Public Land & Resources Law Review

Volume 41

# 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

*Western water rights are unlike any other real property interest because they are a usufructuary right. Thus, a water right holder has a right to use, but does not own, the corpus of the water. This makes water rights similar in some ways to intellectual property. As a result of this unique character, the muddle that currently exists in takings jurisprudence is further exacerbated when applied to water right takings claims. This muddle highlights the pressing need to safeguard excessive, unpredictable, or unfair use of the government's ability to take private property in the form of water rights.*



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## I. HISTORICAL FOUNDATIONS OF WESTERN WATER RIGHTS

Water scarcity in the western states led to the development of the water law doctrine of prior appropriation.[1] The Americans moving into these arid lands created a new system of water law to replace the English common law doctrine of riparian rights used in the eastern states.[2] 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.[3] In the West, where water was scarce and often located 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 both riparian and non-riparian lands. The prior

1. ROBERT EMMET CLARK ET AL., 5 WATERS AND WATER RIGHTS: A TREATISE ON THE LAW OF WATERS & ALLIED PROBLEMS: EASTERN, WESTERN, FEDERAL § 405,40–41 (1972).

2. Andrew P. Morriss, *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning*, 80 OR. L. REV. 861, 865, 868 (2001).

3. 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 1 (1974).

appropriation doctrine followed naturally from the miners' customs for claiming mineral lands.[4]

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 principle of priority is sometimes referred to as "first in time, first in right," and it determines the priority (order) in which water rights are used.[5] A second principle of the prior appropriation doctrine is the beneficial use rule, which requires that a water right be put to a beneficial use. This rule of beneficial use prohibits waste and speculation in the arid West where water is a scarce resource. In short, western appropriation water rights differed fundamentally from eastern riparian water rights due to contrasting geographical conditions that dictated a different approach to allocating water among private users. Territorial and state courts of the West legitimized this approach as the prior appropriation doctrine while generally rejecting the riparian doctrine.[6] 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 for, or in addition to, the traditional common law riparian rights system of law.[7]

Before 1890, water law in the West emphasized absolute property rights in water.[8] 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

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4. TERRY LEE ANDERSON, BRANDON SCARBOROUGH, LAWRENCE R. WATSON, TAPPING WATER MARKETS, 29 (2012).

5. Carolyn F. Burr, *A Survey of Water Rights Title Review in the Six Western States*, 52 ROCKY MTN. MIN. L. IN. (2006); ROBERT EMMET CLARK ET AL., 1 WATERS AND WATER RIGHTS: A TREATISE ON THE LAW OF WATERS & ALLIED PROBLEMS: EASTERN, WESTERN, FEDERAL 61 (1967).

6. CLARK ET AL., *supra* note 1, at 41. 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 poorly, in California.

7. Morriss, *supra* note 2, at 865.

8. TERRY L. ANDERSON & DONALD R. LEAL, *Fishing for Property Rights to Fish, in* TAKING THE ENVIRONMENT SERIOUSLY (Roger E. Meiners & Bruce Yandle eds., Rowman & Littlefield Publishers, Inc., 1993).

making, was the first water engineer for the state of Wyoming. Mead was the chief architect of the Wyoming system, which the Wyoming legislature adopted in 1890.[9] The Wyoming system included provisions in the state constitution and water code that provided for subordination of an appropriator to the welfare of the state.[10]

Mead built these provisions into Wyoming's water law because he feared that water would be monopolized without them. The Wyoming doctrine influenced other western states,[11] but most states did not adopt it in its entirety. Rather, the states tailored their water law systems to their particular circumstances and preferences.

Notably, 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 individual rights of appropriation.[12] In his water law treatise, Robert Emmett Clark summarized the western system:

> [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.[13]

Therefore, even though Mead's Wyoming system attempted to establish strong public rights in water, most western states adopted systems favoring private water rights.[14] In his 1912 treatise on irrigation and water rights, Clesson Kinney did not summarize western water law as subordinating private water rights to the welfare of the state. Rather, he stated:

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9. ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 109 (1983).

10. WYO. CONST. art. 8, § 3; Basin Elec. Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978).

11. DUNBAR, *supra* note 10, at 113–32.

12. COLO. CONST. art. XVI, § 5.

13. CLARK ET AL., *supra* note 1, at § 53, 348–349 (emphasis added).

14. *Id.* at § 22; DUNBAR, *supra* note 10, at 86–132.

> 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.[15]

Even in those western states that adopted some version of Mead's Wyoming system, western water law established more certain private rights in water than did the riparian doctrine:

> 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.[16]

As a result of riparian proprietors being tenants in common, their water rights are nonexclusive with respect to the other riparians, but 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 or flow of water than did the riparian system.

Furthermore, riparian rights are not alienable, severable, divisible, or assignable, apart from the land adjacent to the stream.[17] Conversely, the western prior appropriation system for the most part recognizes that a water right is severable, alienable, and assignable apart from land, so long

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15. CLARK ET AL., *supra* note 1, at 347 (citing 2 KINNEY, IRRIGATION &WATER RIGHTS, 1314–1315 (2d ed. 1912) (emphasis added)).

16. CLARK ET AL., *supra* note 1, at 347 (citations omitted).

17. Thompson v. Enz, 154 N.W.2d 473, 379 Mich. 667, 686 (Mich. 1967).

as doing so does not harm other water rights holders.[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 to create secure, private rights in water that 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. A Bundle of Sticks*

In real property cases, courts have often described property rights as a "bundle of sticks," meaning there can be many distinct interests in a single parcel of land. For example, one individual may own the right to use and occupy a parcel's surface while another individual has the right to develop its 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 a landowner possesses "fee simple" in a particular parcel, meaning that landowner controls the parcel in all possible respects. More often, however, multiple individuals control one or more sticks in a single bundle. Depending on which stick or stocks a person owns, that person controls one or more resources of the property.

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, a property interest can range from a mere easement to fee simple. Most interests in land are less than fee simple, and all interests in land are subject to the right of the state to regulate pursuant to its police powers. Not all potential uses, including non-use, are compatible, so one

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18. *See, e.g.*, Strickler v. Colorado Springs, 26 P. 313, 317 (Colo. 1891); Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377–78 (Colo. 1982); MONT. CODE ANN. § 85–2–403(1) (2017) (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 ET AL., *supra* note 1, at 346.

interest may eclipse 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 therefore 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.[20]

Property interests in water rights, too, resemble a bundle of sticks. 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 where uses involve the diversion and/or consumption of water and others require a minimum streamflow dependent upon the non-diversion and non-consumption of water. Water diverted and consumed for irrigation cannot be used downstream for fishing, floating, or powering a mill. Thus, most rights in water have value because they are exclusive to the user and dominant in relation to the rights others may possess in the same water. This is the linchpin of the prior appropriation doctrine.

Historically, most western water rights were consumptive use of water. Some, and often much, of the water would be returned to the common source of supply, but while one used the water, others could not. In fact, most western states required the diversion of water to perfect a water right claim. 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, uses that did not require diversion, such as fishing (with some narrow exceptions), navigation, or waste disposal, were not recognized as a protectable property interest in the form of a water right. Persons making in-stream uses of water effectively functioned as tenants in common with everyone else using water in-stream. Generally, under western appropriative water law, property rights in water were limited to out-of-stream, consumptive uses that were superior to all other possible uses while the water remained in the possession of the user. Former Colorado Supreme Court Justice Gregory J. Hobbs, Jr. explained:

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20. ROBERT G. NATELSON, MODERN LAW OF DEEDS TO REAL PROPERTY, 11–12 (1992).

> 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] Unlike ownership of a stick in the bundle of real property rights, an appropriative water right is conditional because it may be forfeited or abandoned by non-use.[23] However, a water right's susceptibility 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, legal grounds for forfeiture include ceasing to put water to a beneficial use. Beneficial use is an evolving definition, so a use of water once recognized as beneficial can become non-beneficial and lose its constitutional property protections as a result.[24] For example, the Wyoming Supreme Court has recognized that the prior appropriation has "evolved" to recognize uses of water that do not require physical diversion of water:

> Although our statutory scheme regulating the appropriation of water has contemplated an actual physical diversion of water, we have never said that a requirement to do so existed. This is understandable if we

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21. Justice Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV.WATER L. REV. 1, 2 (1997).

22. CLARK ET AL., *supra* note 1, at 346 (citations omitted).

23. *Id.*

24. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007, 3 Cal.2d 489, 567 (Cal. 1935). ("What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.").

> give consideration to that, until passage of our instream flows act, it was necessary to actually divert water to put it to a beneficial use permitted by law in Wyoming. "Beneficial use" is, however, an evolving concept and can be expanded to reflect changes in society's recognition of the value of new uses of our resources. Actual diversion is neither constitutionally required nor an essential element of our appropriation doctrine. Beneficial use is the key element.[25]

"Beneficial use" could therefore evolve to leave some once-protected water rights unprotected. This aspect—unique to property interests in water—is no doubt a function of water's scarcity, particularly in the American West.

Therefore, based on the theory of the prior appropriation doctrine, the two critical parameters of sticks (in the bundle 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, and 2) the amount of water the owner is entitled to use.[26] 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."[27]

### *B. The "Usufructuary" Nature of A Water Right Does Not Diminish the Constitutional Protection of the Property Interest*

Water rights have long been described as usufructuary, meaning the owner possesses a right to use the water as opposed to owning the water itself.[28] 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 recognized 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

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25. *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P.2d 273, 279 (Wyo. 1992).

26. *See* Gen. Agric. Corp. v. Moore, 534 P.2d 859, 863 (Mont. 1975).

27. *Id.*

28. Murphy v. Kerr, 296 F. 536, 541 (1923).

the rights of other real property owners. The common law's recognition of this pragmatic difference between the use of water and use of land has been relied upon for claiming that water rights, because they are usufructuary, are a less constitutionally protected form of property right.[29]

The factor that gives any property right value, making it something for which compensation must be paid if the right is taken, is the control the property owner has over the use of the particular resource. Land has value because of its potential uses and non-uses. Although true that the right to exclude has constitutional value independent from the economic value of land, deriving from control over use, the economic value determines what compensation must be paid when land is taken. It is the same with water rights. The economic value of a water right is control over its use or non-use. In this sense, which is the only sense relevant to the Takings Clause, the usufructuary nature of water rights makes them similar to, rather than different from, land. However, the fact that the main stick in the water rights bundle is the right of use in no way lessens the constitutional protection afforded a water right. Much takings jurisprudence has focused on land, but that does not mean that rights in physically different resources like water or intellectual property warrant any less constitutional protection. The owner's exclusive rights of use or non-use give those rights economic value.

Appropriative water rights are generally understood to be usufructuary. A usufructuary interest consists of the right to use, but not own, the water.[30] In 1911, Samuel C. 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

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29. *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).

30. CLARK ET AL., *supra* note 1, at 349 (citing Wells A. Hutchins, *Selected Problems in the Law of Water Rights in the West*, Misc. Pub. No. 418 at 27 (USDA 1942)). *See also* Sherlock v. Greaves, 76 P.2d 87, 91 (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.").

> 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 possession and control, becomes private property during the period of possession.[31]

Although advocates of the uncompensated regulation of property interests in water have made much of the usufructuary nature of a water right, it should have no significance on the constitutional protections of the Fifth Amendment. Interests in water rights are described differently from interests in land because of the transient—and sometimes reusable—nature of the resource. While land is generally most effectively used by the actual possessor of the corpus of the resource, most water uses allow repeated use by successive water 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."[32] 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 unique resource. Usufructuary was never intended to express a peculiar limit on property rights in water or justify unusually broad exercise of the police power. Property rights in water

31. CLARK ET AL., *supra* note 1, at 349 (citing 1 WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 709, 739, 773–75, 792–95 (3d ed. 1911)).

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

have no lesser constitutional standing than property rights in land,[33] in easements,[34] in intellectual property, or in mineral estates.[35]

Even though a property interest in water has different characteristics than a property interest in land, it is generally considered to be real property.[36] 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."[37] 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.[38]

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 owner could only be divested in some legal manner."[39] Exactly thirty years later that same 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

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33. *See, e.g.*, Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1378 (Colo. 1982); Gen. Agric. Corp. v. Moore, 534 P.2d 859, 863–64 (Mont. 1975; Harrer v. N. Pac. Ry. Co., 410 P.2d 713, 715 (1966) (stating that water rights are "considered property of the highest order"); Sheep Mountain Cattle Co. v. State Dep't of Ecology, 726 P.2d 55, 57 (Wash. Ct. App. 1986) (holding that "[p]roperty owners have a vested interest in their water rights); Strait v. Brown, 16 Nev. 317, 322 (1881) (stating that [t]here['s] . . . no difficulty in recognizing a right to the use of water flowing in a stream as private property).

34. *See* United States v. Causby, 328 U.S. 256, 262, 266–67 (1946).

35. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922) (holding that coal interests were compensable property interest); Armstrong v. United States, 364 U.S. 40, 45–46 (1960); Whitney Benefits v. United States, 18 Cl. Ct. 394, 409 (1989).

36. CLARK ET AL., *supra* note 1, at 345. *See also* Carson City v. Estate of Lompa, 501 P.2d 662 (Nev. 1972).

37. CLARK ET AL., *supra* note 1, at 345 n.4.

38. *Id.* at 345 n.5.

39. 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).

> distinct injuries; both water rights and ditch rights are considered property of the highest order.[40]

Similarly, the Washington Court of Appeals stated, "[p]roperty owners have a vested interest in their water rights, and these rights are entitled to due process protection."[41] The Nevada Supreme Court reached the same conclusion, holding: "[t]here is . . . no difficulty in recognizing a right to the use of water flowing in a stream as private property."[42]

## 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.[43] The meaning of the Fifth Amendment language, "nor shall private property be taken for public use, without just compensation," would be the same if it were written as an affirmative authorization to take private property for a public use, upon payment of just compensation. As the Federal Circuit Court of Appeals stated in *Loveladies Harbor, Inc. v. United States*:

> [w]hat is not at issue is whether 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.[44]

The police power of the state is in no way diminished by the enforcement of the Takings Clause's mandate for just compensation.

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40. Harrer v. N. Pac. Ry. Co., 410 P.2d 713, 715 (Mont. 1966).

41. Sheep Mountain Cattle Co. v. State Dep't of Ecology, 726 P.2d 55, 57 (Wash. App. 1986).

42. Strait v. Brown, 16 Nev. 317, 322 (Nev. 1881).

43. U.S. Const. amend. V.

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

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.'"[45]

A seminal Supreme Court case dealing with takings, *Lingle v. Chevron U.S.A. Inc.*, established a clearer approach to takings jurisprudence by building on the fairness concept and deleting due process analysis from the Fifth Amendment takings analysis.[46] 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 which, in all fairness and justice, should be borne by the public as a whole.'"[47] 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

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

46. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540–42, 545 (2005).

47. *Id.* at 537 (quoting *Armstrong*, 364 U.S. at 49).

> 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.[48]

Similar to *Lingle*, the Court of Federal Claims in *Tulare*[49] started its analysis with the same often-quoted sentence from *Armstrong v. United States* discussing fairness.[50] After disposing of some contract legal theories, the Court of Federal Claims determined the nature of the alleged taking:

> 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, 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."
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> A regulatory taking, in contrast, arises when the government's regulation restricts the use to which an owner may put his property. In assessing whether a regulatory taking has occurred, courts generally employ the balancing test set forth in *Penn Central*, weighing the character of the government action, the economic impact of that action and the reasonableness of the property

48. *Id.* at 539 (citations omitted).

49. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313, 316 (2001).

50. *Armstrong*, 364 U.S. at 49.

> owner's investment-backed expectations. Regulations that are found to be too restrictive, however—i.e., those that deprive property of its entire economically beneficial or productive use—are commonly identified as categorical takings and, like physical takings, require no such balancing.[51]

In *Tulare*, the Court of Federal Claims faced the intersection of "the Endangered Species Act and California's century-old regime of private water rights . . . and the proper balance between them . . . ."[52] That court's use of the word "balance" seemed to foreshadow that a regulatory takings analysis would be applied to the plaintiff's claim for loss of water rights due to ESA-imposed restrictions. However, the court viewed the taking of water rights as a physical taking, reasoning:

> 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. 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 all value. . . . That complete occupation of property—an exclusive possession of plaintiffs' water-use rights for preservation of fish—mirrors the [physical] invasion present in Causby. To that 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.[53]

*United States v. Causby*, is the physical takings case involving real property referenced by the *Tulare* Court.[54] In *Causby*, the United States Supreme Court ruled that frequent flights immediately above a

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51. *Id.* at 318.
52. *Id.* at 314.
53. *Id.* at 319.
54. United States v. Causby, 328 U.S. 256 (1946).

landowner's property constituted a taking because: "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as if the United States had entered upon the surface of the land and taken exclusive possession of it."[55] The fact that an appropriative water right is usufructuary therefore supports, rather than undercuts, the conclusion that any government action that limits a water right holder from using the water constitutes a per se, physical taking. A mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself because a water right holder's sole entitlement is to the use of water.

After *Lingle* and *Lucas*, 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 Fifth Amendment jurisprudence 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?*
*E. If there is a taking, what is the value of just compensation for the taking?*

If regulations depriving use of water rights were consistently viewed by courts as per se, physical takings as in *Tulare*—an approach advocated by the authors—the analysis would be much simpler.

55. *Id.* at 261.

### *A. Is There A Constitutionally-Protected Property Right?*

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."[56] 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."[57] In *Lucas*, the Supreme Court reaffirmed that state law determines the "bundle of sticks" that inhere in a property owner's title.[58] Therefore, "[f]irst, a court determines whether the plaintiff possesses a valid interest in the property affected by the government action."[59]

As water rights are recognized as property rights under state law,[60] they are entitled to the same constitutional protection as any form of property.[61] Furthermore, courts have long recognized that water rights are

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56. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (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.

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

58. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n. 7 (1992).

59. 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*. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 281 (1943). *See also* Klamath Irrigation Dist. 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).

60. Walker v. United States, 69 Fed. Cl. 222, 230–32 (2005).

61. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001).

controlled by state law because Congress has repeatedly enacted laws specifying that state law governs private water rights.[62]

Normally, the parameters of real property rights include the right to exclude others,[63] the right of possession,[64] and the right to alienate.[65] Because of the peculiar nature of the water resource, water rights are deemed usufructuary rights and are defined by elements such as source, flow rate and/or volume, priority date, and purpose.[66] Former Colorado Supreme Court Justice Hobbs 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 to the appropriator's beneficial use; that beneficial use then becomes the basis, measure, and limit of the appropriation.[67]

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62. *See, e.g.*, Andrus v. Charlestone Stone Prods. Co., 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, 41 Cong. Ch. 236 (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"); Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 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").

63. Kaiser Aetna v. United States, 444 U.S. 164, 179–180 (1979) ("The right to exclude, so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

64. Cox Cable San Diego v. County of San Diego, 185 Cal. App. 3d 368, 376 (1986) ("[R]eal property includes the possession of, claim to, ownership of, or right to the possession of land….").

65. Rodrigue v. Rodrigue, 218 F.3d 432, 437 (5th Cir. 2000).

66. Mont. Code Ann. § 85–2–234(6) (2017).

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

Due to the prior appropriation doctrine, two primary elements of a water right are: (1) the amount of water that has been put to beneficial use and (2) the priority of water rights relative to each other.[68] Changing what constitutes beneficial use or shuffling priority dates can therefore diminish the value of, or "take," that right.[69] The prior appropriation doctrine greatly values use of water rights, so much so that non-use or non-beneficial use can result in forfeiture.[70]

Beneficial use can also serve as the measure of protection afforded or not afforded to an appropriative water right. As the Federal Circuit has described California water rights:

> Although appropriative water rights are viewed as property under California law, those rights are limited to the "beneficial use" of the water involved. This principle, set forth explicitly in the California Constitution, limits water rights holders to the use of the amount of water "reasonably required for the beneficial use to be served . . . ." The same limitation is found in the California Water Code. California courts have found the beneficial use limitation a valid exercise of state power to regulate water rights for public benefit and have deemed it an "overriding constitutional limitation" on those rights.[71]

Similar to this California case, Montana's Supreme Court allowed the state's Department of Natural Resources and Conservation ("DNRC") to modify the beneficial use of water during an administrative process to change a water right.[72] The DNRC decreased the volume of the water right based on the department's calculation of consumptive use, which therefore allowed the DNRC to modify the beneficial use element of a water right.[73] This is arguably an unconstitutional taking of a water right.

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68. State Dept. of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993).

69. General Agric. Corp. v. Moore, 534 P.2d 859, 166 Mont. 510, 516–17 (Mont. 1975) ("Priority in appropriation of water is a valuable right. . . . [T]o deprive a person of his priority is to deprive him of a most valuable property right.").

70. Mont. Code Ann. § 85–2–227(3) (2017).

71. Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1354–55 (Fed. Cir. 2013).

72. Hohenlohe v. State, 240 P.3d 628, 357 Mont. 438 (Mont. 2010).

73. *Id.* at ¶ 70.

Overall, water rights in western states are protected so long as they are put to beneficial use by the rights holder, although like real property, they remain subject to the government's power to take that right pursuant to due process and in conformance with the Fifth Amendment's Takings Clause. The value of a water right rests entirely on the right to use water. Thus, any government action that precludes use of the water right deprives the owner of some—or arguably all as recognized in *Tulare*—of the economic value of the water right, meaning just compensation must be paid to the owner.

## *B. IS THE GOVERNMENT ACTION A CATEGORICAL TAKING?*

In *Lucas*, the Court acknowledged that although it had not followed any "set formula" in its 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."[74] The two categorical, or per se, takings situations are physical invasion of property and regulation that denies all economically beneficial use of the property.[75]

### *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.[76] The most obvious case of physical invasion occurs when government seeks to locate public facilities like roads and buildings on private property. As the Court stated in *Dolan*, "In general . . . no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasions]."[77] Recently, the imposition of exactions has tempered this requirement. For example, in *Dolan*, the Supreme Court recognized that conditions imposed by a city on its approval of a building permit, including "[d]edications for streets, sidewalks, and other public ways are

74. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
75. *Id.*
76. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).
77. *Id.*

generally reasonable exactions to avoid excessive congestion from a proposed property use."[78]

The theory of this per se takings category was explained in *Loretto v. Teleprompter Manhattan CATV Corporation*,[79] a case involving a relatively minor—1.5 square foot—state-mandated, physical invasion of private property:

> To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, 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.[80]

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.[81] 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,[82] federal courts have consistently held that governmental orders that deprive landowners of the right to exclude others from their property are per se takings.[83]

Courts traditionally begin a physical takings inquiry by first determining whether the government action appropriated the private 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

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78. Dolan v. City of Tigard, 512 U.S. 374, 395 (1994).

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

80. *Id.* at 435.

81. *Id*. at 436 n. 12.

82. *E.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992).

83. *See, e.g.*, Nollan v. Cal. Coastal Comm'n 483 U.S. 825, 831–32 (1987); 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).

of his rights or rises to the magnitude of an appropriation of some interest in his property permanently to the use of the [g]overnment."[84] This "appropriation" inquiry readily applies to appropriative water rights given that "it is the character of the invasion, not the amount of damage which results from it' that determines whether a taking occurred."[85]

Because water is transient and not possessed in the same way as land, it may appear at first glance that water rights are not subject to physical invasion. As the court recognized in *Hage*, "[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."[86]

However, an important trilogy of United States Supreme Court cases, beginning with *International Paper Co. v. United States*, established that regulation restricting the use of water is a physical invasion amounting to a taking of private water rights by the government.[87] During World War I, the United States issued a requisition order for all hydroelectric power from the Niagara Falls Power Company.[88] The power company leased a portion of its water to plaintiff International Paper Company, which diverted the water via a canal to its mill.[89] In response to the United States' order to "cut off the water being taken" by International Paper to increase hydroelectric power production, Niagara Power ceased diverting water to International Paper.[90] International Paper was unable to operate its mill for nearly ten months as a result.[91] Although the government did not physically take over the operations of either Niagara Power or International Paper, nor did it physically direct the flow

84. National By-Products, Inc. v. United States, 405 F.2d 1256, 1273–74 (1969).

85. Baird v. United States, 5 Cl. Ct. 324, 329 (1984) (quoting United States v. Cress, 243 U.S. 316, 327).
(1917)).

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

87. 282 U.S. 399 (1931).

88. *Id.* at 405.

89. *Id.* at 404–05.

90. *Id*. at 405–06.

91. *Id.* at 406.

of water, the Supreme Court still found that the government directly appropriated water that International Paper had a right to use.[92]

In *United States v. Gerlach Live Stock Co.*, Gerlach possessed riparian water rights for irrigation of its grasslands by natural seasonal overflow of the San Joaquin River in California.[93] After the United States Bureau of Reclamation built Friant Dam upstream of Gerlach's land, "a dry river bed" was left downstream of the dam, and the overflow irrigation of Gerlach's lands virtually ceased.[94] The United States had caused water to be physically diverted away from Gerlach for storage and delivery to third parties who held water contracts.[95] While the Friant Dam served a public purpose of "mak[ing] water available where it would be of the greatest service," the Supreme Court concluded the government's action was a physical taking.[96]

In *Dugan v. Rank*, the Supreme Court provided guidance on the distinction between regulatory and physical takings analysis with respect to water rights.[97] *Dugan* also involved claims arising out of the United States' physical diversion of water for use by third parties through construction of the Friant Dam. Landowners along the San Joaquin River who owned riparian and other rights in the river alleged that the Bureau of Reclamation's upstream storage of water behind Friant Dam left insufficient water to supply their water rights.[98] The Supreme Court again characterized the government's action as a physical taking.[99]

In *Tulare*, the Court relied on this trilogy of cases to hold that plaintiff's assertion of a physical taking was the correct analysis because, "the distinction between a physical invasion and a 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

92. *Id.* at 407 ("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.").

93. 339 U.S. 725, 729–30 (1950).

94. *Id.*

95. *Id.*

96. *Id.* at 728.

97. 372 U.S. 609, 614 (1963).

98. *Id.* at 616.

99. *Id.* at 625–26.

of the property and to limit his exploitation of it.'"[100] *Tulare* analogized a government restriction on the use of water rights to a physical taking of land, reasoning that the water rights had been rendered useless in the same manner that land had been rendered useless by the frequency and altitude of overhead flights in *United States v. Causby*, 328 U.S. 256, 265 (1946).[101]

*Tulare* and the trilogy of Supreme Court cases would go on to inform the 2008 *Casitas* decision. *Casitas* recognized that a physical taking is the paradigmatic form of a taking and occurs by direct government appropriation or physical invasion of private property.[102] *Casitas* also recognized that two categories of regulatory action can be deemed per se takings in the same manner that physical takings are viewed as per se takings.[103] These categories are: (1) when the government requires an owner to suffer a permanent physical property invasion, however minor—as in *Loretto*—and (2) when regulation completely deprives an owner of all economically beneficial property use, as in *Lucas*. Regulatory takings outside of those narrow categories are governed by *Penn Central* analysis.[104] The *Casitas* Court turned to the trilogy of Supreme Court cases for guidance, noting that in all three, "the United States physically diverted the water, or caused water to be diverted away from the plaintiffs' property."[105]

*Casitas* found that the governmental regulation at issue resulted in a physical diversion of water away from the plaintiff: "[T]he government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the [plaintiff's canal] . . . ."[106] Although not all of the plaintiff's water was taken, in the context of physical takings jurisprudence, any impairment, however minor, is a taking.[107] The fact that the government took Casitas' water for a public purpose—the preservation of endangered fish under the Endangered

100. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) (citing United States v. Causby, 328 U.S. 256, 265 (1946)).

101. *Tulare*, 49 Fed. Cl. at 319.

102. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1288 (Fed. Cir. 2008).

103. *Id*. at 1288–89.

104. Katzin v. United States, 908 F.3d 1350, 1361 (Fed. Cir. 2018).

105. *Casitas*, 543 F.3d at 1289–90.

106. *Id*. at 1291.

107. *Id*. at 1290 (citing Dugan v. Rank, 372 U.S. 609 (1963)).

Species Act—did not diminish the nature of the physical taking. "When the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting West Coast Steelhead Trout, this is a governmental use of the water."[108] Any diversion of a private, usufructuary water right for a public purpose is a per se taking.[109] "The active hand of the government," in diverting water away from Casitas, "permanently" took that water from Casitas.[110] The taking of water "is not temporary, and it does not leave the right in the same state it was before the government action. The water, and Casitas' right to use that water, is forever gone."[111]

Recently, in *Klamath*, the Court of Federal Claims revisited the issue of whether a taking of water rights should be analyzed as regulatory or physical taking.[112] The plaintiffs are water users in the Klamath River Basin, which receives water from the Klamath Irrigation Project.[113] The United States Bureau of Reclamation operates the Klamath Irrigation Project.[114] The irrigation project's "dual purposes of serving agricultural uses and providing for the needs of wildlife" are "subject to the requirements of the Endangered Species Act."[115] In order to comply with the requirements of the Endangered Species Act, the Bureau of Reclamation withheld delivery of irrigation water for several months.[116] When water was finally released, it was alleged to have been too late in the growing season to grow crops.

The *Klamath* court began its inquiry into whether the plaintiffs had suffered a physical or regulatory taking of their water rights by noting:

> Decisions of the Supreme Court have drawn a clear line between physical and regulatory takings. The former involves a physical occupation or destruction of property, while the latter involve restrictions on the use of the

108. *Id*. at 1292–93.
109. *Id*. at 1292.
110. *Id*.
111. *Id*. at 1296.
112. Klamath Irrigation v. United States, 129 Fed. Cl. 722 (2016).
113. *Id*. at 724.
114. *Id*.
115. *Id*. at 725–26.
116. *Id*. at 726.

> property. The distinction is important because physical takings constitute per se takings and impose a categorical duty on the government to compensate the owner, whereas regulatory takings generally require balancing and complex factual assessments, using the so-called *Penn Central* test. The United States Court of Appeals for the Federal Circuit has held that our focus should primarily be on the character of the government action when determining whether a physical or regulatory taking has occurred.[117]

The court then noted the facts it was presented with were "very similar to those in *Casitas*."[118] It cited *Casitas* for its determination that "the appropriate reference point in time to determine whether the United States caused a physical diversion is the status quo before the challenged government action."[119] For users of irrigation water in the Klamath Basin, the status quo prior to the government's action was "generally receiv[ing] as much water for irrigation as they needed."[120] By refusing to release water, "the government prevented water that would have, under the status quo ante, flowed into the Klamath Project and to the plaintiffs."[121] Governmental action "arrested and diverted waters destined for the plaintiffs in the same manner the Supreme Court found to have caused a physical taking in *Gerlach* and *Dugan*."[122] The Bureau of Reclamation's retention of water "amount[s] to a physical diversion of water."[123] The *Klamath* court then found that a regulatory taking analysis was not appropriate because governmental action, not regulation, deprived the plaintiffs of their water.[124] Accordingly, the government's actions should have been analyzed as a per se, physical taking.[125]

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117. *Id*. at 730.
118. *Id*. at 733.
119. *Id*. at 734.
120. *Id*.
121. *Id*.
122. *Id*.
123. *Id*.
124. *Id.* at 734–35.
125. *Id.* at 737.

### *C. Has There Been A Partial Taking?*

Current Supreme Court takings doctrine draws a distinction between partial and total takings. In *Keystone Bituminous Coal Association v. DeBenedictis*, the Court found no taking where a state regulation required owners of coal to leave 50 percent of the minable coal in place.[126] In dissent, Chief Justice Rehnquist challenged the majority's broad definition of the relevant mass of property to consider when analyzing a taking:

> 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.[127]

Three forms of partial takings exist. One is where a stick in the bundle of rights is taken, but the other sticks remain. The result is a reduction in, but not elimination of, economic value. A second occurs where all sticks in the bundle are retained, but with restrictions on the use of one or more sticks. The third form of partial taking occurs where a regulation is applied to only a portion of the physical extent of the property. Under current takings jurisprudence, the first form is a taking of the whole of a severable stick and is indefensible as Chief Justice Rehnquist argued. The second form is what *Penn Central*'s balancing test applies to and is therefore only defensible if *Penn Central* remains defensible. The third form, however, is wholly indefensible in light of a physical occupation analysis.

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126. 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 *Pennsylvania Coal v. Mahon* case in which, on very similar facts, the Court found a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

127. *DeBenedictis*, 480 U.S., at 519.

This distinction in jurisprudence 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 a state if it took even a small percentage from random citizens' bank accounts. From the point of view of the burglary victim or a 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 taking one stick from the bundle can amount to a total taking. There is no logical reason to distinguish the partial and total takings of a single stick in the bundle, especially in the bundle of property interests in water rights where only a single stick—the right of use—provides the true measure of economic value. In terms of economic impact, the difference is one of degree, but the Fifth Amendment does not permit for distinctions of degree in the redistribution of wealth.[128]

Since *Lucas*, these issues have received close attention in the Federal Circuit. In *Florida Rock Industries, Inc. v. United States*,[129] the appeals court held that a takings analysis is not an "all or nothing proposition."[130] Although the Federal Circuit remanded the case back to the Court of Federal Claims, which had found for the property owner, the 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.[131]

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128. *E.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 124, 115 (1978) (Supreme Court decisions have not been without suggestions that the wealth of affected property owners is relevant to whether or not a taking has occurred. The *Penn Central* majority thought it relevant that Penn Central owned other properties in Manhattan.); *See also DeBenedictis*, 480 U.S. at 478–79 (it was considered relevant that Keystone owned other properties in western Pennsylvania); *C.f.* Michael C. Blumm, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005) (provides an extreme view that endorses the concepts expressed in *Penn Central* and *DeBenedictis*).

129. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

130. *Id.* at 1572.

131. *Id*. at 1567.

Florida Rock owned 1,560 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 based on its conclusion that the proposed mining would cause irremediable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity.[132] 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 percent. The Federal Circuit questioned the method of assessment, and therefore the $500 per acre figure, but not the principle that less than total loss of value might be a taking.[133] "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."[134]

In a subsequent opinion, Judge Plager addressed in *Loveladies Harbor v. United States* what he labels "the denominator problem.[135] The denominator problem is what happens when the determination of whether a categorical taking depends on how much of the property owner's property is impacted by the regulation.[136] 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.[137] The claimants had already developed and sold most of the 199 acres not included in the remaining 51 acres and 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.[138] These facts presented the Court of Appeals for the Federal Circuit with

132. *Id.* at 1563.
133. *Id.* at 1567.
134. *Id.* at 1569.
135. 28 F.3d 1171, 1180 (1994).
136. *Id.* For example, if one owner owns all 10 acres that are being impacted by a regulation and the adjoining, second land owner owns a total of 50 acres, but only 5 acres are being impacted, which would mean that the second landowner still had residual value in his property and therefore did not experience a categorical taking.
137. *Id*. at 1173–74.
138. *Id*. at 1174.

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 property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes."[139]

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.[140] The majority thus rejected the possibility of simply precluding regulatory takings from the reach of the Fifth Amendment, and was left with the problem of distinguishing between "a partial regulatory taking and the mere 'diminution in value' that often accompanies otherwise valid regulatory impositions."[141] Justice Holmes saw the same dilemma in *Pennsylvania Coal Co. v. Mahon*, 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,"[142] the judiciary's task is to determine when government regulation goes "too far."[143] This formulation, according to the *Florida Rock* majority, "requires case by case adjudication," an approach which they believe their opinion follows.[144] The Court stated, "[p]roperty owners and regulators, attempting to predict whether a

139. 18 F.3d at 1569.
140. *Id.*
141. *Id.*
142. 260 U.S. 393, 413 (1922).
143. *Id.* at 415.
144. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1570 (Fed. Cir. 1994).

governmental regulation has gone too far, will still need to use judgment and exercise care in making decisions."[145]

Although the *Florida Rock* opinion does not provide "a bright line, simply drawn,"[146] it eliminates some of the "ad hocery" problem. Taken by itself, the "too far" language from *Pennsylvania Coal* is not helpful in drawing the distinction between regulatory taking and incidental diminution in value.[147] But the *Florida Rock* majority applied Holmes' concept of "reciprocity of advantage" from *Penn Central* 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.'"[148] If there are "direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment,"[149] 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 requires compensation.[150] 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."[151]

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145. *Id.* at 1571.

146. *Id.*

147. *Id.* at 1568. ("Since the Supreme Court's decision in [*Pennsylvania Coal*], the problem for courts has been to determine the extent to which the Fifth Amendment burdens the exercise of the police power through regulation, that is, to determine when a particular regulation somehow—in the words of Justice Holmes—goes "too far," and therefore effects a taking.").

148. *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.

149. Fla. Rock Indus., Inc. v. United States, 18 F.3d at 1571.

150. *Id.*

151. *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 first determining whether the government regulation takes a property right defined by state law, and second, whether there is a per se or physical taking, or whether there is a partial taking, Supreme Court takings doctrine, like much of current constitutional law, ultimately requires a balancing of interests. In takings cases, the courts must balance the property owner's loss against the public benefits. This balancing test grows directly out of the legacy of *Penn Central*, but it is the inevitable consequence of the "too far" test from *Pennsylvania Coal*.[152]

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.[153] Because balancing tests are by their nature ad hoc, it is impossible to generalize about the likely outcome in water rights taking cases. However, the economic impacts of loss of water can be substantial and water users often invest 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 compensation for the taking of water rights.[154]

Although *Penn Central*'s 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 the apparent recognition of compensable partial takings has made it easier to find for the property owner without engaging in a balancing of the private burden imposed and the public benefit gained. While a court could find that property owners have "shown that their private interest in developing and utilizing their property outweighs the

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152. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 829 (2006).

153. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

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

public value in . . . [the regulation],"[155] courts instead frequently defer to legislative judgment about the net public benefits of a regulation of property.[156]

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.[157] The *Loveladies Harbor* 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 state?"[158] 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."[159] 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 unconstitutional invasion in the *Loretto* case where economic loss for the property owner was minimal—far less than the costs resulting from the prohibition in *Penn Central* on the use of the valuable air space above Grand Central Terminal.[160] Yet the property

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155. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 399 (Cl. Ct. 1988).

156. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005) (determining that taking property for commercial development was a net public benefit).

157. *Loveladies Harbor*, 28 F.3d at 1178–79.

158. *Loveladies Harbor*, 28 F.3d at 1179.

159. Fla. Rock Indus., Inc. v. United States, 18 F.3d 1571 (Fed. Cir. 1994).

160. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a regulation requiring an apartment building owner to allow

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 though the ordinance dramatically reduced the value of Penn Central's property.[161] 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.[162]

In *Penn Central* the Court acknowledged that—"The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty"[163]—and admitted that it had been unable to develop any "set formula" for determining when a regulation goes so far as to require compensation.[164] The Court then proceeded to identify the significant factors from 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.[165]

Many of these questions raised in a *Penn Central* analysis have already been addressed in prior tiers of takings analysis. The character of governmental action is 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 analysis.[166] It is redundant to apply these same tests especially to a water right in which value is entirely dependent on the right of use. Therefore, there is no need to balance whether the property owner retains any value since taking the use right takes everything.

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cable television access to private property was a taking; but *c.f.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (the *Penn Central* Court did not find a taking when the historic preservation law forbade the construction of an office building on private property). The latter situation was not a taking and yet had a much greater impact on the property owner).

161. *Penn Cent.*, 438 U.S. at 104.
162. *Id.* at 130–36.
163. *Id.* at 123.
164. *Id.* at 124.
165. *Id.* at 124–28.
166. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

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, which is whether there is categorical taking. Perhaps it is time to collapse the multi-factor balancing test into the second 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 test is somewhat circular.

Under the *Penn Central* multi-factor balancing test, the outcome would depend upon an ad hoc, case by case, factual analysis. In *Lingle*, 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.'"[167] 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."[168] Such language indicates that the Court is resurrecting the principles embodied in the Fifth 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. Therefore, if the lower courts applied takings analyses with consistency, there may no longer by what seems to be such an ad hoc approach to takings cases from the lower courts up to the Supreme Court.

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 criterion used to determine a taking. As Chief Justice Rehnquist said, the desire to improve public conditions does not justify circumventing the "constitutional way" of

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167. *Id.* at 536–37 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

168. Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

paying the property owner.[169] The Fifth Amendment acknowledges that private property can be taken for a public purpose, but only if just compensation is paid.

## 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 for water rights holders.[170] 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 doctrine provides a trump of existing rights, assuming the doctrine can be demonstrated to apply to the waters in question and to include the public uses being advocated. But the common law public trust doctrine was always limited to navigation and fishing in navigable waters. While a few courts have expanded both the protected public uses and the affected waters the doctrine remains of limited scope in most states.[171] Thus, justifying constraints on water rights for other public purposes and on non-navigable waters requires that courts effectively amend that longstanding common law doctrine. A taking without compensation could also result from the Endangered Species Act as occurred in *Tulare* and *Casitas*, if courts view wetlands regulations legislation, or water quality regulation as mere implementations of preexisting public rights.

This redefinition of property rights via the "discovery" of pre-existing or somehow superior public rights is often justified by the asserted importance of protecting the environment and public health. But such justification flies in the face of the Fifth Amendment, which does not make exceptions based on the perceived importance of the public purpose.

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169. *Dolan*, 512 U.S. at 396.

170. 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 & SOC'Y REV. 10, Winter 1976, at 236, 36.

171. *E.g.*, Montana Coal. for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (Mont. 1984).

Indeed, where the public purpose is thought to be particularly important, compensation for the taking of private property rights should be least controversial. 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. Uses causing harms that must be compensated for under nuisance law and which the state can therefore regulate are uses the property owner never had a right to engage in. Their prohibition by regulation takes nothing. The same is true for similar regulations of use of water rights if there was a common law nuisance such as pollution or flooding—two unlawful invasions of another owner's property. In cases of nuisance, the property owner does not warrant 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 must compensate property owners for what is to be taken from them. Some commentators argue 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.[172]

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.

## 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 non-

172. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 258 (1990).

consumptive, the law needs to recognize public rights in water.[173] Lynda Butler argues that the public interest needs to be recognized as a property right.[174] 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.[175] 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 intervene and divine the public interest that needs protection.

Even accepting that this is true, it does not alter the takings analysis. The point of the Takings Clause is a recognition that sometimes the pursuit of the public interest requires a taking of property rights, which is allowed when compensation is paid. But the assumption that environmental objectives will only be achieved by constraining property rights, or that private property owners will not take measures to protect the environment, is incorrect.

Private property owners have strong incentives to protect the environment where doing so preserves or enhances the value of their property. While it is certainly true that some uses of property have harmful impacts on the environment, environmental stewardship is unlikely to be the result of uncompensated takings. Rather the threat of uncompensated taking creates incentives for property owners to extract other values before a regulation is imposed. While it is possible for environmental interests to acquire properties from those who would engage in environmentally harmful activities, market failures often create obstacles to such transactions. In such cases regulation is the appropriate remedy, but not without compensation. If one can acquire through regulation without compensation what might otherwise have been accomplished through purchase, regulation will always be the preferred option. And it will come at the expense of property owners rather than at the expense of the public beneficiaries.

In addition to finding the most cost-effective approach to environmental protection, we should be equally concerned to respecting

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173. Lynda L. Butler, *Environmental Water Rights: An Evolving Concept of Public Property*, 9 VA. ENVTL. L.J. 323 (1990). *See generally*, Sax, supra note 172; Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990).

174. Butler, *supra* note 173, at 326.

175. Sax, *supra* note 172, at 258.

the mandates of the U.S. Constitution—including the separation of powers. In an eminent domain proceeding the determination of whether the cost of property acquisition is offset by the benefits to the public rests with the elected executive and legislative authorities. But when the question is raised in an inverse condemnation or takings action in court, the policy choice falls to often unelected judges. In the context of water rights, as discussed *supra*, at least one court has called beneficial use "an evolving concept" that "can be expanded to reflect changes in society's recognition of the value of new uses of our resources."[176] But the courts have no particular expertise in divining the public interest and, at least at the federal level, they are not democratic institutions. A takings doctrine requiring courts to balance individual interests against those of the public is a prescription, indeed a mandate, for judicial policy making. The *Penn Central* balancing approach effectively requires courts to make substantive decisions of what is the public interest. Such policy making by the courts should concern advocates of individual freedom as well as advocates of democratic government. Under the American system of government, the legislature (or the people acting directly) is, by definition, the final arbiter of the public interest. Courts should adhere to their constitutionally-prescribed duty to enforce the law that, among other things, includes enforcing the Fifth Amendment Takings Clause.

The foregoing analysis of takings law as it applies to water rights suggests an approach that will insulate the courts from straying beyond their constitutional role into policy making. If all regulations of water use are understood to be physical takings, the per se rule of *Loretto* applies and there is no need for courts to engage in the balancing of private rights and the public interest.

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

176. In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 835 P.2d 273, 279 (Wyo. 1992).

control, it is not the owners who make decisions, but politicians and bureaucrats. The citizen as beneficiary is often a fiction.[177]

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, as commonly happens when a natural resource is supposedly valued by the many, but owned by none.[178] 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."[179] 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, 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.[180]

Similarly, the authors of this article advocate providing private citizens with the means to value the resources instead of relying on the government's guesstimates in response to political pressures. 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 clearly definable interests in water rights. Critical to

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177. RICHARD L. STROUP & JOHN A. BADEN, NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT, 7–8 (1983).

178. TERRY L. ANDERSON & DONALD R. LEAL, *supra* note 8, at 161.

179. Anderson & Leal, *supra* note 178, at 161. *See* Richard L. Stroup, *Political Behavior*, THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 45–50 (David R. Henderson, Ph.D. Ed. 1993) (explaining why the political arena does not provide satisfactory results in resolving natural resource issues or other issues of scarcity).

180. Donald R. Leal, *Yes, Private Owners Protect the Environment*, (1993) (unpublished briefing paper, Property and Environment Research Center).

this system is enforcement of the Fifth Amendment's protection of property rights.

## VI. CONCLUSION

In her dissenting opinion to the *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."[181] 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]."[182] 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.[183] In the case of water rights, which deserve the same protection as other real property rights in the West, but are also different in that they are usufructuary rights, or only use rights, it is even more important that the courts provide constitutional protections to water rights. If the government can acquire through regulation without compensation what might otherwise have been accomplished through paying just compensation, government regulation will always be the preferred option. And it will come at the expense of property owners rather than at the expense of public beneficiaries. Such an outcome would be a violation of "security of Property" as articulated by Alexander Hamilton, and as cited by Justice O'Connor in *Kelo*.

181. Kelo v. City of New London, 545 U.S. 469, 489 (2005) (O'Connor, J., dissenting) (citing Brown v. Legal Found. of Washington, 538 U.S. 216, 231–32 (2003)).

182. *Id.* (citing 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1934)).

183. *Id.*