Casitas Municipal Water District v. United States (2013)
Appeal from the United States Court of Federal Claims in No. 05-CV-168

Relevance: This opinion is relevant to the Council because it involves an alleged physical taking of a water right through the implementation of a fish ladder and fish screen to protect endangered steelhead trout and defines the scope of CA water rights under the Physical Takings rubric.

Background: The Fifth Amendment of the United States Constitution prohibits the taking of "private property for public use without just compensation." State law, not the Constitution, defines this property right.

The U.S. Supreme Court has held that an owner can bring an action for compensation when the taking has deprived the owner of all use of the property even temporarily.

The Casitas Case: The Casitas Municipal Water District ("Casitas") operates the Ventura River Project ("Project"), which is owned by the Bureau of Reclamation ("Bureau"). The Project provides water to residential, industrial, and agricultural customers in Ventura County, California.

In 1997 the Steelhead trout was listed as an endangered species under the Endangered Species Act ("ESA"). NMFS released a Biological Opinion, requiring construction of a fish ladder and instituted a flow regime (or "operating criteria"), increasing the amount of water bypassing the Casitas facility during steelhead trout migration periods and facilitating fish passage upstream to spawning sites. The operating criteria were adopted and implemented by Casitas in December of 2004.

In January of 2005 Casitas filed suit in the United States Court of Federal Claims, alleging that the imposition of the operating criteria on the Project, constituted a taking of property by the US government without just compensation in violation of the Fifth Amendment.

Issue: The disagreement at trial focused on the fundamental issue of what constituted a property right in water under California law?

Casitas ARG: The SWRCB's water right License to Casitas defined Casitas' property right; in effect that Casitas possessed the right to divert 107,800 AFY from the Ventura River and the right to put 28,500 AFY to beneficial use for their customers.

Gov't ARG: Under CA law, Casitas had a compensable property interest *only in the amount of water it put to beneficial use* regardless of the amount of water it may have diverted or stored; To establish a taking, Casitas had to demonstrate that the specific amount of water actually taken otherwise would have been put to beneficial use.

Held: The United States Court of Appeals for the Federal Circuit sided with the government, the final holding affirming the dismissal of Casitas' case from the court below on February 27, 2013.

Reasoning: the Court reasoned that until Casitas could demonstrate that the deliveries of water to their customers was inhibited by the NMFS operating criteria, they could not

allege a compensable taking of their beneficial use of the water, and thus their claim was not "ripe".

Implications: The Court very narrowly defined Casitas' property interest in the water they were diverting to the water that is put to "beneficial use". This appears to be consistent with CA State water law, which emphasizes that no one has a right to the actual molecules of the water, rather *only a right to beneficially use the water of the State*.

We will continue to monitor this case and provide updates as they arise.

Legal Update March 28, 2013—Tori Sundheim, Legal Intern

I. Update on Request for Extension of New Smelt Biological Opinions: Consolidated Fish (Smelt and Salmonid) Cases

Facts: Early in January, US Fish and Wildlife Services (FWS) and the Department of Water Resources (DWR) requested a 3 year extension of the Biological Opinion because the agencies stated that they wish to develop a collaborative science and adaptive management program and because of recent changes to the BDCP that would also allow for further collaboration for a better Biological Opinion (BiOp). On January 30, 2013, the U.S. District Court for the Eastern Court of California remanded FWS's request until March.

Update: On March 15, DWR filed their updated extension request, which also included a request for a hearing. The outline of the request is as follows:

A. The Collaborative Science and Adaptive Management Program (CSAMP) Is A Significant Change In Circumstances That Makes The Existing Remand Schedule Detrimental To The Public Interest
    1. The Development of the CSAMP Concept Is a Significant Change In Circumstances
        a. CSAMP didn't exist at time of judgment and couldn't have existed, and wouldn't have agreed to the remand schedule.
    2. The development of the CSAMP Concept Makes the Existing Remand Schedules Contrary to the Public Interest
        a. Implementing the CSAMP Will Decrease The Possibility of Further Implementing The CSAMP Will Decrease The Possibility Of Further Litigation, Whereas The Existing Remand Schedules Will Increase It
            1. The CSAMP aims to avoid further litigation by improving scientific understanding over the long term, and using new information gained from this process in implementing, and adaptively managing, the existing RPAs within the BiOps over the short term.
        b. The CSAMP And CAMT Will Follow Standardized And Generally-Accepted Protocols For A Collaborative Science Process
        c. The Current Remand Schedules Are Contrary To The Public Interest Because They May Limit Implementation Of The CSAMP
    3. The Requested Continuance Is Tailored To Implementing The CSAMP
B. The Collaborative Science And Adaptive Management Proposal CSAMP Is A Significant Change In Circumstances That Makes The Existing Remand Schedule Detrimental To The Public Interest

We will continue to monitor the progress of this case

Legal Update March 28, 2013—Tori Sundheim, Legal Intern

II. Settlement and Delta-Mendota Canal Contract Renewals

Natural Res. Def. Council v. Salazar, 686 F.3d 1092 (9th Cir. 2012)

Recall the legal update provided on October 25, 2012. NRDC requested that the Bureau engage in formal ESA §7 consultation for contract renewal where there was speculation that a rehearing might be granted. The case was heard before Judge Procter Hug, Jr. and Richard A. Paez, Circuit Judges, and Liam O'Grady, District Judge (The Honorable Liam O'Grady, District Judge for the U.S. District Court for Eastern Virginia, Alexandria, sitting by designation).

Request for Rehearing Granted "Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35–3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."

Additional Information (That may help with understanding the court's reasoning for granting the rehearing) : Pay attention to the dissent written by Judge Paez that the plaintiffs "must show only that they have a procedural right that, if exercised, *could* protect their concrete interests." If the Bureau were to consult with the Service on the DMC contracts, it might choose to provide *less water* to the contractors, which would improve the conditions of the delta smelt and its habitat. There is standing since consultation *could* advance concrete interests. **Recall:** The *Karuk Tribe* decision on consultation (assuming the discretionary issue is resolved in favor of the NRDC) and "may affect"—where mining activities require NOI's *because* they "may affect" an endangered species. Similarly, the BiOp is required because it "may affect" the Delta Smelt.

- Discretionary Action: (1) Bureau could simply not renew contracts b/c CVPIA and SWRCB do not require renewal of water contracts, separate from SRS (Sacramento River Settlement) Contracts and subject to interpretation that could go either way according to contracts law. (2) Could have renegotiated terms in the renewed SRS contracts protective of smelt and habitat.
- Shortage Provision: That the shortage provision in the contracts *allow* the Bureau to comply with the ESA certainly does not *ensure* that it will.

We will continue to monitor the progress of this case