IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CASITAS MUNICIPAL WATER DISTRICT, Plaintiff, v. UNITED STATES, Defendant.	No. 05-168 L Hon. John P. Wiese

THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, STATE WATER CONTRACTORS, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, KERN COUNTY WATER AGENCY, WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT AMICI CURIAE BRIEF

Daniel J. O'Hanlon
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation
400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4416
Telephone: (916) 321-4500
Facsimile: (916) 321-4555

Counsel for Amici Curiae
Association of California Water Agencies et al.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1, Amici Curiae Association of California Water Agencies, State Water Contractors, San Luis & Delta-Mendota Water Authority, Kern County Water Agency, and Wheeler Ridge-Maricopa Water Storage District hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

I. INTEREST OF AMICI CURIAE 1

II. INTRODUCTION 4

A. Casitas Holds Vested Appropriative Water Rights 4

B. The NMFS Biological Opinion 7

III. ARGUMENT 8

A. Under California Law, The Right To Divert Water, And The Water Actually Diverted From The Stream, Are Property Protected By The Fifth Amendment 8

B. There Is No Per Se Rule Under California Water Law That Diversions That Harm Fish Are Unreasonable Or Are Contrary To The Public Trust Doctrine 12

C. The Federal ESA And The NMFS Biological Opinion Do Not Mirror The Requirements Of California Water Law 15

D. Casitas' Right Under Its License Is Not Vested Only In The Sense That Its Right May Be Reconsidered, And After Due Process, Water Allocations May Be Altered Prospectively 18

E. Casitas' License Reflects The SWRCB's Last Judgment of Reasonable And Beneficial Use And Application Of The Public Trust Doctrine, And Governs Unless And Until It Is Reconsidered And Revised By The SWRCB Or A California Court 20

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 17

Tulare Lake Basin Water Storage District v. United States,
49 Fed. Cl. 313 (2001) 20, 21

U.S. v. Gerlach Live Stock Co.,
339 U.S. 725 (1950) 12

STATE CASES

Eddy v. Simpson,
3 Cal. 249 (1853) 9

Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.,
26 Cal. 3d 183 (1980) 12

In re Waters of Long Valley Creek Stream System,
25 Cal. 3d 339 (1979) 19

Ivanhoe Irr. Dist. v. All Parties,
47 Cal. 2d 597 (1957) (*revd. on other grounds* in
Ivanhoe Irr. Dist. v. McCracken) 11

Kidd v. Laird,
16 Cal. 161 (1860) 10, 11

Lindblom v.Round Val. Water Co.,
178 Cal. 450 (1918) 10

McDonald v. Bear River & Auburn Water & Min. Co.,
13 Cal. 220 (1859) 11

National Audubon Society v. Superior Court,
33 Cal. 3d 419 (1983) 13, 19

Parks Canal & Min. Co. v. Hoyt,
57 Cal. 44 (1880) 11

Palmer v. Railroad Commission,
167 Cal. 163 (1914) 10, 11

TABLE OF AUTHORITIES

Page

San Bernardino v. Riverside,
186 Cal. 7 (1921) 10

State Water Resources Control Board Cases,
136 Cal. App. 4th 674 (2006) 14, 15

Stevens v. Oakdale Irr. Dist.,
13 Cal. 2d 343 (1939) 11

United States v. State Water Resources Control Board,
182 Cal. App. 3d 82 (1986) 7, 11, 13, 14

FEDERAL STATUTES

16 U.S.C. § 1536 7

16 U.S.C. § 1536(a)(2) 16

16 U.S.C. § 1536(a) 16

16 U.S.C. § 1536(b) 16

16 U.S.C. § 1536(b)(3)(A) 16

STATE STATUTES

California Water Code

Section 100 ..... 8, 13, 20
Section 102 9
Section 275 20
Section 1001 9
Section 1225 5
Section 1241 8
Section 1243 7
Section 1253 ..... 6, 13
Section 1255 7
Section 1257 ..... 7, 13
Sections 1300-1324 5
Section 1330 5
Section 1340 et seq. 5

TABLE OF AUTHORITIES

Page

Section 1350 5
Section 1380, et seq. 5
Section 1381 5
Section 1455 5
Section 1610 5

STATE CONSTITUTION

California Constitution, Article X, section 2 ..... passim

FEDERAL RULES AND REGULATIONS

50 C.F.R. § 402.14 6

OTHER AUTHORITIES

62 Cal. Jur. 3d Waters § 356 10

62 Fed. Reg. 43937 (August 18, 1997) 7

12 Witkin Summary of Cal. Law, Real Property § 917 11

Hutchins, *The California Law of Water Rights* (1956) 4, 5, 11, 12

Slater, *California Water Law and Policy* (2009) 11

I. INTEREST OF AMICI CURIAE

The Association of California Water Agencies ("ACWA"), State Water Contractors, San Luis & Delta-Mendota Water Authority, Kern County Water Agency, and Wheeler Ridge-Maricopa Water Storage District (collectively "amici curiae") submit this brief as amici curiae. These entities have a vital interest in ensuring that a long-term, reliable water supply is available to meet California's ever-increasing demands for water. California water agencies depend upon water rights granted under California law to provide for the needs of the cities and farms they serve, now and for the future.

ACWA is a non-profit corporation that represents a coalition of over 440 member public water agencies in California. Member agencies range in size from small irrigation districts to the largest urban water wholesalers in the country. These agencies manage, treat and distribute water to rural communities, farms and cities. ACWA represents these agencies before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts.

State Water Contractors ("SWC") is a non-profit corporation that represents 27 member public agencies from Northern, Central and Southern California that purchase water under contract from the California State Water Project. Collectively, the SWC members deliver water to more than 25 million residents throughout the state and more than 750,000 acres of highly productive agricultural lands. SWC represents these members before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts.

San Luis & Delta-Mendota Water Authority ("SLDMWA") was formed in 1992 as a joint powers authority, and has its principal office in Los Banos, California.

SLDMWA is comprised of 29 member water agencies, of which 27 contract with the United States for water supply stored, pumped and conveyed by the CVP. The water supplied to SLDMWA's member agencies is used to meet the water supply needs of areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito and Santa Clara Counties. This water serves over 2.8 million acres of agricultural lands, the municipal and industrial needs of more than 1 million people in the Silicon Valley and cities in the San Joaquin Valley, and wildlife needs on approximately 50,000 acres of private waterfowl habitat. SLDMWA represents its member agencies before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts.

Kern County Water Agency ("Kern") is a local public agency created by an act of the California Legislature in July 1961 to contract with DWR for SWP water supplies needed by the people and farms in Kern County, among other purposes. Kern has a contract with the State of California for a long-term water supply from the State Water Project ("SWP") of approximately 1,000,000 acre-feet of SWP water. Kern provides the water supply for approximately 600,000 acres of prime farmland and 300,000 residents of Kern County. Kern represents its water users before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts.

Wheeler Ridge-Maricopa Water Storage District ("WRMWSD") is a local public agency created by an act of the California Legislature in August 1959 for the purpose securing a surface water supply for agricultural purposes from the Feather River Project (now the SWP). WRMWSD provides water supplies to approximately 90,000 acres of

farmland within its boundaries. WRMWSD represents its water users before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts.

This case concerns the intersection of water supply and the mandates of the federal Endangered Species Act ("ESA"). Pursuant to the ESA, in order to protect fish, the Casitas Municipal Water District ("Casitas") is being required to release water it is otherwise entitled to use for municipal, industrial, irrigation and other beneficial uses under a license issued by the California State Water Resources Control Board. The water that the federal government requires Casitas to release down a fish ladder flows into the ocean, and Casitas loses all use of that water.

In this brief, these amici explain the property interest in appropriative water rights and water appropriated pursuant to those rights under California law. In particular, this brief addresses arguments raised by the United States, and by amici the State Water Resources Control Board ("SWRCB") and the Natural Resources Defense Council ("NRDC"), that under background principles of California law, California water rights cannot extend to the diversion or use of any water that federal wildlife agencies have decided should be dedicated to the needs of fish pursuant to the federal ESA. These briefs do not accurately state California law. Instead, as we explain, Casitas' right to divert water under the License granted by the SWRCB is a protectable property interest, and Casitas owns the water that it has diverted from the Ventura River. There is no support in California law for the per se rule proposed by the United States, SWRCB and NRDC that no one can own a right to divert water where doing so causes harm to fish. Nor does the NMFS biological opinion simply mirror California law; the requirements of

the federal ESA are focused on listed species, making the inquiry far narrower than the broad balancing of public interest factors required under the relevant principles of California law. Finally, while Casitas' rights are subject to the ongoing supervision of the SWRCB and the California courts, and are subject to reconsideration and prospective reallocation in light of changing circumstances and needs, no such reallocation in accordance with California law has occurred here.

II. INTRODUCTION

A. Casitas Holds Vested Appropriative Water Rights

California's system of water rights is a product of the state's history and the challenges in meeting the varied water needs within California. The prosperity and well-being of California's residents, farms and businesses require a stable and functioning water supply system. Water rights are the foundation upon which California water suppliers depend to protect and assure their customers' use of water, and to justify their massive investments in water supply and treatment facilities.

This case involves appropriative rights to surface water. In general, appropriative rights to surface water are rights to divert and use otherwise unappropriated water, that is, water which is surplus to the needs of riparian owners, prior appropriators and prescriptors. Hutchins, *The California Law of Water Rights* (1956) at 67-68. Appropriative rights are based on physical control and beneficial use. *Id.* at 108-112. They are rights of priority in that, if the available supply is insufficient to meet the needs of all appropriators, the one with the earliest priority date (*i.e.*, the date of the first act initiating the right) is entitled to satisfy his needs fully before those with later priority are entitled to any water. *Id*. at 47, 130-132. Appropriative rights arising under the statutory

procedures are an exclusive right "to the use of definite quantities of water." *Id.* at 132; *see also* Cal. Water Code § 1610 [a license "confirms the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use"]. Cal. Water Code § 1610. An appropriator may use the water for any reasonable, beneficial purpose on any land no matter where located, and may store water from one season for use in a later season or from one year for use in subsequent years. Hutchins, *The California Law of Water Rights* at 149-151.

The permit process involves public notice of the application, an opportunity for interested persons to protest, and hearings before the SWRCB. Cal. Water Code §§ 1300-1324, 1330, 1340 et seq. At the completion of this process, the SWRCB may issue a permit to appropriate water. *Id.* at §§ 1350, 1380 et seq. The issuance of a permit continues in effect the priority date of the application, and gives the right to take and use the water to the extent and for the purposes allowed in the permit, pending issuance of a license or revocation of the permit. *Id.* at §§ 1381, 1455. To complete an appropriation, and obtain a license, the water must be put to beneficial use. After a permit holder has perfected its right by putting the water to full beneficial use, it returns to the SWRCB for a license. The Board issues "a license which confirms the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use." Cal. Water Code § 1610. The procedures set forth in the California Water Code provide the sole and exclusive method for acquiring appropriative rights to divert and store unappropriated surface waters. Cal. Water Code § 1225.

Casitas' water rights date to at least the mid-1950s, when the district obtained a permit (Permit 10364) from the SWRCB, and entered into a contract with the United

States Bureau of Reclamation ("Reclamation") for the construction and operation of a water reclamation project on the Ventura River ("Project"). (Plaintiff's Mot. Part. Summ. J. Contract Claim at 1.) The Project facilities allow the control of the water necessary for an appropriative right. Unlike some projects built by Reclamation where it issued permits in its own name, in this instance, the permit was issued in the name of Casitas. In the years after completion of construction, Casitas put the water diverted by the Project to beneficial use. Based on proof of completion of the Project facilities, and proof that Casitas had put the water to beneficial use, in January of 1986 the SWRCB issued a license (No. 11834) on the permit ("License"). The License authorizes Casitas to beneficially use the water in the Ventura River and Coyote Creek in Ventura County for municipal, domestic, irrigation, industrial, recreational, and standby emergency uses. (*Id.* at 4.) Under the License, Casitas has a right to divert up to 107,800 acre-feet per year, including to storage, and to put up to 28,500 acre-feet per year to beneficial use.

Importantly, a SWRCB-issued water rights permit or license reflects an exercise of its judgment, which involves weighing sometimes competing interests and deciding upon the outcome that best serves the public interest overall. In the permit process, the SWRCB is required to "allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." Cal. Water Code § 1253. The SWRCB must "consider the relative benefit to be derived from (1) 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, mining and power purposes, and any uses specified to be protected in any

relevant water quality plan, and (2) the reuse or reclamation of the water sought to be appropriated . . ." Cal. Water Code § 1257. The SWRCB must also "take into account, *whenever it is in the public interest,* the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." Cal. Water Code § 1243 (emphasis added). Indeed, the SWRCB must reject an application that is not in the public interest: "[t]he Board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest." *Id*. at § 1255. As a California court explained:

> The nature of the public interest to be served by the Board is reflected throughout this statutory scheme. As a matter of state policy, water resources are to be used "to the fullest extent . . . capable" (§ 100) with development undertaken "for the greatest public benefit" (§ 105). And in determining whether to grant or deny a permit application in the public interest, the Board is directed to consider "any general or co-ordinated plan . . . toward the control, protection, development . . . and conservation of [state] water resources . . ." (§ 1256), as well as the "relative benefits" of competing beneficial uses (§ 1257). Finally, the Board's actions are to be guided by the legislative policy that the favored or "highest" use is domestic, and irrigation the next highest. (§ 1254.)

United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 103 (1986) (*citing* Cal. Water Code).

B. <u>The NMFS Biological Opinion</u>

Effective October 17, 1997, the National Marine Fisheries Service ("NMFS" or "NOAA") listed the Southern California steelhead trout as an endangered species. 62 Fed. Reg. 43937 (August 18, 1997). Reclamation thereafter consulted with NMFS concerning the impacts of the Project on these fish, pursuant to section 7 of the ESA, 16 U.S.C. § 1536. On March 31, 2003, NMFS issued a biological opinion, in which it

concluded that construction of a fish passage facility and a new set of operating criteria to facilitate upstream and downstream passage of fish, were necessary to avoid jeopardy to the Southern California steelhead trout.

Historically, Casitas was only required to bypass up to 20 cfs for downstream flows in the Ventura River, under the Trial Operating Criteria. Biological Opinion, Authorization for the Construction and Future Operations of the Robles Fish Passage Facility, March 31, 2003 at 6. Under the biological opinion, the flows released downstream at the diversion are increased, and "must be maintained at or above 50 cfs during the first 10 days of each migratory storm event (i.e., storms generating flows 150 cfs or greater, as measured at the Robles Diversion)." *Id*. at 17. This increased down-stream flow requirement decreases the amount of water Casitas can otherwise divert under its water right license, by up to 30 cfs during the months of January through June. *Id*. at 7.

III. ARGUMENT

A. Under California Law, The Right To Divert Water, And The Water Actually Diverted From The Stream, Are Property Protected By The Fifth Amendment

A core tenet of California water law is that "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." Cal. Water Code § 100. Accordingly, water rights arise only through beneficial use, and a failure to exercise a right for five consecutive years by putting water to beneficial use will result in forfeiture of the right. Cal. Water Code §§ 100, 1241. In that way, parties are prevented from hoarding rights they cannot use, and water is available for those who can put it to beneficial use. Accordingly, the California Supreme

Court explained more than one hundred fifty years ago, "[i]t is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." *Eddy v. Simpson*, 3 Cal. 249, 252 (1853). Section 102 of the California Water Code provides: "[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." Cal. Water Code § 102; *see also* Cal. Water Code § 1001 ("Nothing in this division shall be construed as giving or confirming any right, title or interest to or in the corpus of any water.").

Citing these principles, the United States argues that Casitas "does not own the water in the Ventura River and does not own the water it diverts into the Robles Diversion facility. Plaintiff's license gives it the ability to divert from the Ventura River, but its compensable property interest is neither the water itself nor the right to use the particular molecules it diverts." (U.S. Pretrial Memorandum, Doc. 159, at 11.) The United States is correct that Casitas does not own the water flowing in the Ventura River, but wrong in claiming that under California law Casitas does not own the right to exclusive use of water it has diverted from the Ventura River into the Robles Diversion facility, and wrong in claiming that Casitas' right to divert that water is not a compensable property interest.

The California courts have explained that, notwithstanding the people's interest in the corpus of water flowing in a stream, persons and entities do own a right to exclusive use of the water they have removed from the stream and reduced to their possession. The California Supreme Court explained this in 1914:

> [t]he doctrine that it is public water, or that it belongs to the state because it is not capable of private ownership, has no support in the statutes of the state or in any decision of this court. The true reason for the rule that there can be no property in the *corpus* of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership. . . . One may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be a part of the stream.

Palmer v. Railroad Commission, 167 Cal. 163, 168 (1914). In *San Bernardino v. Riverside*, the court dismissed a literal interpretation of the legislative declaration in former California Civil Code section 1410 that "[a]ll water or the use of water within the state of California is the property of the people of the state of California." The court explained that

> [t]aken literally this would include all water in the state privately owned and that pertaining to the lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use. (See *Palmer v. Railroad Commission*, 167 Cal. 175, [139 Pac. 997].) The constitution expressly forbids it. (Art. I, sec. 14.)

San Bernardino v. Riverside, 186 Cal. 7, 30-31 (1921). Contrary to the claim by the United States, therefore, Casitas does own the particular water that it takes possession of by diverting it from the Ventura River. That water is its property no less so than the person who purchases a bottle of water from a store owns the water contained in the bottle. This principle is confirmed in treatises of California water law, which recognize that "waters reduced to possession are private property during the period of possession." 62 Cal. Jur. 3d Waters § 356 (citing *Kidd v. Laird*, 16 Cal. 161 (1860); *Lindblom v.*

Round Val. Water Co., 178 Cal. 450 (1918); *Parks Canal & Min. Co. v. Hoyt*, 57 Cal. 44 (1880); *Palmer v. Railroad Commission of California*, 167 Cal. 163 (1914); *Stevens v. Oakdale Irr. Dist.*, 13 Cal. 2d 343 (1939)); 12 Witkin Summary of Cal. Law, Real Property § 917 (citing *Stevens v. Oakdale Irr. Dist.*, 13 Cal. 2d 343, 350 (1939)); *see also* Scott S. Slater, *California Water Law and Policy* (2009), § 2.18 (1). Regardless of whether its right is characterized as title to the water diverted, or as a right to exclusive use of the water diverted, Casitas holds a private property interest in the water it has diverted from the Ventura River.

Further, Casitas' right to divert water from the Ventura River is a property right, a right that has long been protected as such by California courts. From the earliest days of statehood, California has recognized that an appropriative water right is a private property right, subject to ownership and disposition by the owner as in the case of other private property. "The right that one may acquire with respect to water flowing in a stream is a right to its use, which will be regarded and protected as property." Hutchins, *The California Law of Water Rights* at 37. The right to the use of water is "regarded and protected as property" and is "substantive and valuable property." *Id.* at 121 (*citing Kidd v. Laird*, 15 Cal. 161, 179-180 (1860) and *McDonald v. Bear River & Auburn Water & Min. Co.*, 13 Cal. 220, 232 (1859)). Water rights arise when water is put to beneficial use, and as courts have explained: "once rights to use water are acquired, they become vested property rights. As such they cannot be infringed by others or taken by governmental action without due process and just compensation." *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 101 (1986) (*citing Ivanhoe Irr. Dist. v. All Parties*, 47 Cal. 2d 597, 623 (1957) (*revd. on other grounds* in *Ivanhoe Irr.*

Dist. v. McCracken), and *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-754 (1950)). "Because water rights possess indicia of property rights, water right holders are entitled to judicial protection against infringement, e.g., actions for quiet title, nuisance, wrongful diversion or inverse condemnation." *Id*. at 104 (*referencing* Hutchins, *The California Law of Water Rights* at 262-282, 348-356).

B. There Is No Per Se Rule Under California Water Law That Diversions That Harm Fish Are Unreasonable Or Are Contrary To The Public Trust Doctrine

A false premise underlies the arguments of the United States, the SWRCB and NRDC regarding the background principles of California law. The false premise is that water diversions that harm fish are a *per se* violation of the prohibition against unreasonable use or method of diversion in Article X, section 2 of the California Constitution, and of the public trust doctrine. To the contrary, these doctrines do not prohibit all harm to fish from water diversions. Instead, these doctrines require a complex balancing of the many uses of the water involved and of the public interest, and the needs of fish are but one factor in this complex balancing.

As the California Supreme Court has explained, "[w]hat constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes . . . . [W]hat is a reasonable use of water depends upon the circumstances of each case, such an inquiry cannot be resolved *in vacuo* from statewide considerations of transcendent importance." *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.*, 26 Cal. 3d 183, 194 (1980) (internal citations omitted). The California Supreme Court has been quite clear, too, that the public trust doctrine does not provide fish and wildlife resources absolute protection from any harm due to water

diversions. Rather, "[t]he state must have the power to grant . . . rights to appropriate water *even if diversions harm the public trust uses.*" *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 426 (1983) (emphasis added). As the court further explained:

> As a matter of current and historical necessity, the Legislature acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to instream trust values . . . . [I]t would be disingenuous to hold that such appropriations are and always have been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

National Audubon Society, 33 Cal. 3d at 446.

This required balancing of interests is reflected in the statutes governing how the SWRCB must evaluate applications for permits to appropriate water. In regulating appropriations of water, the SWRCB "is expressly commissioned to carry out" the policy of Article X, section 2. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d at 129; Cal. Water Code § 100. The SWRCB is required to balance all competing uses, and strike the balance that in its judgment will "best develop, conserve, and utilize in the public interest the water sought to be appropriated." Cal. Water Code §§ 1253, 1257; *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d at 113. If the needs of fish truly had the primacy assumed by the United States, the SWRCB and NRDC in their briefs, then much of the California Water Code would be of no effect.

Outside of this litigation, the SWRCB has recognized that California law does not prohibit harm to fish from water diversions. For example, in Decision 1485, the SWRCB balanced the presumed needs of fish against the municipal and irrigation water supplies provided by the State Water Project and Central Valley Project. The SWRCB recognized that it was possible to adopt water quality standards that would provide "full protection" for fish, but found that it was not in the broader public interest to do so. *United States v. State Water Resources Control Bd*., 182 Cal. App. 3d 82, 149 (1986). The Court of Appeal explained that "the Board recognized that while a higher level was necessary to ensure protection of other species (e.g., white catfish, shad and salmon), such level of protection would require the 'virtual shutting down of the project export pumps,' contrary to the broader public interest. Thus, the Board determined that the modified without project standards provided a reasonable level of protection, pending future mitigation actions." *Id.*

More recently, in another case involving the permits applicable to the State Water Project and Central Valley Project, the Court of Appeal again rejected an argument that the public trust doctrine required the SWRCB to do all it feasibly could to benefit salmon. *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 778 (2006). The Court of Appeal explained:

> Seizing on the phrase "whenever feasible," the Audubon Society parties contend that "conflicts between public trust values and competing water uses must, whenever possible, be resolved in favor of public trust protection." . . .
>
> We are not persuaded. . . . In a passage from *National Audubon Society* that the Audubon Society parties ignore, our Supreme Court concluded that when the state, acting through the Board, approves appropriations of water "despite foreseeable harm to public trust uses," "the state

> must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation], and to preserve, *so far as consistent with the public interest,* the uses protected by the trust." (*National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at pp. 446-447, 189 Cal.Rptr. 346, 658 P.2d 709, italics added.) Thus, in determining whether it is "feasible" to protect public trust values like fish and wildlife in a particular instance, the Board must determine whether protection of those values, or what level of protection, is "consistent with the public interest."
>
> In formulating the 1995 Bay-Delta Plan, the Board set out "to attain the highest water quality which is reasonable, considering *all* demands being made on the water of the [Bay-Delta]." (1995 Bay-Delta Plan, p. 14, italics added.) While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses. It was for the Board in its discretion and judgment to balance all of these competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives.

Id.

In sum, neither Article X, section 2 of the California Constitution nor the public trust doctrine prohibits diversions that harm fish. Instead, California law is clear that fish and wildlife needs are but one factor to be considered when determining reasonable use of water and balancing under the public trust doctrine.

C. The Federal ESA And The NMFS Biological Opinion Do Not Mirror The Requirements Of California Water Law

The United States and amici argue that the requirements of the NMFS biological opinion simply mirror what Article X, section 2 and the public trust doctrine would require anyway, had the SWRCB or a California court applied them. This argument

apparently rests entirely on the mistaken notion that California law flatly prohibits harm to fish from water diversions, because the United States and amici make no effort to substantiate why the precise outcome reached in the biological opinion is compelled by state law. In fact, no such symmetry should reasonably be expected. Instead, substantial differences between the federal ESA and California water law should be expected to produce different outcomes.

In contrast to the complex balancing and search for the public interest required under California water law, consultations under section 7 of the ESA are narrowly focused and place priority on the protection of listed species. ESA subsection 7(a)(2) provides in pertinent part that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). At the conclusion of consultation, the Secretary must provide its biological opinion to the action agency and any project applicant, "detailing how the agency action affects the species." 16 U.S.C. § 1536(b)(3)(A). "If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." *Id*. Section 7 consultation is not an open process. A right to participation is limited to the federal "action agency," NMFS or the United States Fish and Wildlife Service, and where applicable the permit or license applicant. 16 U.S.C. § 1536(a), (b); 50 C.F.R. § 402.14. The consultation process does not involve any

public hearings, any opportunity for interested members of the public to contest, rebut or offer additional evidence, or any adjudication of facts. *Id*.

In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the famous snail darter case, the Supreme Court emphasized the absolute priority that ESA section 7 places on preventing a federal action that would jeopardize the continued existence of a species, in spite of any resulting costs:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species. . . . 16 U.S.C. § 1536 (1976 ed.). (Emphasis added.) This language admits of no exception. . . . Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.

TVA v. Hill, 437 U.S. at 173-74. The mandate of ESA section 7 thus stands in sharp contrast to the weighing of relative benefits and competing needs for water, and the broader public interest, that is mandated under California law. An argument that the requirements imposed by a biological opinion will necessarily mirror the results from a proceeding applying the public trust doctrine or Article X, section 2, because both will involve consideration of the needs of fish, is specious.

In the biological opinion at issue here, NMFS did not even purport to follow the process and apply the standards of California water law in determining reasonable use or method of diversion, or waste. Nor does it have the authority or expertise to do so.

NMFS only determined how it believed project operations should be altered and diversions curtailed to carry out the narrower mandates of section 7 of the federal Endangered Species Act, and the Bureau of Reclamation adopted those requirements. The Court should reject the implausible and unsubstantiated argument advanced by the United States and amici that NMFS, through its biological opinion, remarkably and coincidentally precisely determined Casitas' water rights just as they would be determined under California law.

D. Casitas' Right Under Its License Is Not Vested Only In The Sense That Its Right May Be Reconsidered, And After Due Process, Water Allocations May Be Altered Prospectively

The United States, SWRCB and NRDC argue that Casitas cannot own a right to make diversions or uses of water in a way that would harm fish. For this theory, they rely upon the principle that California water rights are not "vested" against application of Article X section 2, or the public trust doctrine and reallocation of water under those doctrines. They misunderstand California law.

Casitas' rights are not "vested" only in the sense that they are subject to reconsideration by the SWRCB or a California court, and the water subject to those rights may be reallocated after such reconsideration. That is the sense in which *National Audubon* held that water rights on tributaries to Mono Lake were not forever "vested" against change: "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. 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 accordingly has the power to reconsider allocation decisions. . . ." *National Audubon*, 33 Cal. 3d at 447.

As a practical matter, in any such reconsideration the focus is necessarily on potential changes to future diversions of water, because past diversions of water cannot be altered retroactively. Nonetheless, *National Audubon* provides guidance regarding whether under these doctrines past diversions authorized by the SWRCB can be retroactively declared to have been unlawful. The court in *National Audubon* rejected a theory that past and current diversions by Los Angeles under the license at issue there could be determined to have been in violation of the public trust. It explained that "[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to instream trust values . . . . [I]t would be disingenuous to hold that such appropriations are and always have been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel." *National Audubon*, 33 Cal. 3d at 446. Instead, while the state may always reconsider a water right under Article X section 2 and the public trust doctrine, a reconsideration and reallocation of water pursuant to those doctrines operates only <u>prospectively.</u> *Id.*; *see also In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 348, n. 3 (1979) (evaluating consistency of future exercise of riparian right with Article X, section 2). This result follows from the nature of these doctrines, which require a case and fact specific application of a broad range of factors, based on current information and needs, and a weighing and balancing of the public interest. Unless and until an appropriate proceeding has occurred, and a competent body has considered new and updated information, weighed the relevant factors, and applied its discretion, there is no basis for

determining what future allocations should be, and hence no basis for determining whether under these doctrines a change to the existing, authorized diversions of water is necessary.

Casitas' right under the License is subject to reconsideration and reallocation of water under the public trust doctrine and Article X, section 2, and Casitas cannot claim its License is "vested" against such reconsideration. Indeed, Page 3 of 3 of the License expressly provides that the rights afforded thereby are subject to the continuing jurisdiction of the SWRCB to apply California Water Code sections 100 and 275, and the public trust doctrine. The License further provides, however, that no such reallocation will occur "unless the Board determines, after notice to affected parties and opportunity for hearing" that such terms are feasible, and that such action is necessary and in the public interest. No such reconsideration of the License and reallocation of water has occurred here. When and if it occurs, any reallocation of water will operate prospectively.

E. Casitas' License Reflects The SWRCB's Last Judgment of Reasonable And Beneficial Use And Application Of The Public Trust Doctrine, And Governs Unless And Until It Is Reconsidered And Revised By The SWRCB Or A California Court

In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), the United States made the same argument it makes here. It argued that the plaintiffs in that case had no "vested" right to water diverted in accordance with the applicable SWRCB permits, because the diversions by the State Water Project were unreasonable and contrary to the public trust. *Tulare Lake*, 49 Fed. Cl. at 321. As the Court there observed, "the difficulty with defendant's argument" was that the applicable water rights permits "specifically allowed for the allocations of water defendant now

seeks to deem unreasonable." *Id.* In *Tulare Lake*, the Court declined to try to anticipate how the SWRCB or a California court would apply Article X, section 2 or the public trust doctrine to reconsider authorized diversions by the State Water Project. *Id.* at 322. As it observed there, "a finding of unreasonableness by this court would be tantamount to our *making* California law rather than applying it." *Id.* at 324. Likewise here, the License expressly allows the diversion and use of the water that the United States wants the Court to declare unreasonable. For the same reasons as in *Tulare Lake*, the Court should decline to anticipate how the SWRCB or a California court would apply these doctrines to Casitas' License.

The SWRCB is aware of the biological opinion. The brief by the United States refers to a request in 2004 by Cal Trout to the SWRCB to amend the License to conform to the requirements of the biological opinion, and related communications. Def.s' Ex. 144. Ultimately, as it explained in its letter dated January 27, 2006, the SWRCB decided that under the circumstances it was unnecessary to hold a hearing on Cal Trout's complaint, or take any action regarding the License. In this action, the United States is asking the Court to act where the SWRCB saw no need to act. If in this proceeding the Court were to reconsider the License as requested by Defendant, it would go beyond acting in place of the state; it would be acting contrary to the judgment of the state that no action to amend the License is necessary.

The SWRCB's allocations of water from the Ventura River under the License may be revisited, and following proper process and due consideration of all factors affecting the public interest, those allocations may be altered prospectively to reflect changed needs or circumstances. The Court should rule that unless and until such time as

Casitas' License is modified by the SWRCB, or the terms of its water right are declared by the final judgment of a California court to be unreasonable, or to violate the public trust, Casitas has a right recognized and protected under California water law to divert water from the Ventura River in accordance with its License.

IV. CONCLUSION

The briefs of the United States, the SWRCB and NRDC do not accurately reflect California law regarding water rights. Under California law, the right to divert water from a stream, and the right to exclusive use of the particular water diverted from the stream, is protected as private property. Diversions of water that harm fish are not per se unreasonable or in violation of the public trust doctrine; instead, under these doctrines the needs of fish are considered in a complex balancing involving all beneficial uses of the water involved, and the public interest. There is no symmetry between the requirements of a biological opinion prepared under the federal ESA and the broader balancing of interests required by California water law. Accordingly, application of these laws can be expected to produce different results. Under California law, Casitas has a protected property interest in its right to use the water in the Ventura River in accordance with the terms of its License, notwithstanding the different requirements of the biological opinion.

This Court should reach the same conclusion that it reached in *Tulare Lake*. The proper allocation of the water in the Ventura River is a matter of discretion committed to the authority of the state. The SWRCB has not seen fit to change that allocation, nor has

any party sought reconsideration and reallocation by a California court. This Court should decline Defendant's invitation to alter the License where the state has not.

Dated: September 20, 2010

Respectfully submitted,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By s/ Daniel J. O'Hanlon
Daniel J. O'Hanlon
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD, A Professional Corporation
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555

Attorneys for Amici Curiae
ASSOCIATION OF CALIFORNIA WATER AGENCIES et al.

950108.1