6-15-1994

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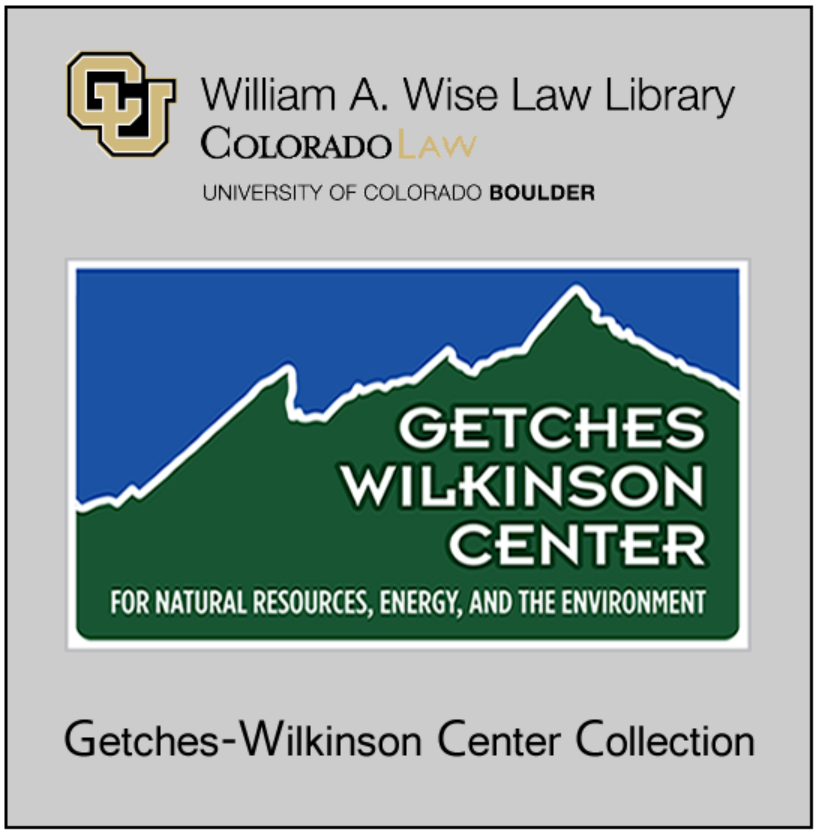

David H. Getches, *Takings and Water Rights* [includes unsigned annotations by David Getches], *in* REGULATORY TAKINGS AND RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS? (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1994).

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TAKINGS AND WATER RIGHTS

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REGULATORY TAKINGS & RESOURCES:
WHAT ARE THE CONSTITUTIONAL LIMITS?

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June 13-15, 1994

Takings and Water Rights

I. The Nature of Property in Water

A. Riparian rights are private interests appurtenant to real property that allow reasonable use of water correlatively with other property owners.

1. The right does not depend on use; new uses may commence at any time resulting in initiation or expansion of a use.

2. The proprietor may use any quantity of water that is reasonable relative to the uses of other riparians.

3. In times of shortage, uses may be curtailed to accommodate the uses of all riparians.

4. Rights exist only to the extent of "reasonable" use of water.

B. Appropriative rights allow use of the resource for specified purposes according to a system of priorities.

1. Rights exist only to the extent that a "beneficial use" is made of the water.

2. Unappropriated water is public property.

3. In times of shortage, the oldest uses are served; newer uses must abate to the extent that the water they do not use would be available to senior users.

C. Permit rights define allocate and define terms and conditions for use of water.

1. Quantities, purposes, and other terms may be specified.

2. Riparian principles of sharing shortages or restricting the place of use may apply.

3. Appropriative principles of priority and loss for nonuse may apply.

4. The permit may be renewable or have a term that expires with or without a preference right to renew.

5. Changes require approval of a permitting agency.

D. All water rights, whether riparian or appropriative, are merely usufructuary so that the "property" is in the right to use and not in the corpus of flowing water. Wells A. Hutchins, *Water Rights in the Nineteen Western States* (Riparian: vol. II,

pages 23-27; Appropriative: vol. I, page 442).

1. Flowing water is not subject to private ownership.

2. Natural streamflow belongs to the public. I Samuel Charles Wiel, *Water Rights in the Western States* §63 (3d ed. 1911); I *Waters and Water Rights* §4.05, pp. 68-69 (Robert Beck, ed. 1991).

II. Takings Challenges Based on Legislative Changes in Water Law

A. When states convert from a riparian system to prior appropriation it can deprive riparian owners of valuable interests in their lands.

1. Making streams subject to appropriation and allowing appropriative rights to be exercised to the detriment of riparians has been upheld. *In re Hood River*, 227 P.2d 1065 (Or. 1924). See also *Wasserburger v. Coffee*, 141 N.W.2d 738 (Neb. 1966)(riparians are protected against "unreasonable" uses of appropriators).

2. Departure from property rules established by prior case law is not a taking. Thus, a state has power "to modify or reject the doctrine of riparian rights because unsuited to the conditions in the state and to put into force the doctrine of prior appropriation and application to beneficial use or reasonable use." *Baumann v. Smrha*, 145 F.Supp. 617, 624 (D.Kan.), affd., 352 U.S. 863 (1956).

B. Changes from common law riparian or appropriation rights to statutory systems can result in loss or diminishment of existing rights.

1. States have required rights to be quantified through adjudication, typically extinguishing rights that have not been used as of the date of adjudication or within some specified period.

a. California requires adjudication of all rights on stream systems before the State Water Resources Control Board. The Board (under authority delegated by the legislature) has authority to define and limit future riparian rights consistent with promoting reasonable and beneficial use. *In re Waters of Long Valley Creek*,

599 P.2d 656 (Cal. 1979)(Board may remove priority of future riparian rights, subordinating them to all uses commenced before they are actually used, but may not extinguish the rights altogether.

b. In upholding Washington's statute that converted the state from riparian law to prior appropriation while preserving riparian rights in use, the state supreme court said that rights unexercised when the law was passed in 1917 were also preserved if they were put to use within a "reasonable period." *Brown v. Chase*, 217 P. 23 (Wash. 1923). Later, the court said that 15 years was a sufficient period to give riparians notice and satisfy the constitution. *Matter of Deadman Creek Drainage Basin*, 694 P.2d 1071 (Wash. 1985).

c. The Texas Supreme Court overruled a lower court that had declared unconstitutional a law that limited riparian rights to those put to use during the period 1963-67. *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982).

d. South Dakota passed a statute that recognized riparian rights as vested only "to the extent of the existing beneficial use." The state supreme court upheld the law as within the state's power to provide for the "maximum utilization of the waters of the state." *Belle Fourche Irrigation Dist. v. Smiley*, 176 N.W.2d 239 (S.D. 1970); accord *Knight v. Grimes*, 127 N.W.2d 708 (S.D. 1964). Earlier, the South Dakota held a prior appropriation statute unconstitutional on due process grounds, saying that it resulted in a taking of riparian rights. *St. Germain Irr. Co. v. Hawthorn Ditch Co.*, 143 N.W. 572 (S.D. 1913).

e. Kansas' law restricting vested riparian rights to those actually instituted at the time the legislation was passed and requiring state approval for any new uses was upheld in *State v. Knapp*, 207 P.2d

440 (Kan. 1949).

2. Statutes that require registration or adjudication of appropriative rights also are upheld as within state police power.

   a. Failure to register appropriative rights within time set by statute caused rights to be relinquished. This was upheld as consistent with furthering the beneficial use of water and thus was not a compensable taking. *Washington Department of Ecology v. Adsit*, 694 P.2d 1065 (Wash. 1985).

3. Overlying landowner's interest in groundwater does not prevent limitation or restriction on use.

   a. Law requiring permits for development of groundwater underlying land did not take rights from overlying owner because state has control of unappropriated water. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164 (Kan. 1981).

   b. Right to use groundwater based on overlying land ownership does not preclude changes in law that allow other water users to develop water from the same source and thereby to interfere with owner's uses because there is no right of private ownership in the water itself and therefore can be no taking. *Williams v. City of Wichita*, 374 P.2d 578 (Kan. 1962); *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324 (Ariz. 1981).

III. Judicial Decisions as the Basis for Takings Claims

A. A court decision that effectively redefines water rights, thereby destroying all value in a previously vested right theoretically could raise due process questions.

B. Virtually no cases have raised the issue and the Supreme Court has not found that the judicial redefinition of property amounts to a taking.

   1. The issue is fully and thoughtfully explored in Barton Thompson, *Judicial Takings*, 76 Va. L.Rev. 1449 (1990).

   2. The Hawaii Supreme Court overruled a series of cases spanning a century

to hold in 1973 that the prior law of water rights was no longer effective and that riparian law prevailed. *McBryde Sugar Co. v. Robinson.* 504 P.2d 1330 (Haw. 1973). The Ninth Circuit upheld the ability of the court to change the common law so far as it affected future rights. Insofar as rights were already vested, by compliance with and reliance upon pre-existing law, they remained vested and they could only be divested through condemnation upon payment of just compensation. *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir.1985), remanded, 477 U.S. 902 (1982), opinion vacated, 887 F.2d 215 (9th Cir. 1989).

IV. Regulation of Water Use as a Taking

A. Destruction or expropriation of the landowner's riparian right to make reasonable use of water.

1. Existing uses

Where legislature enacted statute conditioning use of navigable waterway for dams upon agreement to surrender the site and facilities at less than their market value there was no due process violation because the state may define the nature of the property rights of riparians and of the state in navigable waters. *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651 (1927).

2. Future uses

B. Limitation on the amounts of water that may be used for particular purposes.

1. Several states have duty-of-water statutes limiting the quantity of water or rate at which it can be applied.

a. Washington has upheld imposition of a duty-of-water limitation that reduced the existing water rights claimed by the plaintiffs. The portion of the right not used efficiently (i.e., within the duty of water) was not used beneficially and reverted back to the state. Because beneficial use is a limitation on all water rights this was not a taking. *Washington Department of Ecology v. Grimes*, 852

P.2d 1044 (Wash. 1993).

b. Nebraska passed several such laws beginning around the turn of the century; one said that the maximum rate for irrigation application was one cubic foot per second and another said the maximum annual quantity for irrigation was three acre-feet per acre. The laws all said that they were not to "impair the rights to water appropriated and acquired prior to" 1895, the date of the first such law. The Nebraska Supreme Court held that the limitations were unconstitutional as applied to the plaintiff's 1889 right. *Enterprise Irr. Dist. v. Willis*, 284 N.W. 326 (Neb. 1939). The court acknowledged that the beneficial use doctrine limits the amount an appropriator can put to use which, in the case of irrigation, is "a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops." The court said that

> while vested water rights may be interfered with within reasonable limits under the police power of the state to secure a proper regulation and supervision of them for the public good, any interference that limits the quantity of water or changes the date of its priority to the material injury of its holder is . . . a deprivation of a vested right.

In this case there was unrefuted evidence that the plaintiff required more water to produce crops "in the usual and ordinary way," and that there had been no "no waste or misapplication." Thus, the legislature's arbitrary numerical limitation on the amount of water to be used could not be justified.

C. Denial or conditioning of permit to use federal project water.

1. Where no absolute rights survive the creation of an irrigation district, a water users rights will be determined by the terms of the contract with the district. E.g., *Nelson v. Belle Fourche Irrigation Dist.*, 845 F.Supp. 1362 (D.S.D. 1994).

2. Contracts to use federal project water do not created any vested property right and are subject to changes in federal law that restrict water use. *Peterson v. United States Department of the Interior*, 899 F.2d 799 (9th Cir. 1990).

3. Federal law that prevents development of a water right in the manner contemplated (i.e., effectively precluding issuance of a FERC license) does not effect a taking. *Broughton Lumber Co. v. United States*, 30 Fed. Cl. 239 (1994).

D. Restrictions on groundwater pumping are regularly upheld as a means of preventing waste. E.g., *Kline v. State ex rel. Oklahoma Water Resources Board*, 759 P.2d 210 (Okla. 1988).

E. Limitations on the quality of returns that prevent an appropriator from using water in an amount or in a manner so as to carry out the specified beneficial purpose of the right may be upheld.

The Alaska Supreme Court rejected a taking claim based on the restrictions in ~~an~~ NPDES (water pollution) permits that prevented continued use of sluice boxes by placer miners and thereby diminished property values. ~~The court did not shown a deprivation of their property~~

F. Restrictions on land use that indirectly prevent the beneficial of water.

1. Private land

2. Public land

In *Fallini v. Hodel*, 725 F. F.Supp.1113 (D.Nev.), affirmed, 963 F.2d 275 (9th Cir. 1989), BLM required grazing allottee to allow wild horses to have free access to plaintiff's watering hole thereby monopolizing it and excluding plaintiff from using the water right for cattle. BLM had effectively expropriated the full value of the water right for a public use. The court set aside the government's action preventing plaintiff from fencing the watering hole but did not grant compensation.

G. Limitations on the type of diversion, conveyance, or distribution (irrigation)

works that may be used.

H. Restrictions on the type or manner of water use.

I. Denial or subordination of the priority of an appropriator.

V. A Suggested Analysis for Determining Whether There is a Compensable Regulatory Taking

A. Has the regulation destroyed or damaged the **property right** in water use?

1. Most regulations of water use do not destroy the ability of the holder to put the right to a beneficial use.

a. Because the property right extends only to making a "beneficial use," there is no right to waste water or to use water inefficiently. Compare *Lucas v. South Carolina Coastal Council*, 505 U.S. (1992)(no property right in land to carry on nuisance-type activities).

b. What is "beneficial" should be construed relative to the alternative of holding the unappropriated water for the public generally -- the status of all water prior to a grant of water rights to a private party.

c. Beneficial use is flexible and dynamic so that holders of property rights should expect what is permissible to change. "[W]hat is a reasonable use or a beneficial use in 1890 may not be so in 1990." I *Waters and Water Rights* §4.01, p. 68 (Robert Beck, ed. 1991). It is in the very nature of the water right that the state may redefine it, *Fox River*, supra, and regulate its use to ensure that it is beneficial. See Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 Loy.L.A.L.Rev. 943 (1993); Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U.Colo.L.Rev. 257 (1990)(arguing that the traditions of change and of public servitudes in water law create an expectation of public control of

water rights).

d. The state legislature or courts may change the law so long as it arguably conforms to reasonable expectations, and is not a "sudden change . . . unpredictable in terms of the relevant precedents." See *Hughes v. Washington*, 389 U.S. 290, 296 (1967)(Stewart, J., concurring).

2. If the water right holder can still put the water to a beneficial use as defined by state law, that ends the matter. There is no need to get into the Supreme Court's cases on takings.

Note that some commentators have argued that each and every characteristic attributable to a water right -- quantity, priority, place and manner of appropriation, access to source, right to change uses, continuation of stream conditions at time of appropriation, alienability -- is itself an indispensable part of the right which, if significantly limited may trigger a takings analysis. David C. Hallford, *Environmental Regulations as Water Rights Takings*, 6 Nat. Resources and Environment 13 (1991); Gregory J. Hobbs and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U.Colo.L.Rev. 841 (1989). See also, Jan G. Laitos, *Constitutional Limits on Police Power Regulations Affecting the Exercise of Water Rights*, 16 Colo. Law. 1626 (1987).

3. If the water right holder is no longer able to make a beneficial use of the water, the right has been destroyed or damaged and the next question must be addressed.

B. Does the regulation substantially advance **legitimate state interests**? (Due Process)

"[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987).

1. If not, it is an unconstitutional taking.

2. If so, it is necessary to go to the next question.

C. Has the beneficial use been **expropriated or transferred** to another for a public purpose as a consequence of the regulation?

1. If so, there is a compensable taking. This is tantamount to a "physical invasion" that dedicates private property to a public use. *Loretto Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

2. If not, there may still be a compensable taking depending on the answers to the next question.

D. Does the regulation deny the holder of **all economically viable use** of the water right?

~~1.~~ If so, ~~there is a compensable taking~~. maybe

~~2.~~ If not, there is no taking.

2. ... depending on the answer to the next Q

E. Is reg'n consistent with "background principles" of state law (e.g., nuisance, property) at time of regulation?

1. If so, no taking
2. If not, there is a taking

A Suggested Approach to Analyzing Regulatory Takings Claims

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