**2023-1602**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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**UNITED WATER CONSERVATION DISTRICT,**

*Plaintiff-Appellant*

v.

**UNITED STATES,**

*Defendant-Appellee*

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Appeal from the United States Court of Federal Claims
in No. 1:22-cv-00542-CFL, Senior Judge Charles F. Lettow.

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# PLAINTIFF-APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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JUNE 18, 2025

# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

## CERTIFICATE OF INTEREST

**Case Number** 2023-1602

**Short Case Caption** United Water Conservation District v. US

**Filing Party/Entity** Plaintiff-Appellant United Water Conservation District

**Instructions:**

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 06/18/2025

Signature: /s/ Frank S. Murray

Name: Frank S. Murray

| **1. Represented Entities.** Fed. Cir. R. 47.4(a)(1). | **2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2). | **3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). |
|---|---|---|
| Provide the full names of all entities represented by undersigned counsel in this case. | Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.<br><br>☑ None/Not Applicable | Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.<br><br>☑ None/Not Applicable |
| United Water Conservation District | | |
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☐ Additional pages attached

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

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**5. Related Cases.** Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☑ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

**6. Organizational Victims and Bankruptcy Cases**. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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**STATEMENT OF COUNSEL UNDER FED. CIR. R. 40(C)**

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court and precedents of this Court: *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. When the government commandeers from a private usufructuary water rights holder the beneficial use of a volume of water for a public-purpose beneficial use, and thereby deprives the property holder with the usufructuary right from using that same volume of water for its own private beneficial use, does the governmental action constitute an appropriation, and therefore a *per se* physical taking, of the property holder's property right in the beneficial use of the commandeered water?

2. Is prior physical possession of the specific water molecules at issue a legal prerequisite to establish a partial physical taking of an appropriative water right, when the government commandeers the beneficial use of the water for a public purpose and thereby prevents the appropriative rights holder from diverting the water and putting the water to its own private beneficial use?

/s/ Frank S. Murray
Frank S. Murray

Counsel for Plaintiff-Appellant

## POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL

The panel decision warrants rehearing because it imposes preconditions on claimants' ability to establish *per se* physical takings of usufructuary water rights, and those preconditions are contrary to controlling Supreme Court precedent. Between 2017 and 2021, the government obtained beneficial use of 49,800 acre-feet of Santa Clara River water that Plaintiff-Appellant United Water Conservation District ("United") was entitled to divert from the river and put to alternative beneficial uses authorized by United's California water permit and license. United brought a Fifth Amendment takings claim for the value of the water the government appropriated for public use. The panel acknowledged United had an established usufructuary property right in the water beneficially used by the government and accepted that United's Complaint alleges a valid, albeit unripe, regulatory taking. The panel, however, rejected United's physical takings claim by limiting *per se* physical takings of water commandeered for government use to just two circumstances: (1) the government "completely cuts off" all water to which the claimant is entitled, or (2) the claimant first diverts and then returns the water to the river for the government's instream use.

The panel's novel preconditions for physical takings of water rights so limit the doctrine of *per se* physical takings that the government would have virtual free reign to appropriate use of private water rights for public purposes *without*

compensation to the rights holder. Those preconditions contravene controlling precedent recognizing (i) *partial* physical takings of water rights, and (ii) that government action preventing a diversion in the first instance constitutes a physical taking of water rights. The decision errs on four grounds that warrant rehearing.

First, the panel's decision relies upon the regulatory basis of the government's action as justification for distinguishing Supreme Court precedent finding similar appropriations of water rights to be *per se* physical takings. That approach is contrary to *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021), in which the Supreme Court held that the "essential [takings] question" the court must address is whether the government action appropriates a property interest, *and not* whether the action comes "garbed as a regulation." Here, the panel acknowledged three Supreme Court precedents that each found government action denying claimants access to water in which they held a usufructuary property right constituted physical appropriation of their rights to put the lost water to beneficial use. Yet, the panel refused to apply those physical takings precedents to United's claim, in part on the ground that the government action here arose from a regulation and therefore constituted a "regulatory" taking. That "garbed as a regulation" rationale is directly contrary to *Cedar Point*, and the decision does not articulate any other legally valid basis to distinguish controlling Supreme Court precedent that government appropriation of a water right via a regulation constitutes a physical taking.

Second, the panel's holding that the government does not effectuate a partial physical taking of usufructuary water rights when it appropriates the use of *some*, but not *all*, of the claimant's water entitlement is contrary to *Dugan v. Rank*, 372 U.S. 609 (1963) and *Cedar Point*. The panel acknowledged *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931), found a government order preventing a claimant from diverting and using water in which the claimant held a usufructuary right to constitute "a direct physical appropriation" of the claimant's usufructuary right. Add10. The panel, however, refused to apply *International Paper* to United's claim by limiting that precedent to government actions that "completely cut off" the claimant's access to water. Add10. Imposing that limitation on *International Paper* runs directly contrary to *Dugan*, which held that government action denying claimants' access to a portion of water in which they had usufructuary rights constitutes a *partial* physical taking of their water rights.

Third, the panel committed clear error when it distinguished the otherwise controlling precedent of *Dugan* from the facts alleged in United's claim on the ground the physical taking in *Dugan* "involve[s] riparian water rights, not appropriative water rights as here." Add12. The water rights taken in *Dugan* did, in fact, include appropriative water rights, directly undercutting the panel's basis for distinguishing *Dugan*.

Finally, the panel's assertion that the takings analysis materially differs depending on whether the usufructuary water rights are riparian or appropriative misinterprets California water law. The relevant compensable property interest for both rights is identical—the right to withdraw water from the stream and put it to beneficial use—and governmental action appropriating that beneficial use constitutes a physical taking whether the water right is riparian or appropriative, as confirmed by *Dugan*.

## ARGUMENT

### I. The Panel Improperly Relied on the Government Action's Regulatory Basis to Label It a Regulatory Taking, Directly Conflicting with *Cedar Point*.

The Santa Clara River water that flows to United's Freeman Diversion facility either (i) is diverted by United into the Freeman Canal for United's beneficial uses as authorized under its California water license and permit, or (ii) bypasses United's canal and remains in the riverbed where it is lost to United but can be applied to *instream* beneficial uses of others, such as the federal government for fish preservation. California recognizes use for preservation and enhancement of fish as a beneficial use of water. *See* Cal. Water Code § 1243(a) ("The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water.").

Thus, the governmental action alleged here—the National Marine Fisheries Service ("NMFS") requiring United to leave 49,800 acre-feet of divertible water in the Santa Clara River for the benefit of steelhead trout preservation—had the effect of *appropriating and reallocating the beneficial use* of those 49,800 acre-feet of divertible water from United to the public-purpose use dictated by NMFS. This action constitutes a "paradigmatic taking" (*see* Add7), a direct government appropriation of the beneficial use of 49,800 acre-feet of Santa Clara River water for the public purpose of fish preservation, accomplished by depriving United of its property right under its California water license and permit to divert that same 49,800 acre-feet of water and put it to United's own beneficial use. *See* Add2-Add3.

United cited three controlling Supreme Court precedents that uniformly found government actions denying access to water in which the claimants held usufructuary rights constitute physical *per se* takings (total or partial) of the claimants' usufructuary water rights. Those precedents firmly establish United's claim as a physical taking. The panel, however, invoked the regulatory basis of the NMFS restrictions under the Endangered Species Act ("ESA") to avoid that result. *See* Add12 (distinguishing *International Paper*, *Dugan*, and *Gerlach* from United's claim "because the alleged takings in those cases did not arise from a regulation as it clearly does here under the ESA.").

Yet, the physical *per se* taking in *Cedar Point*—another controlling Supreme Court precedent cited by United—*did* arise from a regulation and represents the Supreme Court's most recent and clearest pronouncement on the precise issue weighed by the panel: the distinction between regulatory and physical takings. *Cedar Point*'s holding eviscerates the panel's approach, as it renders the regulatory basis of an appropriation *irrelevant* to the determination of whether the governmental action is a physical or regulatory taking:

> The essential question is not … whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

594 U.S. at 149 (citation omitted).

The panel here focused on what *Cedar Point* designates the *wrong* question (did the alleged taking arise from a regulation?), instead of focusing on the "essential question" of whether the alleged taking resulted in a physical appropriation of United's usufructuary water right. Had the panel instead addressed what *Cedar Point* designates "the essential question," the Supreme Court precedents United cited mandate finding that NMFS partially appropriated United's usufructuary water right, thereby confirming United alleged a physical taking. *See* Add10

(acknowledging *International Paper* found denial of water access constitutes "direct physical appropriation" of claimant's usufructuary right); *Dugan*, 372 U.S. at 625 (characterizing government action preventing water from reaching claimants with beneficial-use rights as "an appropriation of property for which compensation should be made"); *Gerlach*, 339 U.S. at 753 ("Public interest requires appropriation; it does not require expropriation.").

Those controlling precedents unequivocally establish NMFS's denial of United's access to 49,800 acre-feet of water that United had a vested property right to divert and put to beneficial use constituted a governmental physical appropriation of United's right to use that water. The panel's "taking arising from a regulation" rationale to avoid that result directly contravened *Cedar Point*.

## II. The Panel's Novel Standard for Establishing Physical Takings of Usufructuary Water Rights Contravenes Binding Precedent.

The panel decision announces a novel two-prong standard for establishing a *per se* physical taking of usufructuary water rights: the taking must either (i) result from the water being "completely cut off" or (ii) involve already-diverted water that the claimant was forced to return to the river. Add10. Both prongs are contrary to the controlling precedent of *Dugan*. In *Dugan*, the Supreme Court expressly recognized that (i) a physical taking of California water rights—including appropriative rights such as those underlying United's claim—occurs where the government cuts off access to less than all the claimant's water, and (ii) a partial

physical taking of California appropriative water rights occurs even when government action has not forced the claimant to return water molecules it already diverted and possessed.

### A. Controlling Precedent Precludes the Panel's Holding That Physical Takings Arise Only When the Government "Completely Cut[s] Off" Access to All Water.

*International Paper* held that the government appropriates, and therefore physically takes, a claimant's usufructuary water right by preventing the claimant from diverting water into its canal so the water instead could be put to the government's preferred alternate use. United's claim alleges precisely that same circumstance: NMFS's directive prohibited United from diverting 49,800 acre-feet of Santa Clara River water into United's canal that United had a property right under California law to divert and put to beneficial use, so the water would instead be applied to NMFS's desired downstream public-purpose use of fish preservation.

The panel acknowledges *International Paper*'s holding that governmental requisition of the use of water that never enters the claimant's facilities constitutes "a direct physical appropriation" of the usufructuary right. Add9-10. That acknowledgment effectively establishes United's physical takings claim, because *Cedar Point* holds that such an appropriation of a property right is not a regulatory taking, but rather constitutes a *per se* physical taking entitling the claimant to

compensation, even though the appropriation occurs pursuant to a regulation. 594 U.S. at 149.

Rather than applying the binding precedents of *International Paper* and *Cedar Point* and concluding United's claim alleged a *per se* physical taking, the panel characterized United's facts as "materially different" from those in *International Paper*, because United had alleged only a partial appropriation of its water right: "Unlike the water rights holders in *International Paper* …, United has not alleged that the government *completely cut off* its access to water[.]" Add10 (emphasis added).

The panel thus reads *International Paper* as precluding claims for *partial* appropriations of usufructuary water rights when the government denies the claimant access only to *some*, but *not all*, of the water in which it holds a beneficial-use right. Under the panel's approach, when government action leaves the claimant with access to even a fraction of its usufructuary right, the government has not committed an appropriation of the remainder of the claimant's water right. That approach is directly contrary to the controlling precedent of *Dugan*, as well as *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008), both recognizing partial physical takings of California usufructuary water rights.

In *Dugan*, the Supreme Court expressly recognized the United States can effectuate partial physical takings of California beneficial-use water rights: "Having

plenary power to seize the whole of respondents' rights … the federal officers a fortiori had authority to seize less. It follows that *if any part of respondents' claimed water rights were invaded* it amounted to an interference therewith and *a taking thereof*[.]" 372 U.S. at 623 (emphasis added). *Dugan* refers multiple times to the taking at issue in the respondents' claim as a "partial taking." *Id.* at 620 ("we conclude that there was, under respondents' allegations, *a partial taking* of respondents' claimed rights") and at 625 ("Interference with or *partial taking of water rights in the manner it was accomplished here* ….") (emphasis added). *Accord Casitas*, 543 F.3d at 1292 (while water district's "right was only partially impaired, in the physical taking jurisprudence any impairment is sufficient").

The panel also relied on a clear and material factual error to distinguish *Dugan* from United's claim: that *Dugan* "involve[s] riparian water rights, not appropriative water rights as here." Add12. That assertion is wrong, as the Supreme Court and this Court in *Casitas* both stated that more than just riparian rights were at issue in *Dugan*: "The named plaintiffs claimed to represent a class of owners of riparian *as well as other types of water rights*." 372 U.S. at 614 (emphasis added); *Casitas*, 543 F.3d. at 1290 (*Dugan* involved "landowners along the San Joaquin River, owning riparian *and other water rights* in the river") (emphasis added). Moreover, the underlying litigation record establishes that the water rights at issue in *Dugan* included appropriative rights: "The plaintiffs and members of their class lying within

the alluvial cone of the San Joaquin river had vested rights, riparian, overlying, *appropriative* and/or prescriptive[.]" *Rank v. Krug*, 142 F. Supp. 1, 115 (S.D. Cal. 1956) (emphasis added).

*Dugan*'s partial takings doctrine was reinforced in *Cedar Point*, in which the Supreme Court held a California regulation appropriating a limited right of access to agricultural employers' property for union organizers constituted a *per se* physical taking. The majority specifically rejected the contention by the dissent, and the reasoning of the Ninth Circuit below, that the claim should be analyzed as a regulatory taking because the right of access appropriated by the regulation was only partial, as it "does not allow for permanent and continuous access '24 hours a day, 365 days a year[.]'" 594 U.S. at 152.

As the *Cedar Point* majority explained, any appropriation of a property right, no matter the duration or size, constitutes a *per se* physical taking. *Id.* at 149. The duration or size of an appropriation goes not to whether the appropriation qualifies as a physical taking, but merely to the amount of compensation owed by the government for the physical taking: "The duration of an appropriation—*just like the size of an appropriation*—bears only on the amount of compensation." *Id.* at 153 (emphasis added) (citation omitted). As the Supreme Court explained, "[t]here is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364." *Id.*

Identical reasoning applies to governmental appropriation of beneficial-use water rights: there is no reason the law should analyze government action in one manner if it cuts off 100% of the claimant's overall water entitlement, but in an entirely different manner if it cuts off 99% (or 95% or 90% or 50%). In both scenarios, the government appropriates the claimant's right to use the water that the government action prevents the claimant from possessing and using. Under *Cedar Point*, appropriation of a property right is, by definition, a physical taking, no matter the size or duration, whether partial or complete. The panel's approach of treating anything less than *complete* appropriation as a regulatory taking is, as *Cedar Point* states, "insupportable as a matter of precedent and common sense." *Id.*

### B. The Panel's Divert-and-Return Predicate for Physical Takings of Usufructuary Water Rights Conflicts With Supreme Court Precedent.

The panel interprets this Court's *Casitas* decision as negating partial physical taking of appropriative water rights if the government action does not "cause[] [the claimant] to return any volume of water it had previously diverted to its possession." Add10. Such an interpretation of *Casitas* is untenable under the Supreme Court precedents of *International Paper*, *Dugan*, *Gerlach*, and *Cedar Point*. Rehearing is

warranted so this Court can correctly apply *Casitas* in concert, rather than in conflict, with those Supreme Court precedents.

As detailed above, government action appropriating beneficial use of water by preventing the water from reaching the rights holder's possession constitutes a *per se* physical taking under *International Paper*, *Dugan*, and *Gerlach*. Likewise, *Cedar Point*, issued thirteen years after *Casitas*, states unequivocally that appropriation of a property right, by whatever means, constitutes a physical taking, not a regulatory taking. The panel's interpretation of *Casitas* as meaning the rights holder, to establish a physical taking, must first physically possess the water whose use the government appropriates is incompatible with each of those cases.

This Court cannot impose additional conditions for physical takings that conflict with the results in controlling Supreme Court precedents. This appeal should be reheard to interpret *Casitas* in concert with binding Supreme Court takings precedent.

## III. The Panel's Distinction Between Appropriative and Riparian Rights Misapplies California Water Law and Eviscerates the Beneficial-Use Property Right Enjoyed by Appropriative Rights Holders.

The panel's attempt to distinguish *Dugan* and *Gerlach* based on a supposed "meaningful" difference between riparian and appropriative water rights (Add12) rests on a misinterpretation of when an appropriative right vests under California law. The panel justifies its "divert-and-return" predicate for a physical taking by

asserting, erroneously, that United's appropriative right to divert and use Santa Clara River water has not "vested" for any water molecules United has not already diverted: "Unlike the riparian-rights holders in *Gerlach* and *Dugan*, therefore, the appropriative-rights holder here needed to have physically diverted water for its property right to vest and thus become subject to a physical taking, as in *Casitas*." Add12.

That statement ignores that, under California law, United had already established its vested right to divert and appropriate the water at issue by virtue of United's state-issued permit and license. Since 1914, appropriative rights are acquired in California under a statutory scheme of permits and licenses. *United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 102 (Cal. Ct. App. 1986). "Once an appropriative water right permit is issued, the permit holder has the right to take and use the water according to the terms of the permit." *Id.* A license confirms the right to appropriate a designated quantity of water for beneficial use. *Id.* United holds a permit and license authorizing it to divert and use Santa Clara River water annually, on an ongoing basis. Add2-Add3. The panel concedes that "it is undisputed that United acquired a valid, appropriative property right[.]" Add8.

As this Court has recognized, once an appropriative right is acquired under California law, it is a vested property right: "once rights to use water are acquired,

they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1354 (Fed. Cir. 2013) (quoting *State Water Res. Control Bd.*, 182 Cal.App.3d 82, 101 (1986)). The Supreme Court, too, has recognized that, once an appropriative right is acquired under state law, the holder has a vested right to divert water in the future:

> To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, *to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever,* subject only to the right of prior appropriations.

*Arizona v. California*, 283 U.S. 423, 459 (1931) (emphasis added).

As those cases illustrate, United—having indisputably *already acquired* an appropriative water right under its California permit and license—had the vested *continuing* property right to divert and put to beneficial use "annually forever" the quantity of water authorized under its state water permit and license (assuming hydrology makes such water available for diversion, as it did here). Thus, when the government deprives an appropriative rights holder of beneficial use of water by preventing the rights holder from diverting the water in the first place, as NMFS did here with United, the government is appropriating the holder's *vested, ongoing,*

*continuing* right to divert and make beneficial use of water under its state permit or license.

The panel interprets the nature of appropriative water rights as precluding claims for compensation for the lost use of water that the government appropriates and thereby prevents the rights holder from having even the opportunity to divert and possess for its own beneficial use. The panel's interpretation is contrary to (i) United's vested California property right *to continue* to divert and make beneficial use of water according to the terms of its California water permit and license, (ii) California water law and appropriative water rights principles generally, and (iii) *Dugan* and *International Paper*. The panel decision thus renders illusory the continuing property right afforded by California water permits and licenses and invites government action that infringes the rights holder's ability to divert and appropriate water according to the terms of its state-issued permit and license.

Further undermining the panel's position that United lacks a vested property interest in non-diverted water, the panel accepts United's Complaint as alleging an unripe regulatory taking claim. Add12. That framing necessarily accepts that United *does* hold a property interest in non-diverted Santa Clara River water. As *Cedar Point* reiterates, a regulatory taking occurs when "the government, rather than appropriating private property for itself or a third party, instead imposes regulations *that restrict an owner's ability to use his own property*[.]" 594 U.S. at 148 (emphasis

added). The panel characterization of United having alleged a regulatory taking concedes that NMFS's restrictions on United's diversion of river water into United's canal *do* restrict United's ability "to use its own property"—*i.e.*, the Santa Clara River water United would have diverted but for the NMFS restrictions.

Because the property right at issue here is usufructuary, NMFS's prevention of United's diversion of water constituted an *appropriation* of United's use right in the water, not a *restriction on how United used* its use right. Because of the NMFS-imposed restrictions, United had less water for beneficial use and completely lost the beneficial use of water it otherwise had a vested property right to use. *See, e.g., Casitas*, 543 F.3d at 1294 ("The water, and Casitas' right to use that water, is forever gone."). Concomitantly, NMFS *gained* the beneficial use of that same volume of water for the instream beneficial use of fish preservation NMFS desired. The use right in the 49,800 acre-feet of water United lost because of the government action has been commandeered by, and transferred to, the government for a public purpose and lost to United forever—a paradigmatic physical taking.

## CONCLUSION

For the foregoing reasons, United respectfully requests that the panel, or the Court *en banc*, grant this petition for rehearing.

Respectfully submitted,

/s/ Frank S. Murray

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June 18, 2025

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## CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitations of Fed. R. App. P. 40(d)(3) because the Petition contains 3,898 words, excluding the parts of the Petition exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2). This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6). This Petition has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen (14) point Times New Roman font.

/s/ Frank S. Murray
Frank S. Murray

Counsel for Plaintiff-Appellant

# ADDENDUM

# United States Court of Appeals for the Federal Circuit

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**UNITED WATER CONSERVATION DISTRICT,**
*Plaintiff-Appellant*

**v.**

**UNITED STATES,**
*Defendant-Appellee*

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2023-1602

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Appeal from the United States Court of Federal Claims in No. 1:22-cv-00542-CFL, Senior Judge Charles F. Lettow.

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Decided: April 2, 2025

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FRANK S. MURRAY, Foley & Lardner LLP, Washington, DC, argued for plaintiff-appellant. Also represented by DAVID THOMAS RALSTON, JR.; MICHAEL P. CALABRESE, Los Angeles, CA.

TAMARA N. ROUNTREE, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by TODD KIM.

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Before LOURIE and HUGHES, *Circuit Judges*, and GILSTRAP, *District Judge*.[1]

LOURIE, *Circuit Judge*.

United Water Conservation District ("United") appeals from a decision of the U.S. Court of Federal Claims ("the Claims Court") dismissing its complaint for lack of subject matter jurisdiction. *United Water Conservation Dist. v. United States*, 164 Fed. Cl. 79 (2023) ("*United Decision*").

United's suit against the United States ("the government") seeks just compensation for an alleged taking under the Fifth Amendment of the U.S. Constitution. The Claims Court dismissed United's complaint because it determined that United's claim should be evaluated as a regulatory taking and, because United had yet to exhaust its administrative remedies, its claim was "not yet viable for adjudication." *United Decision*, at 91. For the following reasons, we affirm.

## BACKGROUND

United is a water conservation district, created pursuant to California law to serve as the water management agency for the Santa Clara River and the Oxnard coastal plain. *Id.* at 82. The California State Water Resources Control Board ("the State Board") issued United a license in 1958 and a permit in 1983, providing United the right to appropriate and divert water from the Santa Clara River for United's beneficial use, *i.e.*, to recharge groundwater aquifers, deliver surface water to groundwater users, and

[1] Honorable Rodney Gilstrap, District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

stabilize the riverbed.[2] *Id.* at 82–83. In 1987, United's permit was amended to allow for the construction of the Vern Freeman Diversion dam ("Diversion dam"), which diverts water from the Santa Clara River into the Freeman Canal. *Id.* Water that the Diversion dam does not divert into the Freeman Canal remains in the Santa Clara River and flows into the Pacific Ocean. *Id.* at 83.

In 1997, the National Marine Fisheries Service ("NMFS"), an office of the National Oceanic and Atmospheric Administration within the Department of Commerce, designated the Southern California steelhead trout in the Santa Clara River as an "endangered species" under the Endangered Species Act ("ESA"). *Id.*; *see* 16 U.S.C. §§ 1531–44. Section 9 of the ESA prohibits taking species that are designated as endangered or threatened under the Act. *United Decision*, at 83; *see* 16 U.S.C. § 1538(a)(1)(B). The government, however, may allow a taking of steelhead trout otherwise prohibited by the ESA by issuing an incidental-take permit under Section 10 of the ESA, 16 U.S.C. § 1539(a). *United Decision*, at 83. United, as of the time of the Claims Court's decision, had not yet applied for such a permit. *Id.* at 86.

In 2016, NMFS's Office of Legal Enforcement ("OLE") issued a letter ("OLE Letter") notifying United that "a significant issue regarding ongoing take of endangered southern California . . . steelhead [trout] exists at the [Diversion] Dam . . ., which United owns and operates." *Id.* at 85 (quoting J.A. 53) (alteration in original). The letter further states that "United must commit to implementing interim operating measures that are consistent with the

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[2] The license, permit, and amendment to the permit were not provided to the Claims Court and therefore any reference to the recitals reflect matters drawn from the complaint, the parties' briefing, and other materials included in the Joint Appendix.

operational criteria set forth in the [Reasonable and Prudent Alternatives ("RPAs")] . . . of the 2008 Biological Opinion [("2008 BiOp")]." *Id.* (quoting J.A. 55). According to United's complaint, RPA 2 of the 2008 BiOp requires an increase in bypass flow, *i.e.*, requiring more Santa Clara River water to either remain in the river or to flow through a fish ladder that is also located in the river (collectively, "bypass flow").[3] *Id.* at 88.

United's State Board-issued license and permit provide it with the right to appropriate and divert 144,630 acre-feet of Santa Clara River water per year at the Diversion dam and to put that amount of water to beneficial use. *Id.* at 83. United's complaint therefore alleges that NMFS, by way of OLE's Letter requiring United's implementation of RPA 2, "caused and required United to increase the amount of Santa Clara River water used as bypass flow to the [Diversion dam] fish ladder and/or remaining in the Santa Clara River for the benefit of the endangered fish species." J.A. 35, ¶ 52. It specifically alleges that "compliance with RPA 2 of the BiOp, as interpreted by NMFS, caused United to lose at least 49,800 [acre-feet] of water that it would have been permitted to divert from the Santa Clara River for its beneficial use," resulting in a physical taking. *Id.*, ¶ 53; *see* J.A. 39, ¶ 67 (alleging that "the taking by [the government] constituted a physical taking").

In the Claims Court, the parties disagreed about whether United's claim should be analyzed as a physical or regulatory taking, *United Decision*, at 88, and thus "whether United's claim is ripe for adjudication," because "[f]or a regulatory taking claim to ripen, there must be final agency action," *id.* at 91. United argued that its claim was

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[3] The 2008 BiOp was not provided to the Claims Court and therefore any reference to the recitals reflect matters drawn from the complaint, the parties' briefing, and other materials included in the Joint Appendix.

ripe because it alleged a physical, not regulatory, taking. *Id.* For its part, the government argued that the claim was not ripe because United alleged a regulatory taking and had not yet applied for and been denied an incidental-take permit under Section 10 of the ESA. *Id.* In addition, as relevant here, United conceded that the Diversion dam is located in the Santa Clara River and any water it diverts to the fish ladder "does not enter the Freeman [ ] Canal." *Id.* at 83 (citing J.A. 24, ¶ 18).

The Claims Court first explained that "a physical taking occurs when the government directly appropriates property or engages in the functional equivalent of a practical ouster of the owner's possession." *United Decision*, at 89 (quoting *Katzin v. United States*, 908 F.3d 1350, 1361 (Fed. Cir. 2018)) (cleaned up). A regulatory taking on the other hand, it explained, "occurs when a regulation restricts the owner's use of their property." *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Finally, it explained that "[w]hen determining if a taking was physical or regulatory, a court should focus on the character of the government action." *Id.* (citing *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1290 (Fed. Cir. 2008) ("*Casitas I*")).

The Claims Court determined that United's claim should be analyzed as a regulatory taking. *United Decision*, at 91. It reasoned that the circumstances of this case distinguished it from those where the Supreme Court and this court had applied the physical takings doctrine to water rights because in those cases the water rights holder "had to return water it had already diverted." *Id.* at 91 (citing *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931), and *Casitas I*, 543 F.3d at1291–92)). And "[b]ecause United does not allege that it had to return water it had already diverted, it has not stated a physical takings claim." *Id.* at 90–91. In light of that determination, the Claims Court concluded that United's complaint was not ripe because United had yet to apply for a Section 10

incidental-take permit under the ESA. *Id.* at 91 (citing *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349 (Fed. Cir. 2002) ("[A]bsent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking.")). The Claims Court therefore dismissed United's complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the United States Court of Federal Claims. *Id.*

United timely appealed, and we have jurisdiction under 28 U.S.C. § 1491(b)(1).

## DISCUSSION

United argues that the Claims Court improperly dismissed its complaint for lack of subject matter jurisdiction. In United's view, because the alleged taking should be evaluated as a physical, not regulatory, taking, its claim is ripe for adjudication as pleaded. We disagree.

"This court reviews legal conclusions by the Court of Federal Claims *de novo* and factual findings for clear error." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1351 (Fed. Cir. 2013) ("*Casitas II*") (citation omitted). "The nature or scope of a compensable property interest in a takings analysis is a question of law." *Id.* (citation omitted). "In addition, whether the Court of Federal Claims properly dismissed a complaint for lack of subject matter jurisdiction also is a question of law," *id.*, with any underlying jurisdictional fact determinations reviewed for clear error, *Stephens v. United States*, 884 F.3d 1151, 1155 (Fed. Cir. 2018). "Finally, the Court of Federal Claims must address ripeness as a threshold consideration before addressing the merits." *Casitas II*, 708 F.3d at 1351 (cleaned up).

The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. To establish a taking under the Fifth Amendment, a party must prove that it had a cognizable property interest at the time of the alleged

taking and that "the government's action amounted to a compensable taking of that interest." *Casitas II*, 708 F.3d at 1348. A taking can either be physical or regulatory in nature. *See Casitas I*, 543 F.3d at 1288–89. A taking that is physical in nature is the "paradigmatic taking" and occurs by "a direct government appropriation or [a] physical invasion of private property." *Id.* at 1288 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)). A "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021).

Regulatory takings differ from physical takings in that, instead of asking "whether the government has physically taken property for itself or someone else—by whatever means," the question is whether the government "has instead restricted a property owner's ability to use his own property." *Id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321–23 (2002)). "While there is no 'set formula' for evaluating regulatory takings claims, courts typically consider whether the restriction has risen to the level of a compensable taking under the multi-factor balancing test articulated in *Penn Central*, 438 U.S. at 124." *Casitas I*, 543 F.3d at 1289; *see Tahoe-Sierra*, 535 U.S. at 322 n.17 ("When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex."). The *Penn Central* factors include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and also, "the 'character of the governmental action'—for instance whether it . . . merely affects property interests through 'some public program adjusting the benefits and burdens of economic

life to promote the common good.'" *Lingle*, 544 U.S. at 538–39 (quoting *Penn Central*, 438 U.S. at 124).

Moreover, a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. Township of Scott*, 588 U.S. 180 (2019)); *see, e.g.*, *Boise Cascade*, 296 F.3d at 1357 ("Boise cannot make out a ripe takings claim based on the mere imposition of a permitting requirement" under the ESA.).

Here, it is undisputed that United acquired a valid, appropriative property right in the beneficial use of water it diverts to the Freeman Canal. *See United Decision*, at 83. United contends, however, that the Claims Court erred by characterizing its complaint as alleging a taking that is regulatory in nature. It argues that "restrictions imposed by NMFS's [OLE Letter] on United's operation of the [Diversion dam] resulted in a decrease in the volume of water United was able to appropriate and put to beneficial use." United Br. 32. More particularly, it argues that "the government appropriated the beneficial use of [ ] 49,800 acre-feet of Santa Clara River water for the federal public purpose of fish preservation," *id.* at 18, and that that volume of water is now "gone forever," *id.* at 20. Because, as it argues, "United does not have the same amount of water it can put to beneficial use *after* the government action as it would have had *absent* the government action[,] . . . the government action is not a use *restriction* that otherwise leaves United's property right undisturbed, as is the case in a regulatory taking[s] claim." *Id.* at 19 (emphasis in original). We disagree.

California property rights are governed by state law. *Cedar Point*, 594 U.S. at 155 ("As a general matter, it is true that the property rights protected by the Takings

Clause are creatures of state law."). "Under well-established California law, the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." *Casitas II*, 708 F.3d at 1353 (internal quotation marks and citation omitted). "[A]lthough a private entity cannot own water itself, the right to use that water is considered private property." *Id.* at 1354; *see Thayer v. Cal. Dev. Co.*, 128 P. 21, 24 (Cal. 1912) ("Under the law of this state as established at the beginning, the water right which a person gains by diversion from a stream for a beneficial use is a private right—a right subject to ownership and disposition by him, as in the case of other private property."). Further, "[u]nder the prior appropriation doctrine, recognized in most of the western states, water rights are acquired by diverting water and applying it for a beneficial purpose." *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982).

Supreme Court precedent, as well as our own, "involving water rights provides guidance on the demarcation between regulatory and physical takings analysis with respect to these rights." *Casitas I*, 543 F.3d at 1289. *International Paper* and *Casitas I* are illustrative because they involve appropriative water rights. *See Int'l Paper*, 282 U.S. at 404–408; *Casitas I*, 543 F.3d at 1291–95. In both cases, the water rights holder diverted a volume of water from the watercourse (*e.g.*, a river) to a canal for its beneficial use under its relevant contract or license. *Int'l Paper*, 282 U.S. at 404; *Casitas I*, 543 F.3d at 1280.

In *International Paper*, the government ceased the diversion of water to International Paper's mill for a public purpose—supplying power for the war effort. *International Paper*, 282 U.S. at 405–6 ("On December 29, the representative of the Secretary of War wrote to the secretary of the Power Company 'Please note that the requisition order covers also all of the water capable of being diverted through your intake canal. [ ] This is intended to cut off the water being taken by the International Paper

Company . . . .'"). The Supreme Court concluded that this was a direct physical appropriation because International Paper's right to the water was completely cut off. *See Int'l Paper*, 282 U.S. at 407 ("The petitioner's right was to the use of the water; and when all the water that it used was . . . turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use.").

In *Casitas I*, after the water had been diverted to the canal and into the rights holder's possession, the government subsequently mandated a return of that water for a public purpose—fish preservation. *Casitas I*, 543 F.3d at 1291–92. Because the government caused water that was diverted to be returned—*i.e.*, a direct physical appropriation—we determined that the taking was physical in nature. *See id.* ("[T]he government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Robles–Casitas Canal—*after the water had left the Ventura River and was in the Robles–Casitas Canal*—and towards the fish ladder, thus reducing Casitas' water supply." (emphasis added)).

United's allegations here are materially different. Unlike the water rights holders in *International Paper* and *Casitas I*, United has not alleged that the government completely cut off its access to the water or caused it to return any volume of water it had previously diverted to its possession in the Freeman Canal. In fact, United alleges that NMFS, at most, required more water to stay in the Santa Clara River. *See* J.A. 20, ¶ 4 ("[T]he BiOp RPAs . . . compelled United to increase the amount of Santa Clara River water (a) flowing to a fish ladder located at United's [Diversion dam], and/or (b) remaining in the Santa Clara River (collectively and commonly referred to as 'bypass flow') to facilitate fish migration."); J.A. 24, ¶ 18 ("Bypass flow water used for the fish ladder or flowing into the roller gate does not enter the Freeman [ ] Canal."). Put simply,

the BiOp RPAs represent a nonpossessory government activity merely requiring that more Santa Clara River water, whether flown through the fish ladder or not, remains in the river.

The RPAs therefore operate as "regulatory restrictions on the use of" a natural resource and "do not constitute physical takings." *Seiber v. United States*, 364 F.3d 1356, 1366 (Fed. Cir. 2004); *see, e.g.*, *Boise Cascade*, 296 F.3d at 1355 ("The government simply imposed a temporary restriction on Boise's exploitation of certain natural resources located on its land unless Boise obtained a permit."). Stated differently, "this case does not present the classic taking in which the government directly appropriates private property for its own use; instead the interference with property rights arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Tahoe-Sierra*, 535 U.S. at324 (cleaned up). United's complaint therefore alleges a taking that is regulatory in nature.

United argues that "[t]here is no legal support" for requiring "that the water at issue must have already entered the property owner's facilities before the governmental appropriation at issue." United Br. 38. It argues that "such a requirement . . . cannot be squared with the Supreme Court's consistent finding of a physical taking of the right to use water whenever the government action at issue prevents the rights holder from accessing water it has the right to use." *Id.* at 38, 42. Specifically, it contends that "the taking of the right to use water constitutes a physical taking, even where the governmental action prevented the water from entering the property owner's facilities in the first instance." *Id.* at 42 (relying on *Int'l Paper*, 282 U.S. 399 (1931), *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), and *Dugan v. Rank*, 372 U.S. 609 (1963)).

The Supreme Court precedent that United relies upon, however, does not acknowledge any distinction between physical and regulatory takings. That is presumably because it was not until 1978, decades after the decisions in *International Paper*, *Gerlach*, and *Dugan*, that the Court, in *Penn Central*, "clarified [ ] the test for how far was 'too far'" for a regulation to be recognized as a taking. *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015). It may also be because the alleged takings in those cases did not arise from a regulation, as it clearly does here under the ESA. Moreover, *Gerlach* and *Dugan* involve riparian water rights, not appropriative water rights as here. The difference between the two is meaningful in the context of this case because riparian rights exist by virtue of land ownership and, therefore, their acquisition by the landowner does not depend on any physical acts of diversion and beneficial use of water as is required for appropriative water rights. *See Colorado*, 459 U.S. at 179, n.4 ("Appropriative rights do not depend on land ownership and are acquired and maintained by actual use. Riparian rights, in contrast, originate from land ownership and remain vested even if unexercised."). Unlike the riparian-rights holders in *Gerlach* and *Dugan*, therefore, the appropriative-rights holder here needed to have physically diverted water for its property right to vest and thus become subject to a physical taking, as in *Casitas*. For at least those reasons, the Supreme Court precedent and related cases United cites are consistent with our decision here.

A regulatory takings claim, as alleged here, is not ripe until the rights holder obtains a final agency action. *See Schooner Harbor Ventures*, 569 F.3d at 1365; *see, e.g.*, *Boise Cascade*, 296 F.3d at 1355 ("[T]hat the [government] never denied Boise's permit . . . is fatal to Boise's regulatory takings claims, and it remains fatal notwithstanding Boise's attempt to recharacterize those claims as a forced physical [taking]."). Having yet to have been denied an incidental-take permit under Section 10 of the ESA, United has

therefore not pleaded a ripe takings claim, and the district court properly dismissed its complaint for lack of subject matter jurisdiction.

## CONCLUSION

We have considered United's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm.

**AFFIRMED**