Appeal Nos. 18-1323, -1325

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LONNY E. BALEY, et al., JOHN ANDERSON FARMS, INC., et al.,
Plaintiffs - Appellants
v.
UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,
Defendants - Appellees.

On Appeal from the United States Court of Federal Claims
The Honorable Marian Blank Horn
in Case No. 1:01-cv-00591-MBH

CORRECTED *AMICUS* BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Baley **v.** United States

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CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

John D. Echeverria

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Natural Resources Defense Council	none	none

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

none

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

none

12/4/2018
Date

/s/ John D. Echeverria
Signature of counsel

Please Note: All questions must be answered

John D. Echeverria
Printed name of counsel

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Articles

STATEMENT OF IDENTIFICATION

Amicus Natural Resources Defense Council ("NRDC") is a not-for-profit conservation organization with more than 385,000 members. Through its scientific, litigation, and other programs, NRDC has long been active in efforts to promote sound water management and to protect endangered species. NRDC has participated, as a party or as an *amicus,* in many cases addressing water management, including cases involving application of the Takings Clause to water interests. NRDC was involved as an *amicus* in this case before the U.S. Court of Federal Claims. NRDC filed a motion seeking leave to file this brief.[1]

SUMMARY OF ARGUMENT

NRDC files this brief to assist the Court in resolving a single issue whether appellants were entitled to invoke a *per se* physical takings rule or whether instead their takings claims must be analyzed using the regulatory takings framework. The Supreme Court and this Court have recognized a clear, fundamental distinction between regulatory takings claims and *per se* physical takings claims, and also recognized that *per se* physical takings claims fall into two

[1] The undersigned counsel for NRDC is the sole author of this brief and no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no other a person — other than NRDC, its members, and the undersigned counsel — contributed money that was intended to fund preparing or submitting this brief.

separate categories, occupations and appropriations. The type of regulatory restriction on the use of water at issue in this case cannot be a physical occupation of an interest in water because a water right does not confer any exclusive right to occupy some physical space from which others can be physically excluded or which the government can physically invade. In addition, the regulatory restriction on the use of water in this case is not an appropriation because it does not effect a transfer of ownership of the water interest to the government or some third party. Because appellants failed to establish that the government either occupied or appropriated their private property, the ruling of the U.S. Court of Federal Claims that this case should be governed by a *per se* physical takings test should be rejected.

This Court's decision in *Casitas Municipal Water District v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) ("*Casitas I*"), does not support application of a *per se* takings test in this case. That fact-specific decision rested on two factual premises, namely that the dam operator was required to divert water into a fish ladder after it had already diverted water from the river into a private irrigation canal, and that the dam operator actually owned the water (the physical molecules themselves) in the private irrigation canal. Because neither of these premises applies in this very different case, *Casitas I* is not controlling for purposes of this appeal.

Finally, NRDC urges the Court to follow the venerable precedent set in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), holding that a takings claim based on a regulatory restriction on the use of water should be analyzed using the regulatory takings framework. *Hudson County* is the most directly relevant, authoritative precedent on the issue of what takings test should apply in this case, and compels reversal of the claims court's reliance on a *per se* physical takings test.

ARGUMENT

I. APPELLANTS FAILED TO ESTABLISH A PHYSICAL TAKING BY SHOWING THAT THE GOVERNMENT EITHER OCCUPIED OR APPROPRIATED THEIR PRIVATE PROPERTY.

The law of takings includes a significant, well-established distinction between physical takings claims and regulatory takings claims. This case clearly falls on the regulatory takings side of this divide, and therefore the U.S. Court of Federal Claims erred in applying a *per se* physical takings test.

A. The Distinctions Between Physical Takings and Regulatory Takings.

"Decisions of the Supreme Court have drawn a clear line between physical and regulatory takings." *CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1246 (Fed. Cir. 2010); *see also* *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302, 323 (2002) (referring to the "fundamental distinction" between physical takings claims and regulatory takings claims).

A "physical takings" claim arises from either "direct government appropriation or physical invasion of private property." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 537 (2005). By contrast, a regulatory takings claim arises from a government restriction "prohibit[ing] particular contemplated uses of property." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978).

Different rules apply to physical takings claims and to regulatory takings claims. "[P]hysical takings constitute *per se* takings and impose a 'categorical duty' on the government to compensate the owner." *CRV Enterprises,* 626 F3d at 1246. Thus, if the government has physically taken private property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the Supreme Court has] required compensation." *Id*., quoting *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). The Supreme Court has justified the *per se* rule for physical takings on the grounds that they are "relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Tahoe-Sierra*, 535 U.S. at 324.

By contrast, regulatory takings claims are analyzed using a more complex framework that typically focuses on (1) the economic impact of the government action, (2) the degree of interference with the claimant's investment-backed expectations, and (3) the character of the restriction. *Penn Central*, 438 U.S. at 124. In the rare case where a regulation strips a property of "any economic use,"

see Tahoe-Sierra, 535 U.S. at 331, a finding of a regulatory taking will almost invariably follow. In either case, to measure the economic impact of a regulation in a regulatory takings case, the Court has "declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation." *Murr v. Wiscoinsin*,137 S.Ct. 1933, 1944 (2017). The Supreme Court has justified its regulatory takings standards by observing that

> regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.

Id.; *see also Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

Because the *per se* physical takings test is so potent, and requires a court to ignore the factual nuances of the individual case, the Court has emphasized that it must be applied sparingly. In *Tahoe-Sierra*, the Court instructed that "[t]he 'temptation to adopt what amount to per se rules . . . must be resisted.'" 535 U.S. at 342, quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring); s*ee also Loretto v. Teleprompter* Manhattan *CATV* Corp., 458 U.S. 419, 441 (1982) ("Our holding today [establishing a *per se* rule for permanent physical occupations] is *very narrow*.") (emphasis added); *Yee v. Escondido*, 503 U.S. 519, 538 (1992) (same). In this case, the claims court self-evidently did not

abide by the Supreme Court's injunction to avoid the temptation to adopt *per se* rules.

Within the general category of "physical takings," the Supreme Court has identified two separate types of physical takings: appropriations and occupations. See *Lingle*, 544 U.S. at 537 ("A "physical taking" claim can arise from "a direct government appropriation ***or*** physical invasion of private property.") (emphasis added); *see also Yee v. Escondido*, 503 U.S. at 522 (same); *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1339 (Fed. Cir. 2018) (same).

An appropriation occurs when government seizes private property and makes itself the new owner of the property, either *de facto* or by legal edict. Thus, *in Tahoe-Sierra*, 535 U.S. at 324 n. 19, the Supreme Court explained that an appropriation "gives the government possession of the property." In *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2428 (2015), the Court recently concluded that a Department of Agriculture raisin marketing order resulted in an appropriation, observing that "[a]ctual raisins are transferred from growers to the Government," and the government "disposes of what become its raisins as it wishes." See also *United States v. General Motors Corp*. 3223 U.S. 373 (1945) (treating a government takeover of a leasehold as an appropriation). An appropriation also occurs when the government seizes private property and makes a third party the new owner of the property. *See Brown v. Legal Foundation of*

Washington, 538 U.S. 1406 (2013) (treating a government-mandated transfer of money from lawyer trust accounts to a foundation as a *per se* taking).

On the other hand, a *per se* taking based on physical occupation occurs when the government compels a private property owner to suffer the permanent unwanted physical presence of things or people. A classic *per se* physical occupation occurs when the government permanently floods private real property by impounding water behind a dam. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166 (1871). In *Loretto*, the Supreme Court ruled that a *per se* taking occurred when a New York statute allowed a third party to install cable television wire and equipment without the permission of the building owner. *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) (stating there was "no doubt" there would be a *per se* physical-occupation-type taking if the government had directly required beachfront property owners "to make an easement across their beachfront available to the public").

B. There Was Neither an Occupation Nor an Appropriation in this Case.

The U.S. Court of Federal Claims erred in ruling that a *per se* physical takings test, rather than a regulatory takings analysis, should apply in this case. She acknowledged that this case presents a claim that "the government has taken an action that had the effect of preventing plaintiffs from enjoying the right to use water provided by an irrigation project." *Klamath Irrigation District v. United*

States, 129 Fed Cl. 722, 733 (2016). On its face, this accurate description of the burden placed on plaintiffs' asserted property interests in water confirms that this case involves a regulatory restriction on property use warranting application of regulatory takings analysis: a government action that has the effect of "preventing" the "use" of private property represents, at most, a potential regulatory taking.

Moreover, this case plainly does not fit into either of the established *per se* physical takings categories discussed above. First, there was no *physical occupation*. Appellants and their *amici* acknowledge that the water rights at issue in this case consist solely of usufructuary interests in water. Unlike an interest in land, a water right does not confer any rights to some physical space, such as a plot of land, from which others can be excluded or which the government can physically occupy or invade. *See* John Leshy, A Conversation About Takings and Water Rights, 83 *Tex. L. Rev.* 1985, 2009 -2016 (2005). It is simply an oxymoron to call a regulatory restriction on the exercise of a usufructuary interest in water a physical occupation.

Nor does this case involve an *appropriation* of water. A usufructuary interest in water is certainly susceptible to being appropriated, as Supreme Court precedent confirms. S*ee, e g.*, *Dugan v. Rank*, 372 U.S. 609 (1963). But *this case* does not involve an appropriation because the government did not seize an interest in water for its own proprietary use or for use by some third party. Instead, the

government simply imposed a restriction on the use of water to prevent harm to endangered species. If every restriction on the use of water or any other resource were called an appropriation, the "fundamental" distinction between regulatory takings and physical takings claims would be erased. *Tahoe-Sierra*, 535 U.S. at 323.

The claims court offered several theories for why a *per se* physical takings analysis should apply in this case. *See Klamath Irrigation*, 129 Fed Cl. at 733. Upon analysis, none of these theories supports application of a *per se* physical takings test on these facts.

First, the claims court asserted that enforcement of the Endangered Species Act resulted in a *per se* physical taking because the restrictions protecting endangered species and their habitats serve a public purpose. *See id*. at 733 ("'there is little doubt that the preservation of the habit of an endangered species is for government and third party use—the public – which serves a public purpose'"), quoting *Casitas I*, 543 F.3d at 1291; *see also id*. ("If [the water] was not diverted for a public use, namely protection of the endangered fish, what use was it diverted for?").

This assertion reflects a serious misunderstanding of the function of the public purpose requirement in takings analysis. Every type of takings claim, whether a physical takings claim or a regulatory takings claim, presupposes that

the government has acted for a public purpose. Accordingly, the test for deciding whether to apply a physical takings test as opposed to regulatory takings analysis cannot be whether the government has acted for a public purpose. The Takings Clause provides: "[N]or shall private property be taken *for public use*, without just compensation." As the Supreme Court explained in *Kelo v. City of New London*, 545 U.S. 469, 480 (2005), "public use" has been defined to mean "public purpose.' Because the Takings Clause only supports a claim for just compensation based on a taking "for public use," *every* inverse condemnation claim is necessarily based on the premise that the government action at issue serves a public purpose. *See St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018) ("the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose"); quoting *Lingle*, 544 U.S. at 543.

The claims court's reasoning is also refuted by precedent of this Court recognizing that takings claims based on regulations under the Endangered Species Act are properly analyzed as potential regulatory takings, not physical takings. *See Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed.Cir. 2002). These cases obviously involved regulation for a legitimate public purpose — protection of endangered wildlife — but that fact alone did not convert the regulations into *per se* physical takings.

Second, the claims court erred in concluding that a *per se* physical takings analysis was appropriate because water flow in the Klamath basin is controlled by physical dams and diversion structures. More specifically, to support application of a physical takings test, the court pointed to the fact that the Bureau of Reclamation, acting under the Endangered Species Act, directed several irrigation districts (who are not parties to this lawsuit), to not open diversion structures so as to maintain water levels in Upper Klamath Lake and stream flow levels in the Klamath River below the lake. This reasoning too was flawed.

Most fundamentally, the simple fact a government regulatory mandate restricting use of property is implemented through some physical instrumentality does not mean that the government has engaged in an appropriation or occupation as those terms have been defined by the Supreme Court, as discussed above. The use of a physical instrumentality to effect a restriction on the use of property does not make the government (or some third party) the owner of the property, nor does it mean that the government has occupied some physical space over which the owner has a right to physically exclude others.

Moreover, this Court has specifically rejected the argument that a potential regulatory taking is converted into a *per se* physical taking if the restriction on use is implemented through a physical instrumentality. In *CRV Enterprises, Inc. v. United States*, *supra*, this Court declared that "the mere fact that the government's

regulatory action included some sort of physical instrument does not change the fact that the government activity merely restricted plaintiff's use of its property." 626 F.3d at 1248. In that case, the government placed a log boom across a waterway, blocking a landowner's ability to exercise its riparian rights. Despite the fact that the log boom was obviously a physical barrier, the Court held that a regulatory takings analysis applied because the effect of the government action was to restrict use of the property. Over a century ago, in *Norther. Transp. Co. City of Chicago*, 88 U.S. 635 (1878), the Supreme Court rejected the argument that a city's physical construction activity constituted a taking because it blocked access to the plaintiff's property. Tellingly, in the landmark *Loretto* case, the Court described the holding in *Northern Transportation* as being "that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the appellants were thereby denied access to their premises, *because the obstruction only impaired the use of plaintiffs' property*." *Loretto*, 458 U.S. at 428 (emphasis added).

The claims court's analysis also was mistaken because a regulatory (not a physical) takings analysis applies regardless of whether a regulation *affirmatively* requires an owner to use her property in a particular way or imposes a purely *negative* constraint on her use of the property. *See*, 458 U.S. at 440 (physical takings analysis does not apply to "the State's power to require landlords to

comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers"); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (ruling that legislation compelling an railroad to provide rail service did not result in a taking); *Miller v. Schoene*, 276 U.S. 272 (1928) (order requiring landowner to destroy cedar trees to protect other trees not a taking). If, as these cases demonstrate, a physical taking does not arise when the government affirmatively compels an owner to physically use her property in a particular way, it follows *a fortiori* that a physical takings analysis does not apply where, as in this case, the government directed a *third party* on how to manage its property, which in turn imposed a restriction on takings claimants' ability to use their property.

The claims court's erroneous physical takings theory also has no logical stopping point, demonstrating its unworkability. Any regulatory restriction on the use of water involves operation of some physical object, such as a head gate or a pump. As a result, the claims court's theory would convert *every* regulatory restriction on water use into a taking, no matter how modest the restriction and no matter how brief, contrary to the Supreme Court's admonitions in *Tahoe-Sierra*. 535 U.S. at 324.

Third, the claims court erred in asserting that this regulatory restriction on water use should be treated as a physical taking because the "government prevented water that would have, under the *status quo ante*, flowed into the

Klamath project and to the plaintiffs." *Klamath*, 129 Fed. Cl. at 734. A regulation is not a physical taking simply because it bars or restricts an *ongoing* use of property. In *Penn Central*, the Court explained that "'taking' challenges have . . . been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted . . . ." 438 U.S. at 126, citing numerous cases including *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (restricting continuation of existing sand and gravel operation); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (ordering closure of gold mine). *See also Yee*, 503 U.S. 519 (new mobile home rent control law applied to existing mobile home park not a physical taking). Regulatory takings analysis plainly applies to restrictions on both future uses and ongoing uses.

Finally, the claims court erred by relying on a trilogy of Supreme Court cases to support her *per se* physical takings theory. *See International Paper Co. v. United States*, 282 U.S. 399 (1931); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Dugan v. Rank*, 372 U.S. 609 (1963). These cases plainly fit into the category of appropriation-type physical takings, but they did not support the theory that an appropriation occurred here.

International Paper involved a takings claim brought by a paper company that held a right to use water flowing in a canal. The federal government

requisitioned the flow of the canal for the production of electricity to support mobilization for World War I, transferring the right to use the water in the canal from the paper company to an electric power company. This government-mandated transfer of a property interest from person A to person B was a classic appropriation resulting in a *per se* taking.

Similarly, in *Dugan*, the Bureau of Reclamation constructed a dam impeding a major portion of the flow of the San Joaquin River. The dam deprived downstream landowners of their riparian water rights, and the Bureau sold the water impounded behind the dam to new water users. Again, the Court ruled that the government had appropriated the plaintiffs' right to the use of water by transferring it to third parties. *See also Gerlach Live Stock Co*., 339 U.S. 725 (1950) (ruling that the government's diversion and storage of water for sale to new water customers constituted an appropriation of water rights belonging to riparian landowners).

II. THE COURT'S 2008 *CASITAS* DECISION DOES NOT RESOLVE WHAT TAKINGS TEST APPLIES IN THIS CASE.

The claims court ruled that enforcement of the Endangered Species Act resulted in a *per se* physical taking "according to the standards set forth" in *Casitas I. Klamath Irrigation*, 129 Fed. Cl. at 734. But that decision does *not* support

application of a *per se* physical takings test in these circumstances, and in fact suggests that a *per se* test should *not* apply in this case. Indeed, the claims court acknowledged, in a significant understatement, that enforcement of the ESA "may not have amounted to as obvious a physical diversion" in this case as in *Casitas I*. *Id*. To explain why *Casitas I* does not govern this case, it is necessary to first review recent takings cases arising from regulation of water interests in the claims court and the Federal Circuit.

1. In 2001, in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed Cl. 313, the claims court (Wiese, J.), ruled that restrictions on the exercise of water rights mandated by the Endangered Species Act resulted in a *per se* physical taking. The litigation arose from measures developed by federal fisheries agencies to protect endangered salmon and smelt in the Sacramento-San Joaquin Delta in northern California. The measures included restrictions on the operation of large government-owned water pumps, which led to curtailed water deliveries to California's Central Valley, which in turn restricted plaintiffs' ability to use their water rights. Ignoring the "fundamental distinction" the Supreme Court has drawn between regulatory takings and physical takings (*see* Section I, *supra*), the claims court ruled that "by preventing plaintiffs from using the water to which they would otherwise have been entitled, . . . [the government] effected a physical taking." *Id.*

at 318. Understandably, the ruling in *Tulare Lake* has been severely criticized. *See Casitas I*, 543 F.3d at 1295 n. 16 (summarizing various criticisms).

2. Six years later, in *Casitas Municipal Water District v. United States*, 76 Fed Cl. 100, 101 (2007), Judge Wiese reversed himself and ruled that a takings claim based on "restrictions on stream-flow diversions" required by the Endangered Species Act called for application of a regulatory takings analysis, not a *per se* physical takings test. *Casitas* arose from a conflict between a water user and the public interest in protecting endangered fish, as in *Tulare Lake* and in this case; more specifically, the *Casitas* case involved regulation of a water project adversely affecting steelhead trout in the Ventura River in southern California. Judge Wiese justified his repudiation of his earlier *Tulare Lake* ruling by pointing to the Supreme Court's intervening decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which he correctly read as affirming the strict dichotomy between physical and regulatory takings claims. *See* 76 Fed. Cl. at 106 (*Tahoe-Sierra* "compels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property.").

3. On appeal, this Court reversed, concluding that the plaintiff had presented a *per se* physical takings claim, not a regulatory takings claim. *See Casitas I*, 543

F.3d 1276. Importantly, the Federal Circuit did not directly reject Judge Wiese's reading of the governing law, but instead focused on certain facts in the case that Judge Wiese had not highlighted. Judge Wiese had understood the *Casitas* case to involve a straightforward restriction on water use, as in *Tulare Lake* (and in this case). Instead, the *Casitas I* panel focused on the fact that the government had compelled the plaintiff, after having diverted water out of the Ventura River into its private irrigation canal, to "re-divert" some of that water into a fish ladder designed for upstream and downstream fish migration. *Id.* at 1294. In other words, contrary to Judge Wiese's view of the case, the *Casitas I* panel said, the government "did not *just* require that water be left in the river." *Id*. at 1295 (emphasis added). Based on its different perspective on what facts were most relevant to the disposition of the case, the *Casitas I* panel ruled that the plaintiff stated a *per se* physical takings claim.

Consistent with this narrow, fact-specific ruling, the *Casitas I* panel stressed that it was not addressing how the Takings Clause should apply to a government regulation that only required that water be left in a stream:

> We note that prior to *Tahoe-Sierra*, the Court of Federal Claims decided *Tulare* in favor of the plaintiffs holding that 'the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, [has] .. . . effected a physical taking.' *Tulare*, 49 Fed.Cl. at 318. . . . *We do not opine on whether Tulare was rightly decided. . . . Tulare* has been criticized for [, among other things,] focusing on the results of the government action rather than on the character of the government

> action . . . . In the instant case, the government . . . did not merely require water to be left in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal and towards the fish ladder.

543 F.3d at 1295 n. 16 (emphasis added). Just as the *Casitas I* panel declined to address whether *Tulare Lake* was correctly decided, the *Casitas I* panel (at least implicitly) also did not address whether Judge Wiese's ruling in *Casitas* would have been correct if his understanding that the case involved only a restriction on water use in order to leave more water in the stream had been accurate.

The *Casitas I* panel also stressed that its ruling was based on a concession, made by the government for the purpose of its summary judgment motion filed in the trial court, that Casitas actually owned the water in the irrigation canal it was required to divert through the fish ladder. The Federal Circuit understood this concession to mean that Casitas had a possessory interest in the water molecules themselves. As the Court explained, "the government has conceded that Casitas has a valid property right in the water in question." *Id*. at 1288. Or, as the Court put it in its 2013 *Casitas* decision, "Casitas had a property right in the water diverted from the Ventura River." *Casitas v. United States*, 708 F.3d 1340, 1346 (Fed. Cir. 2013) (*Casitas II*); *see also id.* at 1352–53 (explaining Casitas's argument that the "water diverted into the canal has become the property of Casitas").

4. Judge Mayer filed a dissent, observing that, "for this to be a physical taking requires expanding the definition to the point of erasing the line between physical and regulatory takings." *Casitas I*, 543 F.3d at 1300. The full Court denied the United States' petition for rehearing and rehearing *en banc*, but four members of the Court (in addition to Judge Mayer) dissented from the denial of rehearing. *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329, 1330, 1333-36 (Fed. Cir. 2009). Judge Gajarsa, in dissent from the denial of rehearing, again made the argument that "the panel majority eliminates the fine distinction and balance that has been established by the Supreme Court between physical and regulatory takings." 556 F.3d at 1334.

5. After this judicial debate, the claims court, following a full trial on remand, dismissed Casitas's takings claim on the ground that it was not ripe because plaintiff made no showing that the ESA restrictions resulted in any impairment of plaintiff's right to "beneficial use" of water. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443 (2011). This Court subsequently affirmed dismissal of the case on that basis. *See Casitas II*, 708 F.3d 1340 (Fed. Cir. 2013).

* * *

This history supports two points. First, the *Casitas I* decision offers a weak foundation for the novel, expansive *per se* physical takings theory advanced by the claims court in the present case. The *Casitas I* ruling is obviously controversial

and produced a sharp split of opinion on this Court. In addition, we respectfully submit that the *Casitas I* panel erred in concluding that the ESA worked a physical taking because it required Casitas to "actively" divert water into the fish ladder. As explained above, the Supreme Court has repeatedly said that regulatory (not physical) takings analysis applies to a regulation of property use regardless of whether the regulation *affirmatively* requires the owner to manage her property in a particular way or imposes a negative constraint on use of the property. In addition, as just discussed, the Court's analysis was based on a misunderstanding that Casitas actually owned the water (the molecules themselves) that it was required to pass through the fish ladder. This premise conflicts with the principle of Western law that the public owns the water itself, and a water right holder possesses only a usufructuary interest in the amount of water it can actually beneficially use, a principle the Court subsequently affirmed in *Casitas II*. 708 F.3d at 1353.

More importantly for present purposes, and accepting (as we must for the purposes of this appeal) that *Casitas I* represents binding precedent, *Casitas I* established only a narrow, fact-specific *per se* physical takings rule that does not govern this very different case. As discussed above, the *Casitas I* panel repeatedly distinguished the case before it from the situation where a government regulation requires "that water be left in the river." 543 F.3d at 1291, 1295 By stating that it

was not deciding whether *Tulare Lake* was decided correctly, the Court declined to say whether the *per se* physical takings rule applied in *Casitas I* does or should apply to purely negative restrictions on the exercise of water rights. The *Casitas I* decision simply leaves that issue to the side. Finally, the *Casitas I* panel's adoption of a *per se* takings test depended heavily on the premise that Casitas actually owned the water after it had been diverted into the irrigation canal. In this case, the plaintiffs did not divert the water at issue into any private canal before it was subject to regulation and there is no claim, or any basis for such a claim, that they actually owned the physical water itself.

The claims court thus erred in concluding that this case could properly be resolved by mechanically applying the Court's *Casitas I* decision. Enforcement of the Endangered Species Act in this case simply required that water be left in the Klamath River and Upper Klamath Lake and thereby restricted appellants' use of their water rights. Such restrictions are distinguishable from a regulation requiring a water user to "actively" manage and "re-divert" water that it purportedly actually owns in its own private canal, as this Court held in *Casitas I*. Thus, *Casitas I* does not govern this case.

III. THE CLAIMS COURT ERRED IN READING *HUDSON COUNTY* TO SUPPORT A *PER SE* PHYSICAL TAKINGS TEST

The claims court also erred by not following the Supreme Court's decision in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the most directly relevant, authoritative precedent on the issue of what takings test should apply in this case. *Hudson County* rejected a takings challenge to a restriction on the use of water based on a regulatory takings analysis and mandates application of a regulatory takings analysis in this case as well.

Hudson County involved a lawsuit by the New Jersey Attorney General to enforce a state statute banning the transport of the waters of the state "into any other state, for use therein." *Id*. at 353. The defendant water company, holder of water rights in the Passaic River, proposed to transport water to customers in Staten Island, New York. The company defended against the Attorney General's suit by asserting that enforcement of the statute would result in a taking. The New Jersey courts rejected the takings argument, and the U.S. Supreme Court affirmed in an opinion written by Justice Oliver Wendell Holmes, Jr.

The claims court took the position that *Hudson County* did not resolve what type of takings analysis should apply in the case because *Hudson County* was decided based on the threshold issue of whether defendant held a protected "property" interest.

> Justice Holmes' conclusion that the law did not effect a taking was . . . premised on his understanding that the [defendant], as a holder of riparian water rights, never actually held the right allegedly taken . . . . As such, *Hudson County* concerns the extent of riparian water rights, rather than

> whether the government's actions depriving parties of such water rights should be analyzed as a physical or regulatory taking, and is, thus, inapplicable . . . .

129 Fed. Cl. at 736.

The claims court's reading of *Hudson County* is mistaken. The New Jersey Court of Errors and Appeals *did* reject the takings argument on the narrow, threshold ground described by the claims court. *See McCarter v. Hudson County Water Co*., 70 N.J. Eq. 695, 708 (1906). However, the U.S. Supreme Court explicitly did *not* rest its decision on the limited nature of defendant's water interest. While Justice Holmes's opinion shows that he clearly understood the reasoning of the New Jersey court, *see* 209 U.S. at 354, Justice Holmes just as clearly pronounced that the U.S. Supreme Court would decide the case on a different ground: "We will not say that the considerations [identified by the New Jersey court] do not warrant the conclusion reached," he wrote, "*[b]ut we prefer* to put the authority . . . upon *a broader ground* than that which was emphasized below . . . ." *Hudson County,* 209 U.S. at 355 (emphases added).

Justice Holmes then proceeded to explain that resolution of the "takings" question called for balancing private property interests against the public purposes the State sought to advance through its exercise of the police power.

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become

> strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.

Id. at 355. Using an example that is instantly recognizable as a regulatory takings case, he continued:

> For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

Id. While Justice Holmes' opinion does not reflect the vocabulary of modern regulatory takings cases, the decision is based on the same balancing approach that Justice Holmes applied in the landmark case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). To use the terminology of *Mahon*, the question Justice Holmes addressed in *Hudson County* was whether the New Jersey statute went "too far." The comparison of the statute at issue in that case with a regulation limiting the height of buildings confirms that Holmes was applying a regulatory takings analysis.

Finally, the Court, after determining to apply regulatory takings analysis, concluded that the New Jersey statute did not result in a taking:

> [I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state

> to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.

Id. at 356. [2]

The claims court accurately quotes Justice Holmes as stating, "we agree with the New Jersey courts, and we think it is quite beyond any rational view of view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows." *Id*. But this *dictum* from the Court's opinion does not alter the fact that the Court actually resolved the case on the "broader ground" that the statute did not result in a taking, irrespective of the nature and extent of the property interest at stake. *See also id*. ("Whether it be said that [the public] interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what would otherwise be private rights of property, or that, apart from statute, those rights do not go to the heights of what the defendant seek to do, the result is

2 Tellingly, in subsequent cases, the U.S. Supreme Court has repeatedly characterized *Hudson County* as involving a "takings" question, not a "property" question. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 128 (1978); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 946 (1982).

the same.").[3] *Hudson County* plainly supports the position of the United States that the appellants' takings claim should be viewed as a regulatory takings claim, not as a *per se* physical takings claim.

It has been suggested that *Hudson County* cannot be a regulatory takings precedent because the Supreme Court did not embrace the concept of regulatory takings until it issued its decision in *Mahon* in 1922. *See* Josh Patashnik, Physical Takings, Regulatory Takings, and Water Rights, 51 *Santa Clara L. Rev.* 365, 370 (2011). But just because the Supreme Court did not *uphold* a regulatory takings claim until 1922 does not mean that the Court did not recognize, prior to 1922, that a regulatory restriction *can* result in a taking. In fact, the Court did recognize prior to *Mahon* that a regulation can result in a taking, and *Hudson County* is just one of several pre-*Mahon* decisions proving the point. *See*, *e.g.*, *Block v. Hirsch*, 256 U.S. 135 (1921); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911). In particular respect to Justice Holmes (the author or both *Mahon* and *Hudson County*), William

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3 In *Casitas I*, the Court interpreted *Hudson County* as resting on the defendant's lack of a protected property interest. But the panel's justification for that conclusion was the statement in *Hudson County* that, "the right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line." 543 F.3d at 1295, quoting *Hudson County*, 209 U.S. at 357. That statement appears in the portion of the *Hudson County* opinion addressing the Commerce Clause issue, *not* the takings issue, and thus is beside the point.

Treanor, Dean of Georgetown University Law Center, has traced Holmes's embrace of the concept of regulatory takings back to his period of service on the Massachusetts Supreme Judicial Court. *See* Jam for Justice Holmes: Reassessing the Significance of *Mahon,* 86 *Geo. L. J.* 813, 840-55 (1998).

In sum, it is plainly incorrect to assert that *Hudson County* cannot be a regulatory takings case because the regulatory takings doctrine did not exist until 1922, and, understood in historical context, *Hudson County* clearly *is* a regulatory takings case. Because the Supreme Court applied a regulatory takings analysis in *Hudson County* to a claim based on a restriction on the use of water from a natural stream, so too a regulatory analysis should apply in this case arising from a restriction of the use of water from the Klamath River.

CONCLUSION

For the foregoing reasons, the Court should hold that the claims court erred in ruling that the regulatory restriction on water use at issue in this case should be analyzed using a *per se* physical taking test.

Respectfully submitted,

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United States Court of Appeals

For the Federal Circuit

LONNY E. BALEY, et al., JOHN ANDERSON FARMS, INC., et al.,

v.

UNITED STATES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,

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I, John D. Echeverria, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

On **November 19, 2018**, I electronically filed the foregoing BRIEF OF AMICUS CURIAE with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following principal counsel for the other parties:

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