

In 2008, the Federal Circuit surprised a lot of legal academics by ruling that the [Casitas Municipal Water District's](#) takings claim, which arose from a requirement that the district construct and operate a fish ladder to allow endangered steelhead to pass its diversion dam, should be analyzed using the physical takings test. That didn't resolve the case, because the District had not yet established that it had any property right. The US had conditionally accepted the District's claimed property rights for purposes of establishing whether the takings claim would be evaluated under the more stringent physical takings test, which requires compensation for any permanent physical occupation of a plaintiff's property, or the more generous (to the government) regulatory takings test, which involves consideration of the economic impact of the regulation, its effect on investment-backed expectations, and its character.

After the 2008 decision, the U.S. sought rehearing by the Federal Circuit en banc, but the court didn't bite. The U.S. decided [not to ask the Supreme Court to hear the case](#), so the next step was remand to the Court of Claims for a trial. At the trial, the U.S. vigorously contested Casitas's argument that diversion of water over the fish ladder interfered with its property rights. The Court of Claims ruled for the government, dismissing Casitas's claim as not ripe on the grounds that the District had not shown any such interference, at least not yet. Yesterday, the Federal Circuit [affirmed that ruling](#).

In one sense this latest decision leaves the dispute hanging. The case was dismissed without prejudice, meaning that Casitas is free to file again if and when it can prove that the fish ladder has actually prevented it from using its water rights.

But that isn't going to be an easy showing for Casitas to make, because the court soundly rejected Casitas's extremely broad characterization of its property rights. Casitas supplies water to irrigators from the Ventura River Project, which was constructed by the U.S. Bureau of Reclamation in return for Casitas's promise to repay the construction costs and take responsibility for all operating costs. Casitas holds a water license issued by the State Water Resources Control Board. That license allows Casitas to divert as much as 107,800 acre-feet of water per year from the Ventura River, but limits it to putting 28,500 acre-feet to beneficial use in any year. The higher diversion number allows Casitas to rebuild storage in the Project's reservoir, [which has a capacity of 254,000 acre-feet](#), after dry years. But diversion for storage is not in itself a beneficial use in California. The only beneficial uses are the municipal and agricultural water uses made by Casitas's customers. Under [Article X section 2](#) of the California Constitution, rights to water are "limited to such water as shall be reasonably required for the beneficial use to be served." The municipal and agricultural uses of Casitas's customers, therefore, are the measure of Casitas's property rights. Unless and until Casitas can show that mandated fish ladder flows have actually reduced deliveries

for those uses, it won't have a takings claim. So far, the trial court found, Casitas has not made that showing.

This decision strikes me as correct, both in its reading of California water law, and in its outcome. Ultimately, the touchstone for takings cases is whether the property owner is being treated unfairly. Casitas wants the U.S. to pay for water that has to flow through the fish ladder. That would give Casitas a windfall. If there were no fish ladder, Casitas could not have sold that water to its customers; it was already selling them as much as it had the right to sell. If required fish flows ever do actually reduce Casitas's delivery, then it will be time to raise a takings claim. That sounds fair to me.