Forest Properties, Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999); Tuthill Ranch, 381 F.3d at 1137; Stearns Co., Ltd. v. United States, 396 F.3d 1354, 1357 (Fed. Cir. 2005); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1354 (Fed. Cir. 2002); Seiber, 364 F.3d at 1366-67.

decision is not applicable here.<sup>15f</sup> In Tulare Lake, this Court focused on the fact that plaintiffs possessed contract rights to use a specified quantity of water. As this Court has already held, plaintiff does not have such rights here. See Casitas, 72 Fed. Cl. at 755. Moreover, the Tulare Lake case is also distinguishable from the facts of this case because there has been no “physical retention and diversion of plaintiff[’s] water. . .” Pl.’s Br. at 1. In Tulare Lake, the Department of Water Resources operated the State Water Project; here, plaintiff has operated the Ventura River Project since 1959, and Reclamation does not have a water license under state law which entitles it to divert water from the Ventura River.

4. Even if Reclamation “Controls” the Operation of the Project, This Case Must Still be Analyzed as a Regulatory Taking

Plaintiff contends that “[c]ritical to Defendant’s argument is the contested factual assertion that Casitas establishes the operational criteria for the Project, for if Reclamation controls the release of water over Robles dam, this case is squarely within the rule of *Dugan v. Rank*, 372 U.S. 609 (1963), and *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), in which Reclamation’s control of water through its dams and reservoirs was found to be a taking of plaintiffs’ water.” Pl.’s Br. at 11.

First, as explained supra, plaintiff’s senior engineer is responsible for deciding when

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<sup>15f</sup> None of the cases that plaintiff contends “endors[ed]” or “approv[ed]” the holding in Tulare Lake, provide any analysis of the decision. Instead, the cases cited by plaintiff merely repeat the holding and then distinguish the facts of the case before it. See Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003); Hansen v. United States, 65 Fed. Cl. 76 (2005). Moreover, the other two cases cited by plaintiff are even further off the mark as plaintiff attempts to use *dissenting* opinions to bolster its weak argument. See Rio Grande Sivilery Mirnow v. Keys, 333 F.3d 1109, 1143 n.2 (10<sup>th</sup> Cir. 2003); Public Utility Dist. No. 1 of Pend Oreille County v. State Dept. of Ecology, 51 P.3d 744, 773 (Wash. 2002). Finally, the two cases that have discussed Tulare Lake in any detail have disagreed with its holding finding a *per se* physical taking. See Klamath Irrigation Dist., 67 Fed. Cl. at 538; Allegretti, 138 Cal. App. 4<sup>th</sup> at 1275.

plaintiff diverts water into its storage facility, not the United States. However, since 2003, Mr. Wickstrum makes that determination by consulting the BO to determine how much water to leave in the Ventura River and then diverting any additional flows into its storage facility. This allows plaintiff to maintain incidental take coverage for its operation of the Project, and to comply with federal law concerning the illegal take of SoCal Steelhead.

If the Court somehow finds that Reclamation's sovereign actions in which it allegedly "ordered" plaintiff to comply with the BO somehow means that Reclamation "controls" the operation of the Project, defendant's motion for partial summary judgment must still be granted because this case does not fit under the holdings of Dugan and Gerlach.<sup>16</sup> Those cases involve the physical appropriation of water from Person A (downstream water users) to Person B (water users in less water rich areas), compared to a restriction on the ability to use water stemming from a biological opinion, which is the factual situation here. For example, Dugan and Gerlach are more analogous to the situation that confronted Reclamation and plaintiff in the 1950s when Robles Diversion Dam was being constructed.

In Dugan, the Court noted that "[f]rom the very beginning it was recognized that the operation of Friant Dam and its facilities would entail a taking of water rights below the dam. Indeed, it was obvious from the expressed purpose of the construction of the dam - to store and divert to other areas the waters of the San Joaquin - and the intention of the Government to purchase water rights along the river." 372 U.S. at 623. Here, however, it was plaintiff, not

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<sup>16</sup> It should also be noted that Dugan and Gehrlach, as well as International Paper Co. v. United States, 282 U.S. 399 (1931), were decided in the early to mid-1900s, prior to all currently-applied Supreme Court precedent that sets forth the accepted principles of takings jurisprudence concerning the distinctions between physical and regulatory takings. See, e.g., Tahoe-Sierra, 535 U.S. at 321-325; Loretto, 458 U.S. at 426-434.

Reclamation, which obtained the permits to operate the Ventura River Project and which would operate the Project in such a way as to take from Person A (downstream water users) to give to Person B (plaintiff's customers). Indeed, plaintiff's permit from the State Water Resources Control Board specifically stated that "[t]he diversion and/or storage of water under this license shall not result in unreasonable interference with prior rights to the use of underground water." Def. Ex. 4. As a result, plaintiff entered into the 1959 criteria with the Ventura County Department of Public Works and agreed to let 20 c.f.s. of water continue to flow down the Ventura River instead of diverting it into its storage facility, so as to not interfere with those prior water right holders.<sup>17</sup> See Def.'s Ex. 6.

In sum, even if the Court finds that Reclamation "controls" the operation of the Project, this case is distinguishable from Dugan and Gehrlach, since Reclamation has never appropriated water from the Ventura River in order to enrich another person. Reclamation could not do this under California law since it does not hold a water license from the State Water Resources Control Board, and therefore, cannot divert water from the Ventura River. At most, plaintiff may be able to argue that Reclamation is "controlling" the operation of the Project by requiring

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<sup>17</sup> The other cases cited by plaintiff on pages 28-29 are inapposite. International Paper, similar to Dugan and Gehrlach, involves the appropriation of water by the government from Person A (International Paper Company) to Person B (Niagara Falls Power Company), so that the government could requisition the entire output of electrical power produced by Person B. Hage v. United States, 35 Fed. Cl. 147, 172 (1996), and Store Safe Redlands Associates v. United States, 35 Fed. Cl. 726, 730 (1996), are two interlocutory decisions by Judge Smith involving the alleged taking of state-based water rights on federal land arising from grazing restrictions. Neither decision applies a *per se* takings test to the alleged taking of state-based water rights. See Goodrich v. United States, 63 Fed. Cl. 477, 480 (2005) (finding that plaintiff's allegations regarding a taking of state-based water rights based on the implementation of Forest Service regulations to plaintiff's property interest regulatory in nature), aff'd 434 F.3d 1329 (Fed. Cir. 2006). Finally, Ball v. United States, 1 Cl. Ct. 180, 183 (1982), also does not stand for the proposition that alleged takings of water rights must be analyzed as *per se* takings.

plaintiff to leave water in the Ventura River, as provided for in the BO, instead of diverting it into plaintiff's storage facility. However, such restrictions on use, as opposed to physical appropriations of property, must be analyzed as regulatory takings.

Accordingly, only Allegretti provides the most analogous situation to the facts of this case where instead of a physical appropriation by the government, the government simply limits the amount of water plaintiff can use. Since such regulatory restrictions on use must be analyzed as regulatory takings, defendant's motion for summary judgment must be granted.

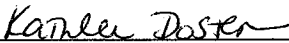
### CONCLUSION

For the foregoing reasons, defendant respectfully requests that its motion for partial summary judgment on the nature of the taking alleged by plaintiff be granted in its favor, with the Court holding that plaintiff's takings claim be analyzed as a regulatory takings claim, and not as a physical takings claim.

Dated: February 6, 2007

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**CERTIFICATE OF SERVICE**

I certify that the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT and APPENDIX OF EXHIBITS** was served upon Plaintiff this 6<sup>th</sup> day of February, 2007, by first class mail, to Plaintiff's counsel of record at the following address:

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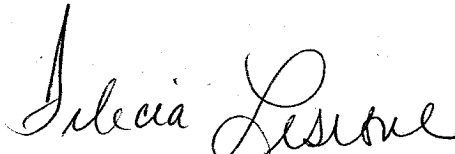
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