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Casitas Mun. Water Dist. v. United States, 708 F.3d 1340 (Fed. Cir. 2013)

COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Casitas Mun. Water Dist. v. United States, 708 F.3d 1340 (Fed. Cir. 2013) (holding: (i) the Casitas Municipal Water District's water license limited the district's constitutionally compensable water right to the amount of water the district could put to beneficial use; and (ii) a diversion potentially constituting a compensable taking of the district's water right had not yet occurred, rendering the district's claim not ripe for adjudication).

Constructed pursuant to a contract between the Casitas Municipal Water District ("Casitas") and the U.S. Bureau of Reclamation ("Reclamation"), the Ventura River Project ("Project") provides water to residential, industrial, and agricultural customers in Ventura County, California. Ownership of the Project remained with Reclamation, while Casitas accepted operational responsibilities. Casitas received a perpetual right to all water that became available through the Project. The contract required Casitas to apply to the California State Water Resources Control Board ("SWRCB") to appropriate the water necessary for the Project. SWRCB issued Casitas the requisite license in May 1956, and Casitas began operating the Project three years later. The license stipulated that Casitas could divert up to 107,800 acre-feet of water per year into the Project and put up to 28,500 acre-feet per year to beneficial use.

In order to avoid civil and criminal liability under the Endangered Species Act ("ESA") following the listing of the West Coast steelhead trout, Casitas began exploring ways to mitigate the Project's impact on the steelhead population in the Ventura River. Following consultation with local water agencies and the National Marine Fisheries Service ("NMFS"), Casitas concluded that the most effective way to achieve mitigation would be to improve upstream access to steelhead habitats. In 2003, NMFS issued an incidental take permit allowing Casitas and Reclamation to avoid ESA liability if they agreed to construct and maintain a fish ladder to allow migrating steelheads to safely bypass the Project. NMFS also required Casitas to divert sufficient water from the Project to allow steelhead passage through the ladder. Under protest, Casitas opened the fish ladder on December 9, 2004.

On January 26, 2005, Casitas filed suit in the United States Court of Federal Claims ("trial court"). Casitas first asserted that the United States had breached the terms of the 1956 contract by forcing Casitas to divert water through the fish ladder. Alternatively, Casitas asserted that, by imposing the diversion requirement, the United States had physically taken its constitutionally protected property without just compensation, a violation of the Fifth Amendment. The trial court dismissed the contract claim under the sovereign

acts doctrine and entered summary judgment for the government on the takings claim.

Casitas appealed and the United States Court of Appeals for the Federal Circuit ("court") affirmed the dismissal of Casitas's contract claim. The court reversed the trial court's grant of summary judgment on the takings claim, however, and remanded for further proceedings on that issue. On remand, the trial court held that, for purposes of a takings claim, California law limits a licensee's compensable water right to its right to beneficial use. Casitas's right to beneficial use included the right to deliver water to its customers. Even though NMFS forced Casitas to divert water into the fish ladder, Casitas failed to show the diversion forced Casitas to actually deliver less water to its customers than it would have otherwise. The trial court dismissed Casitas's takings claim on grounds that the claim was not yet ripe. Casitas once again appealed the district court's decision to the court.

On appeal, Casitas claimed that in its first appeal the court held that a physical taking had already occurred due to the fish ladder diversion and, thus, the trial court erred by conducting its own takings analysis on remand. The court held Casitas interpreted its opinion in the first appeal too broadly. First, Casitas erroneously relied on concessions that the government only stipulated to in order to put the case in a posture for summary judgment. Second, the court held that neither it nor the trial court had addressed the actual scope of Casitas's water right prior to the current appeal. The court held that the trial court had not erred in conducting a complete physical takings analysis on remand. Moreover, the court upheld the trial court's holding that, pursuant to California water law, a court will not find a compensable taking unless the government action complained of has actually impacted a licensee's beneficial use.

Casitas then challenged the trial court's holding that the diversion through the fish ladder would not impinge on Casitas' right to beneficial use until such time as the diversion caused Casitas to deliver less water to its customers than it would have otherwise. The court found that the trial court's test was the correct measure of a physical taking in this context and that Casitas had failed to show that the fish ladder diversion actually impinged on Casitas's deliveries to its customers.

Casitas also argued that its water license was evidence that the SWRCB had already determined that Casitas could beneficially use all 107,800 acre-feet of diversions allowed to it under the license. Thus, Casitas argued, it had a compensable right to this entire amount. The court first confirmed the trial court's holding that California does not recognize a compensable property right in water that a licensee diverts but never puts to a beneficial use. The court then held that a maximum limit on diversion provided by the license did not establish that the SWRCB had determined that Casitas could in fact put that maximum amount to beneficial use. The court also pointed to the fact that the SWRCB expressly limited Casitas's beneficial use under the license to 28,500 acre-feet per year, thus limiting Casitas' compensable right to that amount.

Casitas next claimed that diverting water for storage was a *per se* beneficial use, compensable under a takings claim. The court disagreed, holding that California water law does not recognize storage as a *per se* beneficial use, but

simply as a means to a beneficial end. Moreover, the license itself limited Casitas's right to an enumerated list of beneficial uses, mere storage not among them.

Casitas also asserted that its takings claim began to accrue the moment NMFS required Casitas to divert water through the fish ladder and that such regulatory action gave rise to its takings claim. However, the court held that a physical takings claim only accrues when the physical act constituting the taking occurs, not at the time of the regulatory action that could potentially cause a taking. Under this rubric, Casitas would have to show that the fish ladder diversion physically impinged on its right to beneficial use, that is, its right to deliver water to its customers. Because Casitas made no such showing, the court affirmed the trial court's dismissal of Casitas' takings claim as not ripe.

In conclusion, the Court of Appeals held that California water law limits a licensee's compensable water right to the right to beneficial use. The court held that Casitas's takings claim was therefore not ripe because a governmental action physically impinging on its right to beneficial use had not yet occurred. The court affirmed the trial court's decision to dismiss Casitas's complaint without prejudice.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pyramid Lake Paiute Tribe of Indians v. Nevada, 724 F.3d 1181 (9th Cir. 2013) (holding diversion of water to wetlands for the preservation of waterfowl habitat is not "irrigation" within the meaning of a decree governing water rights but, rather, constituted a wildlife use).

The Truckee and Carson Rivers flow through the Truckee River Basin. The flow from the Truckee River terminates in Pyramid Lake, where it provides the sole source of water to the lake. The lake lies entirely within the Paiute Tribe's ("Tribe") reservation. Under the authority of the Reclamation Act of 1902, the federal government initiated the Newlands Project ("Project") in the early 20th century. The Project diverted water from the Truckee and Carson Rivers to irrigate a substantial amount of land in order develop western agriculture and encourage homesteader settlement.

The Nevada Department of Wildlife ("NDOW") and the Nevada Waterfowl Association ("NWA") submitted an application to the State Engineer ("engineer") to transfer both consumptive and non-consumptive water rights from agricultural land in the Project to a wetland located at the end of the Carson River. The objective of the transfer was to support the growth of plants used as wildlife habitat. If approved, the demand for water from the Truckee River would increase, thereby reducing the water flow into Pyramid Lake. The Tribe and the United States disputed the application, contending that the intended use was not irrigation within the meaning of the Alpine Decree ("decree"), which governs water rights in the Project. The decree does not permit transfer of non-consumptive portion of water rights for a use other than irrigation.