Allegretti v. County of Imperial: Return to Reason

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Environmental damage begets environmental regulation. For the better part of a century, the nation's courts have validated the public regulation of proprietary groundwater rights whose exercise has threatened the well being of other users or the public. In 1933 the California Supreme Court confirmed a local government's police power to limit groundwater pumping. In 1979 the Washington Supreme Court sustained a state agency order that an active well operator limit its withdrawals. In 1981, the Arizona Supreme Court protected its state's new groundwater law from the claim that any limit on pumping would unconstitutionally confiscate property. And in 1994, the California Court of Appeal rejected a categorical preemption challenge to county groundwater regulation. In the best sense of the word "progressive," groundwater jurisprudence has rationally advanced to enable legislative response to ever-increasing threats to our most heavily-used domestic water source.

In the opening year of the 21st century, however, public regulation of water extraction and distribution was placed at severe risk. Property rights advocates, frustrated by the U.S. Supreme Court's rejections of "regulatory takings" claims against zoning and land use measures, sought to re-classify resource regulations as "physical invasions." If successful, this tactic would, under established Supreme Court precedent, convert any restraint on water use, no matter how foreseeable and necessary, into a "per se taking." If any incremental restraint on property use equated to a physical appropriation, such a regulation could only be applied by compensating the property owner for an incremental dollar value of the quantity of water not made available. Remarkably, the property right advocates found a federal trial judge in the U.S. Court of Claims to agree with them, producing a blockbuster decision (*Tulare Lake Basin Water Storage Dist. v. United States* (2001) 49 Fed. Cl. 313) that San Joaquin Valley water districts be compensated for reduction in their water deliveries needed to maintain the Delta's ecological stability.

In its short lifespan, *Tulare Lake* produced immense mischief. Because its result squared with the political philosophy of the then-new George W. Bush administration, the United States did not appeal. The San Joaquin water districts – despite signing State Water Project contracts that exonerated the State from liability for drought or environmental restrictions, and assuming the risk as agricultural beneficiaries of cheap surplus in time of plenty to take the first cut in time of shortage – secured a $16 million windfall settlement. Nor were the misdeeds partisan; despite the pleadings of his top legal and water advisors, former Governor Gray Davis refused to let the Attorney General intervene and prosecute an independent State appeal. Emboldened by their *Tulare* success, the legal team that secured it brought similar claims in behalf of Klamath River and Casitas Valley water users. To the cadre of resource agencies and scores of academic

critics distressed by *Tulare Lake*, it appeared that the mischief would not end until either the Klamath or Casitas cases secured appellate review.

A modest groundwater dispute in California's Imperial County has now intervened to restore reason more promptly to the public regulation of water resources. In April 2006 the Fourth District California Court of Appeal published its decision in *Allegretti & Co. v. County of Imperial*, 138 Cal.App.4th 1261, 42 Cal. Rptr. 122. *Allegretti* directly confronted and rejected the *Tulare Lake* holding that restraint on private water use equated to a physical invasion of the water user's property. *Allegretti* also called *Tulare Lake* on its other great flaw – a single distant federal judge's misreading of California water law – and reconfirmed public authority to limit California water extraction or delivery. With unanimous denials of review in the California Supreme Court and of certiorari in the United States Supreme Court ((2007) 127 S.Ct. 960), the *Allegretti* decision authoritatively removed the underpinnings of the aberrational *Tulare Lake*.

The Imperial County dispute need not have given rise to its significant outcome. Allegretti and Company owns 2,400 acres on the upper alluvium at the edge of the Imperial Valley, not far from Anza Borrego State Park. For some time it had withdrawn groundwater using five wells, one of which needed reconditioning. Under Imperial County's well ordinance, a conditional use permit was required to bring the new well into operation; pumping continued from the other four wells. In preliminary environmental review, federal and state wildlife agencies expressed concern about potential impacts on sensitive groundwater-dependent species. The county called for preparation of an environmental impact report; Allegretti categorically resisted any regulation of its future groundwater use. Ultimately the county sought accommodation by issuing a conditional use permit for the fifth well, accompanied by a mitigated negative declaration rather than an EIR, provided Allegretti restricted its pumping from all wells to 12,000 acre-feet a year (a generous but desert-appropriate 6 AFA per acre duty) – an amount far in excess of what Allegretti had used or then claimed it would need on the land it deemed irrigable.

Allegretti responded by refusing to draw the permit under that condition, and instead bringing an inverse condemnation claim against the county. In a pretrial round of trial court and appellate review, the court of appeal in an unpublished decision confirmed the county's general authority to regulate groundwater, but ruled that unless Imperial could show more specific standards than appeared on the face of the well ordinance, that lack of standards disabled the county from relying on the ordinance to issue a permit with restrictions upon the quantity of Allegretti's extraction. The matter was remanded for trial, which gave rise to the second appeal. That second appeal produced the now-published decision.

The trial court reviewed the county's restatement of its ordinance standards, and confirmed the court of appeal's initial conclusion that the ordinance could not regulate quantity of extraction. Allegretti was not content with that ruling, however, and insisted on compensation. The trial court ruled, consistently with the California Supreme Court's *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, that the

county's actions did not amount to a "taking" of Allegretti's property. The trial court additionally found that Allegretti had not shown that the county's actions produced any economic impact.

It bears emphasis that at the conclusion of trial, Allegretti was entitled to extract without any county regulation of quantity; its only "loss" was of dollars that would "compensate" for an inchoate county restraint on installation of the fifth well. Allegretti could have accepted that result, or on appeal challenged only on traditional regulatory takings grounds the denial of compensation. In either choice, the landowner would have lost, but lost on unremarkable and well-established grounds. Allegretti, however, took a daring third path, and under the banner of the then-just-decided *Tulare Lake* decision asserted that any county groundwater regulation would effect a physical taking of the amount of extraction restrained.

Allegretti thus chose to require the California Court of Appeal to examine the two vital underpinnings of the *Tulare Lake* ruling: its physical invasion theory, and its restricted view of California authority over proprietary water claims. Moreover, Allegretti presented the claim as one founded not in an assertion that the county erroneously asserted regulatory authority, but instead in an assertion that the county categorically could not restrict groundwater pumping without effecting a taking. In response the Court wrote:

> County's action with respect to Allegretti in the present case--imposition of a permit condition limiting the total quantity of groundwater available for Allegretti's use--cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. County did not physically encroach on Allegretti's property or acquifer and did not require or authorize any encroachment; it did not appropriate, impound or divert any water. County's permit decision does not effect a per se physical taking under any reasonable analysis.
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> We are not persuaded by Allegretti's reliance on the United States Court of Federal Claims's decision in *Tulare Lake* as support for the proposition that use restrictions on underground water rights are analogous to a categorical physical taking.
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> In any event, the persuasive value of *Tulare Lake* has been undercut in *Klamath Irrigation District v. United States* (2005) 67 Fed.Cl. 504 , in which the court rejected the underpinnings of its *Tulare Lake* decision ["with all due respect, Tulare appears to be wrong on some counts, incomplete on others, and distinguishable, in all events"].* …. The court further faulted *Tulare Lake* for neglecting to consider whether the plaintiffs' claimed use of water violated state doctrines including those designed to protect fish and wildlife, noting as a

* Just prior to oral argument in *Allegretti*, the federal Court of Claims judge assigned to the Klamath River dispute declined to follow his colleague's reasoning in *Tulare Lake*. Both judges, of course, serve as trial courts and therefore with power only of persuasion, not precedent.

> consequence Tulare Lake awarded just compensation "for the taking of interests that may well not exist under state law." ….
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> We likewise decline to rely on *Tulare Lake*'s reasoning to find a physical taking under the circumstances presented by County's action. Aside from the deficiencies noted in *Klamath*, we disagree with *Tulare Lake*'s conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water. The reasoning is flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation .... *Tulare Lake*'s reasoning disregards the hallmarks of a categorical physical taking, namely actual physical occupation or physical invasion of a property interest.

In the third paragraph of this excerpt, the court of appeal relied on the *Klamath* case to question *Tulare Lake*'s possible misinterpretation of California water law. Then, in addressing Allegretti's more conventional claim that the county had effected a regulatory, as well as physical, taking of Allegetti's water rights, the Fourth District dispatched the notion that California law created a reasonable expectation of unimpaired exercise of proprietary water rights:

> [A]s our high court in *City of Barstow* [*v. Mojave Water Agency* (2000) 23 Cal.4th 1224] acknowledged, although an overlying user such as Allegretti may have superior rights to others lacking legal priority, Allegretti's water "right" is nonetheless restricted to a reasonable beneficial use consistent with article X, section 2 of the California Constitution …. Allegretti's claim to an unlimited right to use as much water as it needs to irrigate flies in the face of that standard, and it has not pointed to any evidence in the record that its proposed irrigation of all 2,400 acres would be reasonable within the meaning of the constitutional restriction.

Thus the California appellate court – the court competent to issue an interpretation of California water law binding on the federal courts – not only rejected the foundation of Allegretti's regulatory taking claim, but also vitiated *Tulare Lake*'s failure to recognize that when called upon to maintain ecological standards during drought, the water claimed by the water districts could not reasonably be supplied to them as a protected property interest.

The court of appeal's initially-filed opinion was not certified for publication. The California Attorney General, who had filed a substantial amicus brief in the appeal, requested the court to order publication. The general's request noted that *Allegretti* was the first major California case to address a takings claim related to water rights since the

landmark *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132; and that since "only a California appellate court can authoritatively determine the nature and scope of water rights in California," *Allegretti* authoritatively resolved the conflict between *Tulare Lake* and *Klamath* – against the claim of unlimited groundwater extraction. Joining the request for publication, Boalt Hall Professor Emeritus Joseph Sax advised the court that he was "aware of no more careful and through review of the judicial history of physical invasion as it relates to regulation of water rights." Publication promptly followed.

The parties joining Allegretti's subsequent petition for California Supreme Court review invoked a common word – uncertainty – to describe the threat they perceived in the court of appeal's decision. That the petition earned no votes to grant bespeaks the universally-recognized (if not accepted) premise that all water rights in California are inherently uncertain; the police power held by California counties and cities (*Baldwin v. Tehama* (1994) 31 Cal.App.4th 166) includes the power to quantify groundwater extraction. What had been well established for surface waters (*Joslin*, *National Audubon*, and many predecessors and successors) can no longer be questioned for groundwater.

And yet, these applicants for review made a valid point: as demands on groundwater increase, and statutory obligations for reliability become more stringent, water managers and land-use regulators will be called to a rigorous standard of performance: they will need to accurately assess the availability of future groundwater supplies that can be limited by local authority. But as the Supreme Court's February 1, 2007 decision in *Vineyard Area Citizens v. Rancho Cordova*, 2007 Cal. LEXIS 748, expresses, that need can be met with factually-supported and realistic predictions, which attain reliability by not assuming or expecting that a resource will be drained to, or past, the edge of unacceptable impact. *Allegretti*'s legacy will include a future of cautious growth, and careful protection and management of groundwater resources, that resolves the inherent tension between the need for reliability and the reality of uncertainty.

Looking beyond the U.S. Supreme Court's denial of certiorari, *Allegretti* will now export its reasoning to other jurisdictions, starting with the federal Court of Claims itself. In the Casitas case now pending before the same claims court judge who decided *Tulare Lake*, *Allegretti* is prominently cited in the requests of the California State Water Resources Control Board and Natural Resources Defense Council that the judge reexamine his analysis and conclusions in *Tulare Lake.* *Tulare* has all but run its course.

In his annual review of takings jurisprudence, Richard Frank, executive director of the California Center for Environmental Law and Policy at Boalt Hall, assesses *Allegretti* as the most significant California takings case in many years. With no less restraint, one of California's leading water law firms advised its groundwater-user constituency, "*Allegretti* is an earthquake of significant proportions." The decision, restoring reason to groundwater protection, will likely earn universal recognition for its prominence.