Federal Government Must Pay for Water to Protect Species Under the Endangered Species Act

Does the federal government commit a taking under the Fifth Amendment to the U.S. Constitution when it restricts water use in order to protect species under the Endangered Species Act (ESA)?\(^1\) In Tulare Lake Basin Water Storage District et al. v. U.S. (Tulare Lake Basin),\(^2\) the Court of Federal Claims became the first federal court to answer this question affirmatively when it granted the plaintiff water contractors' summary judgment motion. The court concluded that federally-mandated reductions of water deliveries under state contracts in response to ESA concerns were takings of property rights. This summary highlights the findings of the Tulare Lake Basin decision and takes issue with its conclusions, arguing that it was incorrectly decided according to California water law, federal constitutional law, and public policy.

Tulare Lake Basin concerned three California water institutions - the State Water Resources Control Board (SWRCB), the Department of Water Resources (DWR), and several water districts ("the water contractors") that contract with DWR for water. The SWRCB is the state agency with the "ultimate authority for controlling, appropriating, using and distributing state waters."\(^3\) It grants water permits to the DWR, which in turn contracts with the water contractors, "conferring on them the right to withdraw or use prescribed quantities of water."\(^4\)

In Tulare Lake Basin, the plaintiff water contractors sued over restrictions placed on water permits that the SWRCB had issued to the DWR under the State Water Project (SWP).\(^5\) The

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3. Tulare Lake Basin, 49 Fed. Cl. at 315.
4. Id.
5. The State Water Project (SWP) encompasses a series of dams, reservoirs, and canals that both provide flood control benefits and distribute water throughout the
case grew from several biological opinions issued by the National Marine Fisheries Service (NMFS) to protect winter-run Chinook salmon, and by the U.S. Fish and Wildlife Service (FWS) to protect Delta Smelt. In 1992, NMFS issued a biological opinion concluding that winter-run Chinook salmon were jeopardized by the operation of both the SWP and Central Valley Project (CVP) (a federally-managed water distribution system similar in nature to the SWP). The NMFS issued similar opinions in 1993 and 1994, and the FWS issued its own jeopardy opinion in 1993, adding the Delta Smelt to the list of jeopardized species.

According to the several biological opinions, the “reasonable and prudent alternative” to address both the jeopardized Chinook salmon and Delta Smelt was to restrict the time and manner in which water was pumped to the plaintiffs. In response, the DWR decreased the amount of water distributed to the water contractors in 1992, 1993, and 1994. Yet the SWRCB did not expressly change the water allocations in the water contractors’ permits, upon which their contracts were based, to reflect the ESA requirements until 1995, three years after the initial biological opinion and first restriction to the water contractors.

Accordingly, the plaintiffs sued for compensation under the Takings Clause for loss of water due to the ESA restrictions from 1992 to 1994. In response, the United States defended on three grounds: 1) that the water reductions did not constitute a taking but simply frustrated the purpose of the contracts with the water contractors, 2) that the reductions did not satisfy the criteria for a regulatory taking, and 3) that the reductions imposed no limitation on the water contractors’ title to water than that which California water law would otherwise require.

Breaking with established precedent, the court in Tulare Lake Basin made several original and controversial findings. First, the court rejected the federal government’s argument that the reduction in water allocations was not a taking, but rather a frustration of the contract between the plaintiffs and the DWR.

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State of California. It is managed by the Department of Water Resources. For more information, see www.water.ca.gov (last visited June 27, 2002).

7. Id.
8. In 1995, the SWRCB enacted D-95-1, which adjusted water allocations and adopted measures designed to protect the fish. Tulare Lake Basin, 49 Fed. Cl. at 322. This lag in adjusting water allocations was later to play a critical role in the court’s holding. See text surrounding notes 16-17, infra.
under the *Omnia* doctrine. Instead, the court found the *Omnia* doctrine inapplicable because the water contractors' water contract rights constituted "a property interest sufficiently matured to take it out of the realm of an *Omnia* analysis."

Second, the court rejected the defendants' contention that the appropriate takings analysis was under the three-part test for regulatory action set forth in *Penn Central Transportation Co. v. New York.* The defendants had asserted that plaintiffs' claim must fail because the plaintiffs' reasonable expectations were limited by regulatory issues regarding the preservation of fish and wildlife. Instead, the court relied on *United States v. Causby,* holding that, in the context of usufructory water rights, a "mere restriction on use" completely extinguishes the value of the water right. The court found that the federal government became the sole beneficiary of the contract right by preventing the plaintiffs from using the water, thus affecting a complete physical taking.

Third, the court rejected defendant's arguments that the plaintiffs did not own the water for which they sought to be compensated. As a preliminary matter, the court recognized that the plaintiffs' contracts only entitled them to water the DWR made available, and that the plaintiffs' contract rights were subject to the public trust doctrine, the doctrine of reasonable use, and common law principles of nuisance. Yet the court found that the federal government was still liable for a taking for several reasons. First, while the SWRCB and DWR were immunized against any ESA-based takings claims by contract, the federal government had no such immunity. Second, although the plaintiff water contractors' contracts were subject

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9. In *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), the Supreme Court noted that an obligation to perform under a contract is not the same thing as the subject matter of the contract. In *Omnia*, the federal government requisitioned a steel company's entire yearly supply of steel. A company that had contracted with the steel company for some of the requisitioned steel sued, claiming a taking. The Court held that no taking had occurred, instead finding that the federal government merely frustrated the contract, not taken the actual physical subject matter of the contract. In *Tulare Lake Basin*, the court distinguished the plaintiffs from those in *Omnia* by holding that they could claim an identifiable ownership interest in a specific volume of water, and were not simply relying on a contract expectancy. *Tulare Lake Basin*, 49 Fed. Cl. at 317-18.

10. *Id.* at 318.
12. 328 U.S. 256 (1946) (holding that frequent, low-level flights immediately over a landowner's property constituted a taking comparable to a physical taking).
14. *Id.* at 321.
15. *Id.*
to the public trust doctrine, the doctrine of reasonable use, and common law principles of nuisance, "the water allocation scheme in effect for the period 1992-1994, as set forth in D-1485 (a decision issued by the SWRCB), specifically allowed for the allocations of water defendant now seeks to deem unreasonable."\(^{16}\) The court refused to replace the state's judgment of appropriate water allocations with its own judgment, and subsequently found that D-1485 defined the scope of plaintiffs' water rights in the absence of a state court ruling or another decision by SWRCB holding D-1485 to be an unreasonable use of water.\(^{17}\) Although the SWRCB or the California courts each had the ability to change the water allocation scheme at any time between the initial reductions required by the NMFS and FWS biological opinions in 1992 until the new decision was issued by the SWRCB in 1995, the fact that neither the courts nor the SWRCB did so was determinative for the *Tulare Lake Basin* court. "As no such determination was made during the period 1992-1994, and subsequent amendments to policy cannot, for contract purposes, be made retroactive, plaintiffs were indeed entitled to the water use provided for in D-1485 and in their contracts."\(^{18}\) Thus, in the words of the court, "[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."\(^{19}\)

This case deviates significantly from California water law in several respects. Looking first to state law principles, the *Tulare Lake Basin* court took one of the most unique, contingent, and universally regulated forms of property governed by California law and created a permanent property right for the plaintiffs. In fact, California law grants no permanent property right in water as the right is always subject to state regulation in response to the public trust and reasonable use doctrines.\(^{20}\) These doctrines predate the plaintiffs' water rights and therefore form part of the "background principles" to California state law that can override private use of public water.\(^{21}\) The court abdicated its responsibility to apply the public trust and reasonable use doctrines to the water rights in question, in the context of a

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16. *Id.*
17. *Id.* at 322.
18. *Id.* at 324.
19. *Id.*
In brief, federal takings claim, and left the definition of these doctrines in a federal takings context solely to the state.

In addition, the court's ruling that the U.S. cannot benefit from contractual limitations on water users rights where it is not a party to the contract disregards the state-defined nature of water contracts as simply "entitlements." As stated in the water contracts at issue in Tulare Lake Basin, these entitlements are not a guarantee of specific amount of water, given the explicit limiting factor of the changing ecological conditions of the Delta. Both the terms of the plaintiffs' contracts and the background principles of state law impose limits on the plaintiffs' right to the water, which undermine the court's finding that plaintiffs' of property rights interests in water allocations.

The court's federal takings analysis is similarly contorted. The contractual limitations on the water allocations prevented the court from finding a regulatory taking based on a deprivation of "distinct investment-backed expectations" in a specific amount of water. Instead, it awkwardly characterized a decrease in water under the "physical invasion" category of takings. Using an unprecedented interpretation of contingent usufructuary water allocations, the court recast these entitlements as a right of property in water, the regulation of which extinguishes all of its value and amounts to a physical taking of property. In addition, the court's conclusion that "by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract... and totally displaced the holder." Of course, the full impact of the Tulare Lake Basin decision on water rights in California, and throughout the nation, is still

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24. The contract states that neither the state nor its agents may be held liable for "any damage, direct or indirect, arising from shortages in the amount of water to be made available for delivery to the Agency under this contract caused by drought, operation of areas of origin statutes, or any other cause beyond its control." Tulare Lake Basin, 49 Fed. Cl. at 320.
27. The court relied on the California Supreme Court's discussion of the nature of water rights in Eddy v. Simpson, 3 Cal. 249 (1853).
not fully realized. One actor conspicuously absent from the conflict, however, is the State of California. The state has a constitutionally-mandated role to manage water resources in the public interest.\textsuperscript{29} To this end, however, the state has left the federal government to uncertainly defend public values against the attacks brought by private interests.\textsuperscript{30} One could argue that the state’s lack of involvement constitutes dereliction of its constitutional duty. Regardless, the Tulare Lake Basin decision underlines the importance of ongoing state monitoring and revision of water allocations in light of changing ecological conditions. However, as a summary judgment that will delay appellate review, and an incomplete federal takings analysis, it sheds little light on the complex area of the regulation of public water in California.

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\textsuperscript{29} The Board retains jurisdiction under Article X, § 2 of the California Constitution and §§ 100 and 275 of the State Water Code to monitor reasonable and beneficial use of water in the public interest.

\textsuperscript{30} Indeed, a search of popular and academic commentary on this case revealed public remarks solely from the plaintiffs’ lawyer and proponents of private property rights.