

No. 2007-5153

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CASITAS MUNICIPAL WATER DISTRICT,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from U.S. Court of Federal Claims Case No. 05-CV-168
Senior Judge John P. Wiese

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OF THE UNITED STATES' PETITION FOR REHEARING AND/OR
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2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is: **None**

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by us are: **None**

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners and associates that appeared for the party or amici now represented by us in the trial court or agency or are expected to appear in this court are: **None**

Dated December 16, 2008


David R. Owen

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I. INTERESTS OF AMICI CURIAE

Amici are professors and scholars who teach, research, and write on water law, property law, and the takings clause. Amici include experts in the historic application of the takings clause to fish passage requirements; the intersection between takings protections and water rights; and the application of the takings clause to regulatory protections under the Endangered Species Act. Because of that expertise, amici can inform the court about the traditional application of the takings clause to restrictions on water use, including requirements for fish passage, and amici have an interest in ensuring that the court is adequately informed on those subjects.

II. INTRODUCTION

The panel's *Casitas* decision represents a marked departure from governing precedent and long-established legal traditions. As the United States has explained, the decision conflicts with precedents of the United States Supreme Court and of this circuit. But we write separately to explain that the problems run deeper. Since the time of the founding fathers, American legislatures have imposed such fish passage requirements, but the overwhelming weight of authority, including Supreme Court authority, holds not merely that such restrictions are not per se takings, but that they are not takings at all. And while the panel reached its decision by referring to three Supreme Court decisions involving constraints on water rights,¹ those cases

¹*Dugan v. Rank*, 372 U.S. 609, 625-26 (1963); *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-53 (1950); *International Paper Co. v. U.S.*, 282 U.S. 399 (1931).

addressed very different circumstances. In those cases, the government had directly appropriated proprietary interests that previously belonged to the plaintiffs, while no such appropriation of Casitas's rights ever occurred. The result is a decision at odds not merely with binding takings authority, but also with traditional understandings of regulatory authority over waterways. The case should be re-heard.

III. THE DECISION CONFLICTS WITH ESTABLISHED LEGAL TRADITION

In 1785, a Virginia legislator introduced a bill that became Virginia's general fish passage law. *See* Act of Oct. 1785, 1785 Va. Acts ch. LXXXII.² His law imposed substantial burdens upon dam operators, for no fish can pass a dam unless the operators redirect flows from power generation to the passage facilities. *See* Hart, *supra*, at 301-02. The Virginia legislator would have understood those burdens, for dam operators were among his constituents. *Id.* at 302-05. The legislator would also have been well aware of takings issues created by the law, had there been any, for the legislator was James Madison, who just four years later would draft the United States Constitution's takings clause. *Id.* at 289, 305-06.³ Yet never did Madison suggest, nor did any Virginia court hold, that the fish passage legislation

² *See* John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MARYLAND L. REV. 287 (2004).

³ Madison also had recently recommended that the Kentucky constitution include a takings clause. *Id.* at 306.

would take private property. Madison instead viewed fish passage requirements as entirely consistent with property rights. *See id.* at 305.

Madison's law was exceptional only because of the enduring importance of its sponsor. Beginning in the later Colonial period, such fish passage laws became common,⁴ and they often compelled water rights holders to adjust their practices, sometimes substantially.

When mill dams in eighteenth-century America prevented migratory fish from reaching their spawning grounds, fishermen sought and often obtained legislative relief. In a departure from the common law, laws were enacted that required mill dam owners to modify dams—by installing gates, openings, or slopes—to allow fish to pass upstream. Fish-passage requirements were applied to preexisting dams, even those built with official approval, as well as to dams built after the laws were enacted. Satisfying fish-passage requirements made dams considerably less efficient and less profitable, some to the point of impracticability. Occasionally dams were ordered to be torn down altogether because they were found to be incompatible with fish passage.

Hart, *supra*, at 288-89 (citations omitted); *see id.* at 292-306.⁵

⁴ According to the first American water rights treatise, “[i]n this country the statute books of almost all the states show the solicitude of the legislature to preserve a free passage for the fish, especially in those rivers which are annually visited by fish from the ocean. JOSEPH K. ANGELL, TREATISE ON THE COMMON LAW IN RELATION TO WATER-COURSES 57 (1824).

⁵ Fish passage requirements came not just from the states, but also from the federal government. In 1801, Virginia's fishway law became operative in the District of Columbia (the part ceded by Virginia) by virtue of an Act of Congress. 2 Stat. L. 103. Later laws contained similar fishway requirements. *E.g.* Revised Code of the District of Columbia 118-119 (1857).

Similar fish passage laws became common in the Midwestern and western states, including California. Since 1872, California law has required dam owners to protect downstream fish.⁶ California's Fish and Game Code still expresses that mandate; since the 1930s, it has required the "owner of any dam [to] allow sufficient water at all times to pass through a fishway... to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish and Game Code § 5937; see *California Trout, Inc. v. State Water Resources Control Bd.*, 255 Cal. Rptr. 184, 187 (1989). Fishway requirements thus have been part of California law for well over a century.

If the panel's takings holding were consistent with traditional understandings of takings, one would expect to find that these fish passage laws had produced many successful takings claims. The panel held that a requirement for a water right holder to divert water from profitable use to fish passage must be analyzed as a physical, and therefore per se, taking. The historic fish passage laws routinely imposed, and modern environmental laws still impose, such requirements; fish passage laws unavoidably require water rights holders to redirect flows they had previously used under their claim of right. Indeed, because "[a]ny sizeable opening in a dam would spill

⁶ See Cal. Stats. 1871-72, Title XV, Ch. 1, § 637 ("Every owner of a dam or other construction in the waters of this State who, after being requested by the fish commissioners to do so, fails to construct and keep in repair sufficient fishways or fish ladders on such dam or obstruction is guilty of a misdemeanor."); Cal. Stats. 1891, Ch. 89, § 1, at 93; Cal. Stats. 1903, Ch. 22, § 5, at 25-26; Cal. Stats. 1915, Ch. 425, § 1, at 820.

a lot of water that could otherwise furnish power... (,) the economic impact of complying with fish-passage requirements must have been considerable.” Hart, *supra*, at 294; *see id.* at 297. One therefore might expect the law reports to be filled with decisions finding takings.

But only a handful of such decisions exist, all from the 19th century, and most courts, including the United States Supreme Court, have rejected such claims.⁷ Each of the exceptional cases was premised on distinctive individual circumstances quite different from those forming the basis of Casitas’s claim.⁸ Successful takings claims against fish passage requirements are not just scarce in the historic record, but also entirely absent from post-19th century jurisprudence, despite the fact that fish passage requirements remain centrally at issue in modern litigation. *See*,

⁷ *See, e.g., Holyoke Co. v. Lyman*, 82 U.S. 500, 506, 512-13 (1872) (explaining that dam owners’ rights are subservient to legislative protection of fish); *State v. Beardsley*, 79 N.W. 138, 139-41 (Iowa 1899) (rejecting a takings challenge, and citing similar decisions from other states); *see also Lawton v. Steele*, 152 U.S. 133, 139 (1894) (citing *Holyoke Co. v. Lyman, supra*, and three Massachusetts decisions regarding fishway laws).

⁸ The panel’s decision might seem superficially compatible with a few early state court decisions holding that a fishway could not be required for a particular dam without compensation. *See People v. Platt*, 17 Johns. 195 (N.Y. 1819); *State v. Glen*, 52 N.C. 321 (1859); *Woolever v. Stewart*, 36 Ohio St. 146 (1880). But none of these courts questioned the validity of their state’s fishway laws as applied to dams in general; all three premised their outcomes on conclusions that either the streams themselves or the impacted fisheries were entirely private resources—circumstances absent from the present case.

e.g., *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).⁹ The panel's decision therefore is an anomaly. Despite over two hundred years of similar fact patterns, its takings holding is unique.

The absence of similar holdings should not be surprising, for the fish passage laws reflected the long-established legal tradition that "all water rights are subject to government regulation." *United States v. State Water Resources Control Bd.*, 227 Cal. Rptr. 161, 171 (1986). American water rights have always been use rights, subsidiary to public ownership of the actual waters, public rights of navigation, and regulatory authority to ensure usage consistent with evolving public values. See, e.g., *People v. Shirokow*, 605 P.2d 859, 865 (1980) (explaining the basis for a "comprehensive regulatory scheme" of water rights); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them."). As Justice Holmes observed,

few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public

⁹ In *PUD No. 1*, the Court evaluated whether a state properly required a federal licensee to leave sufficient flows in the river to enable fish to pass the licensee's hydro-electric facility. The primary issues in the case were statutory—the Court determined that the federal Clean Water Act did empower the state to impose these requirements—but the Court also dismissed the notion that the requirement conflicted with property rights. Rather than infringing a right, the Court held, "[t]he certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act." 511 U.S. at 721.

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.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).¹⁰ Fish passage requirements fit comfortably within that regulatory tradition, and the historic rejections of takings claims reflect the long-established reality that a water right is a limited right to make use of a public waterway, not an absolute entitlement.

The panel's invocation of a per se takings rule is irreconcilable with that legal tradition. The Supreme Court long ago warned that all property rights—not just water rights—must be somewhat flexible in the face of governmental regulation, for “some values are enjoyed under an implied limitation and must yield to the police power.” *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922); see *McCarter*, 209 U.S. at 355. Consequently, the Court has repeatedly warned against invoking per se takings rules in all but the most limited contexts. See *Tahoe-Sierra*

¹⁰ The panel distinguished *McCarter* on the theory that the government action at issue in *McCarter* did not actually affect the plaintiff's property rights, implying that if the regulation had actually affected a property right, *McCarter's* outcome would have been different. Slip. Op. at 27-28. But Justice Holmes' opinion anticipates and rejects that argument:

Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same.
209 U.S. at 356.

Preservation Council v. Tahoe Regional Planning Authority, 535 U.S. 302, 324 (2002) (warning that treating all regulatory constraints as per se takings “would transform government regulation into a luxury few governments could afford”). In this context, with its centuries-old tradition of highly pliable rights, such a per se rule is particularly inappropriate.

IV. *INTERNATIONAL PAPER, DUGAN, AND GERLACH ARE INAPPOSITE*

To depart from this tradition, the court relied on three cases—none involving fish passage regulations—in which the Supreme Court found that deprivations of water rights amounted to takings.¹¹ It applied those cases using a simple syllogism: (1) those cases were physical takings cases; (2) the *Casitas* facts are analogous to those cases; so therefore (3) *Casitas* is a physical takings case. But that analogy is flawed, for the essential attribute that marked those deprivations as physical takings—direct governmental appropriation of a private right—is absent from the *Casitas* facts.

In *International Paper*, the Secretary of War informed a power company, which shared a canal with *International Paper*, that the government was requisitioning all of its power production, and clarified that “the requisition order covers also all of the water capable of being diverted through your intake canal.” 282 U.S. at 404. Lest there be any uncertainty

¹¹ Although the most recent of these decisions is nearly a half-century old, no other court has subscribed to the theory that they require fish passage requirements to be treated as physical takings, or has even implied that they overrule the body of authority rejecting takings challenges to fish passage requirements. Here, again, the panel decision stands alone.

about the scope of the asserted proprietary interest, the Secretary declared that all water previously delivered to International Paper should be cut off, and directed the power company “to *take* water hitherto used by International Paper Co.” *Id.* at 405 (emphasis added). The government, in other words, asserted complete and exclusive proprietary control over water rights previously held by International Paper.

Similarly, in *Dugan* and *Gerlach*, the government did not simply direct the plaintiffs to re-route their water in a particular way. Instead, it built a dam upstream of those plaintiffs’ land and controlled the entire flow of the river; applied for, and received, permits establishing the United States Bureau of Reclamation as the owner of appropriative rights to the stored water that previously had flowed to the plaintiffs; sold that water to third parties; and left the river dry. *See Gerlach*, 333 U.S. at 729; *Dugan*, 372 U.S. at 618-21.¹² In short, the government again asserted exclusive legal ownership over water rights previously held by the plaintiffs. That action again provides a clear and classic example of an appropriation.

In *Casitas*, by contrast, the federal government never appropriated the water in question. It has never asserted ownership of *Casitas*’ water rights, which still belong to *Casitas*. *See PUD No. 1*, 511 U.S. at 721 (stating that a


¹² *See also Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1123 (1998) (describing the history of the Central Valley Project’s Friant Unit); California State Water Resources Control Board Decision No. D. 935 (1959) available at http://www.waterrights.ca.gov/hearings/decisions/WRD_935.PDF (approving the Bureau’s applications for appropriative rights).

water right holder would not be deprived of its right if required to devote that right partly to in-stream flow). It has not applied to the California State Water Resources Control Board, which alone can approve requests to gain property rights to use California waters, for an appropriative rights permit. *See* Cal. Water Code § 1225; *Shirokow*, 605 P.2d at 863. Instead, the federal government's action was a classic exercise of regulatory authority under a classically regulatory statute. It simply told Casitas how to exercise Casitas' use right in order to comply with the Endangered Species Act.

V. CONCLUSION


An important and sensible warning emerges unambiguously from the Supreme Court's takings jurisprudence: per se takings rules are dangerously powerful things, capable of quickly depleting the treasury if not carefully used, and therefore should not be applied beyond "narrow categories." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005); *see Tahoe-Sierra*, 535 U.S. at 324. By applying a per se takings analysis to a fish passage requirement—a requirement that, since the time of James Madison, has been accepted as an appropriate exercise of governmental regulatory authority—the panel decision conflicts not merely with centuries of precedent, but also with that overarching principle. To preserve consistency within takings jurisprudence, the case should be reheard.

Dated December 16, 2008

A handwritten signature in black ink, appearing to read "J. R. Owen", written over a horizontal line.

CERTIFICATE OF COMPLIANCE

In accordance with Federal Circuit rule 35(g), I certify that the text of this brief, including footnotes, uses a proportionally spaced 14-point font and is ten pages in length.


David R. Owen

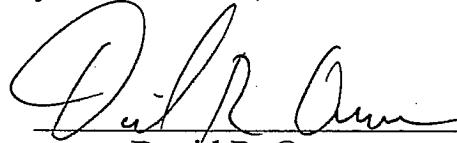
CERTIFICATE OF SERVICE

I certify that two copies of the "Amicus Curiae Brief of Law Professors in Support of the United States' Petition for Rehearing and/or Rehearing En Banc" have been served upon counsel by first class mail, postage prepaid, on this 16th day of December, 2008, to:

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I certify that, in accordance with Federal Rule of Appellate Procedure 25(c)(1)(D) and with the written consent of the United States Department of Justice, this brief has been electronically served upon Katherine Barton, counsel for the United States, on this 16th day of December, 2008.

December 16, 2008


David R. Owen