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Background Principles of California Water Law: The Threshold of a Water Rights Takings Claim

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[1] The views expressed herein are those of the author only and do not represent the views of the State of California, the California Attorney General, California Office of the Attorney General, or any other state agency or entity.

I. THE THRESHOLD OF A WATER RIGHTS TAKINGS CLAIM: ESTABLISHING THE NATURE AND SCOPE OF THE PROPERTY INTEREST

A. **Need to establish the existence of compensable property interest**. In order to establish that a taking has occurred, a plaintiff first must show as a threshold matter "whether the claimant has established a property interest for purposes of the Fifth Amendment [citation]. It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation [citations]. If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed.Cir. 2004); see also *Joslin v. Marin Municipal Water District*, 67 Cal. 2d 132, 143 (1967) ["[w]hile the plaintiffs correctly argue that a property right cannot be taken or damaged without just compensation, they ignore the necessity of first establishing the legal existence of a compensable property interest"].

B. **Property interests defined by state law**. The existence of a compensable property interest normally is determined by state law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) [courts traditionally "resort to 'existing rules and understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments"], quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); see also *id.* at 1027, 1029, and cases cited at 1030.

C. **State law defines the nature and scope of water rights**. In the water rights context, the determination whether a plaintiff possesses a compensable property interest requires an assessment of the nature and scope of that interest. In California, numerous basic principles of state water law limit the nature, scope *and* exercise of all water rights in California and require all water users to exercise their rights at all times in a manner that provides reasonable protection for other reasonable and beneficial uses of the water supply, including instream fisheries.

II. PROCESS FOR OBTAINING APPROPRIATIVE WATER RIGHTS IN CALIFORNIA

A. **Appropriative Water Rights**. Appropriative water rights in California are generally conferred by permit (and then by license, provided certain requirements are met), issued by the State Water Resources Control Board (State Water Board). See Cal. Wat. Code § 1200 *et seq.* Such rights are subject to a "comprehensive regulatory scheme. . . to safeguard the scarce resources of the state." *People v. Shirokow*, 26 Cal.3d 301, 309 (1980).

B. **Water Right Permit Process**.

1. **Permit application**.

a. Following enactment of the Water Commission Act of 1913, the exclusive means of acquiring an appropriative water right in California is to obtain a water right permit from the State Board. Cal. Wat. Code §§ 1200 *et seq.*, 1225.[2]

b. The process is initiated by submitting an application to the State Water Board to appropriate previously unappropriated water and use it for a reasonable and beneficial purpose. Cal. Const., Art. X, § 2; Cal. Wat. Code §§ 100, 1252. The permit application must set forth, *inter alia*, the nature and amount of the proposed use, the proposed point of diversion and place of use of the water, the location and description of the proposed diversion works, the time for commencing and completing construction of such works, and the time for complete application of the water to the proposed use. Cal. Wat. Code § 1260.

2. **Factors for evaluating a permit**.

a. In determining whether to grant a permit, the State Water Board must consider a number of factors, including "the relative benefit to be derived from . . . all beneficial uses of the water concerned, including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational . . . purposes . . . and any uses specified to be protected in any relevant water quality control plan." Cal. Wat. Code § 1257; see also §§ 1243.5, 1258.

b. The Water Code specifically declares that the use of water for "preservation and enhancement of fish and wildlife resources is a beneficial use of water." Cal. Wat. Code § 1243.

c. The State Water Board must reject an application "when it its judgment the proposed appropriation would not best conserve the public interest." Cal. Wat. Code § 1255.

3. **Permit issuance**.

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[2] Appropriative water rights acquired prior to 1914 are not subject to the State Water Board permit process, but still are subject to overriding constitutional and common law limitations that inhere in all water rights in California. See Section III below.

a. The State Water Board may subject appropriations to "such terms and conditions as in its judgment will best develop, conserve and utilize in the public interest the water sought to be appropriated," including terms and conditions necessary to protect water quality and fishery beneficial uses of water. Cal. Wat. Code §§ 1253, 1257.

b. "Once an appropriative water right permit is issued, the permit holder has the right to take and use the water according to the terms of the permit." *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 102 (1986); see also Cal. Wat. Code §§ 1381, 1455.

c. A holder of an appropriative water right permit must commence construction of project works within the time period specified in the permit. Cal. Wat. Code § 1395.

d. The State Water Board "may reserve jurisdiction, in whole or in part, to amend, revise, supplement or delete terms and conditions in a permit." Cal. Wat. Code § 1394.

C. **Inspection and Issuance of License**.

1. Once construction of the project works is completed and the water is applied to beneficial use, the permittee must report the completion to the State Water Board, which must then perform an inspection of the project. Cal. Wat. Code §§ 1600, 1605.

2. If the State Water Board determines that the project works have been properly completed and that the water is being applied to a beneficial use, it may confirm the permit by issuing a water right license. Cal. Wat. Code § 1610.

3. Every license must be subject to terms and conditions under Division 1 of the Water Code, section 100 *et seq.* (General State Powers Over Water), and must contain "the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed." Cal. Wat. Code §§ 1626, 1628.

4. The State Water Board may revoke a license if it finds that the licensee has not put or has ceased to put the water to a useful and beneficial purpose or has not complied with any of the terms and conditions of the license. Cal. Wat. Code § 1675.

III. FUNDAMENTAL PILLARS OF CALIFORNIA WATER LAW

A. In General -- Water Rights are Highly Regulated, Limited and Uncertain.

1. Water rights in California are not like real property rights, and by their very nature are "limited and uncertain." *People v. Murrison,* 101 Cal. App. 4th 349, 359 (2002)*;* see also *In Re Waihole Ditch*, 9 P.3d 409, 493 (2000) ["usufructuary rights have always been incomplete property rights, so the expectations of [rightholders] to the enjoyment of these rights are generally weaker than the expectation of the right to exploit the full value of dry land"]; Gray, Brian: *The Property Right in Water*, 9 Hastings W.N.W. J. Envt'l Law & Pol. 1, 16, Fall 2002 [California "water rights are -- and always have been -- fragile"]. Thus, "no water rights are inviolable; all water rights are subject to governmental regulation." *United States v. State Water Board,* 182 Cal. App. 3d at 106; see also *Murrison*, 101 Cal. App. 4th at 361-362.

2. An appropriative water right is not an unconditional right to a specific quantity of water which is absolutely vested against other competing interests. Rather, the right is to appropriate *up to* a certain quantity of water, subject to numerous overriding limitations and restrictions which inhere in the water right itself, as discussed in the sections below. These limitations apply even absent any specific terms and conditions in water right permit or license.

3. Water rights also are subject to an overriding public interest. See Cal. Water Code § 104 (enacted in 1921) ["the people of the State have a paramount interest in the use of all water of the State and . . . the State shall determine what water of the State . . . can be converted to public use or controlled for public protection"] and Cal. Water Code § 105 (enacted in 1925) ["protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and . . . the State shall determine in what way the water of the State . . . should be developed for the greatest public benefit"].

B. Water Rights are Usufructuary Rights Only -- The Corpus of the Water is Owned by the State.

1. The private right of property in water in California is the right to its *use* only; there is no private property right in the corpus of the water itself. *Eddy v. Simpson*, 3 Cal. 249, 252 (1853); *Kidd v. Laird*, 15 Cal. 161, 180 (1860); Cal. Water Code §§ 102, 1001 (enacted in 1911 and 1913).

2. The corpus of the water is owned, controlled and regulated by the state as trustee for the benefit of the people of the state. Cal. Water Code § 102 (enacted 1911) ["[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law"]; see also Cal. Const., Art. X, § 5 (formerly XIV, § 1, originally codified in 1879) ["[t]he use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state"].

3. Corollary: water rights are non-possessory, non-exclusive rights to the use of the corpus of the water. *Parks Canal & Mining Co. v. Hoyt*, 57 Cal. 44, 46 (1880); *Big Rock Mut. Water Co. v. Valyermo Ranch Co.*, 78 Cal. App. 266, 274 (1926).

C. A Water Right Holder Only Has A Right To Such Amount As Is Actually Put to Beneficial Use.

1. Because water rights in California confer only a right to the *use* of the water, but no ownership interest in the *corpus* of the water, "[a]n appropriative right is limited to the amount of water the appropriator can put to a reasonable beneficial use *and* has put to beneficial use." *Murrison*, 101 Cal. App. 4th at 363, emphasis in original.

2. As California courts have long declared, "an appropriator is not entitled to the quantity of water actually diverted and taken into possession, if he uses only a portion of it, and . . . his right is limited to the amount he actually uses for a beneficial purpose." *California Pastoral and Agricultural Co. v. Madera Canal and Irr. Co.*, 167 Cal. 78, 83 (1914). Thus, "the mere fact that the ditch was full or carried a certain quantity of water throughout the season is of no consequence, unless all of the water so carried was put to a beneficial use all of the time." *Haight v. Costanich*, 184 Cal. 426, 436 (1920).

3. Moreover, the "right is not measured by the extent of his appropriation as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes." *Hufford v. Dye*, 162 Cal. 147, 153 (1912); see also Cal. Wat. Code § 1390 (originally enacted 1913) [an appropriative water right permit is valid only "for such time as the water actually appropriated under it is used for a useful and beneficial purpose"], § 1610 [license may be issued confirming right to appropriate such amount of water as has "been applied to beneficial use"].

D. All Water Rights Are Subject to the Doctrine of Reasonable Use (CA Constitution: Article X, § 2).

1. **Overriding constitutional limitation**. Article X, section 2 of the California Constitution, which establishes the so-called "reasonable use doctrine" is "an overriding constitutional limitation" that is "superimposed on [the] basic principles defining water rights." *United States v. State Water Board*, 182 Cal. App. 3d at 105. This "paramount limitation" and "cardinal principle of California water law," first enacted in 1928, applies to all water rights in California. *Id*. at 105-106.

2. **Article X, section 2 provides in part**: "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." Cal. Const., Art. X, § 2 (formerly Art. XIV, § 3, originally codified in 1928); see also Cal. Water Code § 100 (originally enacted 1913).

3. **Purpose**: the purpose of this constitutional provision "was to ensure that the state's water resources would be 'available for the constantly increasing needs of all of its people'." *Central and West Basin Water Dist.*, 109 Cal. App. 4th at 904, quoting *Meridian, Ltd. v. City and County of San Francisco*, 13 Cal. 2d 424, 449 (1939).

4. **This language imposes four distinct limitations** on the exercise of all water rights in California: a) beneficial *purpose* of use, b) reasonable *amount* of use (waste and unreasonable use), c) reasonable *place or point* of diversion, and d) reasonable *method or manner* of diversion.

5. **What constitutes reasonable use of water**.

   a. What is a reasonable use depends entirely on the circumstances, and may change with changing economic, social and environmental values and needs. *Environmental Defense Fund*, 26 Cal. 3d at 194, quoting *Joslin*, 67 Cal. 2d at 140 ["[w]hat constitutes a reasonable use of water is dependent upon not only the entire circumstances presented but varies as the current situation changes . . . [R]easonable use of water depends on the circumstances of each case, [and] such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance"]; *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist*., 3 Cal.2d 489, 567 (1935) ["[w]hat is a

[reasonable and] beneficial use at one time may, because of changed conditions, become a waste of water at a later time"]; *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935) [what constitutes waste of water "depends upon the circumstances of each case and the time when waste is required to be prevented"].

b. Uses once reasonable may later become unreasonable due to their adverse effects on other water users or the environment. See, e.g., *Town of Antioch v. Williams Irrig. Dist*., 188 Cal. 451 (1922) [point of diversion became unreasonable in light of additional demands for consumptive uses of water]; *Natl. Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983) [adverse effects of licensed appropriative water rights on Mono Lake ecosystem deemed unreasonable in light of increasing ecological damage]; *Imperial Irrig. Dist. v. State Water Res. Control Bd.*, 186 Cal. App. 3d 1162 (1990) [exercise of pre-1914 appropriative water rights deemed unreasonable in light of flooding caused by wasteful water delivery and irrigation practices]; *United States v. State Board*, 182 Cal. App. 3d at 129-130 [use of water is unreasonable to the extent it fails adequately to protect other beneficial uses and avoid violation of state water quality objectives].

c. Application of the reasonable and beneficial use doctrine may require water users "to endure some inconvenience or to incur reasonable expenses." *People v. Forni*, 54 Cal. App. 3d 743, 751-752 (1976); see also *City of Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 561 (1938); *Waterford Irrig. Dist. v. Turlock Irrig. Dist.*, 50 Cal. App. 213, 221 (1920); *Peabody*, 2 Cal. 2d at 376.

6. **Reasonable use is a longstanding background principle of California law**. The reasonable use doctrine was a powerful and explicit limitation on California water rights even prior to enactment of Article X, section 2 in 1928.

a. In *Natoma Water and Mining Co. v. Hancock*, 101 Cal. 42 (1894), the California Supreme Court explained that: "[t]here is but a limited supply of water in this state available for irrigation and other useful purposes, and a paramount public policy requires a careful economy of that supply . . . . While the right of a prior appropriator is carefully protected, he is compelled to exercise it with due regard for the rights of others and the paramount interests of the public. The quantity of his *lawful* appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and

reasonably efficient appliance in making his diversion in order that the surplus may not be rendered unavailable to those who are entitled to it." *Id*. at 50-52 (emphasis added).

b. See also *Peabody*, 2 Cal.2d at 368: "[t]he waters of our streams are not like land which is static, can be measured and divided and the division remains the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product in no wise remains the same. When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield."

7. **There is no property interest in an unreasonable use of water**. California courts have specifically held that there is no property interest in an unreasonable use or waste of water, and consequently there can be no taking.

a. See *Joslin*, 67 Cal. 2d at 144-145 ["since there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable"]; *People v. Forni*, 54 Cal. App. 3d at 753, emphasis in original ["[w]hile correctly arguing that a vested property right cannot be taken without just compensation, respondents ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the *reasonable* use of the flow of water"].

b. In *California Pastoral and Agricultural Co.*, 167 Cal. 78 (1914), the California Supreme Court held that: "[t]he state has limited to right to appropriate the waters of a stream to such waters as are reasonably necessary for the purpose for which the water is in fact appropriated. In so far as the diversion exceeds such reasonably necessary amount, it is contrary to the policy of our law and unauthorized, is a 'taking without right' [*Thayer v. California Devel. Co.*, 164 Cal. 117 (1912)], and can confer no right, no matter how long continued . . . . His 'color of title' . . . extends to no other water. *Id*. at 85-86; see also *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 22 (1929) ["[i]n so far as the diversion exceeds such reasonably necessary amount it is contrary to the policy of the law and is a taking without right and confers no title no matter for how long continued"].

c. See also *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 703

(1933); *Peabody*, 2 Cal. 2d at 369; *In re Waters of Long Valley Creek*, 25 Cal. 3d 339, 348, n.3 (1979); *United States v. State Water Board*, 182 Cal. App. 3d at 106; *Imperial Irrig. Dist v. State Water Resources Control Board*, 225 Cal. App. 3d 548, 563 (1990); *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1279 (2006) (all holding that there is no protectable property interest or vested property right in an unreasonable use of water).

8. **Enforcement and application of the reasonable use doctrine**.

a. Article X, section 2 is expressly declared to be "self-executing," meaning that water rights must constantly be adjusted and exercised in a manner which meets its dictates. Cal. Const., Art. X, § 2.

b. All water rights are subject to the continuing authority of the State Water Board to prevent waste and unreasonable use. *United States v. State Water Board*, 182 Cal. App. 3d at 129; Cal. Wat. Code §§ 275, 1394, 1675.

c. In addition, "the courts have concurrent jurisdiction with the legislatively established administrative agencies to enforce the self-executing provisions of article X, section 2," *even if* the State Water Board has expressly retained jurisdiction over the matter. *Environmental Defense Fund v. East Bay Municipal Util. Dist.*, 26 Cal. 3d 183, 199-200 (1980). Thus, "[p]rivate parties . . . may seek court aid in the first instance to prevent unreasonable water use or unreasonable method of diversion." *Id*.

9. **Conclusion**. Under the constitutional reasonable use doctrine, water users have no vested right to divert and use instream flows where such diversion and use would be unreasonable based on harm to instream beneficial uses, including fisheries. Thus, water users may be required to leave additional water instream in order to protect these fisheries, and such requirement does not infringe upon any vested property rights.

E. All Water Rights Are Subject to the Public Trust Doctrine.

1. **General.** This is a common law principle that has its roots in Roman common law. The public trust doctrine imposes "a further significant limitation on water rights" in California. *United States v. State Water Board*, 182 Cal. App. 3d at 106.

2. **Early application of the public trust doctrine: tidelands and submerged lands and navigable waters overlying those lands.**

a. California courts acknowledged the common law public trust doctrine as early as 1854, recognizing its applicability to all of the state's tidelands and submerged lands and navigable water overlying those lands. *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854) [the State "holds the complete sovereignty over her navigable bays and rivers, and . . . her ownership is . . . attributed to her for the purpose of preserving the public easement, or right of navigation"].

b. The doctrine originally applied to protect the public's right to use the state's tidelands and navigable waterways for purposes of commerce, navigation and fishing. *Ward v. Mulford*, 32 Cal. 365, 372 (1867); *People v. California Fish Co.*, 166 Cal. 576, 584, 589 (1913); *Colberg, Inc. v. State of Cal. Dep't of Pub. Works*, 67 Cal. 2d 408, 417 (1967).

c. This original branch of the public trust doctrine subsequently was expanded to include the preservation of tidelands and lands underlying other navigable waters "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Marks v. Whitney*, 6 Cal. 3d 251, 259-260 (1971); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 231 (1981); see also *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 247 (1981).

d. The State's "power to control, regulate and utilize [its] waters within the terms of the trust is absolute except as limited by the paramount supervisory power of the federal government over navigable waters." *Colberg*, 67 Cal. 2d at 416; see also *People v. Gold Run Ditch and Mining Co.*, 66 Cal. 138, 151 (1884) ["the rights of the people in the navigable rivers of the State are paramount and controlling. The State holds the absolute right to all navigable waters and the soils under them . . . [which] she holds as a trustee of a public trust for the benefit of the people"].

3. **Application to appropriative water rights**.

a. In *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983), the California Supreme Court held that the public trust doctrine applies directly to the state appropriative water rights

system as well as to tidelands and submerged lands and overlying waters. The state "retains continuing supervisory control over its navigable waters and lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores." *Id*. at 445. The public trust also applies to non-navigable tributaries whose diversion and extraction may impair the public trust values of navigable water bodies. *Id*. at 435-437.

(1) The "dominant theme" and "core" of the public trust doctrine is the state's duty to exercise "continuous supervision and control over the navigable waters of the state and the lands underlying those waters," as well as "continuing supervision over the taking and use of the appropriated water." *Id*. at 425-426, 435, 445. The public trust "is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Id*. at 441.

(2) In administering the trust, the state "has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect the public trust uses whenever feasible." *Id*. at 446. "In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state therefore has the inherent power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. . . . No vested rights bar such reconsideration" *Id*. at 447.

(3) The state also must act to prevent parties from using trust resources in a harmful manner. *Id*. at 437; see also *id.* at 426. In this regard, the state has a continuing duty to seek an accommodation between competing interests and "to preserve, so far as is consistent with the public interest, the uses protected by the trust." *Id.* at 447.

b. In *United States v. State Water Board*, 182 Cal. App. 3d 82, the

First District California Court of Appeal rejected arguments by the United States that the State Water Board had no authority to modify an appropriative water right permit once issued and that imposition of new standards for fish and wildlife protection would impair the United States' claimed vested right to appropriate. The court reasoned that:

"[t]his issue is now clearly controlled by *National Audubon Society v. Superior Court* [citation omitted] . . . . In that case, the Supreme Court clarified the scope of the "public trust doctrine" and held that the state as trustee of the public trust retains supervisory control over the state's waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust. . . . This landmark decision directly refutes the [United States'] contentions and firmly establishes that the state . . . has continuing jurisdiction over appropriation permits and is free to reexamine allocation decisions." *Id*. at 149-150.

Thus, the court concluded, in light of *National Audubon Society*, "the Board unquestionably possessed the legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife. That important role was not conditioned on a recital of authority. It exists as a matter of law itself." *Id.* at 150.

c. The Third District Court of Appeal recently affirmed this conclusion in *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 806 n. 54 (2006) [noting that "the rights of an appropriator are always subject to the public trust doctrine"], citing *National Audubon Society*, 33 Cal. 3d at 447.

4. **Public trust interest in fish and wildlife resources.**

a. **General**. In California there is a separate, but related, branch of the public trust doctrine that protects fish and wildlife resources in and of themselves, independent of navigable waters.

b. **Wild game**. *Ex Parte Maier*, 103 Cal. 476 (1894): "[t]he wild game within a State belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so, and they may, if they see fit, absolutely prohibit the taking of it . . . if deemed necessary for its protection or preservation, or the public

good." *Id*. at 483; see also *San Diego Archaeological Society, Inc. v. Compadres* (1978) 81 Cal. App. 3d 923, 927 [wild game "has always been deemed to be owned by the people of the state in their sovereign capacity and is not owned privately except as determined by the people"].

c. **Wild fish**.

(1) *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897): "[t]he fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (*Ex Parte Maier*, 103 Cal. 476, 483) as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statute of this and every other state in the Union." *Id*. at 399-400.

(2) See also *People v. Monterey Fish Prods. Co.*, 195 Cal. 548, 563 (1925) ["[t]he title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state"]; *People v. Stafford Packing Co.*, 193 Cal. 719, 726 (1924) [same]; *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 630 (1989) ["[w]ild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state"]; *People v. Murrison*, 101 Cal. App. 4th at 360 ["the State owns the fish in its streams in trust for the public"].

(3) The public property interest in fish extends to *all* waters of the state, whether navigable or non-navigable, and whether flowing over public or private lands. Thus, "[t]o the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery." *Truckee Lumber*, 116 Cal. at 401.

(4) The public property interest in fish explicitly limits private rights and requires that water rights holders exercise their

rights in a manner not injurious to the public's paramount right to own and control fish. *Id*. at 401-402; *People v. Glenn-Colusa Irrig. Dist*., 127 Cal. App. 30, 38 (1932).

d. **All fish and wildlife**.

(1) The public trust in wild fish and game was later expanded to include all wildlife, not just wild fish and "game" species. See, e.g., *Betchart v. California Dept. of Fish and Game*, 158 Cal. App. 3d 1104, 1106 (1984) ["California wildlife is publicly owned and is not held by owners of private land where wildlife is present"]; see also *People v. Harbor Hut Restaurant*, 148 Cal. App. 3d 1151, 1154 (1984) ["the State of California holds title to its tidelands and wildlife in public trust for the benefit of the people"]; *Center for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1363 (2008) ["it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife"].

(2) Like the navigable waters branch of the public trust doctrine, the fish and wildlife branch imposes an affirmative duty upon the state "to preserve and protect wildlife." *Betchart*, 158 Cal. App. 3d at 1106.

5. **The public trust doctrine also is reflected in the California Constitution**.

a. Art. X, § 4 (formerly Art. XV, § 2, originally codified in 1879) [no individual, partnership or corporation claiming or possessing the frontage or tidal lands of any navigable water body is permitted to exclude the right of way to such water when it is needed for any public purpose, nor destroy or obstruct the free navigation of such water].

b. Art. I, § 25 (codified in 1910) ["[t]he people shall have the right to fish upon and from the public lands of the State and the waters thereof . . . and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon"].

6. **There is no vested right to use water in a manner harmful to public trust interests**.

a. *National Audubon Society*, 33 Cal. 3d at 426, 437, 445, 447, 452 ["parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust" and the public trust doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust"].

b. *United States v. State Water Board*, 182 Cal. App. 3d at 106 ["no one has a vested right to use water in a manner harmful to the state's waters"].

c. *People v. Gold Run Ditch*, 66 Cal. at 151: "a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner . . . . Accompanying the ownership of every species of property is a duty to so use it that it shall not abuse the rights of other recognized owners [Civ. Code § 3479]. Upon that underlying principle, neither the State nor the Federal legislatures could . . . divest the people of the State of their rights in the navigable waters of the State for the use of private business, however extensive or long continued."

7. **Enforcement and application of the public trust doctrine**.

a. "[A]ny member of the general public . . . has standing to raise a claim of harm to the public trust." *National Audubon Society*, 33 Cal. 3d at 431, n. 11.

b. Moreover, the state and federal courts have concurrent original jurisdiction with the State Water Board to limit the exercise of appropriative water rights through enforcement and application of the public trust doctrine. *National Audubon Society*, 33 Cal. 3d at 451.

8. **Conclusion**. Water users have no vested right to violate the public trust doctrine, and water users generally must avoid using water for their own consumptive purposes in a manner that would harm or impair public trust resources, including fisheries, and must continually exercise their rights so as not to adversely affect these resources. Thus, under the public trust

doctrine, water users may be required to leave additional water instream in order to protect public trust resources, and such requirement does not affect any vested property right.

F. All Water Rights Must Be Exercised So As To Avoid a Public Nuisance.

1. **A nuisance is defined** as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, or bay, stream canal or basin." Cal. Civ. Code § 3479 (enacted in 1873). As applied to water resources, California nuisance law is closely related to the public trust doctrine.

2. **Case law examples**.

a. *People v. Glenn-Colusa Irrig. Dist*., 127 Cal. App. 30 (1932) [enjoining diversion from Sacramento River into unscreened canal as a public nuisance, on ground that it killed numerous salmon, trout, shad, bass and other fish].

b. *People v. Russ*, 132 Cal. 102 (1901) [enjoining erection of dams across certain non-navigable tributaries to the Salt River as a public nuisance, because the dams' diversion of water in material quantities from the tributaries obstructed the public's free use of a navigable stream].

c. *People v. Gold Run Ditch*, 66 Cal. 138 (1884) [enjoining hydraulic mining on non-navigable tributaries to the American and Sacramento Rivers, because the mining debris obstructed the public's free use of these navigable rivers].

d. *People v. Truckee Lumber*, 116 Cal. 397 (1897) [enjoining sawmill from discharging sawdust and other deleterious substances into the Truckee River as a public nuisance, on ground that it interfered with the public's property interest in fisheries].

e. *People v. K. Hovden Co.*, 215 Cal. 54 (1932) [enjoining operation of sardine cannery that used excess quantities of fish as a public nuisance that interfered with the public's property interest in fish].

G. All Dam Owners Must Comply With California Fish and Game Code Section 5937.

1. "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish & Game Code § 5937.

2. This section has been in effect in substantially the same terms since 1937, and applicable to the United States since 1945. See *id.*, §§ 5900, 5902.

3. Section 5937 is a legislative reflection and implementation of the common law public trust doctrine. See *California Trout,* 207 Cal. App. 3d at 631.

4. In *Natural Resources Defense Council v. Houston,* 146 F.3d 1118 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that there was no clear congressional directive in the federal Central Valley Project Improvement Act (CVPIA) that would preempt application of section 5937 to the United States' operation of Friant Dam, a component of the CVP, under section 8 of the 1902 Reclamation Act. On remand, the district court held that section 5937 in fact applied to the United States' operation of Friant Dam, whether or not this requirement had been expressly incorporated into the United States' water right permits for the project. *Natural Resources Defense Council v. Patterson,* 333 F. Supp.2d 906, 913-14 and 924-925 (E.D. Cal. 2004), citing *California Trout, Inc. v. Superior Court*, 218 Cal. App. 3d 187, 210 (1990). Furthermore, the court concluded that operations of Friant Dam were in violation of section 5937 because sufficient water was not being released downstream of Friant Dam to maintain historic fisheries. *NRDC v. Patterson,* 333 F. Supp. 2d at 924-925.

5. Section 5937 thus applies to the operation of all dams in California (whether publically or privately owned), thereby reflecting and strengthening the requirements that also are imposed upon dam operations by the California constitution, common law public trust doctrine and statutory nuisance law to protect downstream fishery resources.

H. Measure of Damages: Water Code Section 1392.

1. **Text**. "Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned or claimed for any permit granted or issued under the provisions of this division

["Water"], or for any rights granted or acquired under the provisions of this division, . . . in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State . . . or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division."

2. **Effect**. This condition is included in every water right permit or license issued in California and reflects a policy "that water belongs to the people and should not be given away without reserving an interest in the public. It has the effect of limiting recovery for condemnation of a water right whether through eminent domain or inverse condemnation. . . . [R]ecovery is limited to the water right application fee." Sawyer, Andrew: *Changing Landscapes and Evolving Law: Lessons From Mono Lake on Takings and the Public Trust*, 50 Okla. L. Rev. 311, 331, Fall 1997.

IV. JUDICIAL APPLICATION OF BACKGROUND PRINCIPLES OF CALIFORNIA LAW

A. The Nature and Scope of the Property Interest in Water.

1. ***Tulare Lake Basin Water Storage Dist. v. United States***, 49 Fed. Cl. 313 (2001). The Court of Federal Claims found a physical taking of State Water Project (SWP) contractors' contract rights to receive water from the SWP, on account of restrictions in deliveries due to increased instream flow requirements imposed by biological opinions for the endangered winter run salmon and threatened delta smelt. The court rejected the United States' background principles defense.

   a. ***Tulare Lake* court's conclusion**: "unlike the situation in *Omnia*, where the plaintiff could claim only a contract expectancy but not an ownership right in the steel, our plaintiffs can claim *an identifiable interest in a stipulated volume of water*. While under California law the title to water always remains with the state, the right to the water's use is transferred first by permit to DWR [the California Department of Water Resources], and then by contract to end-users, such as the plaintiffs. Those contracts confer on plaintiffs *a right to the exclusive use of prescribed quantities of water*, consistent with the terms of the permits. . . . Thus, *we see plaintiffs' contract rights as superior to all competing interests*." *Tulare Lake*, 49 Fed. Cl. at 318, emphasis added.

   b. **State law error**: neither appropriative water rights nor the contractual rights derived therefrom are rights to the exclusive use of prescribed quantities of water. Nor are appropriative water

rights or water service contracts superior to all competing interests. The contractors' rights are derived from, and subject to all limitations of, the underlying appropriative water right held by the state Department of Water Resources (DWR).[3] DWR's appropriative water right is subject to and limited by all background principles of state law and must be exercised in a manner consistent with these principles, including the beneficial and reasonable use and public trust doctrines.[4] The SWP contractors' rights are no greater than the appropriative water right from which they are derived.

c. **Case law support**:

(1) The SWP contractors' rights are derivative of, and limited by, the same restrictions applicable to DWR's appropriative water right. See *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th at 806, n.54 ["because the rights of an appropriator are always subject to the public trust doctrine (citation omitted), the same is true of the rights of a person who contracts with an appropriator for the use of the water appropriated. An appropriator cannot give away more rights than he or she has"].

(2) See also *Klamath v. United States*, 67 Fed. Cl. 504, 535 (2005) [the plaintiff water users "could not obtain an interest from the districts better than what the districts themselves possessed" since "one who does not have cannot give"], see also *id*. at 538 and *Allegretti*, 138 Cal. App. 4th at 1274 [both criticizing *Tulare Lake* for failing to consider whether the contracts were limited by principles state law and for awarding compensation "for the taking of interests that may well not exist under state law"]; *Casitas*

[3] In addition, while beyond the scope of this paper, the terms of the plaintiffs' contracts themselves indicate that the plaintiffs do not have an absolute right to receive a "stipulated volume" or "prescribed quantity" of water that is "superior to all competing interests."

[4] The *Tulare* court claimed to recognize that: "plaintiffs' contracts are derivative of the permit issued to DWR," the exercise of their contract rights had to be consistent with the terms of DWR's permit, DWR's permit "has not yet matured into a license," and the plaintiffs "possess rights not as direct appropriators of water, but as parties to a contract with an entity . . . entitled to appropriate water." *Tulare Lake*, 49 Fed. Cl. at 318 n. 6 and 321. Nevertheless, the court clearly did not recognize the significance of these concessions.

v. United States, Slip Op. at 28, n. 16 [noting these criticisms of *Tulare Lake*].

(3) In analyzing analogous Central Valley Project (CVP) federal water contracts, the court in *United States v. State Water Board*, 182 Cal. App. 3d at 147-148, held that: "[t]he CVP's appropriated water rights are, by definition, conditional – subject to the continuing supervisory authority of the Board, the constitutional limitation of reasonable use, and priorities of senior water right holders. Logically, neither the project *nor* the contractors could have any reasonable expectation of certainty that the agreed quantity of water will be delivered. Indeed, the federal water supply contracts reflect the parties' understanding that the availability of water supplies is uncertain: the contracts expressly provide for governmental immunity from any liability to the contractors due to failure to furnish the specified quantities of water in times of shortage [citation omitted]. Thus, both substantively and conceptually, the contractors cannot justify any reasonable expectation of a certain or guaranteed water supply for delivery." The same analysis applies to DWR's appropriated water rights and the contractual rights derived therefrom.

2. ***Allegretti & Co. v. County of Imperial***, 138 Cal. App. 4th 1261 (2006).

a. **Case summary**. The California Court of Appeal rejected an overlying groundwater user's claim of a physical and regulatory taking of its groundwater and land use rights by a county conditional use permit for redrilling a well on the claimant's property. A condition in the permit restricted the total amount of groundwater that could be extracted from all wells on the claimant's property.

b. **Holding re property interest**. "[A]lthough an overlying user such as Allegretti may have superior rights to others lacking legal priority, Allegretti's water 'right' is nonetheless restricted to a reasonable beneficial use consistent with Article X, section 2 of the California Constitution [citation]. Allegretti's claim to an unlimited right to use as much water as it needs to irrigate flies in the face of that standard, and it has not pointed to any evidence in the record that its proposed irrigation of all 2400 acres would be

reasonable within the meaning of the constitutional restriction." *Id*. at 1279.

3. ***Casitas Municipal Water Dist. v. United States***, Federal Circuit Court of Appeals, Case No. 2007-5163.

   a. **Case summary**. Case involves an alleged taking of Casitas' appropriative water right due to the requirements of a biological opinion, which specifies certain criteria for operation of Casitas' water diversion project to prevent jeopardy to endangered southern California steelhead. The U.S. Court of Federal Claims granted the United States' motion for partial summary judgment, holding that Casitas' takings claim must be analyzed under a regulatory taking, not a physical taking, framework. Casitas stipulated to entry of judgment against it on its regulatory takings claim, and Casitas appealed. On September 25, 2008, in a 2-1 decision, the Federal Circuit Court of Appeals reversed, holding that Casitas' claim must be analyzed as a physical takings claim.

   b. **State law error**. In so holding, the majority opinion incorrectly implies that Casitas has an absolute right to divert the entire amount of water specified in its water right license, irrespective of the effect such diversions may have on instream fishery resources. See Slip Op. at 16, 25-26 & n. 15, 30-31 & n. 17. As discussed, no water right holder has a vested right to divert a specified quantity of water in California. *United States v. State Water Board*, 182 Cal. App. 3d at 147. Nor does a water right holder have a vested right, through its diversions, to harm instream fishery resources and other beneficial uses. See, e.g., *id*. at 105-106, 129; *National Audubon Society*, 33 Cal. 3d at 426, 437, 440, 445, 447, 452.

   c. **Limited scope of decision**. Note, however, that the court only decided the question whether, under facts of this case, any alleged taking should be analyzed as a physical or a regulatory taking. (Slip Op. at pp. 5-6, 16, 31 n. 17.) The case did not actually decide whether a physical taking in fact occurred (i.e. whether and to what extent Casitas actually lost water it otherwise would have diverted and actually used for consumptive purposes), or the scope and extent of the property interest at stake (i.e. whether Casitas has an absolute right under California water law to divert at all times the maximum amount of water specified in its license). These remain open questions for the trial court on remand. (Slip Op. at p.

31 n. 17.)[5]

B. Application of Background Principles of California Law: ***Tulare Lake***.

1. ***Tulare Lake* court's conclusion**: "[o]nce an allocation has been made – as was done in D-1485 – that determination defines the scope of the plaintiffs' property rights, pronouncements of other agencies notwithstanding. While we accept the principle that California water policy may be ever-evolving, rights based on contracts with the state are not correspondingly self-adjusting. Rather, the promissory assurances they recite remain fixed until formally changed. In the absence of a reallocation by the [State Water Board], or a determination of illegality by the California courts, the allocation scheme imposed by D-1485 defines the scope of plaintiffs' contract rights. None of the doctrines to which defendant resorts – the doctrine of reasonable use, the public trust doctrine or state nuisance law – are therefore availing." *Tulare Lake*, 49 Fed. Cl. at 322.

2. **State law error**: decision erroneously assumes that D-1485 – a State Water Board water right decision issued nearly 15 years prior to the alleged takings – conclusively defined the scope of plaintiffs' property interests in water, and that such interests were thereby "fixed until formally changed." This holding confuses the authority vested in the State Water Board and the courts to *apply* background principles of state law, with the *actual nature and extent* of the limitations that such background principles continually impose on the plaintiffs' contract rights.

3. **Discussion**. D-1485 defines neither the scope of the plaintiffs' contract interests nor the appropriative water rights from which these interests were derived, for both legal and factual reasons.

   a. **Legal issues**.

      (1) **Water rights are not fixed in time**. The *Tulare Lake* court's ruling pays lip service to, but ultimately ignores, the fundamental principle of California law that application of the reasonable use and public trust doctrines is not fixed at any one point in time. Rather, because the application of

[5] The United States had assumed (the court says "conceded"), for purposes of the summary judgment motion and subsequent appeal only, that Casitas had a valid property right and that Casitas' definition of the scope of that right was correct. However, the United States expressly preserved these issues for later adjudication in the trial court if its motion for summary judgment ultimately were unsuccessful.

these doctrines is highly dependent upon the facts of the case and evolves with changed conditions, they must be applied during the relevant time period – in this case, 1992-1994. *Environmental Defense Fund*, 26 Cal. 3d at 194; *Natural Resources Defense Council v. Patterson*, 333 F.Supp.2d 906, 922-923 (E.D. Cal. 2004).

(a) Uses once reasonable can become unreasonable in light of changed conditions. See, e.g., *Joslin*, 67 Cal. 2d at 140; *United States v. State Water Board*, 182 Cal. App. 3d at 129-130. The reasonable use limitation of the California constitution is expressly declared to be "self-executing" and subject to the continuing authority of the state and the courts to modify previously granted rights to prevent waste and unreasonable use. *Id*.; Cal Const., Art. X, § 2.

(b) Application of the common law public trust doctrine likewise is "not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs," and "[t]he state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust." *National Audubon Society*, 33 Cal. 3d at 447. Thus, even if the State Water Board had considered and applied the public trust doctrine in 1978 – which it did not – such determination would not be conclusive as to circumstances existing in 1992-1994.

(2) **No vested water rights**. The *Tulare Lake* court's decision also ignores that there is no vested right to continue any use of water in violation of the reasonable use and public trust doctrines, irrespective of whether the State Water Board has previously authorized such use of water. While a State Water Board water right decision may give an entity a limited right to the use of a certain amount of the state's waters for a period of time, such use can *never* ripen into a vested right to use the water in an unreasonable amount or in a manner that harms public trust interests. *National Audubon Society*, 33 Cal. 3d at 426, 437, 445, 447, 452; *Forni*, 54 Cal. App. 3d at 753.

b. **Factual issues**. The *Tulare Lake* opinion ignores significant changed legal and factual circumstances that had occurred between the State Water Board's issuance of D-1485 in 1978 and the time period of the alleged taking between 1992-1994.

(1) First, in 1983, the California Supreme Court decided the *National Audubon Society* case, which expressly applied the common law public trust doctrine to appropriative water rights and imposed upon the state an affirmative duty to "take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *National Audubon Society*, 33 Cal. 3d at 446. The State Water Board therefore did not necessarily meet its public trust obligations in issuing D-1485 in 1978, since these duties were not made explicit until 1983.[6]

(2) Second, in 1986, in *United States v. State Water Board*, 182 Cal. App. 3d at 120, the California Court of Appeal disapproved the water quality objectives the State Water Board relied upon in adopting D-1485 as contrary California water rights and water quality law. The court admonished the State Water Board to conduct new proceedings "in light of the principles and views expressed in this opinion." *Id.* The State Water Board ultimately replaced the defective 1978 water quality objectives in 1995.

(3) Finally, the fish species at issue in *Tulare Lake* (the winter run salmon and delta smelt) were not listed as endangered and threatened, respectively, under the federal Endangered Species Act (ESA) until the 1990s, well after the State Board had issued D-1485.

C. Jurisdiction of the State and Federal Courts to Conduct *De Novo* Review of State Water Rights: *Tulare Lake*.

[6] Importantly, the California Supreme Court noted in *National Audubon Society* that "[t]he case for reconsidering a particular decision . . . is even stronger when [as here, the] decision failed to weigh and consider public trust uses." *National Audubon Society*, 33 Cal. 3d at 447.

1. ***Tulare Lake* court's conclusion**: "[t]he public trust and reasonable use doctrines each require a complex balancing of interests -- an exercise for which this court is not suited and with which it is not charged. To the extent that water allocation in California is a policy judgment – one specifically committed to the [State Water Board] and the California courts – a finding of unreasonableness would be tantamount to our *making* California law rather than applying it. . . . While we are often asked to interpret state . . . statutes or regulations to determine the scope of a property interest under a takings claim, those determinations do not extend to matters of discretion committed to the authority of the state." *Tulare Lake*, 49 Fed. Cl. at 323-324, emphasis in original.

2. **State law error**: contrary to the above statements, the California courts have held that *both* state and federal courts have concurrent jurisdiction with the State Board to conduct *de novo* review of state water rights. See *National Audubon Society*, 33 Cal. 3d at 451-452; *Environmental Defense Fund*, 26 Cal. 3d at 200. In addition, Art. X, § 2 specifically provides that "[t]his section shall be self-executing." The California courts have held that the reasonable use and public trust doctrines are inherent, ongoing limitations on all types of water rights in California, regardless of whether the State Water Board has already rendered a decision with respect to such rights. Furthermore, the courts have a duty to apply these doctrines to the water rights in question at the time of the dispute.

3. In *NRDC v. Patterson*, 333 F.Supp.2d 906, the court rejected the United States' and federal water contractors' argument that the environmental plaintiff's claim for instream flows under section 5937 of the California Fish and Game Code was barred by a 1959 State Board water right decision. The court stated that "the courts have concurrent original jurisdiction" and "retain jurisdiction to fashion a judicial remedy for enforcement of the statutory mandate appropriate to the circumstances." *Id*. at 923.

D. Physical vs. Regulatory Taking.

1. ***Tulare Lake***.

   a. ***Tulare* court's conclusion**: plaintiffs suffered a physical taking because "[i]n the context of water rights, a mere restriction on use – the hallmark of regulatory action – completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water [citing *Eddy v. Simpson*]. Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes

a complete extinction of all value. . . . That complete occupation of property – an exclusive possession of plaintiffs' water-use rights for preservation of the fish – mirror the invasion present in *Causby*. To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking." *Tulare Lake*, 49 Fed. Cl. at 319. "[W]hether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference." *Id*. at 320.

b. **State law errors**:

(1) **No physical occupation of a usufructuary right**. By definition, there can be no physical taking of a water right by a mere restriction on the exercise of that right because a water right is a non-possessory, qualified right to the *use* of a limited and critical public resource, the corpus of which is owned in trust by the state for the people. See, e.g., Cal. Wat. Code, §§ 102, 1001; *United States v. State Water Board*, 182 Cal. App. 3d at 100; *Eddy*, 3 Cal. at. 252-253. A restriction on an appropriator's right to take and use water from the stream, as the biological opinions did in *Tulare Lake*, lacks the essential defining feature of a permanent physical occupation: the ouster from or intrusion on a *possessory* interest in property which prevents the owner from excluding others from possession and use of that property. Because a water right holder does not have an exclusive right of possession to begin with, a restriction on use cannot "physically occupy" the property interest, in either a legal or a literal sense.

(2) **No appropriation for instream uses**. The biological opinions also could not have effected a physical taking because under California law, one cannot physically appropriate water for instream uses, including protection of fish and wildlife. The California Court of Appeal has specifically disapproved claims of appropriative water rights for instream flow, where the applicant intends to keep the water instream for fishery protection purposes. Such claimed appropriations *lack* the necessary predicates of physical diversion and control. See *Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 598-

599 (1979) and *Cal Trout v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 603 (1989).

(3) Therefore, under California law, the United States does not and cannot legally "appropriate" or take "physical control" of water by providing that water must remain in the river for instream use. Cf. *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 720-721 (1995) ("minimum stream flow requirements neither reflect nor establish 'proprietary rights' to water," and accordingly an instream flow requirement included within a state certification issued under section 401 of the Clean Water Act does not affect a water right, but rather "merely determines the nature of the use to which that proprietary right may be put").

2. ***Allegretti***.

a. **Claim**. Allegretti contended that a use permit condition which limited the amount of groundwater it could extract denied it "access to the aquifer on its land," thereby physically taking its "right to use the water as if it had diverted it elsewhere." *Allegretti*, 138 Cal. App.4th at 1271. Allegretti further asserted that "when one is precluded from exercising the right to use water today, the right to use that particular water is gone forever." *Id.*

b. **Holding**. The Fourth District California Court of Appeal rejected these arguments, reasoning that:

"imposition of a permit condition limiting the total quantity of groundwater available for Allegretti's use . . . cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. The County did not physically encroach on Allegretti's property or aquifer and did not require or authorize any encroachment [citation omitted]; it did not appropriate, impound, or divert any water. The County's permit decision does not effect a per se physical taking under any reasonable analysis." *Id.* at 1273.

The *Allegretti* court further stated:

"we disagree with the *Tulare Lake's* conclusion that the government's imposition of pumping restrictions is no different

than an actual physical diversion of water. (*Tulare Lake*, *supra*, 49 Fed. Cl. at pp. 319-320.) The reasoning is flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation like the government's diversion in *International Paper* [citation omitted] or its low flight of army and navy airplanes in *Causby* [citation omitted]. *Tulare Lake's* reasoning disregards the hallmarks of a categorical physical taking, namely actual physical occupation or invasion of a property interest." *Allegretti,* 138 Cal. App. 4th at 1275.

3. ***Casitas***.

a. **Factual assumptions**. The United States had assumed, for purposes of the underlying summary judgment motion and appeal only, that the biological opinion required Casitas to construct a fish ladder facility and divert water over the facility, which resulted in the loss of some amount of water that Casitas otherwise would have diverted into Casitas Reservoir. (See Slip Op. at 4, 16, 20-22, 24, 27, 28 n. 16.) The facility was not located on the Ventura River but on Casitas' canal (the Robles-Casitas Canal), near the intersection of the Ventura River and Robles Diversion Dam. (Slip Op. at 4, 20.)

b. **Holding**. The court held that, under these unique facts and based on the government's "concessions," the government's requirement that Casitas divert water over the fish ladder must be analyzed under a physical taking framework, not a regulatory taking framework. Specifically, the court held that the government's admissions "make clear that the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles-Casitas Canal - after the water had left the Ventura River and was in the Robles-Casitas Canal - and towards the fish ladder, thus reducing Casitas' water supply." (Slip Op. at 22; see also *id*. at 26, 28.)

The majority further opined that "[w]hen the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water. The fact that the government did not itself divert the water is of no import." *Id.* at 23-24. The decision implies that, had the biological opinion simply specified that a certain amount of water be left instream, a regulatory taking analysis would have applied. *Id.* at 22, 26, 28.

The opinion's reasoning is predicated on several serious errors of state law.

c. **State law errors**.

(1) As the dissenting opinion pointedly notes, the majority opinion inappropriately elevates form over substance by creating an artificial distinction between bypassing flows around a dam to a water delivery canal then returning water to the river by way of a fishway, versus bypassing flows over, around or through the dam without making use of a water delivery canal. Dissenting Slip Op. at 7-8. Under the majority's approach, while both approaches are designed to achieve the same purpose of maintaining fisheries and other instream beneficial uses, the former approach would be analyzed under a per se physical taking framework and the latter under a regulatory taking framework. As dissenting Justice Mayer states: "[t]o differentiate between these two illustrative approaches on a deceptively simple theory of 'diversion' creates a perverse system of incentives, . . . because self-selected methods of regulatory compliance can be manipulated and negotiated to arrive at preferred Fifth Amendment results." *Id.* at 8.

(2) The majority's artificial distinction between "diversions" around a dam making use of a water delivery canal before water is returned to the river, versus flows over, around or through a dam using bypass flow facilities ignores section 5937 of the Fish and Game Code, which requires all dam owners 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 & Game Code § 5937. Under the majority's reasoning, where fish passage is provided by a fishway that connects to a water delivery canal, whether an alleged taking of California water rights is analyzed under a physical or regulatory taking framework will depend upon whether the water user is or is not in compliance with state law requiring instream flows to be bypassed through a fishway. Such a distinction makes no sense and is unworkable in practice.

(3) The majority opinion also ignores other important requirements of California water law that bear upon the

appropriate analytical framework to be applied in this case. Specifically, as the State Water Board discussed in its amicus brief, under California law, water rights are non-exclusive, non-possessory, usufructuary rights. Cal. Water Code §§ 102, 1001; *Palmer v. Railroad Comn*, 167 Cal. 163, 168 (1914); *Parks Canal & Mining Co. v. Hoyt*, 57 Cal. 44, 46 (1880). As such, water rights cannot be physically appropriated, occupied, or invaded by a mere restriction on the exercise of such rights, as occurred in this case. See Dissenting Slip Op. at 3-4, 6, 9. Dissenting Justice Mayer correctly observed that "[t]he government is not appropriating or taking possession of Casitas' property, but rather is prohibiting Casitas from making private use of a certain amount of the river's natural flow under a public program to promote the common good." *Id*. at 9. Moreover, under California law, it is the holder of the appropriative water rights -- in this case, Casitas -- that actually physically controls water right diversions, not the United States.