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Regulation of Water Use and Takings—The Government Lawyer's Perspective

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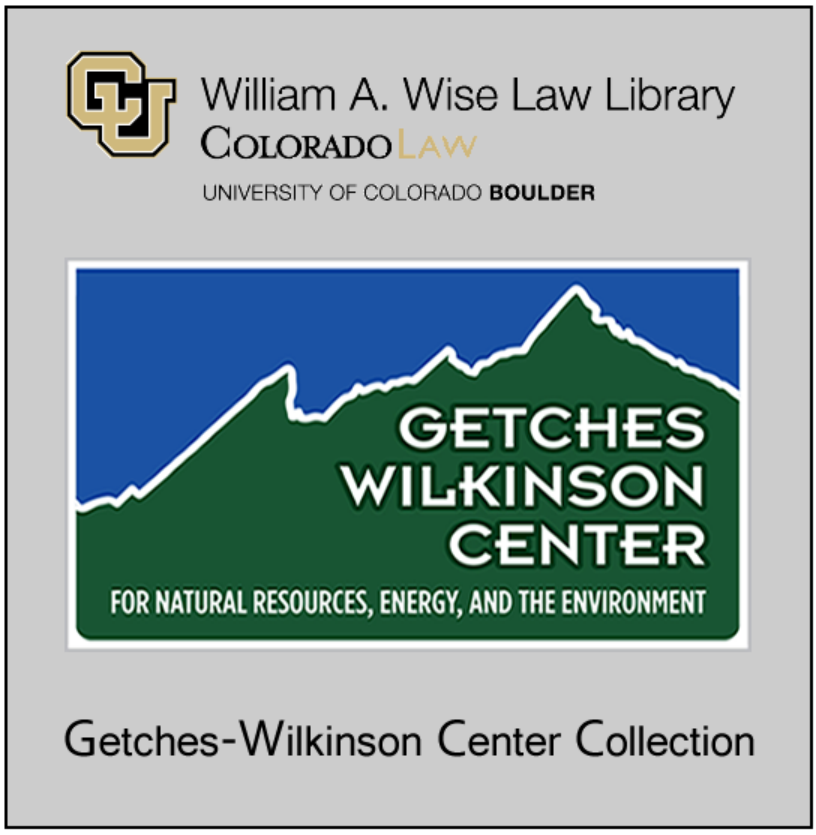

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REGULATORY TAKINGS AND RESOURCES:

WHAT ARE THE CONSTITUTIONAL LIMITS?

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REGULATION OF WATER USE AND TAKINGS--

THE GOVERNMENT LAWYER'S PERSPECTIVE

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1. These program materials and the related oral presentation represent solely the views of the author, and do not necessary reflect those of the Attorney General of the State of California.

OUTLINE

I. TAKINGS LAW AS WE'VE COME TO KNOW AND LOVE (HATE?) IT

The law of regulatory takings has evolved dramatically over the past 15-20 years. Generally speaking, legal principles in this area have become more complicated over that period, and somewhat more solicitous of the interests of private property owners. This has meant increased opportunities for the latter group, and correspondingly greater challenges for government regulators and environmentalists alike.

II. THE IMPACT OF LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

At least until 1992, the most important inverse condemnation precedent was the U.S. Supreme Court's decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1977). Penn Central established a multifaceted balancing test by which courts could determine if a particular regulation went "too far," thereby triggering a compensable taking. Under the Penn Central test, government regulators prevailed in most cases.

In 1992, however, the Court decided Lucas v. South Carolina Coastal Council, 505 U.S. __, 112 S.Ct. 2886. The Court held in Lucas that at least in those "relatively rare" situations in which a regulation totally eliminates the economic value of private property, it would be presumed that an unconstitutional taking had occurred. This "per se" standard can be overcome, the Court ruled, only where: a) the proposed use of private property contravenes traditional notions and limitations based in state property law; or b) the regulation is necessary to forestall threats to the lives and property of others.

Like many of the Supreme Court's recent inverse condemnation decisions, Lucas raises at least as many questions as it answers. Among those most relevant to the present discussion are: a) whether the regulatory takings principles applicable to real

property are equally germane to other types of property interests, including water rights; and b) the scope of the two exceptions to the "per se" rule announced in Lucas. (On the latter point, Justice Scalia's recent dissent from the denial of certiorari in Stevens v. City of Cannon Beach, __ U.S. __, 114 S.Ct. 1332 (1994) raises some intriguing questions.)

III. LAND v. WATER (FEES v. USUFRUCTS)

One of the more interesting aspects of the Supreme Court's regulatory takings jurisprudence is the fact that the Court has traditionally afforded private interests in real property greater protection under the Takings Clause than it has other types of private property rights. This trend was continued and, indeed, exacerbated in Lucas, which made the dichotomy explicit. The consequences of this distinction are especially significant when it comes to the interrelationship of inverse condemnation principles and water rights law. This is because of the usufructuary nature of water rights generally.

IV. THE IMPACT OF THE PUBLIC TRUST DOCTRINE & SIMILAR PRINCIPLES

Another key to government regulation of water rights vis-a-vis the Takings Clause is the first of the two exceptions to the Lucas "per se" rule. The inherent limitations imposed by state law on private water rights have always served as important constraints on the exercise of those rights. In some instances, those limitations are statutory in nature; in others, they are express or implied conditions on the water license or permit itself; in still others, longstanding common law principles such as the public trust doctrine are the basis of the limitations. These multifaceted constraints on the exercise of private water rights have traditionally limited the utility of regulatory takings principles as a shield by which private water users might fend off

government regulation. Whether that trend will continue in the post-Lucas era is a key, unresolved issue.

V. THE BALKANIZATION OF APPLICABLE LEGAL PRECEPTS

The coming years will, in all likelihood, see a "balkanization" of regulatory takings law in jurisdictions around the nation. This balkanization can be expected to be especially prominent when it comes to inverse condemnation attacks on the regulation of private water rights.

A. WATER LAW--WHAT ELSE IS NEW?

The law of water rights has always diverged widely from state to state. Water law principles in the Western United States, for example, reflect precepts that are largely unknown to states east of the Mississippi River. Even among the Western states, water law principles vary from jurisdiction to jurisdiction. And perhaps that divergence is nowhere better illustrated than with respect to the clash between public and private rights to a given state's finite water supply.

B. TAKINGS LAW--REVISITING OLD STATE PROPERTY LAW RULES

The Lucas decision exacerbates this trend by requiring courts to examine "background principles of the [particular] State's law of property and nuisance" in adjudicating specific takings claims. It therefore becomes apparent that a regulation which triggers a compensable taking in State A may be wholly proper and constitutional in State B. This seems an odd state of affairs regarding what is, after all, an issue of federal constitutional law.

C. SOME EXAMPLES FROM PARTICULAR STATES

The phenomenon can be illustrated by comparing the disparate water law systems currently existing in several Western states, and speculating on how a single, hypothetical regulatory restriction on private water rights might be viewed in response to a regulatory takings challenge brought in each of those jurisdictions. California and Colorado, for example, provide a study in marked contrasts.

VI. UPCOMING TAKINGS "HOT SPOTS" INVOLVING WATER RIGHTS

Regulatory takings challenges are being pursued with increasing frequency, and in an ever-expanding set of factual contexts. It is likely that more Takings Clause-based lawsuits will be brought to confront future attempts by government to control or limit the exercise of private water rights. Within that context, certain legal and factual contexts seem especially fraught with controversy and uncertainty. These include the intersection between water rights, on the one hand, and: a) state and federal endangered species laws; b) government efforts to preserve and restore wetlands; and c) federal and state efforts to enact legislative restrictions on previously-settled and contractually-based water rights.

An example of the third type of conflict is discussed in part (VII), below:

VII. FEDERAL WATER CONTRACTS AND THE CONSTITUTION: LESSONS FROM CALIFORNIA'S CENTRAL VALLEY IMPROVEMENT PROJECT

In the past decade, and in response to diverse pressures, Congress has enacted a series of statutes dramatically affecting contractual rights of agribusiness to water furnished by the federal government through the Central Valley Project (CVP) in California. Each of these statutes (as well as executive branch efforts to implement

them) has been met with litigation in federal court raising constitutional objections to the Congressional "reform" efforts. The U.S. Court of Appeals for the Ninth Circuit has issued important decisions in the first two phases of this litigation, and a third, related lawsuit is currently pending and almost certain to be appealed to the Ninth Circuit eventually.

These cases provide important clues as to how courts are likely to rule on future, constitutionally-based challenges to federal efforts to alter water rights previously granted under federal law.

A. ACT I: PETERSON v. U.S. DEPT. OF THE INTERIOR, 899 F.2d 799 (9th Cir. 1990)("hammer clause" contained in Reclamation Reform Act of 1982 withstands both inverse condemnation and due process challenges).

B. ACT II: MADERA IRRIGATION DIST. v. HANCOCK, 985 F.2d 1397 (9th Cir. 1993) (government's conditioning renewal of CVP water contracts on payment of funds for operation and maintenance costs attributable to original contract terms does not violate constitutional rights of water user under federal contract).

C. ACT III: WESTLANDS WATER DIST. v. U.S.A., __ F.Supp. __, 1994 WL 99171 (E.D.Cal. March 3, 1994) (attacks on the Bureau of Reclamation's efforts to implement the 1993 Central Valley Project Improvement Act).

VIII. CAN THE FEDERAL GOVERNMENT "TAKE" STATE-ISSUED WATER RIGHTS?

A distinct question is whether the United States, acting in its police power or sovereign capacity, can act in a manner which triggers a compensable taking of private

water rights granted under state--as opposed to federal--law. Little case law speaks directly to this issue. However, a handful of recent decisions suggest a likely direction, and one can predict at least a couple of contexts in which the issue will be squarely raised.

A. HINTS FROM THE COURT OF CLAIMS

The U.S. Court of Federal Claims recently issued two decisions which touch on, but do not squarely address, this issue. The cases are Broughton Lumber Co. v. United States, 30 Cl.Ct. 234 (1994), and Fallini v. United States, __ Cl.Ct. __, 1994 U.S. Claims LEXIS 64 (1994).

B. THE IMPACT OF FEDERAL RESTRICTIONS IMPOSED UNDER THE ENDANGERED SPECIES ACT--THE SAGA OF THE SNAKE RIVER SALMON

One of the most controversial and potentially-sweeping applications of the federal Endangered Species Act involves a complex system of federal water projects in the Pacific Northwest and the countless private parties who depend on that system for their water and power supplies. The dramatically-declining chinook and sockeye salmon runs in the Columbia/Snake River system have precipitated ESA-based demands that the complex system of federal dams and related improvements on those waterways be operated in a fundamentally different, more environmentally-benign manner. Such reforms, if carried out, would inevitably reduce the water supplies available to at least some categories of users who rely on that system. Those reductions, in turn, will likely produce constitutionally-based challenges to the federal government's power to implement such reforms without compensating those interests who would be prejudiced as a result.

C. REASSERTING FEDERAL RESERVED WATER RIGHTS -- A PHOENIX RISING FROM THE ASHES, OR BANQUO'S GHOST?

The Clinton Administration has announced that it may formally reconsider the decade-old policy of the Reagan and Bush Administrations not to assert federal reserved water rights for Congressionally-created wilderness areas. Secretary of the Interior Bruce Babbitt has promised a final decision by the end of the calendar year. Environmentalists, Native Americans, recreationists and other interest groups are urging the Clinton Administration to vigorously assert these federal reserved water rights. Private property owners and several Western states are just as adamantly opposed to any such shift in federal policy. Regardless of one's views on the subject, one thing can be predicted with certainty: if the Clinton Administration does formally reassert federal reserved water rights appurtenant to federal wilderness areas, an inevitable response will be claims that this policy shift represents an unconstitutional taking of private property (i.e., competing private, state-issued water rights), for which compensation is required from the United States.

IX. CONCLUSION

The intersection of water law and the Takings Clause presents unique factual and legal disputes. Pressed by a variety of legal and policy mandates, government regulators will doubtless continue to assert public rights to water claimed by private parties as their own. Those private parties can be expected in many instances to respond by relying on the Takings Clause and related constitutional principles to challenge the assertion of such public rights.

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