

CONSTITUTIONAL PROTECTIONS OF PROPERTY INTERESTS IN WESTERN WATER

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"What is common to many is taken least care of, for all men have greater regard for what is their own than for what they possess in common with others." Aristotle

I. HISTORICAL FOUNDATIONS OF WESTERN WATER RIGHTS

Water scarcity in the western states led to the development of the prior-appropriation water law doctrine.³ The Americans moving into these arid lands created a new system of water law to replace the English common law system doctrine of riparian rights used in the eastern states.⁴ The riparian system, which had been imported to the eastern states from England, was not suitable to the arid West because it restricted water use to land adjacent to streams.⁵ In the West, where water was scarce and often located at some distance from where it was needed, the miners and agricultural water users required a system that would allow water to be diverted and used on non-riparian lands. The prior appropriation doctrine followed naturally from the miners' customs for claiming mineral lands.

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³ **Robert Emmet Clark et. al., Waters and Water Rights 5**, at 40-41 (1972).

⁴ Andrew P. Morriss, Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning, 80 Ore. L. Rev. 861 (2001).

⁵ **Wells A. Hutchins, Water Rights Laws in the Nineteen Western States Vol. II**, at 1 (1974).

It universally became one of the mining customs that the right to divert and use a specified quantity of water could be acquired by prior appropriation. These customs had one principle embodied in them all, and on which rests the "Arid Region Doctrine" of the ownership and use of water, and that was the recognition of discovery, followed by prior appropriation, as the inception of the possessor's title, and development by working the claim as the condition of its retention.⁶

As with mining claims, the first person to divert water and put it to a beneficial use acquired a property right to the amount of water diverted. This "first in time, first in right," principle determined the priority of water rights on a stream. The beneficial use rule was intended to prohibit waste and speculation. In short, western appropriation water rights differed fundamentally from eastern riparian water rights due to the contrasting geographical conditions that dictated a different approach to allocating water among private users. This approach was legitimized in the territorial and state courts of the West as the prior appropriation doctrine, while the riparian doctrine was generally rejected.⁷ Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming all established legal systems based on prior appropriation as either a complete replacement or in addition to the traditional common law riparian rights system of law.⁸

⁶ Charles W. McCurdy, Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America, **Law and Society Review** 10, Winter 1976 at 236-36.

⁷ Clark, supra note 11 at 404-405. A few states (notably California, Oregon and Washington), adopted dual systems which recognized both riparian and appropriation rights. The dual system continues to function, albeit it poorly, in California.

⁸ Morriss, supra note 12 at 864.

Before 1890, water law in the West emphasized absolute property rights in water.⁹ However, some leaders in the development of western water law considered water a unique resource in which the public's interest should take precedence over private property rights. Elwood Mead, who observed the Colorado system of appropriation of water rights in the making, was the first water engineer for the state of Wyoming. Mead was the chief architect of the Wyoming system, which was adopted by the Wyoming legislature in 1890.¹⁰ The Wyoming system included provisions in the state constitution and water code that provided for subordination of the appropriator to the welfare of the state.¹¹

Mead built these provisions into Wyoming's water law because he feared that the water would be monopolized without such provisions in the law. The Wyoming doctrine influenced other Western states,¹² but most states did not adopt it in its entirety. Rather, the states tailored their water law systems to their particular circumstances and preferences.

Specifically, many states rejected the notion of subordinating private rights to the public welfare and instead followed Colorado in establishing that the public owned the water subject to an individual right of appropriation.¹³ In his water law treatise, Robert Emmett Clark summarized the Western system:

⁹ Anderson and Leal, *supra* note 6.

¹⁰ Robert G. Dunbar, **Forging New Rights in Western Waters** 109 (1983).

¹¹ WY. CONST. Art. 8, § 3; Basin Elec. Coop. v. State Board of Control, 578 P.2d 557 (Wyo. 1978).

¹² Id. at 113-132.

¹³ COLO. CONST. Art. XVI, § 5.

[I]n western jurisdictions, the water of natural streams [was] declared by constitution or statute to be the property of the public and subject to appropriation. The states [had] authority to establish for themselves rules within their borders, subject to constitutional restraint against interfering with vested property rights or the taking of private property for public use without just compensation.¹⁴ (Emphasis added).

Therefore, even though Mead's Wyoming system attempted to establish strong public rights in water, most Western states adopted systems favoring private water rights.¹⁵

In his 1912 treatise on irrigation and water rights, Kinney did not summarize western water law as subordinating private water rights to the welfare of the state. Rather he stated:

A water right, acquired under the arid region doctrine of appropriation, may be defined as the exclusive, independent property right to the use of water appropriated according to law from any natural stream, based upon possession and the right continued only so long as the water is actually applied to some beneficial use or purpose.¹⁶ (Emphasis supplied).

Even in those western states that adopted some version of Mead's Wyoming system, property interests in water under Western water law established greater private rights in water than did the riparian doctrine. In his treatise, Clark stated:

A water right under the doctrine of prior appropriation is an "exclusive right." Under the common law the right to use water from a stream is not exclusive. The common-law right to the use of water by one individual depends upon the equal or correlative rights to its use by all of the riparian owners. Riparian proprietors are tenants in common while appropriators are tenants in severalty.¹⁷

¹⁴ Clark, supra note 11 at 348-49.

¹⁵ See generally, Clark, supra note 11 at sec. 22; Dunbar, supra note 18 at 86-132.

¹⁶ Clark, supra note 11 at 347 (citing 2 Kinney, **Irrigation and Water Rights**, 1314-1315 (2d ed. 1912)).

¹⁷ Clark, supra note 11 at 347 (citations omitted).

As a result of riparian proprietors being tenants in common, their right to the water is nonexclusive with respect to the other riparians—but the rights are exclusive with respect to non-riparian owners and the state. Conversely, a prior-appropriation water right is exclusive against all including the state. Therefore, the prior-appropriation system established a stronger property interest in the use of a certain quantity of water than did the riparian system.

Furthermore, the riparian rights are not alienable, severable, divisible or assignable apart from the land adjacent to the stream. Conversely, the western prior appropriation system recognizes that a water right is severable, alienable, and assignable apart from land.¹⁸ An early water treatise went so far as to say, "The corpus of water, like a wild animal, may be severed from its natural surroundings and be reduced to possession, as for example, in a reservoir."¹⁹ Part of what the western states sought to accomplish by rejecting the riparian system and embracing the appropriation system was the creation of secure, private rights in water which would provide water users with incentives to make efficient and productive use of a scarce water supply.

II. NATURE OF PROPERTY INTERESTS IN WESTERN WATER

A. Sticks in the Bundle of Sticks

¹⁸ See e.g. *Strickler v. Colorado Springs*, 26 P. 313 (Colo. 1891); *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374 (Colo. 1982); Mont. Code Ann. § 85-2-403 (1) (provides that water rights are an appurtenance with the conveyance of land, unless previously severed or specifically exempted). Although common law has upheld severability, alienability and assignability of water rights, there are state law limits on alienability and severability.

¹⁹ Clark, *supra* note 11 at 346.

In real property cases, the courts have often described property rights as mentioned the bundle of sticks a bundle of sticks, meaning there can be many distinct interests in the same parcel of land. For example, one individual may own the right to use and occupy the surface while another individual has the right to develop the underlying minerals, a third person has the right to travel across the surface pursuant to an easement and a fourth person has a right to utilize the airspace above the surface. Occasionally “landowners” possess a “fee simple” interest in a particular parcel (meaning they control all possible uses of the land), but more often these sticks in the bundle will be controlled by different individuals. The significance of owning one, a few or all of these sticks is that the owner has the power to decide what, if any, use will be made of the resource. All of these sticks in the bundle of property rights are held subject to the police power of the state – the power to regulate private use in the public interest: inherent in property rights; however, in water rights cases, there is not a bundle of sticks and perhaps only two sticks total.

To understand the parameters of any property right, one must understand the types of interests that may exist in a particular resource. In the case of land, which will be familiar to most readers, a property interest can range from a mere easement to fee simple title. Most interests in land are to something less than fee simple, and all interests in land are subject to the power of the state to regulate pursuant to the police powers. Not all potential uses (including non-use) are compatible, so one interest may be dominant over another. For example the traditional rule is that the mineral estate is dominant in relation to the surface estate, meaning the mineral owner has

the right to use the surface to the extent reasonably necessary to develop the mineral resources. The value of a particular interest in land is determined by "the amount of in rem control a person has," and by the associated right to exclude others, which could be considered a stick in the bundle of sticks.²⁰

Property interests in water rights are similar in the sense that one person might own a right to divert water for irrigation, while another person has the right to float on the surface, a third has the right to fish in the water, a fourth has a right use the flow of the stream to power a mill and a fifth has the right to dispose of waste in the water. Some of these uses may be simultaneously compatible. For example, a mill can be powered by water in which others have disposed of waste. But for the most part water uses are not simultaneously compatible. Water diverted for irrigation, while in the possession of the irrigator, cannot be used for fishing, floating or powering a mill. Unlike land where surface, subsurface and above surface uses can often proceed simultaneously, it is rare that the possible uses of water can be simultaneous. Thus, though we might describe property rights in water using the traditional metaphor of sticks in a bundle, the reality is that most rights in water have value because they are exclusive to the user and therefore dominant in relation to the rights others may possess. This is different in certain ways than property interests in land.

Historically, most western water rights were for consumptive use of the water. Some, and often much, of the water would be returned to the common source of supply, but while in use it was unavailable for other uses. In fact, most western states

²⁰ Robert G. Natelson, *Modern Law of Deeds to Real Property*, 11-12 (1992).

required that water be diverted from the stream or lake before being applied to a beneficial use. While the diversion rule served to give notice and proof of actual use, it also meant that water rights could only be had for out of stream uses. Thus, there were no property rights in fishing (with some narrow exceptions), navigation, or waste disposal except whatever individuals might claim as a tenant in common with everyone else. The point is that under Western appropriative water law, property rights in water were limited to out-of-stream, consumptive uses that were by definition superior to all other possible uses while the water remained in the possession of the user. Justice Gregory J. Hobbs, Jr., who is a Justice on Supreme Court in Colorado, stated:

Western prior appropriation water law is a property rights-based allocation and administration system, which promotes multiple use of a finite resource. The fundamental characteristics of this system guarantee security, assure reliability, and cultivate flexibility. Security resides in the system's ability to identify and obtain protection for the right of use. Reliability springs from the system's assurance that the right of use will continue to be recognized and enforced over time. Flexibility emanates from the fact that other appropriators not be injured by the change.²¹

An appropriative water right is a freehold, exclusive and conditional interest.²² The right is conditional because it may be forfeited or abandoned by nonuse.²³ However, the fact that a water right is subject to forfeiture does not diminish its constitutional protection. In other words, a water right remains valid and constitutionally protected subject to the legal grounds for forfeiture. In most states

²¹ Justice Gregory J. Hobbs, Jr., Colorado Water Law: An Historical Overview, 1 Water Law Review 1 (1997).

²² Clark, supra note 11 at 346 (citations omitted).

²³ Id.

legal grounds for forfeiture include application of water to nonuse.²⁴ (May want to talk about beneficial use here? Court cites are below) Therefore, so long as a water rights holder exercises her right within the confines of beneficial use and does not abandon her right by not using it for a certain period of time, the right to use the water remains her property. The very fact that western water rights are subject to forfeiture if not used, illustrates how important using the property right is to the whole system of property rights in water.

An essential attribute of a water right is the priority date of that right. The prior appropriation system is based upon the concept "first in time, first in right," which means that a prior-established right trumps a later-established right in the event of a water shortage. An early California case, Nichols v. McIntosh, emphasized that priority is the essence of the appropriative property right:

Property rights in water consist not alone in the amount of the appropriation, but also in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. . . . A priority of right to the use of water, being property, is protected by our constitution so that no person can be deprived of it without "due process of law."²⁵

Therefore, based on the theory of the prior appropriation doctrine the two critical parameters of sticks in the bundles of sticks for a water right are: 1) the date of first use establishing the property owner's priority in relation to other rights owners on the same stream date for the right to use water, and 2) the amount of water the

²⁴ Clark supra note 11 at 178 (stating that abandonment, which requires intentional relinquishment, and forfeiture, which is usually a statutory time period, are concepts embodied in all of the Western states water laws).

²⁵ Clark, supra note 11 at 348 (quoting Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278, 280 (1893)).

owner is entitled right to use a certain amount of water. On this issue the Montana Supreme Court stated, “[p]roperty rights in water consist not alone in the amount of the appropriation, but, also, in the priority of the appropriation. . . . Hence to deprive a person of his priority is to deprive him of a most valuable property right.”²⁶

B. “Usufructuary” Does Not Diminish the Property Interest

Water rights have long been described as usufructuary, meaning the owner possesses a right of use as opposed to having ownership of the water itself. This description served to make clear that others may have a right to use the same water at a different time and in a different place. It was a recognition of the transient nature of water and thus distinguished it from land where a property owner may be said to own the dirt itself without affecting the rights of other property owners. The common law’s recognition of this pragmatic difference between water and land has been relied upon by some legal commentators. They seem to believe that because a water right is usufructuary, this makes the nature of water rights different and for constitutional purposes a less protected form of property right.²⁷

The factor that gives any property right value (and therefore something for which compensation might be paid) is the control the property owner has over the use of the particular resource. Land has value because of the uses (or non-uses) to which it can be put. Although it is true that the right to exclude has constitutional value

²⁶ General Agriculture Corporation v. Moore, 534 P.2d 859 (Mont. 1975)

²⁷ See, e.g., Jan G. Laitos, Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause, 60 U. Colo. L. Rev. 901, 911 (1989); Margaret Z. Ferguson, Instream Appropriations and the Dormant Commerce Clause: Conserving Water for the Future, 75 Geo. L. J. 1701, 1711, (1987).

independent from the economic value of land (deriving from control over use), it is the economic value that determines what compensation must be paid when land is taken. It is the same with water rights. That which gives a water right value is control over its use. In this sense, which is the only sense with relevance to the takings clause, the usufructuary nature of water rights makes them like, rather than different from, land. However, the fact that the main stick in the bundle of sticks inherent to a property right in water is the right to use or usufructuary right, does not lessen its protected property interest any more than the fact that intellectual property has unique characteristics in comparison to land it does not lessen the protected property interest inherent in intellectual property such as copyrights or patents.

Appropriative water rights are generally understood to be usufructuary. This interest consists of the right to use the water as contrasted to and not in private ownership of the corpus of the water.²⁸ In 1911, Wiel described the prior appropriation doctrine in terms of the law of capture, which had also been applied to wildlife and petroleum:

(1) Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general. (2) With respect to this substance the law recognizes a right to take and use of it, and to have it flow to the taker so that it may be taken and used,-- a usufructuary right. (3) When taken from its natural stream, so much of the substance as is actually taken is captured, and, passing under private

²⁸ Clark, supra note 11 at 349 (citing Hutchins, Selected Problems in Western Water Law, Dept. of Agric. Misc. Pub. No. 418, p.27 (1942)). See also, Sherlock v. Greaves, 76 P.2d 87 (Mont. 1938) (citations omitted) (“We are committed to the rule that the appropriator of a water right does not own the water, but has the ownership of its use only.”).

possession and control, becomes private property during the period of possession.²⁹

Although advocates of uncompensated regulation of interests in water have made much of the usufructuary nature of the right, it is a characteristic of a water right which should have no significance in terms of the constitutional protections of the Fifth Amendment. Interests in water rights are described differently from interests in land because of the usually transient nature of the resource. As with rights in land, the thing which gives rights in water value is the power of the owner of the right to use the resource. While land can be effectively used by one who actually possesses the corpus of the resource, most uses of water are dependent upon the transient nature of resource and upon its repeated use by successive rights holders. As Judge Loren A. Smith stated, “[t]he property involved in this case is atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and flows throughout the year.”³⁰

The frequent accurate statement that water rights are usufructuary simply reflects the physical nature of the resource and the requirements of a functional system of property rights in that resource. It was never intended to express a peculiar limit on property rights in water or a justification for unusually broad exercise of the police power. Property rights in water have no lesser constitutional standing than

²⁹ Clark, supra note 11 at 349 (citing 1 Wiel, Water Rights in the Western States, §.709, 739 (3d ed. 1911).

³⁰ Hage v. United States, 51 Fed.Cl.570, 573 (2002).

property rights in land,³¹ in easements,³² in intellectual property, or in mineral estates.³³

Even though a property interest in water has different characteristics than a property interest in land, it is generally considered to be real property.³⁴ As Wiel stated nearly a century ago, "the right to the flow and use of water being a right in a natural resource, is real estate."³⁵ A water right is considered real property in a quiet-title action, in a mortgage recording instrument, when satisfying a statute of frauds, for purposes of descent and inheritance, and for taxation.³⁶

For example: The Montana Supreme Court explained, "[w]hen the [water] right is fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the

³¹ See e.g. Navajo Dev. Co. v. Sanderson, 655 P.2d 1374 (Colo. 1982); General Agriculture Corp. v. Moore, 534 P.2d 859 (1975); Harrer v. Northern Pacific Railway Company, 410 P.2d 713, 715 (1966) (stating that water rights are "considered property of the highest order;" Sheep Mountain Cattle Company v. State Department of Ecology, 726 P.2d 55, (Court of Appeals of Washington, 1986) (holding that "[p]roperty owners have a vested interest in their water rights); Strait v. Brown, 1881 WL 4108, at 3 (Nev. 1881)(stating that [t]here . . . no difficulty in recognizing a right to the use of water flowing in a stream as private property).

³² See United States v. Causby, 328 U.S. 256, 265, 66 S.Ct. 1062, 1067 (1946).

³³ See, e.g. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922) (holding that coal interests were compensable property interest); Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563 (1960); Whitney Benefits v. United States, 18 Cl.Ct. 394 (1989).

³⁴ Clark, supra note 11 at 345. See also, Carson City v. Estate of Lompa, 501 P.2d 662 (Nev. 1972).

³⁵ Clark, supra note 11 at 53.1, 345.

³⁶ Id.

owner could only be divested in some legal manner.”³⁷ Exactly thirty years later the court stated:

The following concepts require no citation of authority: One who has appropriated water in Montana acquires a distinct property right; this water right is a species of property in and of itself and may exist separate and independent of a ditch right; each is capable of several and distinct injuries; both water rights and ditch rights are considered property of the highest order.³⁸

Similarly, in the Washington the Court of Appeals stated, “[p]roperty owners have a vested interest in their water rights, and these rights are entitled to due process protection.”³⁹ The same conclusion was reached by the Nevada Supreme Court which stated, “[t]here is . . . no difficulty in recognizing a right to the use of water flowing in a stream as private property.”⁴⁰

III. TAKINGS LAW AND ITS APPLICATION TO WATER RIGHTS

The Fifth Amendment only requires that property owners be compensated for the value of property rights taken. The meaning of the Fifth Amendment language “nor shall private property be taken for public use, without just compensation”⁴¹ would be the same if it were written as an affirmative authorization to take private property for a public use, if just compensation is paid. Similarly, the Federal Circuit stated in Loveladies Harbor, Inc. v. United States, “[w]hat is not at issue is whether

³⁷ Osnes Livestock Co. V. Warren, 62 P.2d 206, 210 (Mont. 1936); see also, Smith v. Denniff, 60 P. 398, 400 (1900) (stating that a water right is “a positive, certain, and vested property right” of which the appropriator could not be divested).

³⁸ Harrer v. Northern Pacific Railway Company, 410 P.2d 713 (Mont. 1966).

³⁹ Sheep Mountain Cattle Company v. State of Washington, Department of Ecology, 726 P.2d 55 (Wash. App. 1986).

⁴⁰ Strait v. Brown, 1881 WL 4108 at *3 (Nev. 1881).

⁴¹ U.S. Const. amend. V.

the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. . . . The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large."⁴² The public first must bear the costs of compensation, but the police power of the state is in no way diminished by the enforcement of the takings clause.

The Supreme Court decision in Dolan v. City of Tigard makes clear that the purpose of the takings clause has nothing to do with the extent of the police power and everything to do with the state's ability to redistribute wealth held in the form of property. Chief Justice Rehnquist, writing for the majority stated, "One of the principal purposes of the Takings Clause is to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴³

The latest Supreme Court case dealing with takings, Lingle v. Chevron U.S.A. Inc., clearly established a clearer approach to takings jurisprudence, building on the fairness, concept and deleted due process analysis from the Fifth Amendment takings analysis.⁴⁴ In her opinion for the Lingle majority, Justice O'Connor stated, "While scholars have offered various justifications for this regime, we have emphasized its role in 'bar[ring] Government from forcing some people alone to bear public burdens

⁴² Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1175 (1994).

⁴³ Dolan v. City of Tigard, 512 U.S.374, 384 (1994) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

⁴⁴ Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

which, in all fairness and justice, should be borne by the public as a whole.”⁴⁵ In that case, the Court explained that the most important takings inquiry was the impact of the government’s action on the property owner:

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in Loretto, Lucas, and Penn Central) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s rights to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the Lucas context, of course, the complete elimination of a property’s value is the determinative factor. And the Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.⁴⁶

Similar to Lingle, the Court of Federal Claims in Tulare also started its analysis with the same often quoted sentence from Armstrong v. United States discussing fairness.⁴⁷ After disposing of some contract legal theories, the Court of Federal Claims determined the nature of the alleged taking. The Court of Federal Claims stated:

Courts have traditionally divided their analysis of Fifth Amendment takings into two categories: physical takings and regulatory takings. A physical taking occurs when the government’s action amounts to a physical occupation or invasion of property, including the functional equivalent of a “practical ouster of [the owner’s] possession.” Transportation Co. v. Chicago, 99 U.S. 635, 642,

⁴⁵ Id. at 537 (quoting Armstrong v. United States, 264 U.S. 40, 49 (1960)).

⁴⁶ Id. at 539 (internal citations omitted).

⁴⁷ Tulare, 49 Fed.Cl. at 316.

25 L.Ed. 336 (1878); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982). When an owner has suffered a physical invasion of his property, courts have noted that “no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.”⁴⁸

The concept of fairness and not allowing the government to redistribute or reallocate property rights applies to property whether that property be land or water rights.

After Lingle and Lucas and recent cases in the Federal Court of Claims, the trend in takings cases indicates that courts will require just compensation when the state chooses to reallocate resources at the expense of private landowners. As the Tulare Court held, this same approach to interpretation of the takings clause does apply equally to private rights in water.

Although this trend evidences something of a changing approach to takings claims, the law of the Fifth Amendment continues to reflect a structured analysis which should be expected to apply in takings claims involving water rights. That analysis poses the following questions in order: A) Is there a constitutionally protected property right? B) Is the government action a categorical taking? C) Has there been a partial taking? D) On balance do the public benefits of the regulation justify the burden on private property?

A. Is there a constitutionally protected property right?

⁴⁸ Tulare, 49 Fed. Cl. at 318.

More than three decades ago the Supreme Court stated that, "[p]roperty interests . . . are not created by the Constitution. Rather, they are defined by existing rules or understandings that stem from an independent source such as state law."⁴⁹ The Federal Circuit Court of Appeals stated, "[t]he Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment," which interests instead are defined by "existing rules or understandings' and 'background principles' derived from an independent source, such as state, federal or common law."⁵⁰ In Lucas, the Supreme Court reaffirmed that state law determines the "bundle of sticks" that inhere in a property owner's title.⁵¹ Therefore, "[f]irst the court determines whether the plaintiff possesses a valid interest in the property affected by the government action."⁵² Since, water rights are recognized as property rights under state law,⁵³ water rights are therefore entitled to the same constitutional

⁴⁹ Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 450 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972)). Even though states can define the extent and nature of property rights, this does not mean a state can willy nilly change property rights. In fact, the federal takings clause prohibits government, including state government, from taking property even by redefinition, without compensation, unless this was an acknowledged condition of the property right.

⁵⁰ Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed.Cir.2003)(quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992)).

⁵¹ Lucas, 505 U.S. at 1016 fn. 7.

⁵² Karuk Tribe v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1580 (Fed. Cir. 1993), cert. denied, 516 U.S. 870 (1995) (citing United States ex rel. Tennessee Valley Auth. v. Powelson, 319 U.S. 266, 281 (1943)). See also, Klamath Irrigation District v. United States, 67 Fed. Cl. 504 (2005) (the court determined that pursuant to Oregon state law, plaintiffs did not have a state-defined property interest in their use Bureau of Reclamation delivered water).

⁵³ Supra notes 29-42.

protection as any form of property.⁵⁴ Furthermore, the courts have long recognized that water rights are controlled by state law because Congress has enacted laws over and over again specifying that private water rights are governed by state law.⁵⁵

- In every takings case, the Court must decide: first do Plaintiffs own the property at issue, second, did the government take the property, third, what is the “just compensation” due the plaintiffs. Hage 2002
- Threshold question “do plaintiffs possess a property interest, and if so, what is the proper scope of that interest?” Storesafe Redlands v. US 1996 case. Cited by Hage 2002

Normally, the parameters of property rights include the right to exclude others, the right of possession, and the right to alienate. Because of the peculiar nature of the water resource, water rights are further defined as usufructuary and in terms of beneficial use and temporal priority. Most western states define water rights by flow rate and/or volume, priority date, and historical use. Colorado Supreme Court Justice Hobbs, a justice on the Colorado Supreme Court, described a Colorado water right as:

[A] right to use beneficially a specified amount of water, from the available supply of surface water or tributary groundwater, that can be captured, possessed, and controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right. A water right comes into existence only through application of the water

⁵⁴ Tulare at 319

⁵⁵ See e.g. Andrus v. Charestone Stone Products Co., Inc., 436 U.S. 604, 612-13 (1978)(discussing Congress’ early regulation of federal land); California v. United States, 438 U.S. 645, 656 (1978)(stating Congress intended to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of public land under the peculiar necessities of their condition); Act of July 9, 1870, 16 Stat. 218 (Congress ensured occupants of federal public land would be bound by state water law, by providing that “all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights”); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 158 (1935) (stating that the 1877 Desert Land Act, ch. 107, 19 Stat. 377, “effected a severance of all water upon the public domain, not theretofore appropriated, from the land itself”).

to the appropriator's beneficial use; that beneficial use then becomes the basis, measure, and limit of the appropriation.⁵⁶

Due to the unique parameters of a water right, the right of use and the priority date of the right are the critical parameters of an appropriative water right, any limitation of use or shuffling of priority dates can have the effect of forfeiting the right. The prior appropriation water rights allocations system greatly values use of the water rights—so much so that non-use or non-beneficial use can result in forfeiture of the property rights. Furthermore, if an irrigator is precluded from diverting water to fulfill his allocated property right, the water becomes available to other private users or to the government. In the one case it is a taking for a private use, in the other it is an uncompensated taking for a public use. This makes the water available for another use, perhaps for use to fulfill a public value held by the government for which the government holds no water right.

- Prior Appropriation
 - 1911 Clark described the prior appropriation doctrine in terms of the law of capture, which had also been applied to wildlife and petroleum:
 - Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general. With respect to this substance the law recognizes a right to take and use of it, and to have it flow to the taker so that it may be taken and used, a usufructuary right. When taken from its natural stream, so much of the substance as is actually taken is captured, and passing under private possession and control, becomes private property during the period of possession.

⁵⁶ Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 (Colo. 1999)(citations omitted).

- Additionally, the federal government’s action that prohibits a water rights holder from putting his water rights to use is the functional equivalent to a “practical ouster of the [water right holder’s] usufructuary right” which the Lucas court explain was the same thing a physical appropriation of a property right
- The fact that an appropriative water right is usufructuary supports, rather than undercuts, the conclusion that any government action that limits a water right holder from using the water constitutes a per se taking
- In the context of water rights, a mere restriction on use- the hallmark of a regulatory action- completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of water. Tulare.
- “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” From the Casitas Brief
-
- More looking to state law
 - Hage 2002
 - Looked to Nevada law to determine whether Hage had a vested water right
 - 1866 Ditches
 - Act of 1866 was introduced in the Thirty-Ninth Congress on March 8, 1866 as “an act granting the right of way to ditch and canal owners in the State of California over public lands.” 1866 Cong. Globe 1259
 - First the court must determine whether plaintiffs own 1866 ditches. Second the court must examine the proof submitted for each ditch to determine whether the ditch was established prior to 1907, when the land the ditches are on became part of the Toiyabe National Forest Reserve. Finally, the court must determine the extent of the right of way.
 - Plaintiffs must demonstrate that their predecessors-in-interest of the various parcels of land that constitute Pine Creek Ranch (at the time of the alleged taking) established and used the 1866 Act

- ditches prior to 1907 when the land was removed from the public domain and became part of the Toiyabe National Forest Reserve
 - “However, there is no requirement under the law to seek permission to maintain an 1866 Ditch. Instead, that right is expressly reserved in the 1866 Act.”
 - Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law
 -

(this is mentioned earlier?) In California Oregon Power Co. v. Beaver Portland Cement Co., the Supreme Court found that at least from 1862, if not before, Congress acquiesced in the use of and disposition of the waters located on or under federal lands as fixed by territorial or state laws.⁵⁷ Additionally, between 1866 and 1958, Congress passed at least thirty-seven additional statutes in which it expressly recognized the importance of deferring to state water law.⁵⁸ In 1981, the Solicitor General of the Department of Interior acknowledged the long history of congressional deference to state control over water allocation law and stated:

[T]here is no such thing as a “Federal non-reserved water right” . . . That means Federal Land managers must follow State water laws and procedures except where Congress has specifically established a water rights or where Congress has explicitly set aside a Federal land area with a reserved water right. If they need more water for their programs, they [the federal government] must take their place in line like any other citizen and let the State authorities decide.⁵⁹

⁵⁷ California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-155, 55 S.Ct. 725, 727-28 (1935).

⁵⁸ United States v. New Mexico, 438 U.S. 696, 702, n. 5. 98 S.Ct. 3012, 3015 (1978).

⁵⁹ News Release, United States Department of the Interior (Sept. 11, 1981).

Since the Federal government has only reserved water rights and such other rights as it has acquired under state law, and has to stand in line like any other citizen to receive further water allocations, it would seem especially egregious to allow the government to preclude a rightful appropriator, or water rights holder, from using her water right so that government can use water for its preferred purposes without compliance with state process., and then the government acquires use of that water for whatever instream use that it values without going through any of the state process. The government does not acquire use of the water through a legal mechanism; however, the practical, on-the-ground impact is that since the water is not used elsewhere, the government acquires the instream use of that water. Therefore, the government action precludes the rightful water rights holder's use and gains use of that water right itself.

In summary, water rights in the western states are protected for beneficial use by the water rights holder unless the owner is divested of that highest order, vested property right consistent with due process. The value of a water right rests entirely on the right to use a particular amount of water with a particularly priority date relative to other users, **re are only two sticks in the bundle of sticks in a water right—a right to use a certain amount of water in a priority ahead of other users--**which means that any government action that precludes use of the water right deprives the owner of all economic value in the right meaning no stick left in the bundle of sticks for that property right.

B. Is the government action a categorical taking?

- Trilogy of Supreme Court Water Takings (some of this could also go in the history section—up to you)

Trilogy of Cases

- International Paper Co. (1931)
 - Proceeding to recover compensation for property rights in water of the Niagara River taken for war purposes
 - All the agreements were on the footing that the Government had made a requisition that the other party was bound to obey
 - There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and 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.
 - But the Gov. purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay.
 - Concluded that the gov. intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for exigencies of the national security and defense [sic.].
- Gerlach Live Stock Co. (1950)
 - Action to recover just compensation for deprivation of riparian rights from natural seasonal overflow of the San Joaquin river after construction of the Friant Dam
 - President mad allotment of funds for construction of dam and canals under the Federal Emergency Relief Appropriation Act and provided that they 'shall be reimbursable in accordance with the reclamation laws'
 - Riparian rights developed where lands were amply watered by rainfall. The primary natural asset was land, and the runoff in streams or rivers was incidental. Since access to flowing waters was possible only over private lands, access became a right annexed to the shore. The law

followed the principle of equality which requires that the corpus of flowing water become no one's property and that, aside from rather limited use for domestic and agricultural purposes by those above, each riparian owner has the right to have the water flow down to him in its natural volume and channels unimpaired in quality. The riparian system does not permit water to be reduced to possession so as to become property which may be carried away from the stream for commercial or nonriparian purposes. In working out details of the egalitarian concept, the several states made many variations, each seeking to provide incentives for development of its natural advantages.

- Then in the mountains of CA there developed a combination of circumstances unprecedented in the long and litigious history of running water. Its effects on water laws were also unprecedented. Almost at the time when Mexico ceded California, with other territories, to the US, gold was discovered there and a rush of hardy, aggressive and venturesome pioneers began. If the high lands were to yield their treasure to prospectors, water was essential to separate the precious from the dross. The miner's need was more than a convenience- it was a necessity; and necessity knows no law. But conditions were favorable for necessity to make law, and it did- law unlike any that had been known in any part of the Western world.
- In CA, as everywhere, the law of flowing streams has been the product of contentions between upper and lower levels
- That whenever, by propriety of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided however, that whenever, after the passage of this act, any person, or persons shall in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.
- Farms and ranches appeared along the streams and wanted the protection that the common law would give to their natural flow.

- CA decided that a riparian owner came into certain rights which he could assert against a subsequent appropriator of the waters of the stream, even though he could not as against a prior appropriation.
- The court held that common law of riparian rights must prevail against the proposed utilization and, notwithstanding the economic waste involved in plaintiffs' benefit, enjoined the power project
- The doctrine of riparian rights was characterized as socialistic
- We are only concerned with whether it continued in claimants such a right as to be compensable if taken. But what it took away is some measure of what it left.
- The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonable required for the beneficial use to be served
- We assume for the purposes of this decision that the prodigal use, inseparable from claimants' benefits, is such that the rights here asserted might not be enforced by injunction
- No reason appears why those who get the waters should be spared from making whole those from whom they are taken
- Without considering the claim that the 1933 judgments may be res judicata, they are at least persuasive that claimants' rights to the benefit had, in the opinion of CA courts, survived the Amendment and must be retired by condemnation or acquisition before the Friant diversion could be valid
- The same scarcity which makes it advantageous to take these waters gives them value in the extraordinary circumstances in which the CA courts have recognized a private right to have no interception of their flow except upon compensation
- Concurrence
 - Rivers and Harbors Act of 1937 provided that the Secretary of Interior 'may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes.'
 - The Act applies solely to the 17 western states. It deals with reclamation projects as its title indicates. The Central Valley project is such a project
 - Section 8 thus respects 'any vested right' acquired under state water laws relating to irrigation, in 'any interstate stream or the waters thereof.' When such rights will be destroyed or interfered

with by a proposed reclamation project, authority is found to acquire them under §7

- Sec. 8 recognizes state control over waters of non-navigable streams such as are used in irrigation
- This court has recognized, however, that administration of the Act is to be in conformity to state laws

- Dugan (1968)

- Issue of whether the Secretary of the Interior and Bureau of Reclamation officials had statutory authority to acquire the water rights involved.
- The judgment declared that the claimants ‘have been, now are, and will be entitled to the full natural flow of the San Joaquin River past Friant at all times... unless and until the physical solution hereinelsewhere described is erected an constructed (by the defendants) within a reasonable time, and thereafter operated as hereinelsewhere set forth.’
- The court of appeals correctly held that the United State was empowered to acquire the water rights of respondents by physical seizure
- The question was specifically settled in Ivanhoe Irrigation where we said that such rights could be acquired by payment of compensation ‘either through condemnation or, if already taken, through action of the owners in the courts’
- Rather than a trespass, we conclude that there was, under respondents’ allegations, a partial taking of respondents’ claimed rights
- The Project ‘could not operate without impairing, to some degree, the full natural flow of the river’
- To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by the Congress but paid for through it continuing appropriations.
- The judgment, therefore, would not only ‘interfere with the public administration’ but also ‘expend itself on the public treasury...’
- Moreover, the decree would require the US—contrary to the mandate of the Congress—to dispose of valuable irrigation water and deprive it of the full use and control of its reclamation facilities.
- The action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff’s property) can be regarded as so ‘illegal’ as to permit a suit for a specific relief against the officer as tan individual only if it is not within the officer’s statutory powers or, if

within those powers, only if the owners, or their exercise in the particular case, are constitutionally void.’ Larson

- A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land, such as in our recent case of *Griggs v. Allegheny*.

In *Lucas*, the Court acknowledged that, although, it had not followed any "set formula" in takings analysis, the case law had established "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint."⁶⁰ The two categorical or per se takings situations are a physical invasion of property and a regulation that denies all economically beneficial use of the property.⁶¹

1. Is there a physical invasion of the “usufructuary right”?

A physical invasion occurs when property is physically occupied as a consequence of state action or regulation. The obvious case of physical invasion occurs when government seeks to locate public facilities like roads and buildings on private property. Until the relatively recent imposition of exactions like those at issue in *Dolan*, governments never doubted that compensation was due when private property was needed for the location of public facilities, even if only a small portion of a larger parcel was required. As the Court stated in *Dolan*, "In general, no matter how

⁶⁰ *Lucas*, 505 U.S. at 1015.

⁶¹ *Id.*

minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasions]."62

The theory of this per se takings category was explained in Loretto v. Teleprompter Manhattan CATV Corp.,⁶³ a case involving a relatively minor (1 1/2 square feet of the property), state mandated, physical invasion of private property. In Loretto the Court stated:

To the extent that the government permanently occupies physical property, . . . the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.⁶⁴

The Court went on to say that regulations which result in a "permanent physical occupation" or in a "temporary physical invasion" of property are essentially the same as a governmental condemnation requiring just compensation.⁶⁵ Although the Court has declined to expand the physical invasion category to include regulations which force a property owner to accept less than market value from a tenant,⁶⁶ the federal courts have consistently held that governmental orders that deprive landowners of the right to exclude others from their property are per se takings.⁶⁷

- The courts have a long tradition of determining whether the government action was a physical taking by first analyzing whether the government

62 Id. (citations omitted).

63 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

64 Loretto, 458 U.S. at 435.

65 Id. at 436 fn. 12 .

66 See, eg. Yee v. City of Escondido, 503 U.S. 519 (1992).

67 See, Nollan 483 U.S. at 831-32; Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) (holding that an EPA order that authorized access to private property to install and maintain a monitoring well was a per se taking).

appropriated the property. For example, one court stated, “the ‘essential inquiry is whether the injury to the claimant’s property is in the nature of a tortious invasion of his rights or rises to the magnitude of an appropriation of some interest in his property permanently to the use of the government’” Berenholz citing National By-Products Inc

- “And as the Supreme Court noted, ‘it is the character of the invasion, not the amount of damage which results from it’ that determines whether a taking occurred.” Baird citing Cress

Because water is not possessed in the same way as land, it may appear that water rights are not subject to physical invasion.

- “The property involved in this case is atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and flows throughout the year.” Hage 2002.

However, as the Court of Federal Claims stated in a 2003 case:

A physical taking generally occurs when the government directly appropriates private property or engages in the functional equivalent of a “physical ouster of [the owner’s] possession.” (citation omitted). In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of water rights. See Dugan v. Rank, 372 U.S. 609, 625-26, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963)(finding a taking where the government diverted water at a dam from downstream owners of water-rights for public purposes); Int’l Paper Co. v. United States, 282 U.S. 399, 407-08, 51 S.Ct. 176, 75 L.Ed.410 (1931) (finding a taking where the government ordered a diversion of water from owners of water-rights for use in government power production); Tulare, 49 Fed. Cl. At 320 (stating that a deprivation of water from the owner of the water rights amounts to a physical taking).⁶⁸

The Tulare Court, found that plaintiff’s assertion of physical taking was the correct analysis because, “the distinction between a physical invasion and a

⁶⁸ Washoe County v. United States, 319 F.3d 1320, 1326 (Fed. Cir. 2003).

governmental activity that merely impairs the use of that property turns on whether the intrusion is ‘so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it.’”⁶⁹ In its analysis the court referred to Causby, and found that government restriction on water rights is similar to the Supreme Court’s finding that the frequency and altitude of flights rendered the land useless in the Causby case. The Tulare court stated:

[Ii]n the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water. See Eddy v. Simpson, 3 Cal. 249, 252-253 (1853) (“the right of property in water is usufructuary and consists not so much of the fluid itself as the advantage of its use.”). Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of value. Thus, by limiting plaintiffs’ ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to the water and totally displaced the contract holder. That complete occupation of property—an exclusive possession of plaintiffs’ water-use rights for preservation of fish—mirrors the invasion present in Causby. To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.⁷⁰

- Casitas 2008:
 - A physical taking is the paradigmatic taking and occurs by a direct government appropriation or a physical invasion of private property
 - Two categories of regulatory action that generally will be deemed per se takings

⁶⁹ Tulare, 49 Fed. Cl. at 319 (citing United States v. Causby, 328 U.S. 256, 265 (1946)).

⁷⁰ Id.

- Regulatory action will be deemed per se when the government requires an owner to suffer a permanent physical invasion of her property however minor (Loretto)
 - Regulatory action can qualify as per se taking when the regulation completely deprives an owner of all economically beneficial use (Lucas)
 - 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 in Penn Central
 - The government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the canal, thus reducing Casitas' water supply
 - Casitas' right was to use of the water, and its water was withdrawn from the 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.
 - Dugan held that a partial impairment of the petitioner's water rights was a taking
 - The Government physically appropriated water that Casitas held a usufructuary right in
 - Endangered species act was a public use. The fact that the government did not itself divert the water is of no import
 - The government commandeered the water for a public use. No less a physical appropriation.
 - Where the government plays an active role and physically appropriates property, the per se taking analysis applies
 - The water that was diverted away from the canal is permanently gone. Casitas will never, at the end of any period of time, be able to get that water back.
- "Therefore for an appropriation to occur, 'there must co-exist the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use... The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use;" Hage 2002

The federal government action that prohibits a water rights holder from putting his water rights to use is the functional equivalent to a “practical ouster of the [water right holder’s] usufructuary right, which the Lucas Court explained was the same thing a physical appropriation of a property right.⁷¹ As the court determined in Tulare, the fact that a western water right is “usufructuary,” or a use right, means that any government impingement on the ability to use the water equates to a physical taking because the entire value of an appropriative water right is control over use of the water, the main stick in the bundle of two sticks associated with western water right is the use right.⁷² Thus, the fact that an appropriative water right is usufructuary supports, rather than undercuts, the conclusion that regulatory limits on water use constitute an unconstitutional taking.

- “This Court already held in Hage IV that the Government’s actions which physically prevented Plaintiffs from accessing their 1866 Act ditches amounted to a physical taking... However, there is no bright line between physical and regulatory takings. “ Hage 2008
 - Penn Central test
 - 1) extent to which the regulation has interfered with distinct investment-backed expectations; 2) the character of the governmental action; and 3) the economic impact of the regulation on the claimant. Hage 2008
- 2. Beneficial Use, not just water rights**
 - “Under a common sense analysis, the court also found ‘that implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water.’” Citing Hage III at 251
 - The right to the water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such

⁷¹ Lucas, 505 U.S. at 1003, 1014.

⁷² Tulare, 49 Fed. Cl. at 319.

water as shall be reasonably required for the beneficial use to be served.
Casitas 2012

- 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 a disposition by him, as in the case of other private property. Id.
- Although a private entity cannot own water itself, the right to use that water is considered private property. Id.
- Although appropriative rights are viewed as property under California law, those rights are limited to the “beneficial use” of the water involved. Id.
- The Board’s general statement of potential use did not satisfy its statutory and constitutional obligations to determine “that an actual, intended beneficial use, in estimated amounts [would] be made of the impounded waters”
- Concluded that the storage of water, in and themselves do not constitute beneficial uses.
 - Storage of water in a reservoir is not in itself a beneficial use. It is a mere means to the end of applying the water to such use. Id
- The storage of water for the purposes of flood control, equalization and stabilization of flow and future use, is included within the beneficial uses to which the waters of the rivers and streams of the state may be put.
Meridian v. City and County of San Francisco
 - The water allotted to the plaintiff by the trial court is abundantly sufficient in amount to supply all of its need and... no substantial damage to its land has in that respect resulted by reason of the city’s storage. Meridian
- The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonable required for the beneficial use to be served.
Gerlach Livestock Co.

3. Does the regulation deny all economically beneficial use of the property?

Even absent a physical invasion, a per se taking exists if a regulation denies all economically beneficial use of property.⁷³ In Lucas, the Court stated:

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.⁷⁴

Thus, although a property owner may retain the right to exclude others, a taking occurs when a regulation prohibits the owner from making any economic use of the property.

As applied to rights in water, the Tulare court correctly determined that “[u]nlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of value.”⁷⁵ Therefore, even if a court does not find a physical takings, when the government denies the use of valid water right, it is always a per se takings because such denial always takes all economic value of the “usufructuary” property interest in a western water right.

C. Has there been a partial taking?

Current Supreme Court takings doctrine draws a distinction between partial and total takings. In Keystone Bituminous Coal Ass'n v. DeBenedictis the Court found no taking where a state regulation required owners of coal to leave 50 percent of the

⁷³ Lucas, 505 U.S. 1003, 1015.

⁷⁴ Id. at 1003, 1015.

⁷⁵ Tulare, 49 Fed. Cl. at 319.

minable coal in place.⁷⁶ In dissent, Chief Justice Rehnquist challenged the majority's broad definition of the relevant mass of property to consider when analyzing a taking. He said:

I see no reason for refusing to evaluate the impact of the Subsidence Act on the support estate alone, for Pennsylvania has clearly defined it as a separate estate in property. . . . I do not understand the Court to mean that one holding the support estate alone would find it worthless, for surely the owners of the mineral estate or surface estates would be willing buyers of this interest. . . . In these circumstances, where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of the regulation on that particular property interest.⁷⁷

A distinction between partial and total takings is indefensible except as a justification for engaging in the uncompensated regulation of private property. The courts would not excuse a burglar who takes only part of his victim's wealth, nor would the courts forgive the State if it took even a small percentage from random citizens' bank accounts. From the point of view of the burglary victim, and of the person whose property is subject to regulation, there is no principled distinction between a partial and a total taking.

Chief Justice Rehnquist's focus on the severable sticks of the property rights bundle is persuasive in demonstrating that what is a partial taking to one owner of several sticks could be a total taking to another owner of a single stick. There is no logical reason to distinguish the partial and total takings of a single stick in the bundle. In terms of economic impact the difference is one of degree, but the language of the

⁷⁶ Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). The uncertainties of current takings law are well illustrated by the comparison of this case to the Mahon case in which, on very similar facts, the Court found a taking.

⁷⁷ Id. at 519.

Fifth Amendment does not permit for distinctions of degree in the redistribution of wealth.⁷⁸

Since Keystone the Supreme Court has not addressed the partial takings question. However, Justice Scalia acknowledged, in a footnote to the Lucas opinion, that Supreme Court precedent is confused on the issue of what constitutes the relevant unit of property for the purpose of measuring value diminution.⁷⁹ The facts in Lucas did not require the Court to resolve this confusion, but Justice Scalia made it clear that the Court's recognition of a categorical taking where there was a total loss of value did not necessarily lead to the conclusion that there could be no taking when some value remained. Justice Scalia said, "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."⁸⁰

- The three inquiries in Loretto, Lucas, and Penn Central share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain.

⁷⁸ Supreme Court decisions have not been without suggestions that the wealth of affected property owners is relevant to whether or not a takings has occurred. The Penn Central the majority thought it relevant that Penn Central owned other properties in Manhattan, while in Keystone it was considered relevant that Keystone owned other properties in western Kentucky. For an extreme view endorsing this concept see Blumm supra note 4. ____.

⁷⁹ Lucas, 505 U.S. at 1016, n.7.

⁸⁰ Lucas, 505 U.S. at 1016 n.7 & at 1019 n.8 (stating that the dissent erred in assuming that a landowner must suffer complete deprivation to be entitled to compensation).

Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. Lingle.

- A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others. Tahoe-Sierra citing Lucas
- If there had only been a regulatory taking, the government would not be able to use the property for a public benefit.

Since Lucas, these issues have received close attention in the Federal Circuit. In Florida Rock Industries, Inc. v. United States,⁸¹ the appeals court held that a takings analysis is not an "all or nothing proposition."⁸² Although the Federal Circuit remanded the case back to the Court of Federal Claims, which had found for the property owner,⁸³ Federal Circuit concluded that the trial court "was correct in theory" in finding a regulatory taking when less than seven percent of a parcel was immediately affected by a regulation that did not deny the total value of even that small portion.

Florida Rock owned 1560 acres for which they had applied for a permit to dredge and fill wetlands under section 404 of the Clean Water Act. The United States Army Corps of Engineers would only consider an application for 98 acres (the amount Florida Rock could mine in three years), so Florida Rock applied for a permit for 98 acres. That application was denied by the Corps. The trial court concluded that the 98 acres were worth \$10,500 per acre before the regulation and \$500 per acre after imposition of the regulation, a diminution in value of about 95%. The Federal Circuit

⁸¹ Florida Rock Industries, Inc. v. United States, 18 F.3d 1560.

⁸² Id. at 1571.

⁸³ Florida Rock Industries, Inc. v. United States, 21 Cl.Ct. 161 (1990).

questioned the method of assessment, and therefore the \$500 per acre figure, not the principle that less than total loss of value might be a taking.⁸⁴ “Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property;” wrote Judge Plager for the Federal Circuit Court of Appeals, “the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.”⁸⁵

In a subsequent opinion for a unanimous Federal Circuit panel, Judge Plager addressed what he labels “the denominator problem.” The claimants had been denied a Section 404 permit to fill 12.5 acres of wetlands on a 51 acre parcel which had been part of a larger 250 acre parcel. The claimants had already developed and sold most of the 199 acres not included in the remaining 51 acres, and had agreed to dedicate 38.5 acres to the State of New Jersey in return for a state permit to develop the remaining 12.5 acres. These facts presented the Court with several possible denominators in a fraction expressing the diminution in value resulting from the challenged regulatory action. Judge Plager opted for a denominator of 12.5 acres because the claimant no longer owned the already developed lands and had agreed to dedicate the remaining 38.5 acres to the State. The court stated, “Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the

⁸⁴ Florida Rock, 18 F.3d at 1567.

⁸⁵ Id. at 1570.

property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes."⁸⁶

The Florida Rock majority at the Federal Circuit Court of Appeals concluded that logic does not permit a distinction between partial takings where there is physical occupation of property and partial takings where there is 'mere' regulation.⁸⁷ They thus rejected the possibility of simply precluding regulatory takings from the reach of the Fifth Amendment, and were left with the problem of distinguishing between "a partial regulatory taking and the mere 'diminution in value' that often accompanies otherwise valid regulatory impositions."⁸⁸ It is the same dilemma posed by Justice Holmes in Pennsylvania Coal, where he stated, because "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"⁸⁹ the judicial task is to determine when government regulation goes "too far."⁹⁰ This formulation, according to the Florida Rock majority, "requires case by case adjudication,"⁹¹ an approach which they believe their opinion continues. The court stated, "[p]roperty owners and regulators, attempting to predict whether a governmental regulation has gone too far, will still need to use judgment and exercise care in making decision making in this area."⁹²

⁸⁶ Loveladies Harbor, Inc. v. United States, 28 F3d 1171, 1180 (1994).

⁸⁷ Florida Rock, 18 F.3d at 1569.

⁸⁸ Id. at 1569.

⁸⁹ Pennsylvania Coal, 260 U.S. at 413.

⁹⁰ Id. at 415

⁹¹ Florida Rock, 18 F.3d at 1570.

⁹² Id. at 1571.

Although the Florida Rock opinion does not provide "a bright line, simply drawn,"⁹³ it eliminates some of the "ad hocery" problem. Taken by itself, the "too far" language from Pennsylvania Coal is not helpful to drawing the distinction between regulatory taking and incidental diminution in value. But the Florida Rock majority applied Holmes' "reciprocity of advantage" concept to draw what is in fact a fairly clear line: "When there is reciprocity of advantage, . . . then the claim that the Government has taken private property has little force: the claimant has in a sense been compensated by the public program 'adjusting the benefits and burdens of economic life to promote the common good.'"⁹⁴ If there are "direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment,"⁹⁵ the regulation will satisfy the Fifth Amendment. But if regulatory benefits are "shared through the community and the society, while the costs are focused on a few," the Fifth Amendment will require compensation.⁹⁶ This is true where the affected property is less than the "owner's entire fee estate" and "whether the taking results from a physical or regulatory action."⁹⁷

⁹³ Id.

⁹⁴ Id. at 1570. As Richard Epstein has pointed out, the better analysis is that there has been a taking, but there is no Fifth Amendment violation because it has been implicitly compensated in the form of reciprocal benefits to all affected property owners. [cite Epstein book]

⁹⁵ Id. at 1571.

⁹⁶ Id. at 1571.

⁹⁷ Id. at 1572 ("There has never been any question but that the Government can take any kind of recognized estate or interest in property it chooses in an eminent domain proceeding; it is not limited to fee interests. We see no reason or support for a different rule in inverse condemnation cases, and that is true whether the taking results from a physical or regulatory action.").

D. On balance do the public benefits of the regulation justify the burden on private property?

After determining whether the government regulation takes a property right defined by state law, whether there is a categorical or physical takings, or whether there is a partial takings, Supreme Court takings doctrine, like much current constitutional law, requires a balancing of interests. In takings cases, the courts are to balance the property owner's loss against the public benefits. This balancing test grows directly out of is the legacy of Penn Central,⁹⁸ But is the inevitable consequence of the “too far” test from Pennsylvania Coal.

In Penn Central the Court held that three criteria are relevant to whether or not a regulation results in a taking: 1) the character of the governmental action, 2) the economic impact of the regulation on the property owner, and 3) the extent to which the regulation interferes with distinct investment-backed expectations.⁹⁹ Because balancing tests are by their nature ad hoc, it is impossible to generalize about the likely outcome in water rights taking cases. However, it is clear that the economic impacts of loss of water can be substantial and that water users have often invested heavily in water rights, so there is no reason to expect that property rights in water would be treated any differently than other property interests. In fact in Tulare, the court awarded \$13,915,364.78 plus interest as for the compensation for the taking of the water rights involved in that case.¹⁰⁰

⁹⁸ See Definitive Standard, *supra* note 2, at 254-57.

⁹⁹ Penn Central Transp. Co. v. New York City, 438 U.S. 124 (1978).

¹⁰⁰ Tulare Lake Basin Water Storage District v. United States, 59 Fed.Cl. 246, 266 (2003).

Although the Penn Central balancing test has not been abandoned by the Supreme Court, the Court's recent takings decisions have avoided the judicial policy-making inherent in balancing tests. The combination of the Lucas expansion of categorical takings to include total loss of economic value and with the apparent recognition of compensable partial takings has made it more often possible to find for the property owner without engaging in a balancing which will almost always favor the interests asserted by government. Although a court might occasionally find that property owners have "shown that their private interest in developing and utilizing their property outweighs the public value in . . . [the regulation],"¹⁰¹ most courts will defer to the legislative judgment about the net public benefits of a regulation of property.¹⁰²

Absent an express abandonment of the Penn Central balancing test, water rights are subject to the same uncertainties which affect all property rights. However, in Loveladies Harbor the Federal Circuit opined that the Supreme Court had abandoned the Penn Central balancing test in its Lucas opinion. That court stated, "[t]he question was not one of balance between competing public and private claims. Rather the question is simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the

¹⁰¹ Loveladies Harbor, Inc. and Loveladies Harbor, Unit D, Inc. v. United States, 15 Cl.Ct.381,399 (1988).

¹⁰² See eg Kelo et al. v. City of New London, 545 U.S. 469 (2005) (determining that taking property for commercial development was a net public benefit).

state?"¹⁰³ In its earlier opinion in Florida Rock, the Federal Circuit had acknowledged the continued viability of the Penn Central balancing test, but had identified a fundamental flaw in the balancing approach when it observed that reference to "the purpose and function of the regulatory imposition . . . [in distinguishing] between mere diminution and partial taking should not be read to suggest that when Government acts in pursuit of an important public purpose, its actions are excused from liability."¹⁰⁴ There is no reason to conclude that where a balancing test is applied, property interests in water should carry less weight than other property interests.

The illogic of the Penn Central balancing test is illustrated by the contrasting values at stake in Loretto and Penn Central. Examples of the difference in values include the un-constitutional invasion in the Loretto case where economic loss for the property owner was minimal. **This resulted in much less economic impact than regulatory limits caused in Penn Central the losses were in where the cost was in the millions of dollars.**¹⁰⁵ Yet the property owner prevailed in Loretto and was denied compensation in Penn Central. In Penn Central, the Supreme Court ultimately upheld a New York City landmark ordinance in the face of a Fifth Amendment challenge, even

¹⁰³ Loveladies Harbor, 28 F.3d at 1179.

¹⁰⁴ Florida Rock, 18 F.3d at 1571.

¹⁰⁵ The Loretto Court held that a regulation requiring a apartment building owner to allow cable television access to private property was a taking. Loretto, 458 U.S. 419. Conversely, the Penn Central Court did not find a taking when the a historic preservation law forbade the construction of an office building on private property. The later situation was not a taking and yet had a much greater impact on the property owner. Penn Central, 438 U.S. 124.

though the ordinance dramatically reduced the value of Penn Central's property. The issue in Penn Central was whether the regulation's impact on the property owner, which fell well short of denying all economically beneficial use of the property, went "far enough" to constitute a compensable taking.¹⁰⁶

The Court in Penn Central acknowledged that: "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty"¹⁰⁷ and admitted that it had been unable to develop any "set formula" for determining when a regulation goes so far as to require compensation.¹⁰⁸ The Court then proceeded to identify the factors that had been significant in previous regulatory takings cases: the economic impact of the regulation on the claimant (especially with regards to the claimant's distinct investment-backed expectations), the nature of the governmental action, whether the governmental action is reasonably necessary to effect a substantial public purpose, and whether the government action can be characterized as the acquisition of a resource to facilitate a uniquely public function.¹⁰⁹

Many of these questions raised in a Penn Central type analysis have been already addressed in prior tiers of takings analysis. The character of governmental action was part of the substantial nexus question raised in the legitimate government interest or due process analysis that the Court determined was not part of a takings

¹⁰⁶ Penn Central, 438 U.S. at 130, 136.

¹⁰⁷ Id. at 123.

¹⁰⁸ Id. at 124.

¹⁰⁹ Id. at 124-28.

analysis.¹¹⁰ It seems to be redundant to again apply these same tests especially to a water right in which value is entirely dependent on the right of use. There are only two sticks in the bundle of sticks for a water right. Therefore, there is no need to balance whether the property owner retains any value since taking the use right takes everything.

The Penn Central analysis is pre-Lucas, pre-Dolan and pre-Lingle where the Court clarified several of the tiers of takings analysis. The Lucas case clearly refined the second tier of per se takings situations. Perhaps it is time to collapse the multi-factor balancing test into the second tier and third tiers of analysis where it seems to belong, especially in the case of takings analysis involving western water rights. As a fourth tier inquiry, the multi-factor inquiry is somewhat circular.

Under a Penn Central multi-factor balancing test, the outcome of a takings inquiry would depend upon an ad hoc, case by case, factual analysis. In the recent Lingle case, however, the Court resurrected dormant language from older cases and stated "One of the principal purposes of the Takings Clause is `to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"¹¹¹ The Court has also stated, "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for change."¹¹² Such language indicates that the Court is resurrecting the principles embodied in the Fifth

¹¹⁰ See Lingle, 544 U.S. 528.

¹¹¹ Lingle, 544 U.S. at 536 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

¹¹² Id. at (citing Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922)).

Amendment. The result of the Court's renewed resolve to apply the Fifth Amendment more rigorously means that the ad hoc inquiry performed by lower courts may face a higher level of scrutiny by the Supreme Court in the future.

Any government action or regulation that denies an owner use of an appropriative water right without compensation is subject to a takings challenge. Such regulations as the endangered species act, wetlands regulations, water quality regulations, or any other government regulation that denies a water rights holder the use of an appropriative water right, are most likely a per se taking of the water right without compensation.

Many will agree that most if not all of these regulations provide some public benefit; however, that is not a criteria relevant used to determine a takings. As Chief Justice Rehnquist said, the desire to improve public conditions does not justify circumventing the "constitutional way" of paying the property owner.¹¹³

IV. DO BACKGROUND PRINCIPLES OF STATE LAW OR THE PUBLIC TRUST DOCTRINE ALLOW THE FEDERAL GOVERNMENT TO TAKE WATER RIGHTS WITHOUT COMPENSATION?

The public trust doctrine has been touted as the best means to justify limitations on water rights without the need for compensation from water rights holders.¹¹⁴ The theory is that public rights under the public trust doctrine pre-date all appropriative water rights and therefore have priority under the prior rights doctrine. Of course public use advocates would rather not have to pay, and the public trust

¹¹³ Dolan, 512 U.S. at 396.

¹¹⁴ See supra note 7.

doctrine provides a trump of existing rights, assuming the doctrine can be demonstrated to include the public uses being advocated. Advocates of the public trust doctrine do not want to pay for change. They want to take the use of the water away from current water rights holders and apply that water to different uses or in other words reallocate the water rights to a different beneficial use. The same taking without pay could result from the endangered species act (**Talk about Casitas here?**), wetlands regulations, legislation, or water quality regulations if they can be somehow explained as mere implementations of preexisting public rights.

This redefinition of property rights via the “discovery” of pre-existing or somehow superior public rights reallocation is done under the smoke and mirrors of environmental health needs. Such justification flies in the face of the Fifth Amendment and is not the correct criteria to be used when analyzing the situation. Based on current case law, a water rights takings analysis should occur as laid out in section III. The primary inquiry is not based on the quality of the public benefit: the primary inquiry revolves around the issue of whether a property holder was divested of property without compensation.

Clearly, under common law, a property owner may not be compensated for an act that is considered a nuisance. In such circumstances there are private law remedies and the government has the police power to regulate nuisances on private property. The same would be true for similar for regulations of use of water rights, if there was a common law nuisance such as pollution or flooding--two means of

invading another owner's property. Under a nuisance situation, the property owner does not warrant compensation.

Even under a broad application of established nuisance law; however, the public trust doctrine, the Endangered Species Act, and many other regulations that could affect a water right would not fall within the category of nuisance law. If the government has no police power under nuisance law, the government has no right to take without compensation. As a result of the Fifth Amendment, some legal commentators have tried to formulate a way around the compensation issue. Their basic argument is that public policy to protect the environment will not advance if the public has to compensate property owners for what is to be taken from them. Therefore, public policy demands the reformulation of property rights in water to establish a reallocation of currently held private rights to so-called "public rights." Some commentators argue that this shift in emphasis from private rights in water to public rights in water will provide "opportunities for change" to address environmental goals of increasing instream flows.¹¹⁵

The argument against compensating water rights holders for rights taken by the government is faulty in two ways. First, it would be unconstitutional and second, the argument is based on flawed public policy philosophy. The next section will address the flawed public policy inherent within a water rights system that would decrease private rights in water while increasing so-called public rights.

¹¹⁵ See Sax, Constitution, Property Rights & Water Law supra note 4

V. PUBLIC POLICY ARGUMENTS AGAINST CREATING PUBLIC INTERESTS IN WATER

Some legal commentators have argued that as a result of increasing demand for water rights, both consumptive and nonconsumptive demands, the law needs to create public rights in water.¹¹⁶ Lynda Butler argues that the public interest needs to be recognized as a property right.¹¹⁷ Joseph Sax argues that as times are changing and as we move towards fundamentally different water strategy, the primary question is to what extent claims of vested property rights will constrain opportunities for change.¹¹⁸ Fundamental to these arguments for public rights in water is the belief that private rights will not lead to environmental health. Therefore, the government must enter in intervene and divine the public interest that needs protection.

Will the environment be degraded if we continue and refine a legal system to that protects “3D” property rights in water? Will environmental degradation occur if we do not quickly follow some legal commentators down the anti-property rights trail in pursuit of the protection of the public interest?

The initial problem in protecting the public interest is the determination of who defines the public interest? Supporters of protecting the public interest see the

¹¹⁶ Lynda L. Butler, Environmental Water Rights: An Evolving Concept of Public Property, 9 Va. Envtl. L.J. 323, (1990). See generally, Joseph L. Sax, The Constitution, Property Rights and the Future of Water Law, 6 U. Colo. L.Rev. 257 (1990); Carol M. Rose, Energy and Efficiency in the Realignment of Common-Law Water Rights, Journal of Legal Studies, vol XIX (1990).

¹¹⁷ Butler, supra note 129 at?? .

¹¹⁸ Sax, supra note 129 at 258.

courts as the diviners of the public interest. But the courts have no particular expertise about the public interest and, at least at the federal level, they are not democratic institutions. A takings doctrine that requires courts to balance individual interests against those of the public is a prescription, indeed a mandate, for judicial policy making. This creates the problem of judicial activism because the courts would become involved in substantive decisions of what is the public interest. Such policy making by the court's judicial activism should concern advocates of individual freedom as well as advocates of democratic government. Under the American system of government the legislature is, by definition, the final arbiter of the public interest. Rather than divining the public interest the courts should be perform their duty of protecting the individual from the tyranny of the majority by upholding Constitutional rights, such as the protection of private property.

Furthermore, the basic premise that private rights will result in environmental degradation is simply not logical. History has proven over and over again that people value what they own. One needs to look no further than Eastern Europe to see a failed system that depended on the government to protect the environment, instead of individual incentives.¹¹⁹ In America one need look no further than Yellowstone National Park to see the U.S. bureaucracy's failure to care for the environment.¹²⁰

¹¹⁹ One horrendous example of the problems that can result without private property rights is the demise of the Aral Sea in the former Soviet Union. It took just three decades for economic planners to destroy a body of water bigger than Lake Huron. Paul Hoffheinz, The New Soviet Threat: Pollution, *Fortune*, July 27, 1992 at 110.

¹²⁰ The problems created by a "natural regulation" policy have resulted in overgrazing and environmental degradation to the park. See, eg., Alston Chase, *Playing God in Yellowstone* (1986).

Economic scholars have stated:

It is a common misconception that every citizen benefits from his share of the public lands and the resources found thereon. Public ownership of many natural resources lies at the root of resource control conflicts. With public ownership resources are held in common; that is, they are owned by everyone and, therefore, can be used by everyone. But public ownership by no means guarantees public benefits. Individuals make decisions regarding resource use, not large groups or societies. Yet, with government control, it is not the owners who make decisions, but politicians and bureaucrats. The citizen as beneficiary is often a fiction.¹²¹

Other economists have argued that some resources--such as air, water and sea resources--have eluded market processes because of the difficulty to define and enforce property interests in those resources. Without a property rights system that establishes clear definable property interests, the "tragedy of the commons" results.¹²² These economists further argue that "the challenge in tackling these tougher problems is to devise property rights regimes that can move us out of the political arena and into the market where individuals face opportunity costs of their actions."¹²³

Leal has stated:

In fact, private individuals and organizations are probably doing more to preserve the environment than the federal government. For one thing, the majority of the prime habitat for wildlife exists on fertile and low-lying areas where most of the farms, ranches and private forests are, not in the mountains and grasslands that the government owns. For another, while the government can set aside land as wilderness, national parks, and wildlife refuges,

¹²¹ Richard L. Stroup & John A. Baden, *Natural Resources: Bureaucratic Myths and Environmental Management*, 7-8 (1983).

¹²² Terry L. Anderson & Donald R. Leal, *Fishing for Property Rights to Fish*, in **Taking the Environment Seriously** 161 (Roger E. Meiners & Bruce Yandle eds. 1993).

¹²³ Anderson & Leal, *supra* note 6 at 161. To understand why the political arena does not provide satisfactory results in natural resource issues or other issues of scarcity see, Richard L. Stroup, *Political Behavior*, **The Fortune Encyclopedia of Economics** 45-50 (David R. Henderson, Ph.D. ed. (1993)).

government officials have less motivation to make sure that the land they oversee is well cared for and that its use does not harm others.¹²⁴

Similarly, the authors of this article advocate providing private citizens with the means to value the resources instead of relying on the government to provide environmental protection. In order to allow citizens the means to value the water resource there needs to be a refinement of the present Western water law prior-appropriations system that fully establishes “3D” interests in water rights. Critical to this system is enforcement of the property rights protections of the Fifth Amendment.

VI. CONCLUSION

In her dissenting opinion to the recent Kelo decision, Justice O’Connor stated, the Constitution establishes two conditions on the government’s exercise of eminent domain: “the taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.”¹²⁵ Additionally she wrote:

These two limitations serve to protect the “security of Property,” which Alexander Hamilton described to the Philadelphia Convention as one of the “great obj[ects] of Gov[ernment].” 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1934). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.¹²⁶

¹²⁴ Donald R. Leal, Yes, Private Owners Protect the Environment, (1993) (unpublished PERC Briefing paper).

¹²⁵ Kelo, 545 U.S. at 489, Justice O’Connor dissent (citing Brown v. Legal Foundation of Washington, 538 U.S. 216, 231-232 (2003)).

¹²⁶ Id.