The Public Trust Doctrine as a Background Principles Defense in Takings Litigation

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INTRODUCTION

This Article addresses whether the public trust doctrine should operate as a defense to claims for compensation under the Takings Clause of the Fifth Amendment, particularly takings claims arising from regulatory restrictions on the use of water designed to protect fish and other public trust resources. Two controversial takings cases that arose in California involving regulatory restrictions under the federal Endangered Species Act ("ESA") represent the bookends of the modern debate over this issue: *Tulare Lake Basin Water Storage District v. United States*[1] and *Casitas Municipal Water District v. United States*.[2]

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[1] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001).

In *Tulare Lake*, several water districts and water users filed suit against the United States in the U.S. Court of Federal Claims, contending that the ESA restrictions on their water deliveries from the Sacramento–San Joaquin Delta resulted in a taking of their water rights.[3] In a 2001 decision, Judge John P. Wiese entered judgment for the plaintiffs and rejected various defenses offered by the Government, including that the public trust doctrine barred the claims.[4] The U.S. Department of Justice under President George W. Bush opted not to appeal the ruling and paid the multimillion dollar judgment, leaving the issue of whether the public trust doctrine provides a defense to a takings claim in a state of suspended animation, as well as considerable controversy.

Ten years later, the second case — *Casitas* — provided Judge Wiese an opportunity to revisit the issue of whether the public trust doctrine bars a takings claim based on regulatory restrictions on water use. In *Casitas*, a water district that supplies water to municipal and agricultural water users contends that ESA restrictions on the operation of its Ventura River Project constitute a taking.[5] The United States once again raised the public trust doctrine and Judge Wiese again rejected the defense, but for quite different reasons than in *Tulare Lake*.[6] While the court rejected the public trust defense, it awarded victory to the United States, dismissing the plaintiff's takings claim on the ground that it was not ripe. The plaintiff promptly filed a notice of appeal, and the United States will likely argue on appeal not only that the claim was not ripe but, in the alternative, that the claims court should have dismissed the case on the merits because the public trust doctrine precluded the claim. Thus, *Casitas* may well become the vehicle for definitive resolution of whether the public trust doctrine

[2] Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007), *aff'd in part and rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009), *dismissed on remand*, No. 05-168L, 2011 WL 6017935 (Fed. Cl. Dec. 5, 2011), *and notice of appeal filed*, No. 05-168L (Fed. Cl. Dec. 15, 2011), ECF No. 237.

[3] *Tulare Lake*, 49 Fed. Cl. at 316.

[4] *Id.* at 321-24.

[5] *Casitas*, 76 Fed. Cl. at 101-02.

[6] *See* Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935, at *12-18 (Fed. Cl. Dec. 5, 2011). The court also rejected the Government's background principles defense based on the reasonable use doctrine and California Fish and Game Code Section 5937, as well as the United States's alternative argument that, if the plaintiff presented a viable takings claim, the claim should have been considered and rejected under the standards articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). These topics are outside the scope of this article. *See Casitas,* 2011 WL 6017935, at *18, *31-33.

bars a regulatory takings claim arising from restrictions on water use to protect the environment.

This Article contends that the public trust doctrine should serve as a defense to takings claims arising from regulatory restrictions on the use of water designed to protect public trust resources such as fish. In other words, Judge Wiese got it wrong in both *Tulare Lake* and *Casitas*, and the U.S. Court of Appeals for the Federal Circuit will hopefully get it right on appeal in *Casitas*. Correct resolution of this issue turns, in large measure, on unpacking and resolving two fundamental questions. The first question is how to correctly define "background principles" in the context of a regulatory takings case. According to the Supreme Court decision in *Lucas v. South Carolina Coastal Council*, background principles represent inherent limitations on the scope of private property interests that defeat takings claims by barring plaintiffs from claiming ownership of "property" that could potentially support takings claims.[7] If a regulation does not impinge on a property entitlement that a plaintiff can properly claim under state or federal law, the takings claim fails at the threshold. The key issue to be resolved with respect to the definition of background principles in relation to the public trust doctrine is what types of legal rules qualify as background principles for takings purposes. The potentially surprising answer this Article offers is that not all legal rules that qualify as background principles are alike; legal rules of varying nature and scope can qualify as background principles.[8] Under this analysis, the public trust doctrine is not exactly the same as every other type of background principle, but it certainly qualifies as a background principle that defeats a takings claim.[9]

The second question regarding whether the public trust doctrine can serve as a viable defense to a takings claim is which of the several alternative conceptions of the public trust idea should serve as the relevant background principle in the context of a takings case. The public trust doctrine has been interpreted as both a negative limitation on private property interests and as an affirmative governmental responsibility to protect the public trust. The doctrine has other legal meanings as well. This Article suggests that only one of those — the public trust doctrine as a limitation on title — is pertinent in the takings context.[10] When a regulatory restriction advances a resource-protection goal that parallels the restrictions on private ownership of

[7] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[8] *See infra* Part II.

[9] *See infra* Parts II, IV.

[10] *See infra* Part III.

water imposed by the public trust doctrine, the doctrine serves as a complete defense to a takings claim based on the regulation. Under this analysis, the public trust doctrine can and should defeat takings claims in cases such as *Tulare Lake* and *Casitas*.[11]

This Article proceeds in four stages: Part I describes the facts and specific legal issues in *Tulare Lake* and *Casitas*. Part II discusses how the Supreme Court's decision in *Lucas* has generated confusion about the exact nature of "background principles" of state or federal law that can defeat takings claims. It offers a reformulated definition of background principles designed to eliminate confusion about the meaning of this term while effectuating the Supreme Court's likely intent in adopting the background principles concept. Part III describes the different legal implications of designating a resource as subject to the public trust doctrine, and explains why only one of these implications is relevant for takings litigation purposes. Finally, Part IV explains why the public trust doctrine defeats takings claims based on regulation of water use designed to protect a public trust resource, and explores in detail how the claims court went awry in reaching a different conclusion in *Tulare Lake* and *Casitas*.

I. THE DEBATE OVER THE PUBLIC TRUST TAKINGS DEFENSE: THE *TULARE LAKE* AND *CASITAS* CASES

Government defendants have successfully raised the public trust doctrine as a defense in a number of takings cases across the country, particularly those involving submerged lands. For example, in *Esplanade Properties, LLC v. City of Seattle*, a developer filed a takings lawsuit based on the city's refusal to allow the construction of residences on an elevated platform above tidelands.[12] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment rejecting the claim, reasoning that the tidelands were subject to the public trust and, therefore, the owner could claim no entitlement to erect structures in the tidelands for private development purposes.[13] In *McQueen v. South Carolina Coastal Council*, a landowner claimed a taking based on the South Carolina Coastal Council's refusal to allow the filling of two coastal lots which had been dry land when the claimant purchased them but which had gradually turned into submerged land as a result of natural erosion.[14] The South Carolina

[11] *See infra* Parts III-IV.

[12] Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 980-81 (9th Cir. 2002).

[13] *Id.* at 983-87.

[14] McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 118-19 (S.C. 2003).

Supreme Court, reversing the trial court's ruling in favor of the claimant, held that once the lots became submerged they became subject to the public trust doctrine, barring the takings claim.[15] Finally, in *National Association of Homebuilders v. New Jersey Department of Environmental Protection*, the U.S. District Court of New Jersey rejected a takings challenge to a state agency rule requiring developers of waterfront property to provide walkways along the water.[16] The court reasoned that the area on which the walkways would be constructed was subject to the public trust doctrine and, therefore, the claimant had no entitlement to exclude members of the public seeking to use the area for recreation — an activity which falls within the scope of the New Jersey public trust doctrine.[17]

By contrast, takings cases involving regulatory restrictions on water use in which the public trust doctrine has been raised as a defense have produced quite different outcomes, at least so far. In *Tulare Lake*, the plaintiffs claimed a protected interest in use of water for irrigation purposes pursuant to a long-term contract with the California Department of Water Resources, which in turn held the right to use the water under a license issued by the California State Water Resources Control Board ("SWRCB").[18] The National Marine Fisheries Service and the U.S. Fish and Wildlife Service issued biological opinions under the ESA designed to protect the endangered winter-run Chinook salmon and the delta smelt during the severe drought conditions in California in the early 1990s.[19] The biological opinions included conditions restricting the operations of giant pumps that draw water from the Sacramento–San Joaquin Delta and send it to the southern part of the state, including the plaintiffs' irrigated lands in California's Central Valley.[20] The plaintiffs' suit, filed in the U.S. Court of Federal Claims, asserted that the temporary shut off in water deliveries, due to the ESA restrictions on pumping, resulted in a taking of their property rights to receive water under their contracts with the Department of Water Resources.[21]

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[15] *Id.* at 119-20.

[16] Nat'l Ass'n of Homebuilders v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 356, 360 (D. N.J. 1999).

[17] *Id.* at 356-58, 360.

[18] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 315 (2001).

[19] *Id.*

[20] *Id.* at 315-16.

[21] *Id.* at 314.

Judge Wiese found a taking, rejecting, among other arguments, the United States's position that the California public trust doctrine barred the claims.[22] The court observed that the SWRCB has the initial responsibility to make a water allocation.[23] Once the Board has made an allocation, it continued, "that determination defines the scope of [a water user's] property rights."[24] At the same time, the court "accept[ed] the proposition that [a water user has] no right to use or divert water . . . in a way that violates the public trust."[25] Thus the Board or the California courts can, at any time, examine whether water should be reallocated based on new information about how a project's operation affects public trust interests.[26] But such a re-examination of an existing allocation of water entails "a complex balancing of interests,"[27] a decision-making process "committed to the SWRCB and the California courts,"[28] for which the federal claims court "is not suited and with which it is not charged."[29] In sum, according to Judge Wiese, state legal institutions can modify existing water rights to enforce the public trust doctrine as a background limitation on property rights in water. But a federal court, or at least the U.S. Court of Federal Claims, lacks the authority to apply the public trust doctrine in this fashion.

Judge Wiese asserted that the U.S. Court of Federal Claims can properly apply a background principles defense based on state law only when it points "to a single, discrete resolution" that the regulated activity was "always unlawful."[30] He cited his prior decision in *Rith Energy, Inc. v. United States*,[31] as an example of a case in which this approach applied.[32] In that case, Judge Wiese concluded that a mining company was barred from claiming a taking based on regulatory restrictions on its mining operation because the planned operation would have constituted an illegal nuisance under Tennessee law.[33] In his description of the *Rith Energy* ruling in *Tulare Lake*, Judge Wiese

[22] *Id.* at 320-24.

[23] *Id.* at 322.

[24] *Id.*

[25] *Id.* at 321.

[26] *Id.* at 324.

[27] *Id.* at 323.

[28] *Id.* at 324.

[29] *Id.*

[30] *Id.* at 323.

[31] Rith Energy, Inc. v. United States, 44 Fed. Cl. 108 (1999), *aff'd on other grounds*, 247 F.3d 1355, 1366 (Fed. Cir. 2001).

[32] *See Tulare Lake*, 49 Fed. Cl. at 323-24 (citing *Rith Energy*, 44 Fed. Cl. at 108).

[33] *See Rith Energy*, 44 Fed. Cl. at 114-15.

explained that, given that a federal agency had found that the mining operation would produce serious environmental contamination, it was "clear" in *Rith Energy* that the mining was "prohibited" under Tennessee nuisance law.[34] As a result, the regulatory constraint imposed by the federal agency paralleled what "the state was *required* to do in light of" the facts of the *Rith Energy* case.[35] In other words, "[T]he federal government merely made explicit — in an area over which it shared regulatory authority with the state — prohibitions that had always implicitly existed within state law."[36]

By contrast, Judge Wiese explained that in *Tulare Lake* application of the public trust doctrine involved a "complex balancing of interests" and "did not point to a single, discrete" answer as to whether the regulated activity was "always unlawful."[37] According to Judge Wiese, the SWRCB's earlier affirmative authorization of the water use, which the federal resource agencies were now declaring a violation of the ESA, demonstrated that the use of the water was not "always unlawful."[38] Whereas in *Rith Energy* Tennessee nuisance law always prohibited the mining activity, the public trust doctrine did not always prohibit the water use at issue in *Tulare Lake*. Based on this logic, Judge Wiese concluded that a background principles defense based on nuisance law properly did apply in *Rith Energy*, but a background principles defense based on the public trust doctrine did not apply in *Tulare Lake*.[39]

Judge Wiese's rejection of the public trust defense in *Tulare Lake* met significant criticism. For example, Judge Francis Allegra of the U.S. Court of Federal Claims subsequently stated that the court in *Tulare Lake* did not:

> consider whether the plaintiffs' claimed use of water violated accepted state doctrines, including those designed to protect fish and wildlife, finding that issue to be reserved exclusively to the state courts . . . . As a result, it awarded just compensation for the taking of interests that may well not exist under state law.[40]

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[34] *Tulare Lake*, 49 Fed. Cl. at 323; *see Rith Energy,* 44 Fed. Cl. at 113-15.

[35] *Tulare Lake*, 49 Fed. Cl. at 323 (emphasis in original).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 (2005), *vacated and remanded on other grounds*, 635 F.3d 505 (Fed. Cir. 2011).

Many academic commentators also criticized the ruling.[41] Despite the controversy surrounding the decision, the U.S. Department of Justice under President George W. Bush chose not to appeal the ruling to the U.S. Court of Appeals for the Federal Circuit. While the Department of Justice never publicly explains its reasons for not appealing an adverse decision, it has generally been understood that the Department took this position because the Government's loss was consistent with the Bush administration's generally pro–property rights policies. In any event, Judge Wiese's rejection of the public trust background principles defense in *Tulare Lake* was never reviewed by a higher court.

Casitas Municipal Water District v. United States provides a potential opportunity for federal appellate court resolution of whether the public trust doctrine serves as a defense to a takings claim based on regulatory restrictions on water use.[42] This case, which coincidentally also was assigned to Judge Wiese, involves a water-use regulation takings claim similar to the claim in *Tulare Lake*. The claim arose from ESA restrictions imposed on the operation of the Ventura River Project, an irrigation and municipal water supply project in southern California constructed by the Bureau of Reclamation and managed by the Casitas Municipal Water District.[43] The purpose of the restrictions was to protect endangered steelhead trout.[44] Unlike the claimants in *Tulare Lake*, which asserted a right to the use of water pursuant to a contract with the California Department of Water Resources, Casitas is itself the holder of the water license issued by the SWRCB.[45] The parties dispute whether the Government mandated the specific regulatory controls placed on the Ventura River Project or Casitas voluntarily offered up these restrictions as a way of avoiding potential liability under the ESA.[46] In any event, the regulations now in place

[41] *See, e.g.*, Melinda H. Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551 (2002) (criticizing *Tulare Lake*'s handling of the public trust defense). *But see* Jesse W. Barton, Tulare Lake Basin Water Storage District v. United States*: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS: ENVTL. L. & POL'Y J. 109, 143 (2002) (applauding *Tulare Lake*'s handling of the public trust defense).

[42] Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (2007), *aff'd in part and rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009), *dismissed on remand*, No. 05-168L, 2011 WL 6017935 (Fed. Cl. Dec. 5, 2011), *and notice of appeal filed*, No. 05-168L (Fed. Cl. Dec. 15, 2011), ECF No. 237.

[43] *Id.* at 101-02.

[44] *Id.* at 102.

[45] *Id.*

[46] Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935, at

require Casitas to construct and maintain a fish passage facility at the Ventura River Project, to direct water flows for fish passing through the fish passage facility, and to provide additional flows downstream of the dam to facilitate upstream and downstream fish passage.[47]

A major focus of the *Casitas* litigation has been a dispute over which takings test to apply in this case. In his earlier *Tulare Lake* decision, Judge Wiese ruled that the regulatory restriction on water pumping, and the consequent reduction in water deliveries to the plaintiffs, should be treated as a physical appropriation of property, triggering a per se takings analysis.[48] That ruling, together with the ruling on the background principles issue, was not appealed. Like his ruling on the background principles issue, Judge Wiese's ruling on what takings test to apply was also controversial.[49] In the *Casitas* case, in response to a partial motion for summary judgment filed by the United States, Judge Wiese effectively reversed himself on this issue, ruling that a takings claim arising from a restriction on water use should be evaluated as a potential regulatory taking rather than a physical taking.[50] While there are various grounds for questioning the correctness of Judge Wiese's ruling in *Tulare Lake* on the appropriate takings test,[51] Judge Wiese justified changing his position based on the intervening decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[52] In that decision, the U.S. Supreme Court emphasized both the sharp distinction between regulatory and physical takings claims, and the narrowness of the per se physical takings theory.[53] In response to Judge Wiese's ruling that the regulatory takings test applied, Casitas conceded that it could not demonstrate a taking under that takings test, and the court entered a final judgment in favor of the United

*30-31 (Fed. Cl. Dec. 5, 2011) (describing the parties' debate, and ruling that the United States should be charged with prescribing the ESA regulations giving rise to the takings claim).

[47] *Casitas*, 76 Fed. Cl. at 102.

[48] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318-20 (2001).

[49] *See* Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 537-38 (2005), *vacated and remanded on other grounds*, 635 F.3d 505 (Fed. Cir. 2011) (criticizing *Tulare Lake*'s application of a physical taking test); Allegretti & Co. v. Cnty. of Imperial, 42 Cal. Rptr. 3d 122, 131-32 (Ct. App. 2006) (same).

[50] *Casitas*, 76 Fed. Cl. at 103-06.

[51] *See* John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 VT. J. ENVTL. L. 579, 594-98 (2010) (criticizing the use of a physical takings test to evaluate the takings claim in *Tulare Lake*).

[52] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); *see Casitas*, 76 Fed. Cl. at. 105-06 (discussing *Tahoe-Sierra*, 535 U.S. at 323-25).

[53] *See Tahoe-Sierra*, 535 U.S. at 323-25.

States.[54] Casitas appealed on the issue of what takings test should govern the claim.[55]

A panel of the U.S. Court of Appeals for the Federal Circuit, with one judge dissenting, reversed on the issue of the applicable takings test.[56] The majority did not directly address Judge Wiese's conclusion that takings claims based on regulatory restrictions on the use of water should generally be analyzed using the same standards that apply to takings claims based on restrictions on the use of other types of property.[57] Indeed, the majority expressly stated that it was not deciding whether Judge Wiese's ruling in *Tulare Lake* on the appropriate takings test was correct, and by implication avoided commenting on whether Judge Wiese correctly repudiated that ruling in *Casitas*.[58] But the majority nonetheless reversed Judge Wiese's ruling on the appropriate takings test, concluding — based on the facts as presented at the summary judgment stage of the litigation — that the plaintiff had presented a physical takings claim potentially warranting the conclusion that the Government had imposed a per se taking.[59] In reaching this conclusion, the panel emphasized that applying the ESA to the Ventura River Project did not merely restrict Casitas from diverting water from the stream, but affirmatively required it to pass water through the fish passage facility after the water had already been diverted from the river into Casitas's private irrigation canal.[60] While it is certainly debatable whether these engineering details justified treating the regulation as a physical taking,[61] the more important point for potential future litigation is that the holding of the panel in *Casitas* probably only applies in the narrow set of factual circumstances presented by that case. The Federal Circuit subsequently denied, by a closely divided vote, the United States's application for rehearing en banc.[62]

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[54] Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1283 (Fed. Cir. 2008), *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009), *dismissed on remand*, No. 05-168L, 2011 WL 6017935 (Fed. Cl. Dec. 5, 2011), *and notice of appeal filed*, No. 05-168L (Fed. Cl. Dec. 15, 2011), ECF No. 237.

[55] *Id.* at 1288-96.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1295 n.16.

[59] *Id.* at 1288-96.

[60] *Id.* at 1295.

[61] *See* Echeverria, *supra* note 51, at 601-03 (criticizing the Federal Circuit's use of the physical takings test).

[62] Casitas Mun. Water Dist. v. United States, 556 F.3d 1329, 1329, 1331 (Fed. Cir. 2009), *dismissed on remand*, No. 05-168L, 2011 WL 6017935 (Fed. Cl. Dec. 5, 2011),

The panel then remanded the case to the claims court to consider, among other things, whether the public trust doctrine or other background principles of California water law barred the claim. The United States, in its initial motion for partial summary judgment, had assumed for the sake of argument that the plaintiff possessed a protected property interest.[63] The appeals court relied on the same assumption and, therefore, did not address the merits of that threshold issue.[64] In his dissent, Judge Haldane Robert Mayer commented on the background principles issue as follows:

> Whether Casitas even has a vested property interest in the use of the water is a threshold issue to be determined under California law. California subjects appropriative water rights licenses to the public trust . . . doctrine[], so Casitas likely has no property interest in the water, and therefore no takings claim.[65]

No member of the Federal Circuit contradicted Judge Mayer on the potential relevance of the public trust doctrine on remand, strongly suggesting that the Federal Circuit intended to leave open the issue of whether the public trust doctrine might ultimately defeat the takings claim.

Following the remand, Judge Wiese held a full trial and received extensive further briefing from the parties and numerous amici.[66] In a decision handed down on December 5, 2011 (just as a prior version of this article was being prepared for publication), the claims court dismissed the takings claim without prejudice on the ground that the claim was not ripe.[67] Embracing an argument presented by the United States with strong support from the SWRCB, the court ruled that under California law the plaintiff only possesses a property interest in the water that it puts to actual beneficial use, not in the water that it diverts from the river or places in storage.[68] Because the ESA regulations limited the amount of water Casitas could divert and store, but had not restricted its ability to deliver water to any customer, the

and notice of appeal filed, No. 05-168L (Fed. Cl. Dec. 15, 2011), ECF No. 237.

[63] Defendant's Reply in Support of its Motion for Partial Summary Judgment at 3-4, Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (Mar. 29, 2007) (No. 05-168L), ECF No. 73.

[64] *Casitas*, 556 F.3d at 1331.

[65] *Casitas*, 543 F.3d at 1297 (Mayer, J., dissenting).

[66] Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935, at *1 (Fed. Cl. Dec. 5, 2011).

[67] *Id.* at *25-28.

[68] *Id.* at *9-11.

court concluded that there had been no impairment of Casitas's right to beneficial use of water and, therefore, Casitas failed to present a ripe claim.[69] The Court dismissed the claim without prejudice, leaving open the possibility that Casitas might refile the case if and when the claim ripens.[70]

While the claims court might have limited its discussion to the ripeness question, it proceeded to consider — and reject — several of the Government's substantive defenses to the takings claim. In particular, the court ruled that the public trust doctrine did not preclude the claim.[71] In reaching this result, Judge Wiese relied on reasoning that differs from his reasoning in the *Tulare Lake* case. In *Tulare Lake*, Judge Wiese ruled that a federal court, or at least the U.S. Court of Federal Claims, lacks the authority to resolve whether the public trust doctrine bars the claim, because application of this defense involves a process of balancing competing interests which a federal court lacks the authority to perform.[72] A federal court can only apply a background principle of state law to preclude a takings claim, Judge Wiese stated, when it clearly points to "single, discrete" answer as to whether the background principle bars the claim.[73] In *Casitas*, Judge Wiese, contradicting his prior position in *Tulare Lake*, accepted the proposition that a federal court such as the U.S. Court of Federal Claims has the authority to resolve whether the public trust bars the claim.[74] However, based on an evaluation of the merits of the defense, he ruled that the defense still failed. First, he ruled that the California public trust doctrine only qualifies private property rights vis-à-vis the state government, not the federal government, and therefore it does not support a background principles defense in a takings case against the United States.[75] Second, he ruled that, even assuming the California public trust doctrine applies as a defense to a takings claim based on an action by the federal government, application of the defense involves a balancing of interests and in this case the defense failed because the public and private interests served by exploiting the water for water supply purposes outweighed the public interest in fish

[69] *Id.* at *28.
[70] *Id.* at *33.
[71] *Id.* at *11-18.
[72] *Tulare Lake*, 49 Fed. Cl. at 321-24; *see also supra* text accompanying notes 23-29.
[73] *Tulare Lake*, 49 Fed. Cl. at 323; *see also supra* text accompanying note 30.
[74] *Casitas*, 2011 WL 6017935, at *20.
[75] *Id.* at *22-23.

protection under the ESA.[76] As a result of Casitas's appeal, the Federal Circuit will have an opportunity to review these rulings.

To resolve how the public trust doctrine should be applied in *Casitas* and in future water takings cases, it is necessary to unpack the meaning of the term "background principles" and the nature and scope of the public trust doctrine as a limitation on private property interests. The next two Parts address these issues.

II. THE COMPLEX NATURE OF *LUCAS* BACKGROUND PRINCIPLES

The 1992 Supreme Court decision in *Lucas v. South Carolina Coastal Council* provides the foundation for the modern "background principles" concept in takings doctrine.[77] The case arose from South Carolina's adoption of a new coastal setback line, which had the effect of blocking the claimant's plan to construct residences on two shorefront building lots.[78] The South Carolina Supreme Court rejected the takings claim because the regulation was based on a legislative determination that coastal development would cause serious "public harm."[79] The U.S. Supreme Court reversed, holding that a legislative finding that regulation was necessary to prevent public harm was insufficient to defeat a takings claim, at least when the regulation rendered the property valueless.[80] However, the Court also stated that its ruling did not resolve the threshold question of whether the claim might be barred by background principles of South Carolina law, which the Court said had to be resolved by the state court on remand.[81]

The *Lucas* decision is a landmark in takings jurisprudence because it converted two previously inchoate ideas reflected in the Court's prior takings jurisprudence into relatively definitive legal rules. First, the Court affirmed that a regulation denying an owner "all economically beneficial" use of property will be treated as a taking without regard to any other consideration.[82] The Court had previously stated that a regulation that denies an owner all economically viable use of his property should be regarded as a taking.[83] But the Court had also

[76] *Id.* at *23.

[77] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-30 (1992).

[78] *Id.* at 1006.

[79] Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992).

[80] *Lucas*, 505 U.S. at 1031-32.

[81] *Id.* at 1031.

[82] *Id.* at 1015-19.

[83] *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) ("land-use

previously stated that regulations designed to protect the public from harm should never be treated as compensable takings, regardless of how serious the economic effects of the regulation.[84] Since these two rules contradicted each other, the Court's commitment to the former rule had always been open to debate prior to *Lucas*. The *Lucas* case resolved this conflict in favor of the per se rule that the destruction of all property value represents a taking.[85]

Second, the Court had previously recognized that a vested "property" right is a precondition for a valid takings claim.[86] But it had not elaborated on how the nature and scope of a property interest should be delimited for takings purposes. Since the Court had taken the position that harm-preventing police power regulations were generally immune from takings claims,[87] careful evaluation of the threshold property issue had proved unnecessary. However, the Court's adoption of the new per se takings rule in *Lucas* seemed to increase the odds of takings liability based on regulatory action, thereby elevating the importance of the threshold property question. This, in turn, led the Court to articulate, with greater precision than ever before, what defines property within the meaning of the Takings Clause. The Court's resolution of the threshold property issue in *Lucas* was that even a regulation eliminating all economically viable use of property does not constitute a taking if the challenged regulation

regulation does not effect a taking if it . . . does not deny an owner economically viable use of his land" (internal quotation marks omitted)); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that taking occurs when a zoning ordinance "denies an owner economically viable use of his land").

[84] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987) ("[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property"); *see also* Keystone, 480 U.S. at 489 n.18 ("[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests.").

[85] *See Lucas*, 505 U.S. at 1030-32.

[86] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160-61 (1980).

[87] *See, e.g.*, *Mugler*, 123 U.S. at 668-69 ("The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.").

parallels "the restrictions that background principles of the [s]tate's law of property and nuisance already place upon land ownership."[88]

As Professor Michael Blumm has observed, the *Lucas* decision produced both less change in the law and more change in the law than most observers originally anticipated.[89] On the one hand, the Court's new categorical takings rule has had remarkably little impact on the outcome of takings cases.[90] This outcome is attributable to two subsequent developments. First, while the *Lucas* decision raised a question about the validity of the so-called "parcel as a whole" rule,[91] the Supreme Court later abandoned its doubts about the parcel rule and reaffirmed it.[92] Because most regulations allow some remunerative economic use of some portion of the claimant's property, the parcel rule makes it very difficult to show that an owner has been denied all economically viable use of a property. Second, the Supreme Court subsequently adopted an interpretation of "den[ial of] all economically beneficial or productive" property use that emphasized the narrowness of the *Lucas* test.[93] While the *Lucas* case involved a regulation that literally rendered property "valueless," it was ambiguous whether the *Lucas* decision announced a takings test limited to that extreme circumstance or the Court intended to adopt a test applicable to a broader set of cases. Subsequently, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court adopted the narrow interpretation of the decision, limiting the *Lucas* rule to cases in which the property is rendered valueless.[94]

On the other hand, the *Lucas* decision has turned out to have greater impact than most observers originally anticipated insofar as courts have relied heavily on the background principles concept to reject takings claims.[95] Because the threshold question of whether the claimant can identify a vested property interest is a potential issue in any case brought under the Takings Clause, the *Lucas* background

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[88] *Lucas,* 505 U.S. at 1029.

[89] Michael C. Blumm, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005).

[90] *See id.* at 325.

[91] *Lucas*, 505 U.S. at 1016 n.7 (referring to the Court's "uncertainty regarding the composition of the denominator").

[92] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326-27 (2002).

[93] Blumm, *supra* note 89, at 324-25 & n.26 (quoting *Lucas*, 505 U.S. at 1015) (citing *Tahoe-Sierra*, 535 U.S. at 330 and Palazzolo v. Rhode Island, 533 U.S. 606, 616, 631 (2001)).

[94] *See Tahoe-Sierra,* 535 U.S. at 329-32.

[95] *See* Blumm, *supra* note 89, at 325-26.

principle applies in every takings lawsuit regardless of whether the case is governed by the *Lucas* per se takings test or some other takings test. Furthermore, and to an extent the Court may not have anticipated, state as well as federal law have turned out to include numerous background principles limiting the scope of private interests in land and other resources.[96]

But the most significant feature of the *Lucas* decision for the purpose of determining whether the public trust doctrine qualifies as a background principle that will defeat a takings claim is the ambiguity in the Court's description of how background principles are defined — an ambiguity that courts and commentators have not previously addressed in systematic fashion. At several points in the majority opinion, the Court referred to a background principle as constituting a "pre-existing limitation" on a claimant's property interest.[97] This definition suggests that a background principle operates to preclude a claim of entitlement to use property in a particular fashion; a claimant may have been granted permission to engage in the activity, but it cannot assert a protected right to do so. Under this definition, governments can withdraw permission to engage in an activity without risking exposure to takings liability. At other points in the majority opinion, the Court refers to a background principle as representing a "prohibition" on the activity at issue.[98] When a background principle applies, the Court said, the regulation "does not proscribe a productive use that was previously permissible," but rather prohibits an activity that was "*always* unlawful" under applicable background principles.[99] Under this definition, background principles do not merely bar claims of entitlement to engage in an activity, but instead prohibit the activity altogether and prevent governments from allowing it to proceed.

The two definitions of background principles that appear in *Lucas* are obviously inconsistent with each other. A background principle either bars a claim of entitlement without necessarily outlawing the activity or prohibits the activity; it cannot logically do both. But this

[96] *See id.* at 341-64 (providing an exhaustive summary of cases applying background principles to defeat takings claims).

[97] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992); *see also id.* at 1029 (referring to a "limitation . . . [that] inhere[s] in the title itself").

[98] *Id.* at 1031 (referring to background principles as potentially imposing a "common-law prohibition" on a regulated use and stating that for South Carolina to prevail on remand, it "must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found").

[99] *Id.* at 1028-30.

inconsistency does not necessarily mean that the *Lucas* descriptions of background principles are fundamentally contradictory. The *Lucas* decision can be rationalized, and its seemingly inconsistent definitions of background principles can be harmonized, by recognizing that not all rules of property law that serve as background principles are created equal. The different definitions of a background principle in *Lucas* can appropriately be applied, without logical contradiction, so long as each is applied in its proper context.

Decisions applying the background principles defense in takings cases reveal that courts have, in practice, recognized and applied both of the types of background principles discussed in *Lucas*. The federal navigation servitude, specifically identified in *Lucas* as a background principle that will defeat a takings claim,[100] is an example of a background principle that precludes a claim of entitlement to engage in an activity without necessarily outlawing the activity altogether. Under the navigation servitude, the United States is said to hold a "dominant servitude" for the purpose of promoting and regulating commerce in navigable waters.[101] In the event of a conflict between the navigation servitude and the rights of private riparian owners, "the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all."[102] Thus, the navigation servitude bars any takings claim based on restrictions on private property designed to preserve the public right of navigation. This is so despite the fact that the servitude does not prohibit private encroachments in navigable waters. Private parties routinely construct docks, oil and gas facilities, and many other types of structures in navigable waters, frequently with express government approval. In fact, to facilitate the construction of such projects, Congress has vested the Army Corps of Engineers with broad power to authorize private structures in navigable waters.[103] It is unthinkable that the navigation servitude could be interpreted to bar private encroachments on the public right to navigate because a great deal of modern commerce would be impossible if private encroachments on navigable waters were illegal per se.

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[100] *See id.* at 1028-29.

[101] Nw. La. Fish & Game Pres. Comm'n v. United States, 574 F.3d 1386, 1390-91 (Fed. Cir. 2009).

[102] *Id.* (quoting United States v. Willow River Power Co., 324 U.S. 499, 510 (1945)).

[103] *See* 33 U.S.C. § 403 (2006) (codifying Rivers and Harbors Act of 1899).

In accord with this understanding of the federal navigation servitude, courts have repeatedly rejected claims for compensation under the Takings Clause based on government orders to remove structures from navigable waters, even if the structures were erected with explicit government authorization.[104] In order for this background principle to apply, a government must have the power to prohibit the regulated activity without producing a taking, but it is not necessary for the regulated activity to have been "always unlawful."[105] Thus, governments can grant a private party, as a mere "privilege or a convenience,"[106] permission to occupy navigable waters. But because a private party can claim no entitlement to encroach upon navigable waters, the government can withdraw the privilege to occupy navigable waters at any time without triggering takings liability.[107]

The background principle based on sovereign control of the Exclusive Economic Zone ("EEZ") bordering the U.S. coastline is another type of background principle that precludes a claim of entitlement without making the activity unlawful. In *American Pelagic Fishing Co. v. United States*, the U.S. Court of Appeals for the Federal Circuit rejected a fishing company's takings claim based on a legislative restriction on the use of its vessel to fish in the EEZ.[108] The National Marine Fisheries Service granted the claimant the necessary permits to commence fishing, but Congress subsequently enacted legislation revoking the permits.[109] The appeals court ruled that the takings claim failed because the company could not establish that it possessed a "legally cognizable property interest" in using its vessel to conduct commercial fishing operations in the EEZ.[110] The court based

[104] *See, e.g.*, Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915) (rejecting claim that Secretary of War was required to pay "just compensation" to enforce order requiring the removal of lawfully constructed private wharf from navigable waterway); Kelley's Creek & Nw. R.R. Co. v. United States, 100 Ct. Cl. 396, 398-401, 409 (1943) (rejecting takings claim based on government order to remove lawfully constructed coal tipple to facilitate navigation project, on ground that "every [private] structure in water of a navigable river is subordinate to the right of navigation").

[105] *Lucas*, 505 U.S. at 1030 (emphasis omitted) (quotation); *see supra* notes 97-104 and accompanying text (regulated activity need not have been always unlawful).

[106] United States v. Willow River Power Co., 324 U.S. 499, 509 (1945).

[107] *See Lucas*, 505 U.S. at 1028-29 (citing Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

[108] Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1366-69 (Fed. Cir. 2004).

[109] *See id.*

[110] *Id.* at 1376. The court also ruled that the plaintiffs lacked a protected property interest in the permits they had been issued authorizing them to conduct fishing

this conclusion on the Magnuson Act and the comprehensive fishery management scheme it established, which it said constituted a background principle of federal property law precluding a claim of entitlement to use a vessel to fish in the EEZ.[111] Most significantly for the present issue of how the public trust doctrine operates as a background principle, *American Pelagic* held that this background principle of property law barred the takings claim even though it did not make fishing in the EEZ unlawful.[112] The court explicitly recognized that commercial fishermen had been allowed for many years to use their vessels to fish in the EEZ.[113] But the court explained that this grant of permission to fish did not mean that "those fishermen had a *property interest* in the use of their vessels to fish in the EEZ."[114] Rather, "[t]hey simply were enjoying a use of their property that the [G]overnment chose not to disturb. In other words, use itself does not equate to a cognizable property interest for purposes of a taking analysis."[115]

In the foregoing cases, a background principle barred a takings claim even though the relevant background principle plainly did not prohibit the regulated activity. In other cases, however, courts have recognized that a legal rule that qualifies as a background principle may not only bar a claim of entitlement, but also prohibit the regulated activity altogether. Nuisance law, for example, illustrates this type of background principle. In the case of nuisance, there is no difference between the standard for determining whether an activity is a nuisance and, therefore, can be prohibited without triggering takings liability, and the standard for determining whether an activity is a nuisance and, therefore, unlawful and potentially subject to an injunction. Thus, in the case of nuisance doctrine, *Lucas* accurately indicated that a finding that an activity qualifies as a background principle also supports the conclusion that the activity is illegal. However, for the reasons discussed above, this does not alter the fact that other background principles can preclude a claim of entitlement without making the activity illegal.

In sum, *Lucas*'s inconsistent definitions of background principles are logically defensible because not all background principles are alike. Some background principles preclude a claim of entitlement without

operations in the EEZ. *See id.* at 1374.

111 *See id.* at 1376-81.

112 *See id.*

113 *See id.*

114 *Id.* at 1377.

115 *Id.*

also precluding the possibility that government may lawfully grant a privilege to engage in the regulated activity. Other background principles both preclude a claim of entitlement and make the activity illegal. In either case, the core meaning of a background principle for takings purposes is that it bars a claim of entitlement to engage in the regulated activity. If a takings claimant lacks an entitlement to engage in a particular activity, the claimant lacks a "property" interest sufficient to support a takings claim. It is ultimately irrelevant whether a background principle also makes the activity illegal and prohibits it. As a kind of shorthand, it is technically correct to describe a nuisance background principle as not merely precluding a claim of entitlement to engage in an activity, but barring the activity altogether. But the only essential element of a background principle for takings purposes is that it excludes a claim of entitlement.

In focusing the background principles inquiry on the question of whether and how federal or state law limits the scope of a claimant's property interest, this analysis refines the definition of background principle in a fashion that is faithful to the *Lucas* decision and better achieves the Court's objective than the Court's own opinion does. The core inquiry presented by the background principles issue is the nature and scope of the purported property interest that the claimant presents in support of her takings claim. That inquiry focuses on the question of whether the pertinent background principle precludes an owner from claiming an entitlement to use property in a particular fashion. While *Lucas* states that some background principles make a regulated activity illegal, that observation is essentially superfluous to the basic issue — whether a claimant possesses an actual property right to engage in the regulated activity.

III. THE DIFFERENT FACES OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine is unquestionably one of the most important elements of U.S. natural resources law.[116] The generally acknowledged foundation of the doctrine is the 1892 decision in *Illinois Central Railroad Company v. Illinois*, in which the U.S. Supreme Court ruled that the Illinois legislature's conveyance of over 1,000 acres of land beneath Lake Michigan to the Illinois Central Railroad

[116] *See generally* Michael C. Blumm, *The Public Trust Doctrine: A Twenty-First Century Concept*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 105, 105-07 (2010) (surveying the evolution of the public trust doctrine in 19th and 20th century America).

violated the public trust doctrine.[117] Only slightly less renowned is the decision in *National Audubon Society v. Superior Court*, in which the California Supreme Court invalidated water permit allocations to the City of Los Angeles because the SWRCB had never considered the effects of the permitted water diversions on public trust resources associated with Mono Lake.[118]

Despite the prominence of the public trust doctrine, the actual contours of the doctrine remain somewhat uncertain. The historic geographic focus of the doctrine was coastal waters and the lands lying beneath these waters.[119] But some courts have gradually extended the doctrine — slowly and in small increments — to other waters, to certain upland areas, and even to other types of resources.[120] Even greater uncertainty surrounds the substantive legal content of the public trust doctrine. It is reasonable to speculate whether the apparent popularity of the public trust doctrine (at least among environmentalists) rests in part on its apparent malleability, which may also explain its unpopularity (at least among libertarians).

Decisions involving the public trust doctrine reveal at least four distinct definitions of the doctrine: (1) creating a duty to manage trust resources for broad public benefit;[121] (2) creating a duty to consider the public trust before taking action that may adversely affect trust resources;[122] (3) a basis for citizen standing to sue to protect public trust resources;[123] and (4) a limitation on private title in land and other resources subject to the public trust doctrine.[124] Each of these meanings is briefly discussed below.

First, as exemplified by *Illinois Central*, the public trust doctrine is sometimes understood to impose a substantive legal duty on

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[117] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 460 (1892).

[118] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728-29 (Cal. 1983).

[119] *Id.* at 718.

[120] *See, e.g.*, Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 121 (Mass. 1966) (applying public trust doctrine to invalidate lease of state parkland to private party); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54-55 (N.J. 1972) (extending New Jersey public trust doctrine to dry sand portion of a municipal beach). At least as applied by the California Supreme Court, however, the public trust doctrine applies to a relatively narrow, well-defined set of resources. *See Nat'l Audubon*, 658 P.2d at 719 (explaining that the public trust doctrine applies to "navigation, commerce, and fishing," as well as ecological protection of the public trust resource itself).

[121] *See infra* text accompanying notes 125-26.

[122] *See infra* text accompanying notes 127-31.

[123] *See infra* text accompanying notes 132-33.

[124] *See infra* text accompanying notes 134-37.

government as the trustee responsible for managing public trust resources. The Supreme Court ruled that the Illinois legislature's attempt to make an outright grant of a large portion of the lands beneath Chicago's waterfront to a private company was beyond its power.[125] Thus, at least in the context of submerged lands, the public trust doctrine has been interpreted as a constraint on government authority to grant public trust resources to private parties for purposes unrelated to the core purposes of the doctrine, facilitating such activities as navigation, commerce, and fishing.[126] However, not all resources covered by the public trust doctrine, including water, are subject to this strict rule against public alienation, as discussed below.

Second, the public trust doctrine imposes a duty of due diligence on government as the trustee of public trust resources. The California Supreme Court's decision in *National Audubon* illustrates this application of the public trust doctrine.[127] The court stated that the public trust doctrine in the surface waters of the state represents "an affirmation of *the duty* of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ."[128] However, according to this description, this duty does not include an obligation to achieve any specific level of protection for trust resources; indeed, the court recognized that the State has the power to authorize uses of water that "may unavoidably harm" public trust uses.[129] The State's "affirmative duty" under the California public trust doctrine in water is a narrower obligation "to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses *whenever feasible*."[130] While this means that the State can allow some uses of trust resources that are destructive of the values protected by the trust, "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust . . . and to preserve, so far as consistent with the public interest, the uses

[125] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452-55, 464 (1892).

[126] *See* State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130, 1135 (Vt. 1989) (railroad owning filled submerged land could only convey land to another private party on condition that land continue to be used for railroad, wharf, or storage purposes).

[127] *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724, 727 (Cal. 1983); *see also* United Plainsman v. State Water Bd., 247 N.W.2d 457 (N.D. 1976) (describing the requirement to consider the public trust in water resource allocation decisions); McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw.), *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973) (same).

[128] *Id.* at 724 (emphasis added).

[129] *Id.* at 727.

[130] *Id.* at 728 (emphasis added).

protected by the trust."[131] Ultimately, *National Audubon* imposes a duty on government to fully consider the effects of its decisions on public trust resources and to strive to protect trust resources whenever feasible, but does not prescribe a specific rule for how government should strike the balance between protecting the resources and advancing other aspects of the public interest in specific cases. This version of the public trust obviously leaves a great deal to government discretion.

Third, courts have interpreted the public trust doctrine as supporting the standing of individual members of the public to sue to enforce either substantive or procedural protections under the public trust doctrine. In *Marks v. Whitney*, for example, the California Supreme Court ruled that an individual land owner had standing, as a member of the general public, to seek a declaration that adjacent tidelands were subject to the public trust doctrine and an injunction to protect his right to make recreational use of the area.[132] Numerous other decisions follow *Marks* in recognizing the public trust doctrine as a basis for granting citizens standing to sue.[133]

Finally, the public trust doctrine precludes a private party from claiming a vested property entitlement to utilize resources subject to the trust in a fashion that is harmful to public trust values. In *National Audubon*, the California Supreme Court affirmed "that 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."[134] The court recognized one exception to this rule as it applies to tidelands: grants of tidelands for the construction of "wharves, docks, and other structures in furtherance of trust purposes could be granted free of the trust because the conveyance is consistent with the purpose of the trust."[135] Applying the same principle to water resources, the court explained that 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."[136] This rule for water resources is subject to few if any exceptions.[137]

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[131] *Id.*

[132] Marks v. Whitney, 491 P.2d 374, 381-82 (Cal. 1971).

[133] *See, e.g.*, State v. Deetz, 224 N.W.2d 407, 413 (Wis. 1974) (holding that the public trust doctrine "establishes standing for . . . any person suing in the name of the state for the purpose of vindicating the public trust").

[134] *Nat'l Audubon*, 658 P.2d at 721.

[135] *Id.* (discussing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892)).

[136] *Id.* at 727; *see also id.* at 712 (public trust doctrine precludes "any . . . party from

Because the public trust doctrine precludes a claim of a vested right to harm or otherwise interfere with the public trust, *National Audubon* emphasized that public action enforcing or defending reserved public rights in trust resources cannot give rise to a valid claim to compensation from the public.[138] Subsequent to the *National Audubon* decision, the California State Water Resources Control Board has upheld the same principle, rejecting, based on the public trust doctrine and other background principles of California law, arguments for financial compensation by water users whose water licenses were modified by the Board to provide improved protection for trust resources.[139] In the Board's words, *National Audubon* teaches that:

> [A]ppropriative water rights [are] subject to modification in order to protect public trust uses . . . . Th[is] limitation[] 'inhere[s] in the title' of the property right [in the water] . . . ; applying th[is] limitation[] cannot constitute a taking because [the water right holder] acquired its right subject to th[is] limitation[].[140]

The foregoing definitions of the legal rights created by the public trust doctrine are all quite different from each other. The government duty to preserve certain public trust resources for public use is obviously distinct from the government duty to consider the potential

claiming a vested right to divert waters once it become clear that such diversions harm the interests protected by the public trust"); *id.* at 732 (finding that the public trust doctrine "precludes anyone from acquiring a vested right to harm the public trust").

[137] *See id.* at 723-24, 727 & n.25 (stating it is "unlikely" that there will be "exceptions to the rule" that no party can "acquir[e] a vested right to appropriate water in a manner harmful to the interests protected by the public trust" doctrine).

[138] *See id.* at 722-23 (discussing People v. California Fish Co., 138 P. 79 (Cal. 1913)) (holding that tideland purchasers held title subject to the public trust doctrine and, therefore, were not entitled to compensation when the state used the land to advance public trust purposes); City of Berkeley v. Superior Court, 606 P.2d 362, 372 (Cal. 1980) (rejecting claim that enforcement of public trust rights in tidelands would give rise to valid claim for compensation and explaining that "[w]e do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish*, hold it subject to the public trust."); Boone v. Kingsbury, 273 P. 797, 816 (Cal. 1928) ("The state may at any time remove [oil drilling] structures [from state tidelands] . . . , even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce.").

[139] *See* Fishery Res. & Water Right Issues of the Lower Yuba River, Revised Water Rights Decision 1644, 141-43 (Cal. Water Res. Control Bd. July 16, 2003), http://www.waterrights.ca.gov/hearings/decisions/RevisedWRD1644.pdf.

[140] *Id.* at 141-42 (citations omitted).

effects of government action on public trust resources. Standing to sue conferred by the public trust doctrine represents an essentially procedural litigation right. *National Audubon*'s definition of how the public trust doctrine limits the scope of private interests in water represents a distinct function of the public trust doctrine as a rule of property law. For the purpose of takings litigation, most of these definitions are irrelevant and a distraction. The only meaning of the public trust doctrine that matters in a takings case is that it bars a water right holder from claiming an entitlement to use water in a fashion that harms public trust resources.

IV. THE PUBLIC TRUST DOCTRINE AS A DEFENSE TO A TAKINGS CLAIM.

In light of the foregoing discussion, courts should readily acknowledge that the public trust doctrine provides a background principles defense to a takings claim based on regulatory restrictions on the use of water designed to protect fish or other trust resources from harm. This understanding is consistent with *Lucas,* which teaches that the core meaning of the background principles concept for takings purposes is that it precludes a claim of a property entitlement to engage in the regulated activity.[141] It is also consistent with the understanding that the core definition of the public trust doctrine in terms of property law is to preclude a claim of entitlement to engage in an activity that harms public trust resources.[142] Because no water right holder can claim an entitlement to exercise its water right in a fashion that harms public trust resources, a regulation designed to prevent such harm does not impair a protected property right and, therefore, cannot provide the basis for a successful takings claim.

The *Tulare Lake* and *Casitas* cases plainly satisfied the preconditions for applying the public trust doctrine as a defense to a takings claim. There is no question that fish present in California waters represent public resources protected by the public trust doctrine.[143] It is also obvious that the activities being regulated in *Tulare Lake* and *Casitas* were harming the fish, and that the ESA was applied in both cases to mitigate and avoid the harm. In *Tulare Lake* the pumping operations

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[141] *See supra* Part II.

[142] *See supra* Part III.

[143] *See*, *e.g.*, *Nat'l Audubon*, 658 P.2d at 719 (stating that the public trust includes ecological protection, which necessarily encompasses fish and their habitats); Marks v. Whitney, 491 P.2d 374, 380, 259 (Cal. 1971) ("Public trust easements are traditionally defined in terms of navigation, commerce and fisheries.").

reduced the natural flows in the Sacramento River for salmon migration and directly killed delta smelt,[144] and in *Casitas* the existence and operation of the Robles Diversion Dam on the Ventura River blocked the steelhead trout from reaching upstream spawning habitat.[145] The pumping restrictions in *Tulare Lake* and the fish passage and flow requirements in *Casitas* served to reduce if not eliminate these harms. The fact that the fish at issue in *Tulare Lake* and *Casitas* were listed species under the ESA highlights the strong public interest in protecting them, but it was not by any means essential to bring the public trust doctrine into play. Thus, the claims court should have rejected the claims based on the public trust doctrine.

A. The Public Trust Rulings in Tulare Lake

Despite the apparent force of this argument, the court in *Tulare Lake* developed an elaborate argument for why the takings claim was not barred by the public trust doctrine. The court's analysis was incorrect and should be rejected by higher courts. First, Judge Wiese ruled that Casitas had a vested property right to exploit the water right conferred by its license unless and until the SWRCB or the state courts modified the license. Without disputing that state legal institutions could

[144] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 315-16 (2001).

[145] Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 102 (2007), *aff'd in part and rev'd in part*, 543 F.3d 1276 (Fed. Cir. 2008), *reh'g en banc denied*, 556 F.3d 1329 (Fed. Cir. 2009), *dismissed on remand*, No. 05-168L, 2011 WL 6017935 (Fed. Cl. Dec. 5, 2011), *and notice of appeal filed*, No. 05-168L (Fed. Cl. Dec. 15, 2011), ECF No. 237. In its December 2011 ruling, the claims court "assumed" for the sake of analysis that project operations were harmful to the fish, *see* Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935, at *16 n.17 (Fed. Cl. Dec. 5, 2011), but observed that, if the case turned on whether or not harm was done to the fish, "plaintiff at some point must be given the opportunity to present evidence that Casitas's operations were not in fact the cause of the steelheads' decline and that bypass flows less than those identified in the biological opinion would be sufficient to facilitate the migration of the fish." *Id.* It would be deeply problematic, in the context of a takings case, for the court to embark on an intensive examination of whether or how the plaintiff's project contributed to the steelheads' decline or of whether a different set of prescriptions might have achieved the goals of the ESA at a lower cost. If the plaintiff had wished to challenge the validity of the ESA regulatory conditions, it should have challenged them in an action in federal district court under the Administrative Procedure Act. In any event, as *National Audubon* makes clear, all that is required to sustain the public trust is a showing that project operations were "clear[ly]" harming the fish. *Nat'l Audubon*, 658 P.2d at 712. The extensive record compiled by the claims court during the course of the trial is more than sufficient to establish the necessary showing of harm. *See Casitas*, 76 Fed. Cl. at 102.

modify Casitas's license in light of the public trust doctrine, and could do so without impairing any vested property right in the water, the court ruled that it was required to consider the right conferred by the license consistent with the public trust doctrine unless and until the State declared otherwise. Second, Judge Wiese ruled that federal courts lack the authority to apply the public trust doctrine as a background principle in takings cases because application of the public trust doctrine involves a "balancing of interests" more appropriately left to state institutions.[146] He explained that the public trust doctrine presented an issue that was "specifically committed" to the SWRCB and/or the state courts, and in any event presented a judicial challenge "for which this court is not suited and with which it is not charged."[147] Unfortunately, Judge Wiese was mistaken on both points.

As to the first point, Judge Wiese contradicted *National Audubon* by asserting that the water license issued by the SWRCB to the Department of Water Resources, and in turn conveyed by contract from the Department to the plaintiffs, created a vested entitlement to use of the water.[148] Judge Wiese stated, "[P]laintiffs' right to divert water in the manner specified . . . [in the state board order] continued until a determination to the contrary was made either by the SWRCB or by the California courts."[149] But this assertion is mistaken in light of the teachings of *National Audubon*. The SWRCB has "the power to grant usufructuary licenses" in water to private parties, but 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."[150] In other words, the scope of a property right in water is not determined solely by the terms of a license or permit, but in addition by the fundamental principle that no water right holder can assert a protected right to use water in a fashion that is harmful to fish. A water permit or license confers only a privilege, not an entitlement. Thus, what the SWRCB has authorized in the form of a license or permit is ultimately irrelevant for the purpose of defining the scope and limits of a claimant's property interest for takings purposes.

To support his analysis, Judge Wiese contrasted the public trust doctrine, which he believed did not provide the United States with a valid defense, with the background principles defense based on

[146] *Tulare Lake*, 49 Fed. Cl. at 321-24.
[147] *Id.* at 323-24.
[148] *Id.* at 321-24.
[149] *Id.* at 324.
[150] *Nat'l Audubon*, 658 P.2d at 727.

nuisance law, which he had upheld in *Rith Energy*.[151] According to Judge Wiese's after-the-fact characterization of his ruling in *Rith Energy*, the nuisance defense barred the takings claim in *Rith Energy* because Tennessee nuisance law clearly prohibited the regulated mining activity.[152] By contrast, he asserted, a background principles defense did not apply in *Tulare Lake* because "the [water] use now being challenged was not always unlawful" under the public trust doctrine.[153] Indeed, under Judge Wiese's reasoning, the original SWRCB license authorizing the use of the water represented an affirmative demonstration that, apart from the ESA constraints, Casitas's water use was entirely lawful.

Where the court went wrong in this analysis was in assuming that all background principles are created equal. In the case of the nuisance defense, the same standards determine whether an activity is an illegal nuisance that can be enjoined, and whether the activity can be prohibited without triggering takings liability.[154] But the core function of background principles in the takings context is to define the scope of a claimant's property entitlement. In the case of nuisance doctrine, the scope of the defense to a takings claim based on nuisance doctrine coincides with the legal standard making the activity illegal. For the purpose of applying a background principles defense in a takings case, however, it is ultimately irrelevant whether the background principle also bars the activity altogether. The only relevant question is whether the public trust doctrine precludes a claim of entitlement. Just as with the riparians in the navigation servitude cases discussed above, and the fishing company in *American Pelagic*, a water right holder claiming a taking is barred by the public trust doctrine if the regulated activity impinges on public trust values, regardless of whether the government lawfully granted permission to engage in the activity now being subjected to regulation.

Finally, the claims court's conclusion in *Tulare Lake* that a water license or permit confers a vested right is not helped by the fact that post-1914 water rights holders in California have permits and licenses that impose various conditions on the rights granted, including that the permits or licenses may be reexamined and adjusted by the SWRCB at any time in order to protect the public trust. It might be contended that the permits and licenses themselves are intended to

[151] Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 113 (1999), *aff'd on other grounds*, 247 F.3d 1355, 1366 (Fed. Cir. 2001).

[152] *Tulare Lake*, 49 Fed. Cl. at 323.

[153] *Id.*

[154] *See supra* Part II.

create vested property rights in the use of water, subject to the specific conditions in the permits and licenses. But the terms of a permit or license do not establish a ceiling on public rights in water resources under California law. As the California Supreme Court explained in *National Audubon*, the system of prior appropriation and the public trust doctrine represent separate, parallel regimes under California law.[155] Thus, the public trust doctrine stands apart from the system of appropriative water rights and places conditions on appropriative rights to protect the public that are separate from the conditions included in a particular permit or license. The independent force of the public trust doctrine is confirmed by *National Audubon*'s recognition that not only the SWRCB but also the courts have the power to adjust water permits or licenses to protect public trust values; if permits or licenses established vested entitlements, subject only to the reserved power of the Board to make appropriate modifications, courts would be powerless to enforce the public trust doctrine against permitees and licensees. The limitation imposed by the public trust doctrine is that no water right holder can claim an entitlement to use water in a fashion that is harmful to public fisheries. This legal protection for public resources neither depends upon nor is constrained by the terms of a water permit or license.

As to Judge Wiese's second point, his conclusion that he lacked the authority to apply the public trust doctrine is incorrect because it ignores the established duty of a federal court under *Erie Railroad Co. v. Tompkins*, when it encounters an issue of state law in a case within its jurisdiction, to faithfully apply state law in the same fashion that a state court would.[156] In a takings case, including takings suits filed in federal court, the nature and scope of a claimant's asserted property interest is typically defined by state law.[157] Accordingly, under *Erie*, federal courts hearing takings cases have an obligation to interpret and apply the state law issues presented by a threshold property question as if functioning as a state court. While the *Erie* doctrine establishes a general principle of federal–state judicial relations, the doctrine necessarily applies in takings cases specifically.[158] Moreover, the logic

[155] *See Nat'l Audubon*, 658 P.2d at 726-29.

[156] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[157] *See* Acceptance Ins. Co. v. United States, 583 F.3d 849, 857 (Fed Cir. 2009) ("It is well settled that 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." (quoting Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002))).

[158] *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4520 (2d ed. 1996) ("[S]tate law has been applied [under

of this principle necessarily extends to a state law public trust doctrine, such as the California public trust doctrine at issue in these cases.[159]

Judge Wiese justified his unwillingness to apply the public trust doctrine defense in *Tulare Lake* based on purported deference to state institutions. But judicial deference is misplaced in this context because it contradicts the fundamental principle of *Erie* — that federal courts honor state law by faithfully applying it, not ignoring or contradicting it. Moreover, a federal court's refusal to follow state law defeats even-handed application of state law, and in that sense undermines state law itself. Finally, this approach unfairly deprives the United States of substantive legal arguments it is entitled to present in its defense, based on the happenstance that a case was filed in federal court rather than state court.

Judge Wiese also erred in concluding that he should not apply the public trust doctrine as a background principles defense because it involved a "balancing of interests" that required an exercise of judicial discretion.[160] First, Judge Wiese was mistaken in his premise that a federal court cannot properly apply a background principles defense if its application involves judicial discretion. In *Lucas*, the Court explicitly recognized that applying a background principles defense based on nuisance law will frequently involve the exercise of considerable judicial discretion. The Court said that a nuisance defense

> will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures

Erie] to determine the character of property . . . in federal condemnation actions to determine what property interests are compensable.").

[159] Other federal courts have had no difficulty recognizing that they possess the authority to interpret and apply state public trust doctrines as defenses to takings claims. *See, e.g.*, Esplanade Props., LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (Washington public trust doctrine); Nat'l Ass'n of Homebuilders v. New Jersey Dep't of Envtl. Prot., 64 F. Supp. 2d 354 (D. N.J. 1999) (New Jersey public trust doctrine).

[160] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 324 (2001).

> taken by the claimant and the government (or adjacent private landowners) alike.[161]

If the need to exercise judicial discretion precluded raising a background principles defense in federal court, virtually the entire category of background principles based on nuisance doctrine would be unavailable to takings defendants in federal court. *Lucas* itself certainly lends no support to this idea, and no other court or commentator has ever advanced this idea. In addition, the many cases in which federal courts actually have considered nuisance defenses to takings claims refute the view that they lack the authority to do so.[162]

Second, Judge Wiese erred in concluding that he should not apply the public trust doctrine on the ground that it involved a "balancing of interests" because, in fact, application of the public trust doctrine as a background principles defense does not call for a balancing of different interests.[163] The only question presented by the public trust defense to a takings claim is whether the regulated activity is harmful to public trust resources.[164] A court can easily answer this straightforward factual question without resorting to a balancing of interests or any other type of exercise in judicial discretion.

Judge Wiese's assumption that application of the public trust doctrine in a takings case involves a balancing of interests reflects a confounding of two of the separate and distinct meanings of the public trust doctrine.[165] As applied in the takings context, the public trust doctrine represents a limitation on an asserted private property interest in water that bars a water right holder from claiming a protected entitlement to exercise the water right in a fashion that is harmful to fish. As applied in a regulatory context, the public trust doctrine creates a duty to consider certain public trust uses and values in deciding whether to authorize an activity that may adversely affect the public trust. In describing how the public trust doctrine operates as a background principle defense in a takings lawsuit, Judge Wiese

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[161] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030-31 (1992) (citations omitted).

[162] *See, e.g.*, John R. Sand & Gravel Co. v. United States, 62 Fed. Cl. 556, 562, 589 (Fed. Cl. 2004) (dismissing claim based on background principles of Michigan nuisance law), *aff'd on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006); Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 113-15 (Fed. Cl. 1999) (dismissing claim based on background principles of Tennessee nuisance law), *aff'd on other grounds*, 247 F.3d 1355, 1366 (Fed. Cir. 2001).

[163] *Tulare Lake*, 49 Fed. Cl. at 324.

[164] *See supra* Part III.

[165] *See supra* Part II.

incorrectly invoked the second meaning when instead he should have relied on the first.

The California Supreme Court in *National Audubon* recognized the critical distinction between these two meanings of the public trust doctrine. The court stated that 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."[166] But the court also explained that the SWRCB has the authority — after balancing public trust values along with other aspects of the public interest — to authorize water uses that may be harmful to public trust resources.[167] The court said that the SWRCB necessarily must have the authority to permit some uses of water that are harmful to public trust interests in order to permit essential "economic development."[168] However, this authority coexists, the court explained, with the principle that no water right holder can claim an entitlement to use water in a way that is harmful to fish. No permit or license issued by the state board authorizing an activity that is harmful to fish, though perhaps perfectly lawful in itself, can create a vested property right to continue to engage in that activity. Governmental authorization to exploit water resources confers only a privilege or a license, which is subject to modification or even revocation at any time without compensation.[169]

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[166] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727 (Cal. 1983); *see also id.* at 732 (stating that the public trust doctrine "precludes anyone from acquiring a vested right to harm the public trust").

[167] *See id.* at 727 (rejecting argument that "the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust").

[168] *Id.*

[169] *See id.* at 722 (discussing Boone v. Kingsbury, 273 P. 797, 816 (Cal. 1928)). Courts in California have repeatedly reaffirmed the holding in *National Audubon* that no one can acquire a vested right to exercise a water right in a fashion that is harmful to public trust interests. *See, e.g.*, Nat'l Res. Def. Council v. Kempthorne, 621 F. Supp. 2d 954, 994-95 (E.D. Cal. 2009) (quoting *Nat'l Audubon*, 658 P.2d at 709) (finding that State's duty under 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"); Golden Feather Cmty. Ass'n. v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 841 (Ct. App. 1989) ("[T]he state as sovereign retains continuing supervisory control over its navigable waters . . . , and this precludes anyone from obtaining a vested right to appropriate water in a manner harmful to the interests protected by the trust."); *see also* Fishery Res. & Water Right Issues of the Lower Yuba River, Revised Water Rights Decision 1644, 141-43 (Cal. Water Res. Control Bd. July 16, 2003), http://www.waterrights.ca.gov/hearings/decisions/RevisedWRD1644.pdf (ordering change in permitted water use to protect public trust resources and rejecting argument that mandated change would result in a taking). Courts in other states that have embraced the public trust doctrine have explained the effect of the doctrine on

B. The Public Trust Rulings in Casitas

In his most recent *Casitas* decision, issued on December 5, 2011, Judge Wiese had the opportunity to correct his erroneous analysis of the public trust defense in *Tulare Lake*. While he did correct several of his prior errors, he left one major error uncorrected, and introduced several new errors. At the end of his analysis he reached the same mistaken conclusion: that the public trust doctrine did not preclude the takings claim.

First, Judge Wiese abandoned the idea that a claimant's water use must be deemed to be consistent with the public trust doctrine so long as the use is consistent with a SWRCB permit or license. That viewpoint, he asserted in his latest opinion, ignored the "self-executing" nature of the public trust doctrine and followed an overly "static" view of California water rights.[170] For the reasons discussed above, this new ruling is surely correct. Second, accepting his obligation to follow the principle established in *Erie v. Tompkins*,[171] Judge Wiese stated that he had a responsibility to apply the California public trust doctrine in order to determine whether it precluded Casitas's claim.[172] These rulings in the latest *Casitas* decision represent major changes in position relative to the *Tulare Lake* opinion. At the same time, Judge Wiese adhered to the view articulated in *Tulare Lake* that application of the public trust doctrine in takings cases necessarily involves a "balancing of interests" addressing not only public trust uses and values but other aspects of the public interest. Thus, the court continued to refuse to accept that *National Audubon* established an essentially categorical rule barring a takings claim when the regulated activity harms public trust resources.

On the other hand, striking out in new directions, Judge Wiese adopted the novel position that the limitations on water rights imposed by the public trust doctrine only apply to actions by the State

asserted property interests in water in virtually identical terms. *See, e.g.*, *In re* Water Use Permit Applications, 9 P.3d 409, 453 (Haw. 2000) (holding that the public trust doctrine "precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes"); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983) ("[T]he public trust doctrine takes precedent even over vested water rights."); *cf.* Karam v. Dep't of Envtl. Prot., 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998) ("[T]he sovereign never waives its right to regulate the use of public trust property.").

[170] Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935, at *12 (Fed. Cl. Dec. 5, 2011).

[171] *See* 304 U.S. 64, 78 (1938).

[172] *Casitas*, 2011 WL 6017935, at *12.

of California and not those of the federal government.[173] Unlike the prior position articulated in *Tulare Lake*, which suggested that the federal courts lack jurisdiction to apply the public trust doctrine in a takings case, this alternative theory apparently rests on the judge's interpretation of the substance of California public trust law. In any event, the bottom line is the same — the U.S. Court of Federal Claims is powerless to apply the public trust doctrine to preclude a takings claim. In accord with his embrace of *Erie v. Tompkins*, however, Judge Wiese recognized that, if the public trust doctrine could be raised as a defense to a takings claim based on federal government action, he would have an obligation to conduct the balancing-of-interests analysis which he so forcefully eschewed in his *Tulare Lake* opinion. Applying a balancing analysis, the court concluded that, assuming the public trust doctrine could apply as a defense to a takings claims against the federal government, the defense would fail because the balance of interests came down in favor of the plaintiff and against the United States.

Two aspects of the court's discussion of the public trust doctrine defense in *Casitas* deserve detailed analysis: (1) the ruling that the public trust doctrine cannot serve as a defense to a takings claims based on federal government action (as opposed to state government action), and (2) the court's application of its so-called balancing analysis for determining (in the alternative) whether the public trust defense precluded the takings claim.[174]

As to the first point, in a relatively brief and somewhat cryptic passage, the court indicated that that the California public trust

[173] *Id.* at *14.

[174] The court also rejected plaintiff's argument, based on the Federal Circuit decision in *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), that "the governmental action itself must be based on the asserted background principle of state law in order for a *Lucas* defense to apply." *Casitas*, 2011 WL 6017935, at *13. The court said it did not read that decision "as standing for the proposition that defendant must prove that the challenged property restriction was in fact predicated upon the asserted background principle of law to succeed in its *Lucas* defense." *Id.* All *Palm Beach Isles* requires, the claims court said, is an "identity of purpose between the action taken by the federal government and the background principle on which the government relies." *Id.* That requirement was satisfied in this case, the claims court ruled, because the ESA regulations giving rise to the takings claim have the same fish protection purpose as the public trust doctrine. *Id.* This ruling was unquestionably correct. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 (1992) (remanding case to the South Carolina courts to determine whether background principles precluded the takings claim based on the South Carolina Beachfront Management Act, even though it was self-evident that the regulatory action at issue was based on the Act's statutory mandate rather than on any potentially relevant South Carolina background principles).

doctrine cannot apply in takings cases arising from actions by the federal government.[175] The claims court's apparent rationale for this conclusion rests on the observations in *National Audubon* that the public trust doctrine vests the state with "continuing supervisory control" over public trust resources, and that as a corollary of this principle, a water right holder subject to the public trust doctrine cannot claim a "vested" right to exercise the right in way that harms public trust resources.[176] The claims court believed that because the state's continuing duty to protect the public trust is the primary logical foundation for the qualified nature of private property rights in water under California law, then only the state, and not the federal government, should be entitled to invoke the public trust doctrine as a bar to a takings claim.

The court's reasoning is mistaken, however, because the definition of the nature and scope of a property interest for the purpose of takings analysis does not vary depending upon whether the entity allegedly committing the taking is a part of state government or of the federal government. The claims court cites no authority to support its novel parsing of the background principles defense,[177] and I am aware of no other court adopting a similar position.

The claims court's novel theory conflicts with the traditional approach courts use to define the nature and scope of "property" within the meaning of the Takings Clause. It is well established that evaluation of a takings claim involves a two-part analysis — the "threshold inquiry . . . [into] 'whether the claimant has established a "property interest" for purposes of the Fifth Amendment,' "[178] and an examination of whether the property interest has been "taken."[179] The

[175] *Casitas*, 2011 WL 6017935, at *14.

[176] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727 (Cal. 1983).

[177] The claims court's citation of *United States v. State Water Resources Control Board*, 227 Cal. Rptr. 161, 168 (Ct. App. 1986), is unpersuasive, because the case simply contains references that generally support the point, which no party contests, that water rights holders in California can claim protected property interests in water. *See Casitas*, 2011 WL 6017935, at *14. The fact that interests in water represent private property that in certain circumstances can support takings claims does not mean that the rights are absolute or, more specifically, that they may not be qualified by background principles which may preclude takings liability in certain circumstances. Furthermore, nothing in the referenced decision supports the novel idea that an interest in water can mean one thing vis-à-vis the state government and another thing vis-à-vis the federal government.

[178] Colvin Cattle Co. v. United States, 468 F.3d 803, 807 (Fed Cir. 2006) (quoting Conti v. United States, 291 F.3d 1334, 1339 (Fed. Cir. 2002)).

[179] Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

initial property question starts from the premise that "only persons with a valid property interest at the time of the taking are entitled to compensation."[180] It involves the "logically antecedent inquiry into the nature of the owner's estate [to determine whether] the proscribed use interests were not part of his title to begin with."[181] As the Supreme Court has explained, this approach "accords . . . with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."[182] The United States Constitution itself does not, of course, create or define the scope of "property" interests protected by the Fifth Amendment. Instead,

> In determining whether a party has asserted a cognizable property interest for Fifth Amendment purposes, a court must look to "existing rules and understandings and background principles derived from an independent source" [typically state law] that "define the dimensions of the requisite property rights for purposes of establishing a cognizable taking."[183]

In conducting the threshold property inquiry in a takings case, courts do not take into consideration the level of government (federal or state) that has allegedly committed the taking. Indeed, there is no logical place in the analysis of the property issue for inquiring whether the claim is based on federal or state government action. A property interest, regardless of the source of law defining the interest, necessarily has a single definition for the purpose of the term "property" in the Takings Clause. Tellingly, the Federal Circuit and the claims court have occasionally certified questions to state courts to enlist their assistance in defining the nature and scope of an asserted state property interest that is the subject of a federal takings claim.[184]

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[180] Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001).

[181] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

[182] *Id.*

[183] Klamath Irrigation Dist. v. United States, 635 F.3d 505, 511 (Fed. Cir. 2011) (citations omitted) (quoting *Air Pegasus*, 424 F.3d at 1213) (internal quotation marks omitted), *vacated and remanded on other grounds*, 635 F.3d 505 (Fed. Cir. 2011); *see also* Acceptance Ins. Co. v. United States, 583 F.3d 849, 857 (Fed Cir. 2009) ("It is well settled that 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." (quoting Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002))).

[184] *See, e.g.*, *Klamath Irrigation*, 532 F.3d at 1377-78 (certifying three questions of law to Oregon Supreme Court in Fifth Amendment water takings case); Walker v.

No federal judge certifying such questions, nor any state judge to whom such questions have been certified, has ever imagined that the answers to these questions could or should vary depending on the identity of the defendant in the takings lawsuit.

In accord with this reasoning, decisions in the Federal Circuit have consistently proceeded on the assumption that, when a federal government action is alleged to effect a taking, ordinary application of state law background principles determines whether the claimant has a property interest sufficient to support the takings claim.[185] Following the same line of reasoning, state courts have rejected takings claims arising from state regulations when the claim of a property entitlement is defeated by a background principle of federal law.[186] In either case, the nature and scope of the property interest does not change depending on whether it is the state government or the federal government that is allegedly doing the taking.

An analogous issue has been raised by takings claimants asserting that background principles of state law may bar a regulatory takings claim but not a physical takings claim. The courts have consistently rejected that argument.[187] As Emily Hewitt, the Chief Judge of the U.S. Court of Federal Claims, stated in *John R. Sand & Gravel Co. v. United States*, "Once the nature of the property interest has been determined, the characterization — as 'physical' or 'regulatory' — of any action by the government that is alleged to be a taking does not reduce or enlarge the nature of the property interest."[188] By the same token, the fact that either a state or a federal entity is alleged to have taken an

United States, 69 Fed. Cl. 222, 232-33 (Fed. Cl. 2005) (certifying two questions of law regarding appropriative water rights to the New Mexico Supreme Court).

[185] *See* John R. Sand & Gravel Co. v. United States, 62 Fed. Cl. 556, 572-89 (Fed. Cl. 2004) (dismissing takings claim arising from application of federal superfund law based on Michigan nuisance doctrine), *aff'd on other grounds*, 457 F.3d 1357 (Fed Cir, 2006), *aff'd*, 552 U.S. 130 (2008); Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 113-15 (Fed. Cl. 1999) (dismissing takings claim arising from federal surface mining regulation based on Tennessee nuisance doctrine), *aff'd on other grounds*, 247 F.3d 1355, 1366 (Fed. Cir. 2001).

[186] *See, e.g.*, Kinross Copper Corp. v. Oregon, 981 P.2d 833, 837-40 (Or. Ct. App. 1999) (determining that plaintiff did not possess right to discharge wastewater into river since federal law required compliance with state water laws).

[187] *See Lucas*, 505 U.S. at 1028-29 (stating that the federal navigation servitude would serve as a background principle defense to a physical takings claim); *John R. Sand & Gravel*, 60 Fed. Cl. at 235 (ruling that state nuisance law can serve as a background principles defense to either a regulatory taking case or a physical taking case).

[188] *John R. Sand & Gravel*, 60 Fed. Cl. at 237.

action that amounts to a taking does not reduce or enlarge the nature of the property interest.

The conclusion that background principles of property law apply equally to federal and state government action is supported by *National Audubon*'s recognition, which the claims court properly acknowledged,[189] that the federal courts share with the state courts "the authority and responsibility to apply the public trust doctrine."[190] The California Supreme Court was addressing whether the federal courts have the authority to ensure that the State complies with its affirmative duties under the public trust doctrine, and the court concluded that the federal courts do have this authority.[191] If, as a matter of California law, federal courts can exercise the substantive power to *affirmatively* enforce the California public trust doctrine, it logically follows that they also must have the power to recognize the public trust doctrine as a *limitation* on a private water right in a federal takings case.[192]

Finally, taken to its logical limit, the claims court's approach would lead to absurd results. Property, for the purpose of the Takings Clause, is usually defined by state law. If the inherent limitations of state-created property interests applied only to actions of the state government and not to the federal government, the federal government's liability under the Takings Clause would vastly exceed that of the states, even for actions that are in every respect identical except for the level of government involved. As a matter of fairness, the federal government (and the federal taxpayer who would ultimately be liable) must be allowed to raise background principles as a defense to a takings claim on the same basis as the state government.

Turning to the second point to be made about the December 2011 *Casitas* decision, the claims court erred in ruling that, assuming the

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[189] *See* Casitas Mun. Water Dist. v. United States, No. 05-168L, 2011 WL 6017935, at *12 (Fed. Cl. Dec. 5, 2011).

[190] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 713 (Cal. 1983).

[191] *See id.*

[192] This conclusion is also supported by the claims court's rejection of the plaintiff's argument that, for a background principle defense to apply, the government action alleged to be a taking must be based on the asserted background principle of state law the government defendant is seeking to invoke. *See supra* note 174. The appropriate standard, the claims court ruled, is simply whether the action giving rise to the takings claim is designed to serve the same "purpose" as the background principle. It logically follows from this ruling that a relevant background principle should apply equally, regardless of whether the alleged taking was by the federal government or the state government, so long as the regulation serves the same "purpose" as the pertinent background principle. *See id.*

public trust doctrine can apply as a background principles defense to a takings claim based on a federal government action, application of this defense involves a balancing of interests and in this instance the balance weighed against the Government. In adopting the view that application of the public trust doctrine as a background principles defense involves a balancing of interests the court embraced once more the same mistaken view it adopted in Tulare Lake. I have described above in discussing *Tulare Lake* why this viewpoint is mistaken and the same critique applies to *Casitas*.[193] The focus in *National Audubon* on whether an exercise of a water right "harms" the public trust produces a narrow, straightforward test for determining whether the public trust doctrine bars a takings claim — if the exercise of a water right harms the public trust, a regulatory constraint that serves to prevent this harm cannot give rise to a viable takings claim because the regulation does not constrain a property entitlement recognized under California law. Following this analysis, the claims court should have ruled that the public trust doctrine barred the claim. The court's position that application of the public trust doctrine as a background principle defense requires consideration of *all* aspects of the public interest confuses *National Audubon*'s discussion of how the public trust doctrine qualifies property rights in water, on the one hand, with its discussion of how the SWRCB should take the public trust and other public interest considerations into account in determining whether to authorize particular uses of water, on the other hand. The claims court's rejection of the United States's public trust doctrine defense should clearly be reversed because it is based on a mistaken understanding of how the public trust doctrine operates as a background principle for takings purposes.

Lastly, it is noteworthy that, even if a balancing analysis were appropriate to determine whether the public trust doctrine bars a takings claim, the claims court's balancing of interests was so one-sided that it could not sustain the court's conclusion that the public trust doctrine barred the claim. The court accurately describes the defense side of the equation as "the potential extinction of a

[193] The claims court also posited, based on scant authority, that the Government bore the burden of proof on the background principles issue. *See Casitas*, 2011 WL 6017935, at *8 (citing *John R. Sand & Gravel*, 60 Fed. Cl. at 240). Since establishing the existence of a property interest is an essential element of a plaintiff's claim, the better view is that the plaintiff should bear the burden of demonstrating that a background principle of property law does not bar the claim. In any event, and however the burden of proof is assigned, the claims court should have ruled in this case that the claim was barred by the public trust doctrine.

species."[194] On the other side of the equation, given the plaintiff's failure to make any showing of present loss of beneficial use, the court could only consider a possible future injury to the plaintiff's ability to serve its water customers. Without directly analyzing the significance or likelihood of harm on each side, or comparing the potential harm on one side with that on the other, the court simply summed up its thinking by stating: "Because we ultimately find that the foregone diversions are *not necessarily* surplus to Casitas's needs . . . , we do not believe defendant has succeeded in demonstrating that the one outweighs the other."[195] This analysis is so heavily weighted in favor of development interests that the traditional public trust value of fishery protection could almost never prevail over development interests.[196] In the end, the court's balancing analysis does not involve a genuine balancing at all, but instead functions like a per se test favoring development interests over fish protection in virtually every instance. Thus, the court's application of a balancing analysis fails to deliver a defensible outcome even on its own terms. Moreover, the court's analysis is plainly contrary to the mandate of the California public trust doctrine that trust resources should be protected "whenever feasible." Of course, the court's misguided balancing analysis is, in a sense, the least of the defects in the court's opinion because, for the reasons already explained, the court erred in thinking that the public trust defense to a takings claim involves a balancing analysis at all.

CONCLUSION

In the long-running saga represented by the *Tulare Lake* and *Casitas* litigations, Judge Wiese has effectively reversed himself several times. In *Tulare Lake*, he ruled that a regulatory restriction on the use of water should be analyzed as a physical appropriation of the water interest triggering a per se takings analysis. In *Casitas*, Judge Wiese reversed himself and ruled that a regulatory restriction on the use of water should be analyzed under the traditional regulatory takings framework, only to be reversed on appeal by the U.S. Court of Appeals for the Federal Circuit. Later in the same case, Judge Wiese reaffirmed his position that the public trust doctrine does not provide a defense to a takings claim based on regulation of California water rights, but in

[194] *Id.* at *18.

[195] *Id.* (emphasis added).

[196] *See id.* (concluding that the United States "has failed to show that the fish protection aspect of California's public trust doctrine is superior to other competing interests, including Casitas's use of the water").

essence reversed himself once again by adopting new reasoning to reach the same conclusion. The inevitable notice of appeal has already been filed. Hopefully the U.S. Court of Appeals for the Federal Circuit is prepared to offer one more reversal.