

## Casitas: Property Rights Trump Species Survival

According to the Federal Circuit, when a California fish – even one threatened with extinction – needs more water to survive, the government must pay for it, pursuant to the Fifth Amendment of the U.S. Constitution. That conclusion, reached in the case of *Casitas Municipal Water District v. United States*,<sup>1</sup> places western water law, where water use is a proprietary right, squarely in conflict with the Endangered Species Act. Also, it underscores a need for a more considered approach toward other species' needs, as the possible disappearance of a species proved no match for property rights.

Congress authorized the Ventura River Project, including the Robles Diversion Dam in California, to provide water supply for farmland irrigation and municipal, domestic and industrial uses. In 1956, the United States and Casitas Municipal Water District entered into a contract for construction of the project by the U.S. in exchange for Casitas' repayment of construction costs over a 40-year period. The contract also stated that Casitas "shall have the perpetual right to use all water that becomes available through the construction and operation of the Project."

When that language was adopted more than 53 years ago, the government failed to reserve any water rights for itself and failed to anticipate the possibility that perhaps fish might need water too. But in 1997, the West Coast steelhead trout was listed as an endangered species, pursuant to the Endangered Species Act. As a result of a biological opinion that considered the effects of U.S. Bureau of Reclamation water management actions upon the trout, the federal government advised Casitas in 2003 that it was obligated to construct a fish ladder and to divert water from the project to the fish ladder,

resulting in a permanent loss to Casitas of a certain amount of water per year.

Casitas complied, but sued, alleging that the federal government actions constituted a taking of private property that required compensation pursuant to the Fifth Amendment takings clause. Regarding the fish ladder, a Federal Circuit disagreed: "The record is replete with evidence, including from Casitas' own consultants, that the Project has blocked the West Coast steelhead trout's access to miles of prime spawning and rearing habitat for nearly fifty years, and that such water development is a contributor to the trout's endangerment."

Despite the irrefutable role of the Ventura River Project and the Casitas Municipal Water District in the trout's decline, the Federal Circuit still held that the command to divert water into that fish ladder was a compensable, constitutional taking: "The government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water ... towards the fish ladder, thus reducing Casitas' water supply. ... Casitas' right was to the use of the water, and its water was withdrawn from the Robles-Casitas Canal and turned elsewhere (to the fish ladder) by the government. Although Casitas' right was only partially impaired, in the physical taking jurisprudence any impairment is sufficient."

Perhaps this conclusion can be construed as limited to this case. A poorly worded contract, with insufficient consideration for fish, proved no match for the constitutional claims and investment-backed expectations of the irrigators and municipal water users. But the decision remains jurisprudentially challenging.

First, the decision stands in stark contrast to Earth jurisprudence. Even with the survival of a species at stake, individual property rights were paramount. If the fish need water, the Courts concluded, they can receive

it only if those fish are part of the public interest; even then, the taking of water rights for public use must be compensated. Moreover, without a finding of public interest – human interest – the fish have no rights at all.

Second, despite the Federal Circuit's rigid application of physical takings law in Casitas, the application of takings law to water rights is historically difficult. Many scholars struggle with the distinctions between regulatory takings, based on *Penn Central Transportation Co. v. New York City*,<sup>2</sup> and physical takings, especially in the arena of government regulation of water rights. Also, under California law, water rights cannot be physically appropriated, occupied or invaded by a mere restriction on the exercise of such rights. Those competing points were cast aside by the court. Unless the federal government appeals the decision to the Supreme Court, the case will head back to the Federal Court of Claims for a calculation of the damages that the government owes the Casitas Municipal Water District.

Third, the decision seems to stand for the proposition that no good deed goes unpunished. Leaving water in a river would not be a taking. Refusing to build a dam that altered the ecological value of the water resource would not be a taking. Yet, when government participates in harvesting water resources, helps build a dam and then requires mitigation measures to offset the ecological harms, that effort at compromise creates a constitutional taking. The result may leave some taxpayers wondering: were the project benefits worth it?

– Environmental attorney Keith Rizzardi publishes [www.ESAblog.com](http://www.ESAblog.com), the Endangered Species Act law blog.

<sup>1</sup> *Casitas Municipal Water District v. United States*, United States Court of Appeals for the Federal Circuit 2007-5153, (September 25, 2008); see [www.ca9.uscourts.gov/opinions/07-5153.pdf](http://www.ca9.uscourts.gov/opinions/07-5153.pdf).

<sup>2</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) provided a three-pronged test: (1) the "economic impact" of the government action, (2) the extent to which the action "interferes with distinct investment-backed expectations," and (3) the "character" of the action. See also John D. Echeverria, "Making Sense of Penn Central," 23 UCLA J Envtl L. and Policy 171 (2005).



Photos by Mark Israel

## Language of rights inches forward

The Spanish Parliament's commission for environment, agriculture and fisheries, on June 25, 2008, took a step toward broadening the realm of legal rights to nonhumans when it passed a resolution (161/000099) enjoining the government to declare its adherence to the Proyecto Gran Simio (Great Apes Project) to protect great apes from mistreatment, slavery, torture, death and extinction.<sup>1</sup> While other countries have adopted rules against cruelty to

1 BOLETÍN OFICIAL DE LAS CORTES GENERALES, IX LEGISLATURA, Serie D: 16 de julio de 2008 Núm. 52, [www.congreso.es/public\\_oficiales/L9/CONG/BOCG/D/D\\_052](http://www.congreso.es/public_oficiales/L9/CONG/BOCG/D/D_052) at page 11.

animals, significantly this resolution is couched in the language of recognition of rights of the apes – including notable

### Loyalty to petrified opinion never yet broke a chain or freed a human soul.

Mark Twain

use of the word “slavery” – rather than a more paternalistic duty of humans to protect them. The government was given four months to adhere to the project and one year from that to take the necessary steps to establish a

criminal penalty for cases of commerce, illegal possession and mistreatment of great apes.<sup>2</sup> As is often the case when an expansion of rights is at issue, the step forward was met by a step back. The government appears to have missed the first deadline<sup>3</sup>; parliamentarian Joan Herrera has requested clarification from the government. For further discussion, see [www.proyectogransimio.org](http://www.proyectogransimio.org).

2 Ibid.

3 [www.tenerifeenlinea.com/foro/viewtopic.php?t=3031](http://www.tenerifeenlinea.com/foro/viewtopic.php?t=3031).



CEJ legal director Mary Munson presented “**Fast Forward Florida 2060: Planning Now for a Changed World**” at the 15th Annual Public Interest Environmental Conference in February 2009. U.S. laws tend to protect the environment by imposing restrictions and controls to address discrete threats; climate change and catastrophic species loss demonstrate the failings of this approach. She discussed the need for laws to recognize the interdependent, interrelated nature of Earth systems. To be effective, environmental policy must be crosscutting in nature, affecting all aspects of humans’ relationships with ecosystems. By positing that all laws be viewed through the lens of encouraging a mutually sustaining relationship between humans and our planet, Earth jurisprudence

may offer a solution and an analytical framework for the large-scale reforms that are needed. To view her presentation, visit <http://earthjuris.org/events/>.

**CEJ Takes Precautionary Action:** In February 2009, the Center for Earth Jurisprudence (CEJ) partnered with the Science and Environmental Health Network (SEHN); with the support of an ELULS special projects grant, the City of Miami and Miami Dade College, they conducted workshops in Miami and Orlando to explore expansion of the Precautionary Principle’s use in law and policy. Discussing broader issues were SEHN executive director Carolyn Raffensperger, SEHN science director Dr. Ted Schettler, SEHN legal director Joseph Guth and CEJ director Sister Pat Siemen. In each forum, a panel of experts examined local initiatives through a precautionary lens. In Miami, Richard Grosso, executive director of the Everglades Law Center, law professor and environmental litigator, guided the discussion among panelists Kelly Brooks, of Lehtinen Riedi Brooks Moncarz; Carlos Espinosa, director of the Department of Environmental Resources Management; and Katy Sorenson, Miami-Dade County commissioner. In Orlando, Robert D. Guthrie, senior assistant county attorney of the Orange County Attorney’s Office, led the discussion with Linda W. Chapin, director of the Metropolitan Center for Regional Studies, University of Central Florida; Anthony J. Cotter of GrayRobinson, P.A.; and Lori Cunniff, CEP, CHMM, manager of the Orange County Environmental Protection Division. For a summary, video clips and a radio interview, visit <http://earthjuris.org>.

**In the fullness of time:** The CEJ and St. Thomas and Barry universities invited Sister Miriam MacGillis to time-travel in a talk titled “Cosmology, Faith and Sustainability” in February 2009. After exploring deep time – the beginnings of the universe and the planet, as measured by scientific instruments; and that which precedes these beginnings, the realm of mystery and the divine – Sister Miriam examined Western cosmology and the societal institutions founded on its basis. While many indigenous cosmologies find spirit in things both animate and inanimate, Western cosmology accords little value to nature, no soul to nonhumans. It therefore creates economic, religious and educational institutions that, without nefarious intent, promote homocentric consumerism and allow destruction to proceed unabated. Today’s economic, spiritual and environmental crises point to the unraveling of this cosmology, just as holding up its effects against deep time highlights its devastating folly. Yet MacGillis’ message was one of hope: Those of us alive now, the products of this evolution, are here because we are ready to re-examine and reshape our cosmology. For more information, visit [www.genesisfarm.org](http://www.genesisfarm.org).

**Call on us!** The CEJ wishes to reach out to law schools in order to engage students and faculty in discussions advancing Earth jurisprudence concepts. The CEJ can provide guest lecturers, workshop panelists and ideas for including Earth jurisprudence content in course curriculum. We are also available to speak with law school environmental law organizations. To discuss possibilities, please contact CEJ legal director Mary Munson at [mamunson@stu.edu](mailto:mamunson@stu.edu).