

Aerial view of the diversion dam and fish passage facility at issue in the Casitas case (from Ventura River Ecosystem blog, http://venturaecosystem.blogspot.com/2008/02/steelhead-take-advantage-of-wet-winter.html)

Last month, when he posted about the Supreme Court taking up the Florida beach renourishment case, Rick noted the possibility that the Court might hear another takings case, Casitas Municipal Water District v. U.S., 543 F.3d 1276 (2008). Indeed, the Casitas case, in which the Federal Circuit held that the physical takings doctrine applied to a NMFS order requiring that a water district construct a fish ladder at a diversion dam, had attracted a lot more attention than the Florida case. But it looks like it won’t be on the Supreme Court’s docket, at least not yet. The United States has decided not to seek certiorari.

As the New York Times story points out, the government may have decided that discretion was the better part of valor in this case — if the Supreme Court doesn’t hear the case, it can’t issue an adverse ruling that could affect not only this case but potentially any restrictions on water project operations to protect listed species. And this isn’t the end of the Casitas litigation. The Federal Circuit remanded to the Court of Claims to determine whether a taking had occurred. On remand, the government will have the opportunity to argue that Casitas never had a property interest in the water it alleges was taken, and even that NMFS did not force Casitas to build a fish ladder. Thus, the government may eventually win the case, and if it does not it may have another opportunity to seek Supreme Court review.

In the meantime, as John Echeverria notes in the Times story, “confusion will continue to reign about how the takings clause applies to the regulation of water.” And apparently Casitas will continue trying to have it both ways, seeking compensation in court for installing the fish ladder while taking credit on its web site for the steelhead spawning the fish ladder has made possible.