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WHAT IS AGRICULTURAL LAW?*

by Susan Schneider**

The Association of American Law Schools (AALS) Agricultural Law Section chair, Professor Anthony Schutz, identified two related goals for the 2009 AALS Agricultural Law section session: (1) To consider the pedagogical and scholarly value of agricultural law, and (2) To identify what belongs in the canon of agricultural law. As Professor Schutz indicated in his message to the panelists, "given the various changes that the agricultural sector has undergone over the last twenty-five years, it is time to reconsider the roots of the subject matter to which our section is devoted."

It was my privilege to serve with Professor Schutz, Professor Drew Kershen and Dean Jim Chen on the panel discussing these important issues. I now offer my thoughts to the AALA membership.

I begin with a general definition of what I mean by "agricultural law." I define agricultural law as the study of the network of laws and policies that apply to the production, marketing, and sale of agricultural products, i.e., the food we eat, the natural fibers we wear, and increasingly, the bio-fuels that run our vehicles.

The Pedagogical And Scholarly Value Of Agricultural Law

In general terms, studying agricultural law takes a different approach from the traditional area-of-law focus that exemplifies most law school courses. Rather than being defined by the area of law, as in Contracts, Torts, or Property, an agricultural law survey course is defined by the industry, and thus, there are numerous areas of law covered.

The study of the application of a variety of different laws to an industry provides the kind of practical "real world" analysis that gives life to the study of law. It is client based as opposed to subject based. Industry is not affected by just one area of law, it is affected by many applicable laws, and lawyers must be mindful of the integrated whole. Studying

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* Presented at the annual meeting of the Association of American Law Schools, January 6-10, 2009.

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CHANGE IN 2009 ANNUAL CONFERENCE DATES

by Robert P. Achenbach, Jr., AALA Exec. Director

New Conference Dates: September 25-26, 2009.

Due to an error in listing the dates of the conference in the contract with the conference hotel, we have been forced to change the dates of the 2009 Annual Agricultural Law Symposium from October 16-17, 2009 to September 25-26, 2009.

Please make any adjustments to your calendars so that you won't miss this year's conference. President-elect Ted Feitshans is planning a very extensive program with a wide variety of topics and issues to be covered in a year of change and challenge for agriculture and agricultural law.

agricultural law, like studying the law applied to any particular industry or type of client, gives students an opportunity to learn how a variety of different laws apply and interact, thus providing an integrated, practical study of applied law.

Several reasons support the specific choice of the agricultural sector for this applied-law study. As noted, changes in U.S. agriculture have altered the landscape over the years, reinforcing some reasons, diminishing others, and adding new justifications.

One enduring reason to study agricultural law is that agriculture provides one of the most basic of human needs: food. In 1990, Professor Neil Hamilton identified "the fundamental nature of the production of food to human existence" as one of the primary reasons supporting the study of agricultural law. The importance of food to society has certainly not diminished, and in fact, recent concerns about food security, food safety, the use of food stocks for fuel, and the global interplay of food production and consumption have heightened contemporary interest in food and agriculture. An adequate supply of safe, wholesome food is a fundamental need for any society, and what food is produced, how it is produced, and who has access to it all raise fundamental issues for legal study.

A second constant concerns the basic nature of agricultural production. Agriculture is an unusual if not unique industry in that it relies on the production of living things. It is therefore vulnerable to natural processes and natural forces; it is not truly under human control as it is inextricably intertwined with nature. This gives the industry a special status, and it has been a justification for protective treatment. In addition, however, as we are now beginning to understand, being the business of creating living things gives the industry of agriculture a special responsibility to confront ecological and ethical issues that may arise regarding the appropriate use and treatment of living products.

Related to agriculture's production of living things, agriculture's extensive use of land is a third important rationale. As noted in the preface to the Agricultural Law casebook published in 1984, "[a]griculture is the only industry where land is a predominant production input. Unlike other resources, land is neither mobile nor fungible." The USDA Economic Research Service (ERS) reports that agriculture uses approximately 46% of the U.S. land base. Who has control of this land, how this land is used, and what role government should play in regulation are clearly important topics of legal analysis.

History and culture provide a fourth rationale. Agriculture has long held a special place in the fabric of our society, with support for the "family farm" deeply engrained in our beliefs. As noted in the preface to the Agricultural Law casebook, "[e]fforts to protect and promote family size farms have deep historical roots and constitute a separate and distinct policy theme that permeates agricultural law." Whether these efforts are based on romantic notions of the agrarian ideal or upon political and economic concerns about land tenure and the control of our food supply, structural issues and debate over the appropriate role of government in regulating farm structure continue to support the study of agricultural law.

These four factors, in combination with the significant political clout of the agricultural industry, have led to the creation of a network of laws that are distinct to agriculture. Historically, our legal system has treated agriculture differently from other industries, providing it with its own specific laws and with exceptions to many general laws. Thus, many of the special rules governing food and agriculture are not covered in the typical law school curriculum. This in itself represents an important reason to study agricultural law – both to learn the laws that apply and to debate the validity of the separate treatment of the agricultural industry.

A final justification, one with increasing relevance, exists. Agricultural production is a highly consumptive activity. The agricultural sector uses more natural resources, including land and water, than any other single industry. It is recognized as a major polluter of water, and a significant source of global warming. Developing an agricultural system that balances production needs with environmental sustainability, particularly in the face of climate change is a serious challenge for the future.

In summary, agriculture is an industry that is essential to human survival, interconnected with the natural environment, supported by a rich cultural heritage, highly consumptive of our essential natural resources, and a major source of environmental problems. Clearly, it is an industry that has an impact on everyone, not just those involved in farming. Understanding the special network of laws that apply and developing sufficient expertise to debate the attendant policies is a very important and highly relevant academic endeavor.

What Belongs In The Canon Of Agricultural Law

One of the most fascinating aspects of agricultural law is its diversity. For example, the LL.M. Program in Agricultural Law at the University of Arkansas attracts candidates from all over the United States and from many other countries. From the very beginning of the course of study each year, it is apparent that there are widely divergent views of agriculture. What it means to be a cotton farmer in the delta of Mississippi or Arkansas is very different from what it means to be a corn farmer in Iowa or a dairy farmer in Vermont. Similarly, consider the fruit and vegetable farms in Florida and California as contrasted with ranchers in Montana. Adding in the important international dimensions, contrast a U.S. cotton farmer with cotton farmer in Sub-Saharan Africa.

All differences, however, are not regional. Consider the farmer who earns his or her livelihood by direct-marketing fruits and vegetables at one of the many farmers' markets. Contrast this face of agriculture with a large industrialized operation that sells to wholesale markets or canneries. Production methods, scale of operation, size of operation, and method of marketing all make for a fascinating diversity of structure, form, and culture.

Consider as well the different perspectives based on race, sex, class, and social status. The agricultural law of the migrant farm worker or the farmer who has been discriminated against because of his race or her gender may have a very different perspective than the typical white male farmer whose land has been in the family for generations.

And, consider the different perspectives of agriculture from the standpoint of consumers. To reject or discourage consumer input into agricultural laws would be nonsensical. In our free market system, agriculture is in the business of raising products for sale. What

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seller can be successful without a close connection to its buyers? And what purchase is more important than the food one eats? Increasingly, consumers are recognizing this importance and seeking a greater connection with the food they eat while questioning its origins and composition. This heightened interest on the part of those previously detached from farming offers a tremendous opportunity for learning, for constructive debate, and for coordinated efforts to examine the positive and the negative aspects of our food system.

With these varying perspectives in mind, it is virtually impossible for an agricultural law survey course to cover all of the issues raised in any satisfying manner. Even in the LL.M. Program in Agricultural Law, it is a struggle to cover all of the issues within a twenty-four credit curriculum.

Each of the following topics or curricular subject matter, in no particular order, could be considered to be a topic area that directly supports the reasons given for the study of agricultural law:

• The government's regulation of agricultural production and the sale of agricultural commodities, including the study of the federal farm programs; marketing orders, the Packers & Stockyards Act, the Perishable Agricultural Commodities Act, and the Warehouse Act and state grain dealer statutes.

• The government's regulation of food through the statutes implemented by both the FDA and the USDA, including efforts to regulate food safety, food labeling, and production claims such as the organic standards.

• The application of commercial laws to agriculture, including the study of UCC Articles 2, 7, and 9 as well as the Bankruptcy Code.

• Governmental entities and programs established to promote agriculture, including USDA lending programs and the Farm Credit System as well as other USDA efforts.

• The adaptation of business structures, such as agricultural cooperatives to agricultural operations.

• The regulation of natural resource use and efforts to protect the environment from degradation from agriculture; efforts to develop a sustainable model for production.

• Legal and policy issues regarding land tenure, farm structure, and the ownership of the incidents of production.

• The regulation of animal husbandry and the ethical and cultural issues raised.

• International trade in agricultural products and the global impact of domestic production and consumption patterns.

• Agricultural labor law, both domestic and international.

• Food security, insecurity, poverty, and the right to food as a human right.

• The use and regulation of technology, including biotechnology; and intellectual property rights associated with agricultural production.

• Agricultural taxation and planning for generational transfer of agricultural assets.

• The encouragement, regulation and consequences of agricultural production of biofuels.

• Agriculture and rural residency, including such topics as rural poverty, population decline, and rural development initiatives.

Developing a reasonable survey course from this list of far ranging topics need not be as daunting a task as the length of the list implies. I offer five guidelines for selecting subject matter from this list and designing a fluid course model.

1) Emphasize the importance of agricultural law, relying upon the rationales set forth above, and using the subject matter selected to reinforce this theme. An Agricultural Law course should awaken in the students the realization that this is something that matters to them personally and that will spark a life long interest in and appreciation of where their food comes from and how it is produced.

2) Expose the diversity of agriculture while addressing the interests of the students. Teaching the Grazing Act in Vermont or the Migrant and Seasonal Agricultural Worker Protection Act in Montana may not be of great interest to the students. There is clearly a need to focus on the elements of agricultural law that are of interest and relevance to the students. Showing them the incredible diversity of issues and perspectives, however, should serve to heighten their interest and demonstrate the complexity of the discipline.

3) Reflect the current issues of concern and pressures on the industry. Agriculture is a dynamic industry; what issues are of greatest concern will vary with the times. During the financial crisis of the 1980s, most Agricultural Law courses were focused on commercial law, in particular, issues of finance and credit. Today, issues of environmental law, sustainability, and food safety are arguably of greater interest. Using the events of the time can serve to promote student interest, increase the relevancy of the course, and best prepare students to address those issues in practice.

4) Promote open discussion of policy issues. Many of the policy issues involved in agricultural law are complex and controversial. They may deal with one's family heritage, one's personal beliefs, and one's personal choices. I personally do not teach agricultural law as an advocacy exercise. My approach is generally not "pro-farmer" or "anti-farmer." My goal is to raise questions, provide resources, and suggest ways for the students to develop answers.

5) Balance the interests of those who consume agricultural products with those who produce them. In my view, agricultural law, and indeed agriculture, has suffered in the past from being too isolated from the consumers that it serves. Food is the most basic item that is produced and sold, and the interests of consumers of agricultural products must have a seat at the agricultural law table. Greater understanding will promote greater appreciation and in the long run, a more secure food system.

6) Provide access to the unique aspects of the law as applied to agriculture. Because other law school courses do not often address the unique application of their subject matter to agriculture, it is helpful to focus the agricultural law curriculum on those areas of law that are unique to agriculture. However, many such areas may well be beyond the typical survey course.

Refer students to the abundant resources available for future study. Tell them about: the American Agricultural Law Association; the LL.M. Program in Agricultural Law

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(http://law.uark.edu/llm; blog at http://aglawllm.blogspot.com); the website of the National Center for Agricultural Law (http://nationalaglawcenter.org); information available through the government websites such as http://USDA.gov; and the ongoing current discussions on the many related blogs such as the Agricultural Law blog at http://aglaw.blogspot.com; the Legal Ruralism blog at http://legalruralism.blogspot.com/; and, the FoodLawClass at http://foodlawclass.blogspot.com.

7) Seek help with regard to teaching materials and suggestions. There are few organizations with members who are as anxious to help and as supportive as the AALA. And, there are is so much expertise to tap into.

As a result of discussions at the AALS conference, the panelists are working on the creation of an online databank of agricultural course materials and resources, possibly through the new CALI feature, E-Langdell (http://w.cali.org/elangdell).

And, Carolina Press will be publishing an issues-based agricultural law/food law casebook designed for a survey course in the future.

ENDNOTES

[1] Neil D. Hamilton, The Study of Agricultural Law in the United States: Education, Organization and Practice, 43 ARK. L. REV. 503 (1990).

[2] See, e.g., Andrew Martin, U.N. Food Meeting Ends With a Call for 'Urgent' Action, NEW YORK TIMES, June 6, 2008 (discussing the crisis level of food insecurity in poor nations as exacerbated by higher food prices and reporting on the UN's call for "urgent and coordinated action" to address the problem). With respect to U.S. food insecurity, see, e.g., Long Lines, Empty Shelves Are Signs Of Times At Food Banks, CNN Online available at http://www.cnn.com/2008/US/11/25/thanksgiving.food/

[3] See, e.g., Bina Venkataraman, Amid Salmonella Case, Food Industry Seems Set to Back Greater Regulation, NEW YORK TIMES, July 31, 2008.

[4] See, e.g., C. Ford Runge and Benjamin Senauer, How Biofuels Could Starve the Poor, FOREIGN AFFAIRS, May/June 2007. For a spirited debate on this issues, see Tom Daschle, C. Ford Runge, and Benjamin Senauer, Food for Fuel? FOREIGN AFFAIRS, Sept./Oct. 2007. Both articles are available at http://www.foreignaffairs.org/20070901faresponse86512/tom-daschle-c-ford-runge-benjamin-senauer/food-for-fuel.html.

[5] See, e.g., Roger Thurow and Andrew Batson, Two Families' Shifting Fortunes, WALL STREET JOURNAL, Dec. 30, 2008, at A-7 (contrasting a poor Ethiopian family struggling to feed their child with a middle class Chinese family's food wealth and linking increased meat consumption in China to higher prices for grain elsewhere); see Posting of Susan Schneider to Agricultural Law Blog, http://aglaw.blogspot.com/2009/01/wsj-on-food-and-agriculture-contrast-in.html.

[6] These concerns may be related to modification of natural processes and products such as those expressed regarding genetic modification or they may relate to animal welfare concerns.

[7] Keith G. Meyer, Donald B. Pedersen, Norman W. Thorson, John Davidson, *Agricultural Law Cases And Materials*, xix (1984).

[8] USDA/ERS Briefing Room, Land Use, Value, and Management, available at http://www.ers.usda.gov/Briefing/LandUse/.

[9] Meyer, Pedersen, Thorson, Davidson, *supra* note 7.

[10] For example, the major law school casebooks for employment and labor law courses note only that "special rules apply to agriculture." The laws that apply to the farmers who hire millions of migrant farmworkers are simply excluded from study.

[11] See generally, David E. Adleman and John H. Barton, Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture, 21 STAN. ENVTL. L.J. 3 (2002).

[12] *Supra*, note 8 and the accompanying text.

[13] See, e.g., Piet Klop and Jeff Rodgers, Watering Scarcity: Private Investment Opportunities in Agricultural Water Use Efficiency, World Resources Institute, Nov. 2008 (reporting that "[a]griculture is by far the biggest water user, accounting for more than 70% of global withdrawals").

[14] USDA, ERS, Agricultural Resources and Environmental Indicators, 2006 ed., Chapter 2.2: Water Quality—Impacts of Agriculture, (recognizing agriculture as "the leading source of impairment in the Nation's rivers and lakes, and a major source of impairment in estuaries.")

[15] Keith Paustian, John M. Antle, John Sheehan, and Eldor A. Paul, Agriculture's Role in Greenhouse Gas Mitigation, Pew Center for Global Climate Change (2006) (reporting that "[g]lobally about one-third of the total human-induced warming effect due to GHGs comes from agriculture and land-use change. U.S. agricultural emissions account for approximately 8 percent of total U.S. GHG emissions when weighted by their relative contribution to global warming.") These figures do not include food transportation costs. See also, U.S. Department of Energy, Energy Information Administration date available at http://www.eia.doe.gov/oiaf/1605/ggrpt/

[16] USDA ERS reports that "[a]bout three-quarters of the general U.S. population is classified as being solely White (i.e., White alone and of all ethnic origins). Farm operators are much more likely than the general population to report being White. In 2007, 96.6 percent of principal operators reported being White . . ." ERS data also finds that only "about 10 percent of principal farm operators are women." USDA ERS Briefing Room, Farm Household Economics and Well-Being: Beginning Farmers, Demographics, and Labor Allocations, available at http://www.ers.usda.gov/briefing/wellbeing/demographics.htm

[17] I signed a contract with them for the production of this book last summer and hope to have it ready for submission at the end of next summer. Suggestions are welcome!

I have never let my schooling interfere with my education.
- Mark Twain

AALA AND THE NATIONAL AGRICULTURAL LAW CENTER PARTNER TO LAUNCH BLOG AND LISTSERV

The American Agricultural Law Association and the National Agricultural Law Center, two national institutions that uniquely serve the nation's agricultural community, are pleased to announce both the launch of "The United States Agricultural & Food Law and Policy Blog" and a Listserve for AALA members. The Blog will serve as the comprehensive news, research, and information blog resource for the nation's agricultural community and will be formally launched on February 1, 2009. It will be updated on an ongoing, typically daily, basis and can be accessed at www.theagandfoodlawpolicyblog.com. The Blog will be viewable by all web users but its content will be managed by joint editorial effort of the AALA and the National Agricultural Law Center. The Listserve will be a tool available exclusively to AALA membership.

The creation of the Blog and Listserve is a direct outgrowth of the Membership Survey conducted this past year by the AALA Membership Committee, chaired by Anne Hazlett. In that survey, many participants indicated their desire to leverage AALA in order to have increased access to news, research, and information as a benefit of AALA membership. In addition, both efforts will provide enhanced exposure of AALA throughout the United States. Upon recommendation of the AALA Membership Committee, the AALA Board of Directors approved the partnership with the National Agricultural Law Center to establish the Blog and Listserve.

At least initially, one Blog will exist. The Blog will have tabs to correspond to the Reading Rooms on the National Agricultural Law Center website in order to segregate content based on topical area. In addition, one listserve will initially be activated. Depending on the activity on the listserv and suggestions from members, the Blog and/or the listserv may be split into multiple forums by topical area. This effort will require both participation and input by AALA members to maximize the benefits of this feature, which will be provided at no extra charge to AALA members.

The Blog will set forth instructions by which users may submit entries to be published, or to recommend particular items for Blog publication. The Blog will be organized on a subject-by-subject basis, which corresponds with the nearly three dozen Reading Rooms published and maintained by the National Agricultural Law Center. Viewers can simply click on particular subjects of interest and review current and archived postings pertinent to that subject area. The Listserve is designed to complement the Blog as an AALA membership development tool, and to serve independently as a tool for AALA members to raise and discuss legal and policy issues pertinent to AALA members. AALA members will automatically be signed up for the Listserve and should receive official notification in the near future. Further, any member wishing to unsubscribe from the Listserve will be free to do so.

For more information, contact Harrison Pittman at hmpittm@uark.edu.

CASITAS MUNICIPAL WATER DISTRICT V. UNITED STATES: A TIDAL WAVE FOR TAKINGS AND WATER RIGHTS?

by Jesse Richardson*

Introduction

On September 25, 2008, the United States Court of Appeals for the Federal Circuit decided *Casitas Municipal Water District v. United States*,[1] a case that promises to send ripples through both water rights and takings jurisprudence. The court reversed the grant of summary judgment in favor of the United States by the United States Court of Claims with respect to the takings claim, holding, inter alia, that the Board of Reclamation's diversion of water to operate a fish ladder should be analyzed under the rubric of a physical taking, not a regulatory taking.

Facts of the Case

The Ventura River Project provides the water supply for farmland irrigation and municipal, domestic, and industrial uses in Ventura County, California.[2] The Project includes the Casitas Dam, Casitas Reservoir, Robles Diversion Dam, and the Robles-Casitas Canal. More specifically, the Project combines water of Coyote Creek and Ventura River in the Casitas Reservoir, generally called Lake Casitas.[3] The Robles Diversion Dam diverts the Ventura River water into the Robles-Casitas Canal, which carries the water to Lake Casitas.[4]

The United States and Casitas Municipal Water District ("Casitas") entered into an agreement on March 7, 1956 to construct the project. Casitas agreed to repay the construction costs over a 40-year period and pay operating and maintenance costs.[5] Article 4 of the agreement provided that Casitas "shall have the perpetual right to use all water that becomes available through the construction and operation of the Project."[6]

In 1997, the National Marine Fisheries Service ("NMFS") listed the West Coast steelhead trout as an endangered species in the watershed that includes Coyote Creek and Ventura River. The United States conceded, for the purposes of the summary judgment motion, that a biological opinion by the NMFS, implemented by a directive to Casitas by the Board of Reclamation (BOR), required Casitas to construct a fish ladder and divert water from the project to the fish ladder.[7] Casitas filed suit, alleging a breach of contract and compensable Fifth Amendment taking of its water. The trial court granted summary judgment in favor of the government on both counts.[8]

Contract Claims

With respect to the contract claims, the Court of Appeals affirmed the ruling of the trial court. First, the court found that the cost of the fish ladder constituted "operational and maintenance costs", which are the responsibility of Casitas under the agreement between the parties.[9]

Second, the court agreed with Casitas that Article 4 of the agreement, that provides

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that "the District shall have the perpetual right to use all water that becomes available through the construction and operation of the Project...." promises that the government would not interfere with those rights. The diversion breaches the contract by infringing upon Casitas' water rights, as defined by the State of California.[10] Casitas recognized that the water rights from the State of California placed limits on the quantity of water that it could appropriate from the Ventura River.[11]

However, the court held that the sovereign rights doctrine insulates the government from liability for breach of contract in this case.[12] Under the sovereign rights doctrine, "'the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as sovereign.'"[13]

The court rejected Casitas' assertion that the sovereign acts doctrine did not apply because the Endangered Species Act did not make the government's performance of its obligations under the contract impossible. The court found that the acts of the NMFS and the BOR qualified as sovereign acts, insulating the government from liability.

Takings Claim

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."[14] For the purpose of the summary judgment motion, the government conceded that Casitas has a valid property right in the water.[15]

The main question for the court was whether Casitas' claim should be analyzed as a physical taking or a regulatory taking. The trial court found that the regulatory takings test applies, citing *Tahoe-Sierra*.[16] Casitas conceded that if the case were analyzed under the regulatory takings test, it could not prevail.[17]

United States Supreme Court precedents "stake out two categories of regulatory action that generally will be deemed per se takings."[19] Regulatory action will be deemed a *per se* taking when the government requires "an owner to suffer a permanent physical invasion of her property—however minor." Additionally, regulatory action can qualify as a *per se* taking when the regulation "completely deprive[s] an owner of 'all economically beneficial use' of her property."[20] If neither of the *per se* categories applies, no "set formula" applies, but courts generally apply the multi-factor balancing test set out in *Penn Central Transportation Co. v. New York City*.[21]

The trial court recognized that a prior trial court decision, *Tulare Lake Basin Water Storage District v. United States*,[22] which was rendered by Judge Wiese (who also presided in this case in the court below), held that a deprivation of water amounts to a physical taking under somewhat similar circumstances. However, the Federal Claims Court concluded that the United States Supreme Court's intervening decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[23] clarified takings law so as to require a different result.

The Court of Appeals in *Casitas* relied on three United States Supreme Court decisions in its analysis of the takings claims. In *International Paper Co. v. United States*,[24] the United States, during World War I, issued a requisition order for all of the hydroelectric power of the Niagara Falls Power Company (Niagara Power).[25] At the time that the United States' order was issued, Niagara Power leased a portion of its water to International Paper Company (International Paper), which diverted the water via a canal to its mill.[26] In response to the United States' direction to "cut off the water being taken" by International Paper to increase power production, Niagara Power terminated the diversion of water to International Paper.[27] The United States caused Niagara Power to stop International Paper from diverting water to its mill so that the water would instead be available for third party use—"private companies for work deemed more useful [by the government] than the manufacture of paper."[28] The Court held that this action was a physical taking.

In *United States v. Gerlach Live Stock Co.*,[29] the claimants held riparian water rights for irrigation of their grasslands by natural seasonal overflow of the San Joaquin River.[30] The BOR built Friant Dam, a part of the Central Valley Project, upstream from the claimants' land.[31] As a result, "a dry river bed" was left downstream of the dam, and the overflow irrigation of the claimants' lands virtually ceased.[32] The Friant Dam served a public purpose of "mak[ing] water available where it would be of the greatest service."[33] The Supreme Court analyzed the government's action as a physical taking.

Finally, *Dugan v. Rank*[34] similarly involved claims arising out of the United States' physical diversion of water for third party use, by the Friant Dam. In *Dugan*, landowners along the San Joaquin River, owning riparian and other water rights in the river, alleged that the BOR's storage of water upstream behind Friant Dam left insufficient water in the river to supply their water rights.[35] Again, the United States Supreme analyzed the government's physical appropriation of water as a physical taking.

The government in Casitas argued that the case at issue involved restrictions on use, as opposed to direct appropriation of property, as in the trilogy of United States Supreme Court water rights cases.[36] The court rejected this argument, finding that the government "actively caused the physical diversion of water…towards the fish ladder, thus reducing Casitas' water supply.[37] The court also distinguished the action of the government from "merely requir[ing] some water to remain in the stream."[38]

Since the court decided to analyze the case as a physical taking, the fact that the water right was only partially impaired, and the dispute between the parties as to how much water was lost, are irrelevant.[39] The government also claimed that the water rights trilogy did not apply since the water was not appropriated for the government's use or for use by a third party.[40] The court disagreed, finding that preserving endangered species habitat serves the government and a "third party"—the public.[41]

Finally, the court rejected the government's attempt to distinguish the water rights trilogy on the basis that each of those three cases involved undisputed use of the government's eminent domain power.[42] The court rejected this argument, finding that to hold otherwise would "allow the government to circumvent paying just compensation for taking private property by simply not offering to acquire the rights in advance."[43]

The analysis of this issue also involved the distinction between a "use restriction on a natural resource" and taking actual

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possession of the resource.[44] The government used *United States v. Central Eureka Mining Co.*,[45] where the government ordered a gold mine to cease operations, as an example of a use restriction and argued that this case presented a restriction on the use of the water. In contrast, the government attempted to distinguish *United States v. Pee Wee Coal Co.*,[46] where the government took actual possession and control of a coal mine. The court disagreed, finding that *Pee Wee Coal Co.* provided the better comparison to the case at bar, holding that the government "took physical possession of the water."[47] The majority reversed the grant of summary judgment to the government with respect to the takings claim and remanded for further proceedings.[48]

A vigorous dissent likened the requirement of the fish ladder and the diversion of water to a restriction on use, not a physical appropriation.[49] In addition, the dissent, picking up on the lower court's reliance on *Tahoe-Sierra*, claimed that the diversion was merely a "moratorium on development of a portion of Casitas' water rights" until the steelhead trout is no longer endangered.[50]

Conclusions

The *Casitas* decision raises more questions than it answers. Would an action by the State of California be immune from a takings claim since the state determines water rights?

Does the court's distinguishing of "physical diversion" from "require[ing] some water to remain in the stream"[51] mean that instream uses are immune from takings claims? Is the distinction one without a difference?

What impact will this decision have in states that use different water rights regimes? Will the decision apply to groundwater disputes?

The government has filed a motion to reconsider and a number of *amicus* briefs have been filed by a variety of interested parties. The author predicts that if the court declines to rehear the case, the government is likely to appeal to the United States Supreme Court, depending on the outcome of the lower court proceedings.

The use of the physical takings standard will allow plaintiffs to prove a taking much more easily than use of the regulatory takings case. The final disposition of the dispute in *Casitas* likely will impact both takings law and water rights in a very significant way.

Before too much hysteria ensues, however, one must note the procedural posture of the case. The government conceded several issues for the purpose of the summary judgment motion. Upon remand, if the case is not reheard, many of those issues will be hotly contested.

Given the increasing competition for water resources between agriculture and other uses, and the increasing incidence of drought, the final outcome will have a significant impact on agriculture. The impact will be dramatically different depending on the final outcome.

ENDNOTES

[1] 543 F.3d 1276 (2008).

[2] Casitas, n. 1 at 1280.

[3] *Id.*

[4] *Id.*

[5] Casitas, n. 1 at 1281.

[6] Casitas, n. 1 at 1282.

[7] *Id.*

[8] Casitas Municipal Water Dist. v. United States, 72 Fed.Cl. 746 (2006).

[9] Casitas, n. 1 at 1283-1287.

[10] Casitas n. 1 at 1286.

[11] Query whether the State of California could have instituted a similar restriction in state law and not have been subject to a takings claim. Since, state law determines the extent of water rights, the state may have more leeway to restrict those rights. The author gleaned this issue from discussions with Anthony Schutz, Professor of Law, University of Nebraska College of Law, from which the author derived (or attempted to derive) much wisdom. Any incorrect statements of law, however, are solely the fault of the author.

[12] Casitas, n. 1 at 1287.

[13] Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1574 (Fed.Cir.1997) (quoting Horowitz v. United States, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925)).

[14] U.S. Const. amend. V.

[15] Casitas, n. 1 at 1288.

[16] Casitas Mun. Water Dist. v. U.S., 76 Fed.Cl. 100, 106 (2007) (CasitasI) ("Tahoe-Sierra... compels us to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property.").

[17] Casitas, n. 1, at 1297.

[18] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

[19] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)).

[20] *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)).

[21] 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); Lingle, 544 U.S. at 538-39, 125 S.Ct. 2074 (citations omitted).

[22] 49 Fed.Cl. 313 (2001).

[23] 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

[24] 282 U.S. 399, 51 S.Ct. 176, 75 L.Ed. 410 (1931).

[25] International Paper Co., at 405, 51 S.Ct. 176.

[26] *Id.*, at 404-05, 51 S.Ct. 176.

[27] *Id.*, at 405-06, 51 S.Ct. 176.

[28] *Id.*, at 404, 51 S.Ct. 176.

[29] 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

[30] *Id.*, at 729-30, 70 S.Ct. 955.

[31] *Id.*, at 730, 734, 70 S.Ct. 955.

[32] *Id.*, at 729-30, 70 S.Ct. 955.

[33] *Id.*, at 728, 70 S.Ct. 955.

[34] 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

[35] *Id.*, at 614, 616, 83 S.Ct. 999.

[36] Casitas, n. 1 at 1290.

[37] *Id.*, at 1291.

[38] *Id.*, at 1291, 1295.

[39] *Id.*, at 1292.

[40] *Id.*

[41] *Id.*

[42] *Id.*, at 1293.

[43] *Id.*

[44] *Id.*

[45] 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958).

[46] 341 U.S. 114. 71 S.Ct. 670, 95 L.Ed. 809 (1951).

[47] Casitas, n. 1 at 1294.

[48] *Id.*, at 1296-1297.

[49] *Id.*, at 1298-1299.

[50] *Id.*, at 1299.

[51] Casitas, n. 1 at 1291, 1295.

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From the Executive Director:

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As noted on the front page, due to an error in listing the dates of the conference in the contract with the conference hotel, we have been forced to change the dates of the 2009 Annual Agricultural Law Symposium from October 16-17, 2009 to September 25-26, 2009.

Please make any adjustments to your calendars so that you won't miss this year's conference. President-elect Ted Feitshans is planning a very extensive program with a wide variety of topics and issues to be covered in a year of change and challenge for agriculture and agricultural law. If you would like to help with a presentation, contact Ted at ted_feitshans@ncsu.edu.

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