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Pointing to prior court opinions and a Utah public use statute, the Clinger Family specifically claimed the State lacked standing to litigate property ownership above the second meander line established in 1874 and to assert claims as a third party on behalf of the United States. This argument did not persuade the appellate court. The State had standing because it had asserted a right to the lands above the 1874 mark throughout the prior district court proceedings. In addition, the parties' competing argument regarding the marks was sufficient to establish standing. The Utah public use statute also did not diminish the State's standing, as it did not address boundaries between a lake-bed and surrounding property. Finally, the United States' interest did not diminish the separate interests of the State in the matter.

The Clinger Family's second claim regarded the district court's decision not to vacate the 4,481 stipulation itself, but then to vacate the judgment that resulted from the stipulation. The district court had offered two grounds for its decision: first, while the State's formal counsel had authority to enter into the stipulation itself, counsel lacked authority to enter into the resulting order; second, the judgment relied on an improper language construction of the stipulation. However, in its appeal, the Clinger Family had concentrated only on the court's first analysis. The appellate court denied the appeal, focusing on the fact that the Clinger Family had failed to challenge the improper language construction. The court also found the district court did not abuse its discretion in separating the stipulation from the judgment, as the stipulation did not address the Clingers' land specifically and did not set an ultimate boundary.

*Nicole A. Bonham Colby*

## FEDERAL CIRCUIT

**Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008)** (holding: (1) although the government breached its contract providing water rights to the contracting party, an agency's action to preserve an endangered species is a sovereign act that shields the agency from liability; and (2) when the federal government requires a water rights holder to divert water to comply with the Endangered Species Act, the diversion results in a compensable physical taking under the Fifth Amendment).

Casitas Municipal Water District ("Casitas") brought this action against the United States for breach of contract and a physical taking of a property interest under the Fifth Amendment when the Bureau of Reclamation ("Reclamation") executed a directive requiring Casitas to construct, operate, and divert water into a fish ladder facility to comply with the Endangered Species Act ("ESA"). Casitas and Reclamation entered into a contract to construct the Ventura River Project ("Project") in 1956. Under the terms of the contract, Reclamation would build the Project and Casitas would repay Reclamation over a

period of 40 years for the cost of construction. Casitas was responsible for any costs associated with the operation and maintenance of the Project. The contract also granted Casitas the perpetual right to use any water that became available through the construction and operation of the Project. To acquire these rights, Casitas paid the State of California to appropriate the water for the Project and obtained permits to use the available water.

The Project diverted and stored water from Coyote Creek and the Ventura River to provide water for Ventura County, California. The Project included the Casitas Dam and its reservoir, Lake Casitas, the Robles Diversion Dam, and Robles Casitas Canal. The Robles Diversion Dam diverted water from the Ventura River into the Robles Casitas Canal, which emptied into Lake Casitas. The water then traveled through a series of pipes, pumping stations, and balancing reservoirs for agricultural, industrial, municipal, and domestic uses. In 1959, Reclamation completed the Project and subsequently transferred it to Casitas.

Almost 40 years later, the National Marine Fisheries Service (“NMFS”) listed the steelhead trout as an endangered species under the ESA. In response to the listing, Reclamation consulted with the NMFS to avoid any liability under the ESA because the operations of the Project at the time would result in a “taking” of the West Coast steelhead trout. The NMFS issued a Biological Opinion, which Reclamation later incorporated into a 2003 directive. The directive compelled Casitas to construct a fish ladder and divert water from the Project into the fish ladder. Casitas complied with the directive and constructed the fish ladder at the intersection of the Ventura River, Robles Diversion Dam, and the Robles-Casitas Canal.

Because diverting water in the fish ladder resulted in a permanent loss of available water, on January 26, 2005, Casitas filed suit in the United States Court of Federal Claims against the United States for breach of contract and a taking without just compensation. Casitas claimed Reclamation breached its contract by requiring Casitas to divert water into the fish ladder, effectively violating the contract’s term that granted Casitas the right to use the water the Project made available. In response, the government filed a motion for summary judgment for the breach of contract claim and a motion for partial summary judgment for the takings claim. In seeking partial summary judgment, the government asked the trial court to decide whether the appropriate standard for Casitas’ takings claim was a physical or regulatory taking. The trial court held the sovereign acts doctrine sheltered the government from liability in a breach of contract claim and granted the government’s motion for summary judgment on the contract claims. The trial court also held the proper standard for Casitas’ takings claim would be a regulatory taking standard, which led Casitas to concede that it would not prevail. As such, the trial court dismissed

the case. Casitas appealed to the United States Court of Appeals, Federal Circuit.

On appeal, Casitas argued the trial court erred in granting the government summary judgment on its breach of contract claims because: (1) Reclamation breached the contract when it required Casitas to allocate a portion of its contractual water rights to the operation of the fish ladder; (2) the sovereign acts doctrine did not apply to the case because the government could still perform its obligations under the contract without violating the ESA; and (3) the trial court did not apply the appropriate standard in evaluating its takings claim because Reclamation's directive required Casitas to divert its water rights, which resulted in a physical taking compensable under the Fifth Amendment. The court affirmed the trial court's decision on the breach of contract claims, but reversed the trial court's finding that the takings claim fell within the ambit of a regulatory taking.

First, the court held Reclamation breached the contract when it required Casitas to divert a portion of its water rights under the contract to supply the fish ladder. The contract gave Casitas a perpetual water right to any water made available by the Project. Reclamation argued that the wording of the contract did not entitle Casitas to divert all available water that vested water rights holders on the Ventura River did not use. Instead, the contract granted Casitas water rights to water stored in Lake Casitas. The court rejected the government's argument, finding, by specifically identifying the Robles Diversion Dam as part of the Project, the clause gave Casitas the right to water made available from the various attributes of the project, not just Lake Casitas. In addition, the State of California regulated Casitas' water rights and, because Casitas obtained a license that provided the amount of water Casitas may divert through the Project, the contract clause was a guarantee that the government would not appropriate the water for other users. As such, the court found Casitas had a right to use the water and Reclamation's directive compelling Casitas to divert those rights into a fish ladder denied Casitas a portion of those rights.

The court disagreed, however, with Casitas' argument that the sovereign acts doctrine did not apply because the government could still perform under the contract and comply with the ESA through a more modest fish ladder or other systems. Instead, the court found the action of Reclamation to implement the NMFS's Biological Opinion was a sovereign act that made it impossible for Reclamation to perform its obligations under the contract. Therefore, the court could not hold the government liable for breaching the contract.

In addressing Casitas' takings claim, the court found that by directing Casitas to divert water for the operation of the fish ladder, the government appropriated Casitas' water for its own use, resulting in compensable physical taking of Casitas' property right. The court relied on three cases where the government pursued the acquisition of water

rights for government use. First, in *International Paper Co. v. United States*, the Supreme Court held a government order that required Niagara Power Company to terminate the diversion of water to International Paper, Niagara's lessee, to increase power production, was a direct appropriation of water for the benefit of a third party, the public. Similarly, in *United States v. Gerlach Live Stock*, the Supreme Court analyzed downstream riparian water rights holders' claim that Reclamation took their water rights by constructing a dam that stored water and diverted the stored water to upstream landowners, leaving the downstream water rights holders with a dry riverbed, as a physical takings claim. Lastly, in *Dugan v. Rank*, the Supreme Court analyzed a case factually similar to *Gerlach* as a physical takings claim because a Reclamation dam left the downstream water rights holders with insufficient water to meet their needs. The government argued Casitas' case was distinguishable from the trio of Supreme Court cases because Reclamation did not directly appropriate the water for its own use, nor for the benefit of a third party. The court rejected the government's arguments and held that, like the trio of cases, Reclamation directly appropriated Casitas' water when it required Casitas to divert the water for the operation of the fish ladder. In so doing, the government took Casitas' vested property interest to protect the steelhead trout for the benefit of the public. As such, the court reversed the trial court and found the diversion resulted in a physical taking of Casitas' water rights.

The dissent argued the court should analyze Casitas' takings claim as a regulatory taking for two reasons: (1) because California, not Casitas, is the legal owner of the water; and (2) because Reclamation did not take the license or make any proprietary use of the water, which made the claim fall in the ambit of a regulatory taking. The dissent argued that Casitas merely held a permit to use the water because, under California law, the public owns all of the water sources in the state. As such, the United States government cannot physically take the water, leaving Casitas without a claim. The dissent argued that the requirement was more akin to a restriction because it did not take a proprietary interest in the water. The dissent reasoned the requirement was a limitation on the quantity of water available to Casitas, which relates to the amount of water necessary to maintain Ventura River's hydrological cycle. By maintaining the hydrological cycle, Reclamation ensures the preservation of the steelhead trout for the public good. In addition, because the government did not take a consumptive or proprietary use of the water, the requirement is part of Reclamation's regulatory criteria in operating the Project. As such, the dissent would hold a court should analyze the case as a regulatory taking.

In conclusion, even though Reclamation may have breached its contract with Casitas when it required Casitas to divert the water for the operation of a fish ladder to comply with the ESA, the court could

not hold Reclamation liable. The court found, however, that Casitas had a physical takings claim under the Fifth Amendment.

*Elizabeth A. Dawson*

### UNITED STATES COURT OF FEDERAL CLAIMS

**Estate of Hage v. United States, 82 Fed. Cl. 202 (Cl. Ct. 2008)** (holding that the U.S. Forest Service violated Nevada ranchers' Fifth Amendment right after the agency built fences blocking the ranchers access to the stream, and when stream flows dropped due to an agency policy of encouraging vegetative growth along the stream and preventing the ranchers from trimming that growth).

The Hages, ranchers in central Nevada, owned several grazing permits and vested water rights in streams originating in the Toiyabe National Forest. After numerous trespassing violations, the United States Forest Service ("USFS") revoked their grazing permits. In four earlier decisions, the United States Court of Federal Claims held that the revocation of grazing permits did not constitute a taking because the permits were a license, not a property right. Here, the Hages alleged that subsequent USFS policies impaired their vested water rights, resulting in a regulatory taking.

Beginning in the 1990s, the USFS instituted an elk habitat improvement program that encouraged riparian growth and beaver dams along the upper reaches of a stream from which the Hages had vested water rights. The USFS also built fences around the upper reaches that prevented cattle but allowed elk to reach the water source. The court used a two-part inquiry to determine if those policies resulted in a taking: (1) whether the Hages would have put the missing water to a beneficial use to satisfy their usufructory right; and (2) whether the government actions constituted a taking. The court held the Hages would have put the water to beneficial use by irrigating the remaining ranchland as they had in the past when flows were larger.

The court spent more time on the takings question. The court emphasized that the revocation of the Hages' grazing permits was not a taking because those permits were licenses, not property rights. However, if the Hages could distinguish their water rights from their grazing rights, the court could perform a takings analysis. The USFS constructed fences around streams from which the Hages' cattle drank water. The court found the physical impediment to the streams constituted a physical taking because it actively prevented the Hages from exercising their water rights.

Next, the court analyzed the effects of the USFS policies encouraging riparian growth. In *Ennor v. Raine*, the Nevada Supreme Court recognized the right of downstream water users to go upstream and clear impediments to stream flows. However, the USFS threatened and did prosecute the Hages when they attempted to clear the brush upstream. To determine whether the USFS had committed a regulatory