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GOVERNMENTAL INTERFERENCE WITH THE USE OF WATER: WHEN DO UNCONSTITUTIONAL "TAKINGS" OCCUR?

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† The authors of this article are members and staff of the Western States Water Council's (WSWC) Legal Committee, including James H. Davenport, Craig Bell, Chad Shattuck, Bill Staudenmaier, Maria O'Brien, John Utton, Norman K. Johnson, Norman Semanko, and Sara Price. The primary purpose of the article is to explore whether regulatory takings jurisprudence significantly impinges on the authority of state water regulators. Having completed the article, the reader will likely conclude, as have the authors, that this jurisprudence does not affect the authority of state regulators. Please note, however, the views presented here are the authors' alone and do not necessarily reflect the views of the WSWC or its Legal Committee.

Do governmental regulatory, contractual, or proprietary actions that interfere with private rights to use water, generically characterized as "water rights," comprise an unconstitutional taking of those rights in a manner that requires compensation under the Fifth or Fourteenth Amendments? Recent litigation has generated an increased interest in the law of unconstitutional "takings" of property as it applies to water rights.[1] Because of limited water availability in the West, in the face of growing demands for water, interest in the topic has intensified.

Any analysis of whether the government has interfered with a legally defensible interest,[2] such as a water right, can be broken into four

1. *See, e.g.*, Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (holding that a "physical" taking requiring compensation occurred when state-recognized, contracted water rights were affected by actions of United States Fish and Wildlife Service and the National Marine Fisheries Service securing water for endangered species protection in California's Tulare Lake Basin); Okanogan County v. Nat'l Marine Fisheries Serv., No. CS-01-192-RHW, 2002 U.S. Dist. LEXIS 13625 (E.D. Wash. Mar. 13, 2001), *aff'd*, 347 F.3d 1081 (9th Cir. 2003) (holding that U.S. Forest Service possessed authority to impose permit conditions that stopped the diversion of water for farmland irrigation in order to benefit an endangered species of fish in the Methow River); Rio Grande Silvery Minnow v. Keys, 356 F.Supp. 2d 1222 (D. N.M. 2002), *aff'd*, 333 F.3d 1109 (10th Cir. 2003), *vacated*, 355 F. 3d 1215 (10th Cir. 2004) (finding, initially, that under the authority of the Endangered Species Act, the Bureau of Reclamation must release contracted reservoir water to increase flows on the middle Rio Grande to protect the Rio Grande silvery minnow; the Tenth Circuit later vacated this ruling due to mootness). Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005) (holding claims of Klamath Basin irrigators whose water deliveries were cut off to preserve endangered species were not compensable takings). This article discusses these cases in more depth in the text below.

2. This article uses the terms "legally defensible interest" and "private property" interchangeably. The term "legally defensible interest" is intended to describe any interest held by a non-governmental entity that the owner can protect against interference by another person through adjudication in federal or state courts. This phrase is

basic questions. First, what particular legally defensible interest is involved? Second, what was the governmental action constituting interference with the legally defensible interest? Third, what takings analysis – physical or regulatory – should the government apply? Fourth, how should the government measure compensation?[3]

The Fifth and Fourteenth Amendments refer to "private property" and "property" respectively.[4] In 1787, when the states adopted the Constitution, the law of property was based primarily on the common law of real and personal property.[5] At that time, riparian rights included the right to use water, a right inherent in real property adjacent to surface water.[6] Private property "taken for public use" would likely have included property expropriated for forts, arsenals, or public roads, or personal property such as crops or residences commandeered for the support of armies. With abundant water resources in flowing rivers and streams, it is unlikely the drafters of the Constitution or Bill of Rights contemplated the appropriation of private rights to use water as a necessary component of the public weal.

Although historical context may limit the term "property" as used in the Fifth and Fourteenth Amendments, the United States Supreme Court has chosen to interpret "privately held interests" more broadly than the drafters originally envisioned.[7] Contemporary courts have treated the right to use water as a legally defensible interest, holding "[u]nder both the due process and the takings clause, property interests are not created by the Constitution itself, but are derived from other sources 'such as state, federal, or common law.'"[8] As a result,

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broad enough to include the panoply of rights typically called "water rights" or the "right to use water" as well as interests created by contract, grant, use, prescription, or by declaration (e.g., private intellectual property interests). *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-314 (1993) (recognizing such things as satellite transmitted signals as a type of private property even though these property interests did not exist when the Fifth and Fourteenth Amendments were added to the Constitution).

3. *See* Hage v. United States, 51 Fed. Cl. 570, 573 (2002) ("As in every takings claim, the court must decide: first, do plaintiffs own the property at issue; second, did the government take the property; and if so, what is the 'just compensation' due the plaintiffs.").

4. U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1.

5. *See* 1 WATERS AND WATER RIGHTS § 7.01 (Robert E. Beck ed., repl. vol. 2001) (1991).

6. *Id.*

7. The Fifth Amendment was proposed in 1789, and ratified in 1791. U.S. CONST. amend. V. Congress proposed the Fourteenth Amendment in 1866, following the Civil War, in the context of protecting all citizens from government encroachment on private interests. The Fourteenth Amendment was ratified in 1868. U.S. CONST. amend. XIV. Concepts of private property have evolved significantly since the proposal and enactment of these amendments.

8. Stockton E. Water Dist. v. United States, 62 Fed. Cl. 379, 394 (2004) (quoting Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1376 (Fed. Cir. 2004)).

there is little doubt that the right to use water, generally, is a legally defensible interest that stands on equal footing with other traditional property rights.

Appropriative water rights, however, pose unique problems for takings protection. As one scholar aptly noted:

> [W]ater rights have *less* protection than most other property rights for several reasons . . . (a) because their existence may intrude on a public common, they are subject to several original public prior claims, such as the navigation servitude and the public trust, and to laws protecting commons, such as water pollution laws; (b) their original definition, limited to beneficial and non-wasteful uses, imposes limits beyond those that constrain most property rights; (c) insofar as water rights (unlike most other property rights) are granted by permit, they are subject to constraints articulated in the permits.[9]

Contractual water rights are difficult to characterize as a defensible property interest because contractual contingencies may reduce the certainty of the right.[10] Here, as in other areas of takings jurisprudence, the case law is still evolving, and many uncertainties remain regarding the scope and nature of defensible interests.

Water rights are also unique because they vary in both their origins and attributes. Water rights may be created by the common law of property or by state and federal statutes.[11] This variety in origin may explain the variety of apparently conflicting cases.

Because attributes of a water right originate from state law, federal statutes, or contract law, examining whether governmental regulatory actions constitute "takings" necessarily requires investigation into the regulation's effects on attributes of a water right. Therefore, this article discusses cases involving regulatory takings of the following categories of water rights:

1. Riparian Property Interests
2. Appropriative Water Rights
3. The Right to Access a Water Right
4. Water Rights Created by Contract
5. Water Rights Created as an Incident of Congressional Reservation

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9. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990).

10. *See, e.g.*, Stockton E. Water Dist., 69 Fed.Cl. at 383-85.

11. For example, the federal government can reserve water rights for Indian Tribes or to serve the purposes of federally reserved land. *See* Winters v. United States, 207 U.S. 564, 577 (1908); Cappaert v. United States, 426 U.S. 128,145-47 (1976). State legislatures can create water rights through statutes defining diversion and beneficial use or through general stream adjudications, which may including federal interests subject to state jurisdiction under the McCarran Act.

This article does not address regulatory takings of interests in groundwater because of the wide variety of state law pertaining to ground water rights. Cases in states adopting the "English Rule"[12] likely have different outcomes than those in states who have adopted the "American" or "Reasonable Use Rule."[13] In western states, where prior appropriation is the law,[14] this doctrine will likely produce different legal outcomes. Additionally, the hydrologic connection between ground water and surface water may produce different legal outcomes in states whose courts acknowledge this principle.[15] Although analysis of these groundwater cases is a worthy project, it is not the focus of this article.

States typically infuse a water right with ultimate public ownership even after a citizen establishes a valid right to use water.[16] This article considers issues related to governmental interference with the exercise of water rights premised on the retained governmental interest. In some states, the state legislature has codified these interests in such concepts as the "public trust doctrine."[17]

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12. The English Rule, first stated in Acton v. Blundel, provides that, absent malice or willful waste, a landowner has the right to take all the groundwater he can capture from under his land, and do with it as he pleases, and will not be liable to neighboring landowners even if in doing so he deprives his neighbor of the use of the water. Acton v. Blundel, 152 Eng. Rep. 1223, 1235 (1843). The English Rule is actually a rule of tort law, rather than a rule of property law. The "English Rule" is used in a few American jurisdictions including Washington D.C. *See* United States v. Alexander, 148 U.S. 186, 192 (1893). In Texas, the legal principle is refereed to as the "Rule of Capture." *See* Sipriano v. Great Spring Waters of Am., 1 S.W.3d 75 (Tex. 1999); Denis v. Kickapoo Land Co., 771 S.W.2d 235, 236 (Tex. Ct. App. 1989); City of Sherman v. Public Utility Comm'n, 643 S.W.2d 681, 686 (Tex. 1983); City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 801 (Tex. 1955); Houston & Tex. Central Ry. Co. v. East, 81 S.W. 279, 280 (Tex. 1904).

13. Most eastern states have adopted the American Rule. The American rule provides that a "landowner, in dealing with surface water, is entitled to take only so such steps as are reasonable in light of all the circumstances of relative advantage to the actor and the disadvantage to the adjoining landowners, as well as social utility." Ridge Line, Inc. v. United States, 346 F.3d 1346, 1357 (Fed. Cir. 2003). *See also* Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979) (a landowner may use his "own property so as not to injure that of another"); Koch v. Wick, 87 So.2d 47 (Fla. 1956); Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 577 (1862).

14. *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 111 (3rd ed. 2000) (1986).

15. *See, e.g., In re* General Adjudication of All Rights to Use Water in the Gila River System and Source, 9 P.3d 1069, 1083 (Ariz. 2000) (holding "subflow" can be regulated as surface water although it is not flowing at the surface and no unconstitutional taking occurs from its regulation.)

16. 4 WATERS AND WATER RIGHTS, *supra* note 5, § 30.01.

17. 1 WATERS AND WATER RIGHTS, *supra* note 5, § 4.07.

I. A BRIEF DESCRIPTION OF TAKINGS JURISPRUDENCE

It is worthwhile, when considering cases pertaining to takings of interests in water, as Part II of this article does, to review the Supreme Court's takings cases that have continually reshaped takings jurisprudence.

The Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment provides "no person shall be . . . deprived of life, liberty, or property, without due process of law; *nor shall property be taken for public use, without just compensation.*"[18] The Fifth Amendment requires the federal government to compensate a landowner when the federal government takes property for public use. The Fourteenth Amendment extends this requirement to include actions of state and local governments.[19] Thus, the takings clause of the Fifth Amendment is the basis for actions against the state, local, or federal government in which plaintiffs allege the government has taken their property. The Fifth Amendment raises three general issue areas: whether the government action is a taking;[20] whether the taking is for a "public use;"[21] and whether the compensation is just.[22]

A. Substantive Law of Takings Claims

1. "Per se," Physical and Regulatory Takings

The Supreme Court first recognized the significance of compensating landowners pursuant to the takings clause in 1833.[23] The Supreme Court elaborated on its support of the takings clause in 1872 while construing a provision in the Wisconsin Constitution modeled after the just compensation clause of the Fifth Amendment:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law [such as the Takings Clause of the Fifth Amendment], always understood to have been adopted for protection and security to the rights of the individual as against the gov-

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18. U.S. CONST. amend. V (emphasis added).

19. Chicago, Burlington, and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897) ("[A]rbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen.").

20. Takings can occur through either the power of eminent domain or the police power. This article explores takings solely in the context of the police power.

21. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).

22. Brown v. Legal Found. of Washington, 538 U.S. 216, 231-32 (2003) ("the taking must be for a 'public use' and 'just compensation' must be paid to the owner.").

23. Barron v. Mayor of Baltimore, 32 U.S. 243, 249 (1833) (recognizing the Fifth Amendment prohibition on taking as a limit on federal authority).

> ernment, . . . [where] it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provisions into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good . . . .[24]

Stated more simply, in 1897, the Supreme Court held ". . . without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution."[25]

A taking through direct expropriation is straightforward, as the action clearly requires compensation under the Fifth Amendment.[26] However, when a taking occurs through less direct governmental interference, such as governmental regulation, the case is more difficult. The Supreme Court has developed judicial principles for analyzing claims under the Fifth and Fourteenth Amendment primarily in the context of growing municipal power to control the use of land through zoning and permitting. Scholars trace regulatory taking jurisprudence to the regulatory takings in *Pennsylvania Coal Co. v. Mahon,*[27] and to the landmark case of *Village of Euclid v. Ambler Realty Co.,* in which the Supreme Court upheld municipal zoning against the claim of an unconstitutional *de facto* taking of the landowner's property without just compensation.[28] In *Euclid,* the Supreme Court noted that the state may exercise its delegated police power in situations where "the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[29]

In *Village of Belle Terre v. Boraas,* the Supreme Court upheld an ordinance barring occupancy of homes by three or more unrelated people.[30] The Supreme Court noted "[t]he police power is . . . ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[31] However, the Supreme Court warned that, although government can, through its police power, interfere with the use of legally defensible

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24. Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1871).
25. Chicago, Burlington, and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).
26. *See* Int'l Paper Co. v. United States, 282 U.S. 399, 408 (1931).
27. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("if the regulation goes too far, it will be recognized as a taking.").
28. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
29. *Id.* at 390.
30. Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).
31. *Id.* at 9.

interests without crossing the boundary beyond which compensation is due, it can go too far in its regulation.[32]

In a chain of cases following *Village of Belle Terre,* the Supreme Court set forth a general proposition that it will uphold a governmental regulation against a taking claim unless the regulation deprives the owner of *all* reasonable economic value.[33] According to that approach, a mere reduction in value, which is often the result of governmental regulation, would not constitute a taking.[34] But interference with economic value is not the only test the Supreme Court has applied.[35] In *United States v. Causby,* where noise from overhead aircraft reduced the value of property beneath the flight path, the Supreme Court determined that the airport proprietor had physically invaded, and, therefore, "taken" the land, even though the proprietor had not deprived the landowner of *all* reasonable economic value.[36] Thus, successful takings claims evolved into two main categories: deprivation of all reasonable economic value and physical invasion.

In the 1978 landmark decision of *Penn Central Transportation Co. v. New York City,* the Supreme Court applied a balancing test to determine whether a regulatory taking had occurred.[37] To determine the occurrence of a taking under the test, the Supreme Court first evaluated whether the regulation served a "substantial public purpose"[38] and then analyzed whether: (1) the regulation resulted in a denial of economically viable use of the property,[39] and (2) the property owner had distinct investment-backed expectations,[40] and (3) whether the interest in the property owner's right to own and use the property without unwar-

32. *Id.* at 4.

33. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

34. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 630-31 (2001).

35. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 197-99 (1985); *Agins,* 447 U.S. at 260; Penn Cent. Transp. Corp. v. New York, 438 U.S. 104, 125 (1978); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Martino v. Santa Clara Valley Water Dist., 703 F. 2d 1141, 1147 (9th Cir. 1983); Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111,117 (Cal. 1973).

36. United States v. Causby, 328 U.S. 256, 262 (1946); *see also* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922) (holding that naval artillery fire over private property was a compensable taking).

37. *Penn Cent. Transp. Corp.,* 438 U.S. at 123-25, 138.

38. *Id.* at 127-29.

39. *Id.* at 130-31.

40. *Id.* at 136. Probably the best method for a court to measure these expectations is in the context of the law in place at the time the landowner invested in the allegedly taken property.

ranted governmental interference outweighed the public interest asserted by the government in support of the regulation.[41]

Applying this test, the Supreme Court upheld New York City's Landmarks Preservation Law.[42] The law imposed a duty on owners of landmark-designated property to maintain the landmark's exterior features in good repair and prohibited alteration or improvement of structures on the property without the City's approval.[43] The Supreme Court held that a taking of private property had not occurred because there was no interference with the current use of the property and a reasonable return on investment in the property was still possible.[44] The Court also analyzed whether New York terminated all of the pre-existing use rights through regulation.[45] The Court concluded that the restrictions imposed were substantially related to the promotion of the general welfare, permitted reasonable beneficial use of the property, and were, therefore, a constitutional exercise of the police power and not a taking.[46]

After *Penn Central*, the Supreme Court continued to find takings when regulations amounted to physical invasions of a property owner's right. For example, in *Kaiser Aetna v. United States*, the Supreme Court found a regulatory taking in conditions to a federal permit to dredge a private lagoon.[47] The U.S. Army Corp of Engineers had conditioned the permit on the owner's providing public access once the owners connected the lagoon to tidal waters.[48] The Court held that because the condition of the permit created an actual physical invasion of property, the permit resulted in a taking even though the permit condition did not deprive the owner of all reasonable economic value.[49]

Later in *Loretto v. Teleprompter Manhattan CATV Corp*, a New York law required landlords to allow cable television equipment on their property, the Supreme Court indicated that any degree of condemna-

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41. *Id.* at 136-37. This factor, typically called the "character of governmental action" factor, logically includes the physical/regulatory interference distinction. Courts differ whether the objective of the governmental action is relevant.

42. *Id.* at 138. The Penn Central multi-factor balancing approach permits a plaintiff to demonstrate a taking based on a possible combination of factors, without any single factor being outcome determinative. Additionally, the Court did not specify whether the balancing test was exclusively a three-part test, leaving open the possibility that courts could analyze other factors when determining whether a taking has occurred. *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (1997); John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?* 52 LAND USE LAW & ZONING DIGEST 3, 4 (2000).

43. *Penn Cent. Transp. Co.*, 438 U.S. at 111-12.

44. *Id.* at 136.

45. *Id.* at 136-37.

46. *Id.* at 138.

47. Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979).

48. *Id.* at 168.

49. *Id.* at 179-80.

tion of property, even for something as small as a cable box constituted a taking for which the government must pay compensation.[50] Physical occupations constitute unconstitutional intrusions into property rights because "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[51]

The Supreme Court ruled similarly in *Nollan v. California Coastal Commission.*[52] In *Nollan* the local government issued a building permit with the condition that the property owner dedicate an easement to permit the public to pass along the beach between the mean high tide line, which defined the seaward edge of the property, and a seawall.[53] The Supreme Court found that the right to exclude others was an essential right in the ownership of private property.[54] Therefore, the Court concluded that if the state wanted an easement, it would have to use the power of eminent domain to obtain it.[55]

In other cases, the Supreme Court continued to apply the *Penn Central* balancing test to uphold regulations. In *Agins v. City of Tiburon,* the Supreme Court upheld a municipal zoning ordinance, which placed privately owned land in planned residential developments and limited residential density zones.[56] The Court concluded that since the zoning ordinance neither prevented the best use of the land, nor extinguished a fundamental attribute of ownership, no taking had occurred.[57] Then, in *Hodel v. Virginia Surface Mining and Reclamation Association,* the Supreme Court upheld regulations adopted pursuant to the Surface Mining Control and Reclamation Act of 1977, which regulated the conditions under which mining could take place.[58] Since the regulations did not deprive the property owners of all economically viable use of their property, the Court found no taking had occurred.[59]

In 1992, the Supreme Court advanced the "economic viability" component of the *Penn Central* balancing test in *Lucas v. South Carolina*

50. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).
51. *Id.* at 435.
52. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-2 (1987).
53. *Id.* at 828.
54. *Id.* at 831.
55. *Id.* at 841-42.
56. Agins v. City of Tiburon, 447 U.S. 255, 262 (1980); *see also* Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2084 (2005) (dismissing the "substantially advances" test as a means to identify an unconstitutional taking, because "[a] test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation.").
57. *Agins,* 447 U.S. at 262-63.
58. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 254, 268, 296; 30 U.S.C. §§ 1201-1328 (2005).
59. *Hodel,* 452 U.S. at 295-97.

Coastal Council.[60] The Court found that when the economic impact of a governmental regulatory action was so severe as to render property without any value, a *per se* taking had occurred:

> In 70-odd years of . . . "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries." We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*"[61]

The regulation in *Lucas* was a building ban, imposed pursuant to South Carolina's Beachfront Management Act. The regulation prevented a residential developer from constructing homes on his land.[62] The Supreme Court concluded the owner met the stricter economic deprivation test since he could no longer build permanent structures on his land under the Act.[63] The Court noted that under the Penn Central test, a court may include an inquiry into common law nuisance principles in order to better understand the scope of a property owner's vested interest, when balancing the private ownership interests and the character of the government action.[64] *Lucas* requires one to consider the "background principles" of the interest allegedly taken, as they existed in the owner's title prior to the application of the regulation.[65] On remand, the South Carolina Supreme Court concluded:

> We have reviewed the record and heard arguments from the parties regarding whether [the state] . . . possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land. [The state] . . . has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use

60. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).
61. *Id.* at 1015-16 (citations omitted).
62. *Id.* at 1007.
63. *Id.* at 1015-19.
64. *Id.* at 1022-24.
65. Loveladies Harbor Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994).

of his land; nor has our research uncovered any such common law principle.[66]

However, the Supreme Court seemed to refocus the regulatory takings inquiry in *Dolan v. City of Tigard.*[67] In *Dolan,* a municipality required, as conditions in a redevelopment permit, a portion of property lying within a 100-year floodplain for improvement of a storm drainage system and dedication of an additional 15-foot strip of land as a pedestrian/bicycle pathway.[68] The Supreme Court held that there must be an "essential nexus" existing between the legitimate state interest and the permit conditions.[69] Additionally, if a nexus exists, then conditions imposed by the municipality must be roughly proportionate to the projected impact of the proposed development.[70] In this case, the Court concluded the conditions imposed by the municipality were not reasonably related to the impact of the proposed development. Therefore, the Court ruled that the permit conditions were an unconstitutional taking.[71]

Each case requires the Supreme Court to engage in an independent fact-based inquiry to determine the reasonableness of an owner's investment-backed expectations.[72] For example, in *Palazzolo v. Rhode Island,* the plaintiff acquired property that was already subject to wetlands regulations.[73] The property owner wished to fill eleven of his wetland acres. When the state denied the permit to fill the land, the owner asserted a taking under *Lucas.*[74] The Supreme Court ruled that neither a regulation in place at the time the owner acquired the property nor his knowledge of such a regulation necessarily cut off a takings claim.[75] Additionally, the Supreme Court indicated that some remaining economic value would not defeat a takings claim.[76] Thus, even though a property still had some economic value and the property owner had knowledge of existing regulations, the owner can assert a takings claim.[77]

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66. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).
67. Dolan v. City of Tigard, 512 U S. 374 (1994).
68. *Id.* at 379-80.
69. *Id.* at 386.
70. *Id.* at 391.
71. *Id.* at 394-95; *see also* Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2086-87 (2005) (referring to the Dolan case and the Nollan case as "exaction" cases, an exaction being imposed as a condition of permit approval).
72. *See generally* Richard A. Epstein, *Takings: Descent and Resurrection,* 1987 SUP. CT. REV. 1 (1987); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims,* 61 U. CHI. L. REV. 1535 (1994); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967).
73. Palazzolo v. Rhode Island, 533 U.S. 606, 611 (2001).
74. *Id.* at 615-16.
75. *Id.* at 626-30.
76. *Id.* at 617.
77. *Id.* at 632.

In *Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency*, the Supreme Court reiterated that a takings analysis demands a full inquiry and that the outcome depends largely upon the particular circumstances of the case.[78] The Supreme Court emphasized its preference to examine "'a number of factors' rather than a simple 'mathematically precise' formula."[79] In addition, in evaluating whether a taking has occurred,

> the duration of the [regulatory] restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to *per se* rules in either direction must be resisted."[80]

In addition to the distinction between *per se* and other takings cases, which require balancing the property rights with the public interest, Supreme Court takings jurisprudence clearly distinguishes between physical[81] and regulatory[82] takings. A physical taking occurs when government action amounts to a physical occupation or invasion of the property, or simply the "practical ouster of [the owner's] possession."[83] Physical takings are invariably *per se* takings. "[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."[84]

Shortly after *Lucas*, the New Jersey Supreme Court restated the distinction between physical and regulatory takings:

> As the United States Supreme Court has recently observed, "takings" cases can generally be divided into two distinct categories: cases in which the government takes title to or physically occupies property,

78. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

79. *Id.* at 326.

80. *Id.* at 342.

81. Physical takings cases derived from the Court's historical takings jurisprudence include: Yee v. City of Escondido, 503 U.S. 519 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

82. Regulatory takings cases derived from the Court's historical takings jurisprudence include: *Palazzolo*, 533 U.S. 606; Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedicts, 480 U.S. 470 (1987); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

83. *See Loretto*, 458 U.S. at 428; Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878).

84. *See Lucas*, 505 U.S. at 1015.

> generally requiring that compensation be paid; and cases in which the government regulates the permitted uses of property, which require fact-specific determinations on whether compensation is mandated. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good ...
>
> But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.[85]

The Supreme Court's most recent clarification between physical or *per se* takings and regulatory takings is in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency.* The Court acknowledged the Fifth Amendment's guarantee is "designed 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."[86] However, the Supreme Court has not simply been unable to develop any "set formula" for determining when "justice and fairness" require the government to compensate landowners for economic injuries caused by public action, rather than permitting the burden to remain disproportionately concentrated on a few persons.

The question presented in *Tahoe-Sierra* was "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constituted a *per se*" or physical taking of property.[87] During the two moratoria at issue, "virtually all development on a substantial portion of the property . . . was prohibited for a period of 32 months."[88] The district court had concluded that the moratoria constituted a "categorical takings" under the Supreme Court's decision in *Lucas.*[89] The Supreme Court distinguished *Lucas* as applying to the rare case in which a regulation permanently denies all productive use

85. *In re* Plan for Orderly Withdrawal From New Jersey, 609 A.2d 1248, 1261 (N.J. 1992) (citations omitted).

86. Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978)).

87. *Id.* at 306.

88. *Id.*

89. *Id.* at n.14.

of an entire property right: "the Court of Appeals held that because the regulations had only a temporary impact on petitioners' fee interest in the properties, no categorical taking had occurred."[90]

The Supreme Court went on to explain:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent; that bans certain private uses of a portion of an owner's property, or that forbids the private use of certain airspace, does not constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."
>
> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.[91]

The *Tahoe-Sierra* Court concluded, "these cases make clear that the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry."[92]

Justice O'Connor commented in *Lingle v. Chevron U.S.A., Inc.* on the current state of takings jurisprudence:

> Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.

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90. *Id.* at 318.
91. *Id.* at 322-23 (citations omitted).
92. *Id.* at 332.

> Outside these two relatively narrow categories (and the special context of land-use exactions discussed below . . .) regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City.* The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.
>
> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries hare 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 owner from his domain. . . .
>
> . . . A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.[93]

A compensable taking surely occurs where regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying it."[94]

2. Partial Takings

Takings of interests in water may be considered as partial takings. A riparian water right is a portion of a real property interest. If taken, a part of the real property interest is taken. Appropriative and contractual water rights are quantified in volume and duration. If either volume or duration were limited by government action, a part of the interest may been taken. The success of many takings claims hinges on the determination of whether to consider the entirety of the plaintiff's property on which an alleged taking has occurred, or to consider only

93. Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2081-82, 84 (2005) (citations omitted).

94. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

the portion upon which the government directed its action.[95] The Supreme Court stated the general rule in *Penn Central*:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole.[96]

A year later, the Supreme Court added: "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[97]

In 1990, in *Loveladies Harbor v. United States*, the United States Court of Federal Claims found an unconstitutional taking where the U.S. Army Corps of Engineers ("Corps") denied a permit to fill a wetland.[98] Attempting to develop 12.5 acres of a 250-acre tract, which included an 11.5-acre wetland, the landowner sought state permits to fill the wetland.[99] After years of negotiations, the state granted the permit on the condition that the plaintiffs mitigate the destruction of the wetlands by creating a corresponding amount of new wetlands.[100] After obtaining the state permit to fill the wetlands, the landowner sought a federal permit from the Corps, and the Corps denied the permit.[101] Despite the Corps' argument that the entire 250-acre original tract should be considered to determine if the property remained economically viable, the court only considered the 12.5 remaining developable acres.[102] The developer had already developed and sold much of the original tract, thus effectively reducing the size of the land where the developer could build.[103] The developer's plan to dedicate the remaining undeveloped wetlands to the state served as an indication that there was no development plan for those lands. Accordingly, the court, in determining the amount of compensation for the taking, treated the wetlands promised to the state differently than the developable acreage.[104] The

95. *See generally* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Loveladies Harbor, Inc. v. United States, 28 F. 3d 1171 (Fed. Cir. 1994).

96. Penn Cent. Transp. Co., 438 U.S. at 130-31.

97. Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

98. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 153-54 (1990).

99. *Id.* at 154.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 153.

104. *Id.* at 159.

United States Court of Appeals for the Federal Circuit affirmed,[105] notwithstanding an intervening observation of Justice Scalia in *Lucas* regarding the "parcel of the whole."[106]

The admittedly imprecise measurement of "all economically feasible use" can result in apparently conflicting outcomes. For example, in *Palazzolo* where the landowner lost the ability to develop over half of his coastal wetland property, the Supreme Court ruled there was no taking.[107] Yet, in *Loveladies Harbor*, the property owner was able to recover for an unconstitutional taking when the Corp's denied him permission to develop 12.5 acres of his total 250 acre-tract.[108]

The "parcel as a whole" problem is also present in cases where the government exercises its power of eminent domain. There, courts address the problem by evaluation of "remainder damages," i.e., damages to the property not taken. The Supreme Court has held, and subsequently Congress has enacted legislation indicating, that where the government physically takes even a portion of property, whether affirmatively condemning the land or by other action, compensation is due for the taken portion, as well as "for any injury to the part not taken."[109]

3. Temporary Takings

In 1982, in *Loretto*, the Supreme Court explained that, where the government intrusion on the use of private property is temporary, a court should use a balancing test to determine if the invasion is of an unusually serious nature, as to constitute a taking of private property.[110] Later, in 1998, the Court of Federal Claims held that a temporary taking, which denies a landowner all use of his property for a period of time, requires just compensation.[111]

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105. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1183 (Fed Cir. 1994).

106. Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992).

107. Palazzolo v. Rhode Island, 533 U.S. 606, 613-16 (2001).

108. *Loveladies*, 28 F.3d at 1181-82.

109. 33 U.S.C. § 595 (2000); United States v. Grizzard, 219 U.S. 180, 185 (1911); United States v. Welch, 217 U.S. 333, 338-39 (1910).

110. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982).

111. Allenfield Assocs. v. United States, 40 Fed. Cl. 471, 488 (1998). Also, in 1879, the Supreme Court held that Chicago's construction of a temporary dam on a river to

The most recent Supreme Court decision involving temporary takings, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, involved property near Lake Tahoe, Nevada.[112] The temporary moratorium in *Tahoe-Sierra* raised the issue of whether a temporary interference can be so substantial as to comprise an unconstitutional taking.[113] The plaintiff property owners relied on the Supreme Court's 1987 decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, in which the church sought relief from what it alleged was inverse condemnation under a county ordinance prohibiting the reconstruction of its flood-damaged building in an interim flood protection area.[114] In *First English Evangelical Lutheran Church*, the Supreme Court held the ordinance to be an unconstitutional taking and required the county to compensate the property owners for their losses.[115] The Court went on to explain that "'temporary' takings which ....deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[116] In response to the plaintiff's reliance on *First English*, the Court in *Tahoe-Sierra* distinguished between an intentionally temporary intrusion, and an intended permanent intrusion that the government later removed.[117] The Court further rejected the landowners' claim that the thirty-two month moratorium on developing their property could conceptually be severed from a fee simple interest "because [the argument] ignores *Penn Central's* admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[118] Citing the Ninth Circuit's decision, the Court said:

> In [the Ninth Circuit's] view a "planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies

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enable the construction of a tunnel was not a taking, even though the dam prevented landowners from accessing their property during construction. However, the access involved was a public right of access, not a privately owned right of way. Thus, the Court held that because the obstruction only temporarily impaired the use of the landowner's property, and no portion thereof was physically taken, no taking had occurred. Transp. Co. v. Chicago, 99 U.S. 635, 636, 643 (1879).

112. Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

113. *Id.* at 306.

114. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 306-08 (1987).

115. *Id.* at 322.

116. *Id.* at 318 (quoting Justice Brennan's dissent in San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 657 (1981), in which he opined "nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."

117. *Tahoe-Sierra*, 535 U.S. at 320-21, 329, 333.

118. *Id.* at 331 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)).

all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel."[119]

The Court affirmed that the temporary deprivation of an economically viable use of the property in *Tahoe-Sierra* was not a taking because the moratorium was temporary in nature, and not a serious intrusion upon the landowners' rights.[120] However, "the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances.'"[121]

B. Procedural Aspects of Takings Claims

Because takings claims are constitutionally based, either on a provision of a state constitution, the takings clause of the Fifth Amendment, or the application of the Fifth Amendment to states through the Fourteenth Amendment, plaintiffs may bring takings claims in several different courts.[122] When plaintiffs premise claims on state constitutional provisions, plaintiffs may file in state court; if plaintiffs premise taking claims on the Fifth Amendment, plaintiffs may file either in a federal district court or in the Court of Federal Claims under the Tucker Act, depending upon the amount in controversy.[123] Litigants can also use 42 U.S.C § 1983 to bring Takings cases.[124] Because multiple venues are possible, takings claims may involve preliminary issues of standing,[125] ripeness,[126] abstention,[127] or issue preclusion.[128]

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119. *Id.* at 318-19.

120. *Id.* at 340-43.

121. *Id.* at 335.

122. *See, e.g.*, Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978); Miller v. City of Albuquerque, 554 P.2d 665 (N.M. 1976); Cent. Motors Corp. v. City of Pepper Pike, 409 N.E.2d 258 (Ohio Ct. App. 1979).

123. Where diversity jurisdiction otherwise exists, a federal district court has original jurisdiction concurrent with the Court of Federal Claims. *See, e.g.*, Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 385-86 (5th Cir. 2001); SK Finance SA v. La Plata County, 126 F.3d 1272, 1276 (10th Cir 1997); But where the contract claim is in excess of $10,000, the case must be resolved before the Court of Federal Claims. *See* Tucker Act, 28 U.S.C. § 1491(a)(1) (2000); 28 U.S.C. § 1346(a)(2) (2000); Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 559-60 n.10 (1983); Amerada Hess Corp. v. Dept. of Interior, 170 F.3d 1032, 1035 (10th Cir. 1999); Stockton E. Water Dist. v. United States, 62 Fed. Cl. 379, 384 (2004); Hage v. United States, 51 Fed. Cl. 570, 574 (2002); The Tucker Act has a six year statute of limitations, which is met when an action is filed either in district court or the Court of Federal Claims. *Stockton E. Water Dist.*, 62 Fed. Cl. at 388.

124. 42 U.S.C. § 1983 creates a right of action against individuals who, acting under color of state law violate federal constitutional or statutory rights. 42 U.S.C. § 1983 (2000). Under section 1983, an action for damages may be brought against a state official, acting in their individual capacity, or a local government for the taking of property without just compensation. *See* 42 U.S.C. § 1983 (2000).

125. In 1984, the Ninth Circuit Court of Appeals rejected Truckee-Carson Irrigation District's ("TCID") claim that the Secretary of the Interior's termination of the contract to operate the project constituted a taking of property rights without due process

The statutory jurisdiction of the Court of Federal Claims does not extend to actions sounding in tort.[129] Some governmental actions that are arguably takings are in fact tortious, justifying damages in tort, but not just compensation under the Takings Clause. Generally, a taking involves a contemplated, direct, natural, or probable result of government action, while a tort is typically an incidental result of governmental action. When the injury and loss of property value appears to represent the predictable consequences of government action, courts have found a taking rather than a tort. For example, in 1940, in *Columbia Basin Orchard v. United States*, an orchard owner near the Grand Coulee dam lost numerous fruit trees due to poor water quality resulting from the government's discharge of excess groundwater water into nearby Orchard Lake.[130] Record level precipitation caused overflow of the lake's salty water onto the orchard lands.[131] When the orchard owner sued, the Court of Federal Claims found no taking, but held that a damage reward, if any, would be for tort damages.[132]

In 1982, in *Berenholz v. United States*, the U.S. Army Corps of Engineers triggered floods by removing a large section of a dike.[133] Property owners who lost their lands were able to recover under a takings claim, because the flooding of the land was a natural and probable consequence of Corps' action.[134] Conversely, in 2002, in *Drury v. United States*, a property owner brought a claim in federal district court seeking

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of law. Truckee-Carson Irrigation Dist. v. Sec'y of Dept. of Interior, 742 F.2d 527 (1984). The court stated:

> As a water district responsible for managing a reclamation project, TCID does not directly own any water rights. Rather, the landowners within the service area irrigated by the Newlands Project own water rights. . . . Only those who would have lost property, the owners of land with water rights, could claim a deprivation of property without due process.

Id. at 530-31.

126. Washoe County v. United States, 319 F.3d 1320 (Fed. Cir. 2003); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996); Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993); Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989).

127. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); United States v. Morros, 268 F.3d 695 (9th Cir. 2001); Bath Mem'l Hosp. v. Me. Health Care Fin. Comm'n, 853 F.2d 1007 (1st Cir. 1988).

128. San Remo Hotel, L.P. v. City of San Francisco, 125 S. Ct. 2491 (2005); Migra v. Warren City School Dist., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980); Stockton E. Water Dist. v. United States, 62 Fed. Cl. 379 (2004).

129. Tucker Act, 28 U.S.C. § 1491(a)(1) (2000).

130. Columbia Basin Orchard v. United States, 132 F. Supp. 707-09 (Cl. Ct. 1955).

131. *Id.*

132. *Id.* at 709.

133. Berenholz v. United States, 1 Cl. Ct. 620, 621 (1982).

134. *Id.* at 627.

damages in tort for negligent or intentional trespass.[135] The government persuaded the district court to remove the case to the Court of Federal Claims on the basis that the property owner had actually alleged a taking.[136] The claims court, however, transferred the case back to the district court because the plaintiff had indeed stated a cause of action in tort.[137] The claims court stated:

> To determine whether defendant's alleged conduct constituted a tort or a taking, the essential inquiry is whether the injury to the claimant's property is in the nature of a tortious invasion of his rights or "rises to the magnitude" of an appropriation of some interest in his property for the use of the government.[138]

In 2003, in *Ridge Line v. United States,* the plaintiff filed a claim in the Court of Federal Claims alleging a taking occurred when the U.S. Postal Service permitted its stormwater to drain across plaintiff's land.[139] The Claims Court found no taking had occurred and dismissed the action.[140] On review, the U.S. Court of Appeals for the Federal Circuit found that the Claims Court must first consider and determine whether to apply tort or takings law to the plaintiff's loss.[141] "The tort-taking inquiry . . . requires consideration of whether the effects . . . [experienced by the property interest holder] were the predictable result of the government's action, and whether the government's actions were sufficiently substantial to justify a takings remedy."[142] The court went on to outline the two-part inquiry used to make this distinction:

> First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for

135. Drury v. United States, 52 Fed. Cl. 402, 403 (2002).
136. *Id.* at 403.
137. *Id.* at 404.
138. *Id.* at 403-04 (quoting BMR Gold Corp. v. United States, 41 Fed. Cl. 277, 282 (1998)).
139. Ridge Line, Inc. v. United States, 346 F.3d 1346, 1350 (Fed. Cir. 2003).
140. *Id.* at 1351.
141. *Id.* at 1356.
142. *Id.* at 1355.

an extended period of time, rather than merely inflict an injury that reduces its value.[143]

In 2004, in *Moden v. United States*, the government polluted groundwater near Ellsworth Air Force Base with trichloroethylene ("TCE"), a chemical used to clean aircraft in the 1940s and 1950s.[144] Nearby property owners, claiming a taking, failed to prove the TCE contamination was a direct, natural, or probable result of the Air Force's use of TCE on the base rather than merely an incidental or consequential injury.[145] The Court of Federal Claims dismissed the takings claim finding that the injury, if any, created a tort claim.[146]

II. ANALYSIS OF THE LIKELY EFFECT OF GOVERNMENTAL ACTIONS ON PARTICULAR INTERESTS IN WATER: WHEN IS AN UNCONSTITUTIONAL TAKING LIKELY TO OCCUR?

The following cases illustrate the significance of the first question presented in the introduction – what particular legally defensible interests are involved? The applicable water right interests fall under the following subheadings within this section: riparian property interests, appropriative water rights, rights to access a water right, water rights created by contract, and water rights created as an incident of congressional reservation. Although the law overlaps in part between these different types of water interests, sorting the cases in this fashion helps to examine the extent to which the governmental action regarding a legally defensible interest is so substantial as to constitute a taking requiring compensation.

A. Riparian Property Interests

Riparian rights are the rights of a landowner, who owns property abutting a river, stream, or lake, to use a reasonable portion of the water in the water body.[147] Riparian rights are appurtenant to that land and within the "bundle of sticks" which composes the real property right of riparian landowners.[148] A riparian right is "an incorporeal he-

143. *Id.* at 1355-56 (citations omitted).
144. Moden v. United States, 60 Fed. Cl. 275, 276, 278 (2004).
145. *Id.* at 289.
146. *Id.*
147. In this paper, the term "riparian right" is used to include both riparian rights and littoral rights even though technically speaking, littoral rights in common law parlance refer to property interests in coastal waters, while riparian rights refer to property interests in streams and rivers. BLACK'S LAW DICTIONARY 952, 1332 (8th ed. 2004).
148. "Ripa" derives from the Latin for "bank" or edge of the water body and therefore does not connote the water in the water body itself. 1 WATERS AND WATER RIGHTS § 6.01 (Robert E. Beck ed., repl. vol. 2001).

reditament rather than a corporeal right because the flow of water itself cannot be owned or possessed."[149] Therefore, one can only own a right to use water as it passes over or lies upon one's land. Historically, at common law, the downstream owner was entitled to the absolute "natural flow" of water.[150] Now, however, most riparian jurisdictions generally require only that downstream owners receive a reasonable use of the waterway.[151] This entitles upstream riparian landowners to use the water so long as their use does not deprive downstream landowners of their reasonable use.[152] Although riparian rights exist in many states, each state's law measures the specifics of reasonable use and acceptable riparian activity differently.[153] A riparian water right is also recognized in the sovereign interest of a riparian state. A continuing sovereign interest in the appropriate exercise of riparian rights is incumbent in the attributes of privately held riparian property rights.[154]

In *Holyoke Water-Power Co. v. Lyman*, an early case before the U.S. Supreme Court involving riparian rights, riparian interests of the landowners included the right of fishery and the right to use stream water for mill purposes.[155] These rights were private property rights.[156] The state legislature granted a charter for a dam that would obstruct the flow of the stream, but later amended that charter to enable fish to swim freely in the stream.[157] The recipient of the legislative charter protested that the amendment abridged his prior contractual interests.[158] The court denied the claim on the basis that the parties' riparian rights were always encumbered by a public right to maintain a viable fishery in the river, which necessitates maintaining unobstructed paths for fish.[159] Since the legislative mandate did not diminish the riparian right, no impairment had occurred.[160]

In *Olympia Light and Power Co. v. Harris*, a power company condemned riparian property for use in producing power.[161] The land-

149. *Id.* § 7.02(a).
150. *Id.* § 7.02(c).
151. *Id.* § 7.02(d).
152. *Id.* § 7.02(d)(2).
153. *See, e.g.*, Int'l Paper Co. v. United States 282 U.S. 399, 404-05 (1931).
154. *See* Virginia v. Maryland, 540 U.S. 56, 67 (2003) ("[D]ominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged." (quoting Massachusetts v. New York, 271 U.S. 65, 89 (1926))).
155. Holyoke Co. v. Lyman, 82 U.S. 500, 506 (1872).
156. *See id.* at 507.
157. *Id.* at 508-10.
158. *Id.* at 511.
159. *Id.* at 517.
160. *See id.* at 521-22.
161. Olympia Light & Power Co. v. Harris, 108 P. 940, 940-41 (Wash. 1910). Riparian interests can be condemned as separable property interests. *See* Spokane Valley Land Co. v. Jones & Co. 101 P. 515, 520 (Wash. 1909).

owner sought compensation for loss of rights to fish, hunt, water stock, boat, and take water for domestic use.[162] The court held that these were riparian rights, and the government must compensate the landowners if there was a taking.[163] However, the court found that the value of these rights could be affected or nullified if the power company enabled the landowner to continue his riparian use by permitting him to cross intervening public property.[164]

As western states began adopting permitting systems, which require users to obtain permits for appropriative rights, the question arose whether the establishment of permitting systems was an unconstitutional taking of prior existing undocumented riparian rights. When Nevada's water code was adopted in 1903, and made comprehensive in 1913, riparian property owners challenged the Nevada Legislature's action on the basis that it took property without compensation.[165] The Nevada Supreme Court dismissed these claims because the distribution of the waters of the state was within the state's police power.[166] Similarly, in a decision that the Supreme Court subsequently adopted in *Pacific Live Stock Company v. Lewis*, the Oregon Supreme Court, in 1914, held that enacting permitting systems was within a state's power.[167] Justice Van Devanter quoted the Oregon Supreme Court saying:

> Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.[168]

A state legislature's or judiciary's action amending prior state property law pertaining to water rights may, however, have the effect of taking the property without compensation where those rights were

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162. *Olympia Light & Power*, 108 P. at 941.
163. *Id.*
164. *Id.*
165. Ormsby County v. Kearney, 142 P. 803, 805-06 (Nev. 1914); *see* Pitt v. Scrugham, 195 P. 1101, 1102 (Nev. 1921).
166. *Ormsby County*, 142 P. at 806; *Pitt*,195 P. at 1103.
167. *In re* Willow Creek, 144 P. 505, 514 (Or. 1914); Pac. Live Stock Co. v. Lewis, 241 U.S. 450 (1916).
168. *Pac. Live Stock*, 241 U.S. at 449. Compare this statement of water rights regulations to Justice Sutherland's description of land use regulations:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare, ... and the law of nuisances, likewise, may be consulted... for the helpful aid of its analogies in the process of ascertaining the scope of the [regulation's] power.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-8 (1926).

firmly vested through reliance on the prior state law and the subsequent legislative or judicial action places "a sufficient cloud upon the title of the plaintiffs so as to interfere substantially with the financing of improvements or any potential sale of their lands."[169] In *Robinson v. Ariyoshi*, the Ninth Circuit Court of Appeals reversed the Hawaii Supreme Court, which held that earlier territorial decisions upholding the use of "normal surplus" water flowing into the Hanapepe River, for use outside that river's drainage, were void.[170] The Hawaii court overruled all territorial cases and adopted the common law doctrine of riparian rights, relying on the sovereign powers of the State to control the waters of the Hanapepe.[171] Recognizing the investment in improvements in reliance on the territorial decisions, the Ninth Circuit found that "any reasonable interpretation of the word 'vested'" included the plaintiff's use.[172] The court noted, "[n]ew law, however, cannot divest rights that were vested before the court announced the new law."[173]

On the other hand, where water is put to use so that the use is deemed "vested," subsequent changes in the law injurious to this use may represent a compensable taking.

In *International Paper Co. v. United States*, the Secretary of War took a riparian interest in water flow, which plaintiffs previously used to produce hydropower and operate mill works, to produce power for the war effort during World War I.[174] The U.S. Supreme Court found that a direct expropriation of a property interest had occurred.[175]

In *United States v. Gerlach Live Stock Co.*, the Supreme Court upheld a Court of Federal Claims decision to compensate riparian water right holders "for the loss of actual beneficial use," noting that compensation for the taking of a water right does not extend to any unreasonable use of water.[176] In *Gerlach*, the property owner held riparian property downstream from a dam constructed by the federal government.[177] The property owner's riparian interest was diminished by a prior appropriate right and an easement imposed on the property by a grantor reserving a riparian interest in a quantified amount greater than the normal flow of the river. This interest was transferred to another ripar-

169. Robinson v. Ariyoshi, 753 F.2d 1468, 1471 (9th Cir. 1985), *vacated and remanded to determine ripeness*, 477 U.S. 902 (1986), *dismissed as not ripe for review*, 887 F.2d 215 (9th Cir. 1989).
170. *Id.* at 1474-75.
171. *Id.*
172. *Id.*
173. *Id.*
174. Int'l Paper Co. v. United States, 282 U.S. 399, 404-05 (1931).
175. *Id.* at 406-08.
176. United States v. Gerlach Live Stock Co., 339 U.S. 725, 752 (1950).
177. *Id.* at 727-28.

ian property owner, which would be served by diversions created by the upstream dam.[178]

The United States claimed authority to operate the project under its commerce power to control navigation, which indicates that the federal government would not have to compensate the riparian landowners for the intrusion on their riparian rights.[179] The Supreme Court concluded that Congress, in an exercise of its constitutional power to tax and spend for the general welfare, had elected to proceed under the reclamation laws and therefore had to pay for any vested rights taken by the Government. "[W]hether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain."[180]

In *Gerlach*, the Court of Federal Claims granted the riparian owners' takings claims.[181] The Supreme Court determined that the Court of Federal Claims had properly understood state law and affirmed the awards.[182] The Supreme Court held that the government had proceeded under the Reclamation Act of 1902 rather than its authority to regulate navigable waterways.[183] The Supreme Court then ruled that California law, rather than federal law, would determine the landowners' property rights.[184] Interpreting the California Constitution, the Supreme Court held that the water rights at issue were limited in quantity to such water as beneficial use reasonably required.[185] The Supreme Court also held that the lower court properly awarded compensation only for the loss of actual beneficial use, stating that the public welfare, which requires claimants to sacrifice their individual benefits for public ones, did not require that their loss be uncompensated.[186]

In *Dugan v. Rank*, the court found that when the federal government impaired "almost three fourths of the natural flow" of the San Joaquin River, by storing and diverting water at Friant Dam, the action constituted a partial taking of riparian rights.[187]

In a 1973 case, *Belle Fourche Irrigation District v. Smiley*, the South Dakota Supreme Court rejected a claim by a riparian who asserted that he had a vested right to use or divert water from the Belle Fourche River for domestic and irrigation purposes.[188] The riparian claimed that this right became "an inseparable incident of his land when it was settled;

178. *Id.* at 752.
179. *Id.* at 731.
180. *Id.* at 739.
181. *Id.* at 726.
182. *Id.* at 755.
183. *Id.* at 739.
184. *Id.* at 743.
185. *Id.* at 743, 751-52.
186. *Id.* at 752.
187. Dugan v. Rank, 372 U.S. 609, 620-23 (1963).
188. Belle Fourche Irrigation Dist. v. Smiley, 204 N.W.2d 105, 107 (S.D. 1973).

use did not create it and disuse cannot destroy it; and to deny such right deprives him of property without due process of law and without just compensation."[189] Rejecting this argument, the South Dakota Supreme Court determined that the legislature had the authority to create a vested right in water that was already being utilized for beneficial purposes prior to passage of the state water law system. The court also held that the South Dakota Legislature could limit the rights of riparian owners to domestic use or to those uses granted under their statutory prior appropriation scheme.[190]

In 1985, the Washington Supreme Court ruled that the legislature could extinguish or limit unexercised riparian rights by statute. The court held that "the 1917 water code established prior appropriation as the dominant water law in Washington."[191] The court concluded that the denial of a water right claim based on riparian status did not constitute an unconstitutional taking because the state had the authority under its police powers to deny claims. The court added:

> In other states, it is well established that riparian rights may be extinguished or limited by statute. That a state has the power to either modify or reject the doctrine of riparian rights because [it is] unsuited to the conditions in the state and to put into effect the doctrine of prior appropriation has long been settled.[192]

Texas, through exercise of its police power, allows the state to terminate riparian rights because of nonuse.[193] Appropriation acts in Kansas and Oregon, which give state government the authority to extinguish riparian rights, have also withstood takings challenges.[194]

However, in *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, the Oklahoma Supreme Court indicated that a riparian water user enjoys the protections of the takings clause even after the state adopts a prior appropriation system.[195] *Franco-American* addressed the issue of how much water riparian owners had the right to use. The

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189. *Id.*

190. *Id.* at 107-08.

191. Dept. of Ecology v. Abbott (*In re* Deadman Creek Drainage Basin), 694 P.2d 1071, 1072 (Wash. 1985).

192. *Id.* at 1077 (citation omitted).

193. *In re* Adjudication of Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 444 (Tex. 1982).

194. *See, e.g.*, Baumann v. Smrha, 145 F.Supp. 617, 624-25 (D. Kan. 1956), *aff'd*, 352 U.S. 863 (1956); Williams v. City of Wichita, 374 P.2d 578, 595 (Kan. 1962); F. Arthur Stone & Sons v. Gibson, 630 P.2d 1164, 1173 (Kan. 1981) (holding that mandatory permit procedures for appropriation of water and imposition of criminal penalty for violation of those procedures does not constitute a taking of property rights because it is a reasonable exercise of police power); *In re* Hood River, 227 P. 1065, 1084 (Or. 1924).

195. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd. 855 P.2d 568, 577 (Okla. 1990).

court found that limiting the riparians water use to domestic use constituted an unconstitutional taking of the remainder of the riparian water right.[196] The Oklahoma Water Resources Board contended that riparian water right holders were able to preserve their rights under 1963 legislation, which provided a mechanism to protect common law riparian water rights that existed prior to the Oklahoma's adoption of the prior appropriation doctrine in 1897. The court ruled that the legislative mechanism, which would have allowed a riparian to maintain only a certain quantity of water as a vested right, did not protect the riparians' common law right, which is not limited in quantity but only by its reasonableness.[197] Thus, the court held the 1963 legislation unconstitutional under the Oklahoma Constitution and ordered the trial court to reconsider the reasonableness of the riparian's water uses.[198]

Operating under a unique system managing both riparian rights and appropriative rights, the California Supreme Court, in *In re Waters of Long Valley Creek Stream System*, ruled in favor of preserving future riparian rights.[199] As part of a stream adjudication, the trial court upheld the California Water Resources Control Board ("CWRCB") determination that a riparian's water right only extended to the eighty-nine acres that he and his predecessors had been irrigating over the previous sixty years, thereby extinguishing any future water right for his remaining 2,884 acres.[200] The riparian property owner appealed, claiming the water board could not extinguish his riparian right to greater water use in the future. The California Supreme Court held that such an extinguishment of future rights would constitute a taking. The court explained:

> [A]lthough the Board has broad authority to define and otherwise limit future riparian rights, we conclude the Legislature did not intend to authorize the complete extinction of any future riparian rights in circumstances in which the Board has failed to establish that the most reasonable and beneficial use of waters subject to the adjudication proceeding could not be promoted as effectively by placing other less severe restrictions on such rights.[201]

However, the court noted that while it would be unreasonable to extinguish an unexercised riparian water right, the CWRCB could limit a future riparian use, so long as those limitations deal with the scope,

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196. *Id.* at 676-78.
197. *Id.* at 577.
198. *Id.* at 571, 577.
199. Rowland v. Ramelli (*In re* Waters of Long Valley Creek Stream Sys.), 599 P.2d 656, 660 (Cal. 1979).
200. *Id.*
201. *Id.* at 659.

nature, and priority of that use, and such limitations do not constitute an outright extinguishment of the right.

> Thus, the Board is authorized to decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised. . . . [W]hile we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources.[202]

Riparian water users must not unreasonably interfere with the rights of other riparian owners. For example, in the case of drought, all riparian owners would presumably bear equally the impact of the reduced amount of water, as the measure of reasonableness changed. The question remains, however, whether a government imposed regulation in the name of drought protection, which reduces the reasonable use of all riparians, would constitute a taking? In California, such a reduction would likely not be a taking because the water board has broad authority to reduce a riparian water right according to what constitutes reasonable use. Unfortunately, current case law does not squarely respond to this question.

In a case arising in the Sixth Circuit, *Stupak-Thrall v. United States*, the government imposed a regulation in 1991 prohibiting houseboats and sail boats within the Sylvania Wilderness Area in Michigan's upper peninsula, thereby reducing the scope of reasonable use of water under a state-based riparian right to fish, boat, sail, and swim.[203] The federal district court found that no taking had occurred because, under Michigan state law, riparian rights are subject to reasonable regulation under the state's police power. "Riparian rights are not, however, absolute rights. They may be regulated under the police power of governmental units. In addition, when the uses of riparian owners are in conflict, riparian rights may be limited by the reasonable use doctrine."[204] The Sixth Circuit affirmed.[205]

In 1995, the Forest Service passed a second regulation prohibiting use of non-electric motorboats in the same Sylvania Wilderness Area.[206] When the riparian owners challenged the second regulation, the court, after looking at the effect of the regulations on the livelihood of the plaintiffs and the value of their riparian property, found a taking had

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202. *Id.* at 668-69.
203. Stupak-Thrall v. United States, 843 F.Supp. 327, 328 (W.D. Mich. N. Div. 1994).
204. *Id.* at 331.
205. Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995), *aff'd en banc by an evenly divided court*, 89 F.3d 1269 (6th Cir. 1996), *cert. denied*, 519. U.S. 1090 (1997).
206. Stupak-Thrall v. Glickman, 988 F.Supp. 1055, 1058 (W.D. Mich. N. Div. 1997).

occurred. "The motorboat restrictions in Amendment No. 5 directly and significantly affect fundamental attributes of Plaintiffs' ownership and enjoyment of their property. . . . There can be no real question that Amendment No. 5 will result in a significant diminution of value to the riparian land."[207]

In many instances, riparian water rights are subject to the principles of public trust. This article addresses the implications of the public trust doctrine on riparian and other water rights below.[208]

B. Appropriative Water Rights

The prior appropriation doctrine protects the rights of the prior users of water against the rights of subsequent users. The geographic position of land in relation to the water is irrelevant. Rights protected by the prior appropriation doctrine arise from state law. Water rights based on prior appropriation may or may not require a permit . In some states, a permit or certificate can constitute *prima facie* proof of a perfected water right, whereas the development of diversion structures and beneficial use of a certain amount of water, by itself, may not. Two experienced Utah water lawyers expressed their view on the continuing governmental interest in appropriative water rights:

> While private rights can be acquired to use water, and while these rights are property interests which are entitled to protection and cannot be taken without due process and payment of just compensation, it is fundamental that the state has an interest in the use of the water resource which justifies regulation to govern the manner in which the resource shall be used. The concept that the state has a dominant interest in use of the water resource by private individuals has been a part of the law of the West from the very beginning. Water rights could be lost through nonuse. The very nature of a water right implied a reasonably efficient use, so as to prevent waste, and the courts have not been hesitant to prevent excessive uses or wasteful practices. Early statutes in the various states expressly declared the public nature of the water resources and the public interest in its use. State constitutions frequently expressed the same public interest.
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> The public concern and public interest in water use became more acute as the water use began to exhaust available supplies. So long as there were surplus waters, or a supply fully adequate to meet the demands placed upon the stream, there was no urgency in preventing wasteful practices or to carefully supervise and regulate water use. As the available supplies diminished, and as the demand for water use threatened to exceed the available supply, the public interest re-

207. *Id.* at 1065.

208. *See infra* text accompanying notes 385 - 408.

> quired that more stringent efforts be made to conserve, utilize and regulate the use of water. . . .
>
> So it can be seen that there is a vital public interest in water. It is a limited natural resource upon which the very function and survival of society depends. While the water supply is renewable in the sense that nature provides a new supply each year, the total volume of water that will be renewed each year is limited, even though the annual supply will fluctuate as a result of variations in the precipitation pattern. In short, the vital public concern in a wise and judicious use of the water resource justifies and requires state regulation.[209]

An appropriative water right is a right to use water. It is "usufructuary,"[210] meaning that it is a right to use[211] the thing and enjoy its fruits and profits, rather than a right to own the thing. Under the prior appropriation doctrine, the principle of "beneficial use" limits the quantity and manner of the water right. Limiting an appropriative water right to its beneficial use is generally not a taking. Beneficial use is the basis, measure, and limit of water rights in most western states.[212] Inasmuch as beneficial use is the limit of a water right, a use that is not beneficial under the state's definition would not be part of the bundle of property rights comprising an appropriative right. In *Lucas v. South Carolina Costal Council,* the Supreme Court explained:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citi-

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209. EDWARD W. CLYDE & DALLIN W. JENSEN, NATIONAL WATER COMMISSION LEGAL STUDY 3: ADMINISTRATIVE ALLOCATION OF WATER 31-33 (1971).

210. Derived from the Latin *usufructus.* Generally refers to a right to use without diminishment or damage to the property or other users. BLACK'S LAW DICTIONARY 1580 (8th ed. 2004).

211. The distinction between the right to use and the right to own is often misunderstood. The right to "use" water includes the right to "consume" it, hence the term "consumptive use." Perhaps a better distinction is between a right to the exclusive use of water and the right to the shared use of water. Water retains a servitude of public or common interest notwithstanding recognition of the right as being within the control of any particular person.

212. *See, e.g.,* Dept. of Ecology v. Grimes, 852 P.2d 1044, 1048-49 (Wash. 1993). *See also* Sax, *supra* note 9, at 267 ("While owners of most property have a right to make inefficient uses is they so choose, this is not true of owners of water rights."). For example, a Utah statute provides that "[b]eneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." UTAH CODE ANN. § 73-1-3 (2005). Similar statutes include: ARIZ. REV. STAT. ANN. § 45-141(B) (2005); NEV. REV. STAT. § 533.035 (2003); N.M. STAT. ANN. § 72-1-2 (2005); S.D. CODIFIED LAWS § 46-1-8 (2005).

> zens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[213]

Because non-beneficial uses are not part of a water right owner's bundle of rights, limiting a water right to its beneficial use does not take any rights away from the owner of the appropriative right. Therefore, the greater the extent of limitations and conditions a state places upon a water right at issuance, the smaller the scope of a water right holder's constitutionally protected uses will be.

Similarly, if the use of the water was such that it would constitute a nuisance under state law, a regulation stopping its use would not take any aspect of the water right. However, in order for the government's regulation to succeed, it cannot simply proffer a legislative declaration that the property owner's intended uses are inconsistent with the public interest, rather the government must identify the background principles of state nuisance and property law that prohibit the intended uses.[214] Thus, in a water right case, if either the doctrine of beneficial use or state nuisance law prohibits the purpose for which the water right owner seeks to use his water, then government action may diminish the use, and even extinguish it without incurring any constitutional liability. Such government action does not actual take anything, because a water right does not include the right to put the water to a non-beneficial use or to use the water in a way that state nuisance law would otherwise bar.

One attribute of a prior appropriation right is seniority in the priority system based on the time the right vested. The common phrase "first in time, first in right," refers to the seniority element of an appropriative water right. This phrase indicates that a senior appropriator is entitled to satisfy his water right even if by doing so he leaves a junior appropriator without water.[215]

Just as continuing state regulation of the manner of use will not generally constitute a taking, the state may take subsequent actions to limit the amount of water subject to the right, without constituting a taking. In 1938, the Supreme Court ruled in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* that no taking occurred when the State of

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213. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (quoting in part Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

214. *Id.* at 1031.

215. *See, e.g.*, Clough v. Wing, 17 P. 453, 456 (Ariz. 1888); Wishon v. Globe Light & Power Co., 110 P. 290, 292 (Cal. 1910); Salt Lake City v. Silver Fork Pipeline Corp., 5 P.3d 1206, 1218 (Utah 2000) (citing UTAH CODE ANN. § 73-3-1).

Colorado formed an interstate compact with New Mexico in a manner that interfered with pre-existing appropriative water rights.[216] "[T]he apportionment [by compact] is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."[217] In an 1898 water proceeding, Colorado had adjudicated the water rights involved in the dispute.[218] Accordingly, the Colorado Supreme Court decided that the later, 1923 interstate compact took a portion of the pre-existing 1898 rights.[219] The Supreme Court overruled the Colorado Supreme Court, reasoning that because Colorado controlled only an equitable share of the La Plata River, the pre-existing right holders' interests could only be as large as the state's equitable interest.[220] Therefore, adoption of the interstate compact did not effect a taking, because, in terms later used by the *Lucas* Court, the attributes of the right purportedly taken were "not part of [the property] to begin with."[221]

Government regulations limiting the usage rights of junior appropriators in favor of senior appropriators do not, by their very nature, take any portion of junior appropriator's water rights. In *Central Colorado Water Conservancy District v. Simpson*, a water conservancy district and others claimed that application of a 1989 state law, granting augmentation exemptions for certain gravel pit owners, represented an unconstitutional taking of a portion of existing junior water rights.[222] Colorado's Water Right Determination and Administration Act of 1969[223] regulated the evaporative loss of tributary groundwater exposed by the excavation of open pit sand and gravel mines. The Act mandated augmentation water to compensate for evaporative loss from the pits.[224] The Act provided augmentation exemptions for certain sand and gravel pits excavated prior to 1981 or meeting specific criteria.[225] The conservation districts alleged that the new law "create[d] a new class of water rights not subject to the appropriation system" because qualifying operations were not required to replace the evaporative loss of tributary groundwater.[226] The districts claimed that in dry years, reduced flows would injure junior water right holders because a call on

216. Hinderlinder v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 99, 106 (1938).
217. *Id.* at 106.
218. *Id.* at 98.
219. La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 25 P.2d 187, 187-88 (Colo. 1933).
220. *Hinderlider*, 304 U.S. at 102.
221. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).
222. Cent. Colo. Water Conservancy Dist. v. Simpson, 877 P.2d 335, 339-40 (Colo. 1994).
223. COLO. REV. STAT. §§ 37-92-101 to -602 (2005).
224. *Cent. Colo. Water Conservancy Dist.*, 877 P.2d at 339.
225. § 37-92-502(b); *see also Cent. Colo. Water Conservancy Dist.*, 877 P.2d at 339.
226. *Cent. Colo. Water Conservancy Dist.*, 877 P.2d at 344.

the river would not enable the state engineer to force exempted mining operations to reduce evaporative losses.[227] The Colorado Supreme Court held:

> Although the water court found that implementation of [the Water Right Determination and Administration Act of 1969] will "somewhat . . . decrease" the amount of water in the river available for use, this fact alone does not establish "substantial" damage to any particular water right owner. Owners of water rights have no title to the water in the river, whatever its volume might be at any particular time. While owners of senior water rights are entitled to protection from injurious depletions by owners of junior water rights, the [conservation districts'] effort to equate potential injuries with actual damages for purposes of takings analysis is not persuasive.[228]

Importantly, the court added that the Act would not prohibit the holder of a water right senior to the water right of a qualifying sand or gravel pit operation from seeking a remedy in court based on specific evidence that the gravel pit operation directly caused an injury to the senior water right holder.[229]

Because state officials retain the discretion to grant or deny a permit in a prior appropriation system, the question arises whether an unpermitted (or uncertified) water right is sufficiently perfected to justify a takings claim. For example, under Utah water law, a certified right is prima facie evidence of a constitutionally protected property interest:

> Upon it being made to appear to the satisfaction of the state engineer that an appropriation . . . has been perfected in accordance with the application therefor, and that the water appropriated . . . has been put to a beneficial use . . . he shall issue a certificate . . . . The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.[230]

While a certificate can aid a water right holder in protecting his interest, an uncertified right is inchoate.[231] Utah case law indicates that, if an application lapses for failure to submit timely proof of appropriation, a taking does not result from the consequent reduction in priority.[232]

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227. *Id.* at 347.
228. *Id.* (citations omitted).
229. *Id.* at 343.
230. UTAH CODE ANN. § 73-3-17 (2005).
231. Mosby Irrigation Co. v. Criddle, 354 P.2d 848, 852 (Utah 1960).
232. *Id.*

While case law dealing with uncertified water rights differs from state to state, the Supreme Court's decision in *Palazzolo v. Rhode Island* is informative.[233] In *Palazzolo*, the Supreme Court ruled that while a takings claim is not necessarily unavailable because the party bringing the claim acquired property after adoption of a regulation diminishing the property's value, a factual inquiry is required in each case to discover whether the property owner's investment-backed expectations were reasonable under the circumstances.[234] If the investment-backed expectations were not reasonable in light of the circumstances, a taking did not occur.[235] However, if an unperfected water right is involved, a takings claim based on sufficient investment-backed expectations may not succeed. The very failure to perfect the right indicates insufficient investment-backed expectations,[236]

C. The Right to Access a Water Right

As many water rights in the West are not put to use on riparian land, the water right holder may need additional property rights in order to gain physical access to water. If the government through regulation prohibits access to the water source, the water right is impaired. Cases vary regarding whether such an impairment is an unconstitutional taking requiring compensation.

In *Okanogan County v. National Marine Fisheries*, the United States Forest Service ("Forest Service"), the United States Fish and Wildlife Service, and the National Marine Fisheries Service negotiated for over two years about the amount of in-stream water required to accommodate the bull and steelhead trout species, both listed as endangered under the Endangered Species Act ("ESA").[237] Pursuant to the negotiations, the Forest Service adopted minimum in-stream flow rates within irrigation canals.[238] Because the canals crossed federal land, a Forest

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233. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

234. *Id.* at 630. The Court held that takings claims are not barred because title after the effective date of a regulation:

> A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking occurred. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question.

Id. at 618 (citations omitted).

235. *Id.* at 618.

236. *Id.* at 618-21 (holding that regulatory agencies must have the opportunity to "exercise their full discretion" in granting property rights before a takings claim is ripe).

237. Okanogan County v. Nat'l Marine Fisheries Serv., No. CS-01-192-RHW, 2002 U.S. Dist. LEXIS 13625, at *3 (E.D. Wash. Mar. 13, 2002), *aff'd*, 347 F.3d 1081 (9th Cir. 2003), *and cert. denied*, 541 U.S. 1029 (2004).

238. *Okanogan County*, 2002 U.S. Dist. LEXIS 13625, at *3.

Service special use permit was required to access the water.[239] When the Forest Service imposed a condition on the special use permits that required users to maintain minimum in-stream flows for endangered fish, the irrigators claimed that the condition effectively denied water right owners access to the water they were entitled to by right.[240]

The irrigators alleged that the Forest Service's decision to place conditions on water use for the benefit of ESA-listed fish was arbitrary and capricious.[241] The irrigators relied on *United States v. New Mexico,* in which the Supreme Court held that Congress did not intend to reserve water rights for wildlife preservation purposes when they enacted the Organic Administration Act and the Multiple Use Sustained Yield Act establishing national forests.[242]

The United States District Court for the Eastern District of Washington concluded that the Forest Service did not effectuate a taking by conditioning the permits and did not relinquish its power to impose such conditions through the special use permits.[243] Rather, the Forest Service had the authority to place conditions on special use permits in accordance with the ESA,[244] and courts may review such conditions for arbitrariness and capriciousness.[245] The court concluded that the Forest Service did not act arbitrarily by imposing conditions for the benefit of ESA-listed fish in the Methow River.[246]

Okanogan suggests that a water right holder's water right and real property access rights are separable and distinct.[247] Federal agencies possess the ability to obtain in-stream flows simply by limiting the terms of special permits.[248] From the perspective of the Supreme Court's decision in *Lucas,* access across federal land is not part of an irrigators' right to water. Although the district court did not address the issue in these terms, its ruling is consistent with *Lucas.*[249]

The Ninth Circuit Court of Appeals affirmed the district court's decision.[250] While acknowledging that the ESA does not grant federal agencies power that they do not otherwise possess,[251] the National Forest Management Act,[252] Organic Administration Act,[253] Federal Land

239. *Id.* at *2.
240. *Id.* at *3-5.
241. *Id.* at *27-29.
242. United States v. New Mexico, 438 U.S. 696, 707-08, 713-15 (1978).
243. *Okanogan County,* 2002 U.S. Dist. LEXIS 13625, at *10-11, *18-19.
244. *Id.* at *18.
245. *Id.* at *27.
246. *Id.*
247. *See id.* at *10-11, *18-19.
248. *Id.* at *12-13.
249. *See supra* text accompanying notes 60-66.
250. County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1081 (9th Cir. 2003), *cert. denied,* 541 U.S. 1029 (2004).
251. *Id.* at 1085.
252. 16 U.S.C. § 1604(g)(3)(A)-(B) (2000).

Policy and Management Act ("FLPMA"),[254] and the Multiple Use Sustained-Yield Act[255] provided the Forest Service authority to "maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species."[256] "The permits [issued pursuant to those statutes], from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way."[257] The Court of Appeals also found that FLPMA's savings clause[258] was not pertinent as the case involved the right of way, not the water right itself.[259] The court distinguished *United States v. New Mexico* because *New Mexico*

> . . . did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. . . . FLPMA specifically authorizes the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law.[260]

However, the Court of Appeals suggested that if the irrigators had alleged that their state water rights had vested prior to Congressional enactment of the Forest Service's permitting authority, then they would implicate the FLPMA savings clause, and a takings claim could have been cognizable.[261]

A similar result occurred in *Bradshaw v. United States* where cattle ranchers, after refusing to pay associated grazing fees, sought continued access to water via the Humboldt National Forest.[262] The Court of Federal Claims, while not ruling on the ranchers' takings claim with

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253. 16 U.S.C. § 475 (2000).
254. 43 U.S.C. §§ 1701-1785 (2000).
255. 16 U.S.C. § 528 (2000).
256. County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1085 (9th Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004).
257. *Id.*
258. "Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(a), 90 Stat. 2743, 2786 (codified at 43 U.S.C. § 1701 (2000)). It adds, "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* § 701(h).
259. *County of Okanogan*, 347 F.3d at 1086.
260. *Id.*
261. *Id.* at 1085 (noting that "[a]ppellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLPMA in 1976"); *see also* Washoe County v. United States *(Honey Lake)*, 319 F.3d 1320, 1322, 1326 (Fed. Cir. 2003) (upholding a 2001 Court of Federal Claims decision denying an right-of-way application across federal land, stating that "[t]he government did not effect a physical taking...because it neither physically appropriated nor denied meaningful access to Appellants' water rights.").
262. Bradshaw v. United States, 47 Fed.Cl. 549, 551 (2000).

respect to water rights,[263] held that the imposition of grazing fees was a reasonable condition on the ranchers' continued use of federal land.[264] Likewise, the Tenth Circuit upheld a decision finding no taking where cattle ranchers in New Mexico refused to pay for grazing permits, and the state subsequently denied the ranchers access to water. In *Diamond Bar Cattle Co. v. United States*, the court explained:

> In entering summary judgment for the United States, the district court held plaintiffs obtained no legal right of possession or use merely because their predecessors historically grazed cattle on the land. Nor did the court find it material that plaintiffs' water rights may have long been vested under New Mexico law, stating: "[W]hether Plaintiffs own certain water rights . . . does not change the fact that such rights do not deprive the Forest Service of its statutory authority and responsibility to regulate the use and occupancy of National Forest System lands for livestock grazing through the issuance of grazing permits." The court enjoined plaintiffs from grazing livestock in the Gila and Apache National Forests until they obtained authorization from the Forest Service.[265]

In *Hage v. United States*, another cattle rancher obtained a different result when the Court of Federal Claims agreed with a water right holder seeking continued access to a water right.[266] Hage alleged that a taking occurred when the Forest Service revoked his grazing permits and denied his use of rights-of-way after he removed several trees adjacent to irrigation ditches in order to provide his cattle access to the water.[267] Hage claimed that he possessed a right to continue to cross federal land to exercise a water right for his cattle even after the Forest Service revoked his grazing permits.[268] Although agencies who issue rights-of-way for ditches can place conditions on their use, the Court of Federal Claims ruled that Hage owned the right, and the associated rights-of-way, to access water by crossing federal land.[269]

The Forest Service argued that Hage exceeded his right of reasonable maintenance as described in the Forest Service Manual when he cleared the vegetation.[270] The court ruled that the Ditch Rights-of-Way Act of 1866 generally allowed, and the legislative intent of the Act supported, a 50 foot right-of-way of on either side of a ditch to provide ample access; thus the court rejected the Forest Service's contention

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263. *Id.* at 552.
264. *See id.* at 553.
265. Diamond Bar Cattle Co. v. United States, 168 F.3d 1209, 1211 (citations omitted).
266. Hage v. United States, 51 Fed.Cl. 570, 584 (2002).
267. *Id.* at 573, 581 n.14.
268. *Id.* at 573.
269. *Id.* at 584.
270. *Id.* at 585.

that the Forest Service Manual controlled.[271] Judge Smith cited the repeated use of that specific measurement in 19th century House and Senate floor debates over the bill: "[T]he Forest Service Manual does not have the force of law. It can not [sic] alter a statutory right. . . . The Manual was created to guide Forest Service personnel, not to govern private citizens in the exercise of their rights."[272]

The court found that Hage obtained various water rights with a priority date that predated the 1907 creation of the Toiyabe National Forest Reserve.[273] Thus, Hage had a vested right to continue to access those waters.[274] The court admonished,

> [T]he government cannot deny citizens access to their vested water rights without providing a way for them to divert that water to another beneficial purpose if one exists. The government cannot cancel a grazing permit and then prohibit the plaintiffs from accessing the water to redirect it to another place of valid beneficial use. The plaintiffs have a right to go onto the land and divert the water.[275]

The court relied on *Elko County Board of Supervisors v. Glickman*, a 1995 decision of the United States District Court for the District of Nevada, holding that a vested right-of-way that runs across Forest Service lands is subject to reasonable Forest Service regulation so long as the regulation does not amount to a prohibition against exercising that right.[276]

In *Washoe County v. United States,* also known as the *Honey Lake* case, the United States Court of Appeals for the Federal Circuit upheld a 2001 Court of Federal Claims ruling that the Bureau of Land Management's ("BLM") denial of an application for a right-of-way to transfer water across federal land did not constitute a taking of a state water right because the water right had not been perfected.[277] Nevada's Washoe County entered into a contract under which it obtained appropriated water rights previously held by the Fish Springs Ranch in the Honey Lake Valley of northwest Nevada.[278] The Ranch was located between an Army depot in Lassen County, California on the west and the Pyramid Lake Indian Reservation on the east.[279] In 1989, despite objections from the Army and the Pyramid Lake Tribe of Indians

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271. *Id.* at 586.
272. *Id.* at 585.
273. *Id.* at 583-84.
274. *Id.* at 584.
275. *Id.*
276. Elko County Bd. of Supervisors v. Glickman, 909 F.Supp. 759, 764 (D. Nev. 1995).
277. Washoe County v. United States (*Honey Lake*), 319 F.3d 1320, 1327 (Fed. Cir. 2003).
278. *Id.* at 1322.
279. *Id.*

("Tribe"), Nevada's state engineer granted a change in the place of use, as well as a change in the manner of its use, from agricultural to municipal and industrial use.[280]

In order to use the water in its newly authorized place of use, the county sought a right-of-way from BLM in order to transport the water via pipeline south to the Reno-Sparks metropolitan area.[281] The Army and Tribe objected to the draft Environmental Impact Statement ("EIS") BLM distributed for comment.[282] The decision "as to whether to proceed further with the development of a final EIS was elevated to the Secretary of the Interior."[283] The Secretary issued an order directing the BLM to suspend work on the final EIS until the county resolved objections from the Army, the Tribe, and the United States Geological Survey.[284] Because the objections were not resolved, the BLM effectively denied Washoe County's right-of-way permit application.[285]

The county argued that by denying the right-of-way application, BLM denied the county meaningful access to its state-recognized water right, thereby effectuating a physical taking requiring compensation.[286] The Court of Appeals for the Federal Circuit found that the right to cross federal land was not part of the water right owner's title to begin with:

> In the instant case, the government has neither physically diverted or appropriated any water nor physically reduced the quantity of water that is available to the Appellants from the water source on the Ranch. . . . [T]he government has not affected Appellants' water rights except by denying permission to use the government's own land to exploit those rights. . . . Because the government neither physically diverted or reduced the amount of water accessible by Appellants nor denied all meaningful access to their water rights, it did not effect a physical taking. . . . Washoe County applied for a right-of-way to build a pipeline on federal land. Washoe County and the other Appellants had no right to build on federal land and thus *no interest in the land.*[287]

The scope of the right of access to a water right depends greatly on the attributes of the water right owner's title at the outset. *Okanogan* held that government action may interfere with state-issued water

280. *Id.* at 1322-33.
281. *Id.* at 1323.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 1325.
287. *Id.* at 1327 (emphasis added).

rights so long as there is statutory support for the action.[288] *Okanogan* also established that, as long as the government's permitting authority predated the vesting of water rights, conditions destroying the exercise of the right are justified.[289] Further, *Honey Lake* held that the right to access a water right may depend on whether the holder of right perfected the right prior to the agency obtaining the power to condition access across the government's land.[290] Where the title enjoyed by the water right owner does not include a vested right of access across the land in question, which was established prior to the agency's ability to regulate such land, reasonable restrictions, including restrictions that may virtually cut off access, have been upheld.

On the other hand, *Hage* provides an example of access to a water right vested in a cattle rancher prior to the creation of the Toiyabe National Forest, which allowed the rancher to cross part of the forest to access his right.[291] While the government may reasonably regulate such a right and charge reasonable fees for the use of the land crossed, the government cannot unilaterally deny access the land to a valid, perfected water right.[292] To do so would require compensation under the Fifth Amendment.[293]

Where the water right owner has reasonable access to water, such as in *Honey Lake,* the government is not obligated to grant the water right owner additional license to construct on or cross federal land. Denying additional means of access does not take any rights away from the right holder because those features were not an attribute of the original water right.

D. Water Rights Created by Contract

A contract with the United States may give rise to a right to use water. Delivery of water pursuant to a contract with a governmental entity, such as an irrigation district or the United States Bureau of Reclamation ("Bureau"), enables the exercise of state-based water rights.[294]

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288. County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1085 (9th Cir. 2003), *cert. denied,* 541 U.S. 1029 (2004).

289. *Id.* at 1085-86.

290. Washoe County v. United States (*Honey Lake*), 319 F.3d 1320, 1327 (Fed. Cir. 2003).

291. Hage v. United States, 51 Fed.Cl. 570, 573-74, 583 (2002).

292. *Id.* at 584.

293. *Id.* at 573, 592.

294. Bureau project water may be obtained from: (1) state-based rights held prior to the project's congressional authorization; (2) state-based rights obtained from state officers by the Bureau under state permitting systems; (3) federal control of the waterway, as in the case of Lower Colorado River projects authorized by the Boulder Canyon Project Act, 43 U.S.C. § 617 (2000); or (4) contracts to transport non-project water under the Warren Act, 43 U.S.C. §§ 523-525 (2000). Courts construing federal contract rights have assiduously maintained the distinction between state-based water

In *Ickes v. Fox*, reclamation project water users alleged that the government took their vested state-based water rights.[295] In 1906, pursuant to authority granted under the Reclamation Act of 1902,[296] the Secretary of the Interior approved the Sunnyside Unit of the Yakima Reclamation Project.[297] In the 1930's, the Bureau of Reclamation levied additional fees on the water district, which had utilized the project pursuant to contract, to cover the costs of constructing another dam in the area.[298] The Supreme Court held that, because the water users complied with their contractual obligations and put their water to beneficial use, their right to use project water vested under Washington state law.[299] The Supreme Court enjoined the Secretary of the Interior from taking action to change the vested water rights.[300] The Supreme Court noted:

> Appropriation [of water] was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract . . . the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.[301]

The Court added that state law determines whether water users acquire property rights in the water provided by Reclamation projects.[302]

Ickes illustrates an attempt by the Bureau to change the quantity of water and the price thereof, although the terms of water delivery contract explicitly protected both quantity and price. The Court's holding indicates that the government cannot reduce water availability or price under an existing contract unless the contract provisions allow such changes. If the government acts outside of the contract provisions, a compensable taking occurs. *Ickes* also illustrates that if irrigators in a water delivery contract comply with their obligations by paying their fees in full, their right to a fixed quantity of water, at the agreed con-

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rights and federal contract rights. *See, e.g.*, Nebraska v. Wyoming, 325 U.S. 589, 629 (1945); United States v. Tilley, 124 F.2d 850, 861-62 (8th Cir. 1941); Verde River Irrigation & Power Dist. v. Work, 24 F.2d 886, 889 (D.C. Cir. 1928); New York Trust Co. v. Farmers Irrigation Dist., 280 F. 785, 795 (8th Cir. 1922); Ramshorn Ditch Co. v. United States, 269 F. 80, 88 (8th Cir. 1920); New York Canal Co. v. Bond, 265 F. 228, 233 (9th Cir. 1920); Tulelake Irrigation Dist. v. United States, 342 F.2d 447, 452 (Ct. Cl. 1965); Bean v. United States, 163 F.Supp. 838, 844 (Ct. Cl. 1958); El Paso County Water Improvement Dist. No. 1 v. City of El Paso, 133 F.Supp. 894, 921 (W.D. Tex. 1955).

295. Ickes v. Fox, 300 U.S. 82, 92-93 (1937).

296. Pub. L. No. 57-161, 32 Stat. 388 (codified as amended at 43 U.S.C. § 371 (2000)).

297. *Ickes*, 300 U.S. at 88.

298. *Id.* at 92.

299. *Id.* at 94.

300. *Id.* at 96-97.

301. *Id.* at 95.

302. *Id.* at 95-96.

tract price, is a vested right, and such rights enjoy the same protections as any other state-issued water right.

In *Nevada v. United States*, the federal government tried to reallocate some of its water rights from the Newlands Project to the Pyramid Lake Paiute Indian Tribe in Nevada.[303] The Orr Ditch decree of 1944 enumerated the water rights for the project, the Tribe, and Truckee River water users.[304] Pertinent contract language between the federal government and the irrigation district stated: "[A]pplication is hereby made to the [Truckee-Carson Irrigation District] . . . for a permanent water right for the irrigation of and to be appurtenant to all of the irrigable area now or hereafter developed under the above-named project[.]"[305] The Supreme Court ruled that land owners relying on Project waters held vested rights to that water, and that those rights could not be taken without appropriate compensation. The Court said:

> Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.[306]

The Court precluded the United States from modifying the irrigators' water rights as outlined in the Orr Ditch Decree.[307]

The terms of a contract define the attributes of a contractual water right. Those terms may preclude a takings claim. In *Peterson v. United States*, the Ninth Circuit rejected claims brought by water agencies that the Reclamation Reform Act of 1982 ("RRA") had taken their water rights, and held that the Central Valley Project contracts gave the government the authority to regulate the quantity of subsidized water provided to the contracting water users.[308]

In *Peterson*, water districts challenged the constitutionality of RRA § 203(b),[309] a so-called "hammer clause," which gave the water districts the options of either amending pre-existing contracts to conform to the RRA's new provisions, or continuing to receive water at the original contract price for delivery to land not exceeding an acreage limit, but then paying full cost for any water delivered to leased land exceeding the limit.[310] The plaintiff water districts declined to amend their con-

303. Nevada v. United States, 463 U.S. 110, 113 (1983).
304. *Id.* at 145.
305. *Id.* at 126-7 n.9 (emphasis omitted).
306. *Id.* at 126.
307. *Id.* at 145.
308. Peterson v. U.S. Dep't. of Interior, 899 F.2d 799, 806-08, 811 (9th Cir. 1990).
309. Act of 1982, Pub. L. No. 97-293, tit. II, sec. 203(b), 96 Stat. 1264, 1265 (1982) (codified at 43 U.S.C. § 390cc(a),(b) (2000)).
310. Peterson, 899 F.2d at 806-07.

tracts and brought an action in federal court claiming that the "hammer clause" violated the Fifth Amendment's due process and taking clauses.[311]

The Ninth Circuit Court of Appeals upheld the district court's denial of the takings claim, stating that by passing the RRA:

> Congress increased the size of farms that could receive reclamation water to 960 acres . . . and raised the price of reclamation water to reflect more accurately its true cost to the government. Section 203(b) authorized the Water Districts to amend their contracts to take advantage of the 960-acre limitation, albeit at a potentially higher, but still subsidized, rate than that provided in their contracts. The Water Districts were not required to amend their contracts because any water district that wanted to maintain the 160-acre limitation and lower contract price was left free to do so. Section 203(b), the so-called hammer clause, simply provided that those who elected to continue under the original contracts could no longer continue to deliver subsidized water to leased tracts of any size. Section 203(b) requires the Water Districts to choose between continuing under previous federal water policy, but without the "leasing loophole" tolerated by the Department of the Interior, or conforming with the new 960-acre limitation of the RRA.[312]
>
> The Water Districts contend that because they were not expressly prohibited by the Department in their contracts from providing water to leased land, they have a contractual right to do so which must be considered "vested" or immune from later regulations or statutory amendments. . . . [T]he implied right asserted here clearly violates the spirit, if not the letter, of the reclamation laws which authorized such contracts. The reclamation projects were funded by the federal government with the express intent that the subsidized water be used to promote the development of family-owned farms. . . . Congress had always required that land receiving reclamation water be owned in no larger than 160-acre parcels *and* that the owners of the land occupy it or reside in the neighborhood. The fact that the Department of the Interior ignored the residency requirement and turned a blind eye to the practice of large-scale leasing does not lessen the importance of these restrictions in the congressional scheme. . . .
>
> The contracts contain no language that can be construed as a "surrender[] in unmistakable terms" of the sovereign's ability to regulate the quantity of subsidized water that may be provided to leased farm lands.[313]

311. *Id.* at 807.
312. *Id.* at 813-14.
313. *Id.* at 810-12.

In *O'Neill v. United States,* the Ninth Circuit Court of Appeals denied a water user's contractual enforcement proceeding based on a fifty percent reduction in water delivery from the San Luis Unit of California's Central Valley Project ("CVP").[314] The contract between the Bureau of Reclamation ("BOR") and the water users contained a provision limiting the government's liability for water shortages caused by "errors in operation, drought, or other causes."[315] The contract, executed in 1963, provided for Westlands Water District's receipt of 900,000 acre-feet of water annually.[316] For several years, the BOR delivered the 900,000 acre-feet each year pursuant to the contract.[317] Disputes over the contract arose in 1978 when the government claimed the contract was invalid.[318] For the next eight years, the BOR and the district entered into short-term delivery contracts, and then in 1986 the parties agreed to operate under the 1963 contract.[319] However, a substantial challenge ensued after federal agencies listed the Sacramento River winter-run chinook salmon and the delta smelt as a threatened species in 1990 and 1993 respectively.[320] In 1993, the BOR announced that, pursuant to efforts to comply with both the Endangered Species Act ("ESA") and the purposes of the CVP, they would reduce water delivery to the Westlands District by half.[321] Water users and the district sued, but due to the contract limitation, the BOR refused to release more water.[322]

The Ninth Circuit Court of Appeals construed the contract language in favor of the government. Article 11(a) of the contract "limit[ed] the government's liability for water shortages caused by errors in operation, drought, or any other causes."[323] The court held that, "[o]n its face, Article 11(a) unambiguously disclaims any liability for damages in the event the United States is unable to supply water in times of shortage."[324] This included artificial shortages, such as legislatively created storage to provide water for endangered species.[325] Due to the contract terms that allowed the federal government to reduce the water quantity to comply with a statutory mandate, the water rights held by the landowners were not absolute, and, therefore, the landowners could not enforce delivery of a specific quantity of water.

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314. O'Neill v. United States, 50 F.3d 677, 681, 689 (9th Cir. 1995).
315. *Id.* at 680.
316. *Id.*
317. *Id* at 681.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at 681-82.
323. *Id.* at 680.
324. *Id.* at 683.
325. *See id.*

Similarly, in *Rio Grande Silvery Minnow v. Keys*, hydrologists predicted that the San Acacia stretch of the Middle Rio Grande in New Mexico would dry up due to extreme drought adversely affecting the endangered silvery minnow.[326] As part of the San Juan-Chama Project, imported water was stored in the Heron Reservoir and was under contract for delivery to farmers and municipalities.[327] The court concluded that the BOR's obligations under the ESA authorized it to release water from federal projects and to restrict and prorate the established water contracts for deliveries from the San Juan-Chama Project and the Middle Rio Grande Project as needed.[328]

Although the district court referenced contractual language that appeared to negate a takings claim against the United States, the court nevertheless directed compensation if water was withheld.[329] In granting the preliminary injunction forcing the release of water from federal projects, the district court stated: "[i]f BOR and FWS conclude that 2003 water deliveries to contractors must be reduced in order to avoid jeopardy to the silvery minnow, under the Court's Order, the contractors must be compensated for the amount of contracted water not delivered to them."[330]

The Tenth Circuit Court of Appeals affirmed the district court's decision, but noted that compensation to the adversely affected state water right holders may be required.[331] Although the compensation portion of the district court's order was moot because the contracts were not abrogated, the court indicated that "the issue of compensation will likely resurface with reallocations that may eventuate from BOR's exercise of discretion."[332]

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326. Rio Grande Silvery Minnow v. Keys, No. CV 99-1320 JP/RLP-ACE, 2002 U.S. Dist. LEXIS 9246, at *27 (D. N.M. Apr. 19, 2002), *preliminary injunction granted by* 356 F.Supp. 2d 1222 (D. N.M. 2002), *aff'd*, 333 F.3d 1109 (10th Cir. 2003), *and vacated and appeal dismissed*, 355 F.3d 1215 (10th Cir. 2004).

327. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246, at *61-62.

328. *Id.* at *53.

329. *Id.* at *67.

330. Rio Grande Silvery Minnow v. Keys, 356 F.Supp. 2d 1222, 1235 (D. N.M. 2002) (granting preliminary injunction and providing findings of fact and conclusions of law), *aff'd*, 333 F.3d 1109 (10th Cir. 2003), *and vacated and appeal dismissed*, 355 F.3d 1215 (10th Cir. 2004).

331. *Rio Grande Silvery Minnow*, 333 F.3d at 1138, *vacated and appeal dismissed*, 355 F.3d 1215 (10th Cir. 2004).

332. *Rio Grande Silvery Minnow*, 333 F.3d at 1138. Six months later, the Tenth Circuit Court of Appeals found moot, and vacated its June 2003 panel opinion affirming the injunction granted by the district court giving BOR broad authority to abrogate water contracts to meet the needs of the silvery minnow. The court reasoned,

> The climatological circumstances that occurred during the appeal and the passage of time have rendered the injunction superfluous. No water has been diverted, and the order requiring diversion expired. . . . Thus, the injunctive order from which this appeal was taken no longer provides the court with a live controversy to review. Therefore, this appeal is moot.

In *Tulare Lake*, the Court of Federal Claims determined that the BOR's water pumping restrictions, imposed in order to provide water for endangered fish, constituted a physical taking of water from irrigation districts using water delivered through a federal project.[333] The irrigators received their water from the coordinated pumping system of the Central Valley Project and the California State Water Project, thereby, utilizing both federal and state infrastructure and contracts.[334] The Court of Federal Claims observed:

> 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 the 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. Thus, by limiting the plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete occupation of property—an exclusive possession of plaintiffs' water-use rights for preservation of the fish—mirrors the invasion present in [*United States v.*] *Causby* [328 U.S. 256 (1946)]. To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.[335]

However, the same court came to a different result under similar circumstances in *Kandra v. United States*, where the BOR shut off water to farmers in the Klamath River Basin in Southern Oregon and Northern California in April 2001 in order to prevent harm to endangered fish in Klamath Reservoir.[336] Irrigators and the Klamath Water Users Association sued to enjoin the agency's action.[337] The court held the irrigators' contractual water rights were subservient to ESA and tribal trust requirements stating, "the ESA explicitly prohibits the relief [the irrigators] seek."[338] The irrigators subsequently filed a lawsuit in the United States Court of Federal Claims seeking compensation for a taking and for the impairment of water rights under the Klamath Basin

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Rio Grande Silvery Minnow v. Keys, 355 F. 3d 1215, 1219-20 (10th Cir. 2004).

333. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313, 314-15, 318-19 (2001).

334. *Id.* at 314.

335. *Id.* at 319.

336. Kandra v. United States, 145 F.Supp. 2d 1192, 1195-96 (D. Or. 2001).

337. *Id.* at 1195.

338. *Id.* at 1211.

Compact.[339] Although the situation was factually similar to the situation in *Tulare Lake*, the Court of Federal Claims denied Klamath Basin irrigators' allegations under the Fifth Amendment of the Constitution.[340] The court criticized its earlier *Tulare Lake* decision, finding that it was "wrong on some counts, incomplete in others and, [sic] distinguishable, at all events."[341]

The court determined that it "must give practical meaning to the term 'property'" as used in the constitutional context.[342] The plaintiffs claimed property interests from a number of sources, including federal reclamation law, general state water law, and water delivery contracts.[343] As to reclamation law, the court noted that in 1922 Congress granted the BOR authority to not only contract for water deliveries with individual users, but also with water districts.[344] In 1926, Congress enacted further legislation specifying that only state-recognized districts may enter into federal contracts.[345] Thereafter, the BOR contracted exclusively with irrigation districts to deliver water.[346] The contracts for Klamath Basin water with the districts superseded provisions of certain BOR contracts with individual users.[347]

The court determined that the BOR was obligated to assure that its operation of the Klamath Project did not result in jeopardy to any endangered species.[348] At the time of the Klamath suit, the BOR was in the process of establishing an operating plan for the project to balance "competing purposes and obligations."[349] The court noted that, if the BOR determined its proposed action would result in jeopardy to endangered species, then the BOR must modify the proposal.[350] Indeed, previous biological opinions indicated that the project would in fact threaten three fish species.[351]

Thirteen of the fourteen contracts between water districts and the BOR contained provisions "holding the United States harmless for 'any damage, direct or indirect,' resulting 'on account of drought or other causes' of 'a shortage in the quantity of water available' from Project sources.'"[352]

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339. Klamath Irrigation Dist. v. United States, No. 01-591 L, 2005 U.S. Claims LEXIS 256, at *4 (Fed. Cl. Aug. 31, 2005).
340. *Id.* at *124-25.
341. *Id.* at *116.
342. *Id.* at *2.
343. *Id.* at *4.
344. *Id.* at *7.
345. *Id. at* *9.
346. *Id.*
347. *Id.* at *20.
348. *Id.* at *13.
349. *Id.*
350. *Id.* at *14-15.
351. *Id.* at *26.
352. *Id.* at *19.

The court noted that, to prevail on a takings claim, the plaintiffs must establish a private property interest protected by the Fifth Amendment of the Constitution.[353] Because water belongs to the public, state water rights are usufructuary in nature.[354] Section eight of the Reclamation Act required the BOR to comply with state law in acquiring project water.[355] The court rejected plaintiff's argument that takings claims were supported by *Ickes v. Fox*,[356] *Nebraska v. Wyoming*,[357] or *Nevada v. United States*,[358] concluding that "Congress, in passing the reclamation laws, [did not] intend[] to create usufructuary rights independent of state law."[359] Therefore, the court considered whether, under state law, the plaintiffs had property rights in the Klamath Basin.[360]

The court found that the United States obtained rights to all unappropriated waters in the basin as of 1905 and acquired pre-1905 rights by contract.[361] The court concluded that the takings clause of the Fifth Amendment protected post-1905 contractual rights, but "cautioned against commingling takings compensation and contract damages."[362] The court cited *Hughes Communications Galaxy v. United States*, in which the court noted, "[t]akings claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity."[363]

The court then applied the *Hughes* rationale: "the United States may be viewed as acting in its proprietary capacity in entering into the water contracts in question, and it appears that the affected plaintiffs [as third party beneficiaries] retain the full range of remedies with which to vindicate their contract rights."[364] The court noted that the Ninth Circuit Court of Appeals in *O'Neill v. United States*, concluded that water shortage provisions in BOR water contracts do not obligate the BOR to deliver the full contractual amount of water if such delivery is inconsistent with the ESA.[365]

The court also concluded that even for those contracts that did not contain such shortage provisions, the reductions ordered did not result in a breach under the sovereign acts doctrine.[366] "An act of govern-

353. *Id.* at *32.
354. *Id.* at *55.
355. *Id.* at *5-6.
356. Ickes v. Fox, 300 U.S. 82 (1937).
357. Nebraska v. Wyoming, 325 U.S. 589 (1945).
358. Nevada v. United States, 463 U.S. 110 (1983).
359. *Klamath Irrigation Dist.*, 2005 U.S. Claims LEXIS 256, at *55.
360. *Id.* at *61.
361. *Id.* at *65, 74-75.
362. *Id.* at *90-91.
363. *Id.*; Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001).
364. *Klamath Irrigation Dist.*, 2005 U.S. Claims LEXIS 256, at *95.
365. *Id.* at *109 (citing O'Neill v. United States, 50 F.3d 677, 682-4 (9th Cir. 1995)).
366. *Id.* at *112.

ment will be considered to be sovereign so long as its impact on a contract is 'merely incidental to the accomplishment of a broader governmental objective.'"[367] Further, the court stated, "[s]everal courts have concluded that the enactment and subsequent enforcement of the ESA should be viewed as sovereign acts . . . ."[368]

The court also addressed the holding in the *Tulare Lake* case, which upheld the plaintiffs' claims to damages because the reduction amounted to a physical taking of property.[369] The court found the *Tulare Lake* decision flawed because it "failed to consider whether the contract rights at issue were limited so as not to preclude enforcement of the ESA," and it treated the contract rights of the districts as absolute without adequately considering whether they were limited in the case of water shortage "either by prior contracts, prior appropriations or some other state law principle," and the court never reached the analysis of whether the claim should be treated as a contract breach rather than a takings claim.[370]

Finally, the court addressed the plaintiffs' patent deed and state water permit claims.[371] The court noted both the deeds and the permits, which were acquired after 1905, were, thus, subservient to prior rights, and "could not have been taken . . . by the failure of the [BOR] [as senior water right holder] to deliver water. . . ."[372]

E. Water Rights Created by Implied Congressional Reservation

Implied congressional reservation may also create water rights. Whether the federal government sets aside land for a national forest, an Indian reservation, a national park, or military purposes, an implied right to water on such land is reserved for federal use. The amount is limited to the water needed to serve the primary purposes for which the land was set aside. Numerous decisions by the high court have refined the definition and scope of such reserved water rights.[373] Because

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367. *Id.* at *112-13.
368. *Id.* at *114.
369. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313, 318-19 (2001).
370. *Klamath Irrigation Dist.*, 2005 U.S. Claims LEXIS 256, at *116-18.
371. *Id.* at *119-20.
372. *Id.* at *121.
373. *See* United States v. New Mexico, 438 U.S. 696, 718 (1978) (holding that "Congress intended that water [for National Forests] would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law."); Cappaert v. United States, 426 U.S. 128, 138 (1976) (holding that "the United States acquires a reserved water right in unappropriated water [for National Monuments] which vests on the date of the reservation[.]"); Arizona v. California, 373 U.S. 546, 600 (1963) (holding that tribal reservations had right to federal reserved water rights to "irrigate all the practicably irrigable acreage on the reservations" for both the present and the future).

the federal government cannot initiate a takings claim against itself, reserved rights are rarely associated with a takings claim.

Although the government cannot sue itself for taking a reserved right to water, it is conceivable that others who enjoy a property interest created by an implied reservation of water could assert a claim if that property interest were taken. In 1998, the Ninth Circuit Court of Appeals ruled on the extent to which incidental beneficiaries of reserved water rights held property interests in excess water.[374] In *Maricopa-Stanfield Irrigation & Drainage District v. United States*, several water districts in Arizona alleged that, by passing the San Carlos Apache Tribe Water Rights Settlement Act ("SCAT Act"), the government took their right to use excess water resulting from the Ak-Chin Indian Water Rights Settlement Act.[375] Pursuant to the Ak-Chin allocation, the Ak-Chin Tribe was to receive 75,000 acre-feet per year, or 85,000 acre-feet in years where sufficient water was available.[376] Because the two sources for tribal water, the Central Arizona Project ("CAP") and the Ak-Chin allocation, "together produced 23,300 to 33,300 [acre-feet] more water than the Ak-Chin Tribe was entitled to under the terms of the settlement, Congress stated that the Secretary 'shall allocate' this excess Ak-Chin water 'on an interim basis to the Central Arizona Project.'"[377] In the years preceding the final SCAT Act allocations, the secretary adopted a system to make the excess water available:

> The Secretary decided that the Indian tribes, which include the Ak-Chin and the San Carlos Apache Tribes, could contract for up to 309,000 [acre-feet] of water from the CAP. Municipal and industrial users were entitled to contract for as much as 640,000 [acre-feet] of CAP water. The non-Indian agricultural pool was allotted the right to contract for whatever CAP supply remains after the tribal, municipal, and industrial users purchased the water allotted to them in 1983.[378]

The excess water remained in the CAP for eight years.[379] In 1992, Congress approved a settlement agreement that provided that the Secretary would allocate excess water to the San Carlos Apache Tribe.[380] Two years later, the water districts sued for damages asserting a takings claim.[381] The claimant water districts alleged a right to water from the

374. Maricopa-Stanfield Irrigation & Drainage Dist. v. United States, 158 F.3d 428, 434 (9th Cir. 1998).
375. *Id.* at 432-33.
376. *Id.* at 432.
377. *Id.* (citing Act of Oct. 19, 1984, Pub. L. No. 98-530, § 2(k), 98 Stat. 2698, 2701 (1984)).
378. *Id.* at 431 n.3 (citations omitted).
379. *Id.* at 432.
380. *See* San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, tit. 37, § 3704(c)-(d), 106 Stat. 4740, 4742-43 (1992).
381. *Maricopa-Stanfield*, 158 F.3d at 432-33.

non-Indian agricultural pool pursuant to subcontracts with the Central Arizona Water Conservancy District, which was no longer available after Congress ratified the Ak-Chin Settlement Act.[382]

The "Ak-Chin Settlement Act direct[ed] the Secretary to 'allocate' the excess Ak-Chin water 'on an interim basis to the Central Arizona Project' without naming a specific allottee or class of allottees."[383] The court held "Congress's failure to designate a specific user or user class [for the excess water] convinces us that, even if the excess Ak-Chin water generally was available to the districts before 1992, the Ak-Chin Settlement Act conferred upon them no protectable property interest."[384]

Thus, while Congress can impliedly reserve protectable water rights to serve the purposes for which federal land is reserved, only by explicit statutory language will such reservations also preserve a right for incidental third party beneficiaries directly affected by the reservation of water rights. When a statute expressly protects such third party beneficiary rights, adverse impact to those rights may require just compensation.

F. The Public Interest and the Public Trust Doctrine

In prior appropriation water rights systems, water is publicly owned.[385] Riparian rights, which are appurtenant to private landowner rights, may also be subject to a continuing public interest. Even after a usufructuary right is established or recognized, the government, as protector of the public's interest, remains involved. State courts in the West have relied on this public interest to justify limiting private water rights without compensating the water right owner.[386] Various courts have emphasized the role of state constitutions and statutory provisions stating that water is the property of the public.[387] The United States District Court for the District of Kansas, in a decision finding Kansas's permitting system constitutional, reasoned, "[a]dequate water supply is a necessity. In the arid and semi-arid regions of the West it is imperative that all available water be utilized beneficially and without waste."[388]

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382. *Id.*

383. *Id.* at 435.

384. *Id.* at 436.

385. *See* 4 WATERS AND WATER RIGHTS, *supra* note 5, § 30.04.

386. *See* Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan. 1956), *aff'd per curiam*, 352 U.S. 863 (1956); Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D. 1968) (upholding state law limiting water right to beneficial use); *In re* Hood River, 227 P. 1065, 1092-93 (Or. 1924) (limiting the extent of the right of a riparian water user).

387. *See Baumann*, 145 F. Supp. at 623; Arthur Stone & Sons v. Gibson, 630 P.2d 1164, 1172-73 (Kan. 1981); Pratt v. Dep't of Natural Res., 309 N.W.2d 767, 771 (Minn. 1981).

388. *Baumann*, 145 F. Supp. at 625 (holding the Kansas Water Appropriation Act of 1945 constitutional).

Further illustrating the substantial public interest in water resources, in *Hudson County Water Co. v. McCarter,* Justice Holmes proclaimed:

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that . . . private property . . . cannot be supposed to have deeper roots . . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.[389]

Professor Joseph Sax commented on Holmes' statement, writing:

> [Justice Holmes] intuited what is indeed a radical idea, that basic resources must be seen not only as ordinary property subject to the rules and assumptions of the private property system, but also as elements of the community's capital stock, the use and protection of which could affect the fate of the whole community.[390]

In *Esplanade Properties, LLC v. City of Seattle,* a landowner proposed constructing homes on pilings above navigable tidelands.[391] The city's denials of the proposal did not constitute a taking of the landowner's property, as the tidelands, used by the public for recreation, were imbued with a public trust and, therefore, the property owner's interest was not diminished by denial of the construction proposal.[392] Similarly, in *R.W. Docks & Slips v. Wisconsin,* a permitting agency declined to grant a fill permit at the last phase of the development of a lakeside marina.[393] The Wisconsin Supreme Court upheld the action on the basis that the public trust doctrine limited the scope of the property interest such that the government action did not constitute a taking.[394]

The public trust doctrine can also limit the exercise of water rights. In *Illinois Central Railroad Co. v. Illinois,* the Supreme Court held that state lands under the navigable waters of Lake Michigan were held in trust for the people, could not be sold or conveyed, and the retaking of

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389. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

390. Sax, *supra* note 9, at 276.

391. Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 980 (9th Cir. 2002), *cert. denied,* 539 U.S. 926 (2003).

392. *Esplanade,* 307 F.3d at 984, 987. *See also* McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003); Coastal Petroleum v. Chiles, 701 So.2d 619, 625 (Fla. Dist. Ct. App. 1997).

393. R.W. Docks & Slips v. Dep't of Natural Res., 628 N.W.2d 781, 791 (Wis. 2001).

394. *Id.*

such lands following their grant was an appropriate exercise of sovereign authority that did not constitute a taking.[395]

However, states cannot use the public trust doctrine as a rationale to establish new rights to use water. In *Wisconsin v. Illinois*, Wisconsin and other states sought to enjoin a diversion from Lake Michigan where the water diluted and carried away sewage from Chicago into the Mississippi River drainage.[396] Wisconsin argued that it held proprietary interests in the lanes of barge traffic on the Great Lakes and that the diversion itself was a taking of property.[397] The diverters argued that their diversion of water through Chicago, and ultimately into the Mississippi River, augmented navigation and that the public trust doctrine protected this use for the benefit of the Mississippi River states and the nation as a whole.[398] The court rejected both public trust arguments.[399]

In the *Mono Lake* case, the California Supreme Court ruled that the public trust doctrine applied to water rights, and used the doctrine to limit appropriative water rights and promote flow into the lake.[400] The court unanimously held that the public trust doctrine always limited appropriations affecting navigable waterways, stating:

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the . . . use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.
>
> The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.[401]

State-issued water rights in California are thus subject to continual exercise of the public trust.[402] Where the public trust limits a water right, there is no taking of private property where the governmental interference imposes no greater limitation than does the public trust.[403]

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395. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892).
396. Wisconsin v. Illinois, 278 U.S. 367, 399-400 (1929).
397. *Id.* at 410.
398. *Id.* at 401.
399. *Id.* at 420-21.
400. Nat'l Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 723-24 (Cal. 1983).
401. *Id.* at 728.
402. *Id.* at 727.
403. *Id.* at 723.

This is consistent with the background principles announced in *Lucas*.[404]

In *Idaho Conservation League v. Idaho,* the Idaho Supreme Court ruled that while "all water rights, are impressed with the public trust[,] . . . the public trust doctrine is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants."[405] Subsequently, the Idaho State Legislature clarified that the public trust doctrine does not apply to water rights.[406]

In *Tulare Lake Basin v. United States,* the United States Court of Federal Claims rejected the argument that the public trust doctrine should be considered within the "background principles" of the right arguably taken.[407] The court dismissed this argument because the state agency responsible for defining the rights involved had not addressed the application of the public trust to these rights.

> There is . . . no dispute that [the California Department of Water Resources] permits, and in turn plaintiffs' contract rights, are subject to the doctrines of reasonable use and public trust. . . . Nor is there serious challenge to the premise that the [State Water Resources Control Board], under its reserved jurisdiction, could at any time modify the terms of those permits to reflect the changing need of the various water users. The crucial point, however, is that it had not . . . .
>
> Nor can we, as defendant urges, make that determination ourselves. It is the Board that must provide the necessary weighing of interest to determine the appropriate balance under California law between the cost and benefit of species preservation.[408]

III. VALUATION IN JUST COMPENSATION

Courts use the principles developed in other inverse condemnation cases or cases involving affirmative condemnation pursuant to the power of eminent domain to determine the value of interests in water taken without just compensation. To the extent those cases involve real property, valuing the property taken is arguably easier than the case of valuing interests in water. In water cases, valuation theory dif-

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404. *See supra* text accompanying notes 60-66.

405. Idaho Conservation League, Inc. v. Idaho, 911 P.2d 748, 750 (Idaho 1995).

406. Idaho Code Ann. § 58-1203(2) (2002), *amended by* H.B. 794, ch. 342 (Idaho 1996). The amending act stated, in relevant part: "Specifically, but without limitation, the public trust doctrine shall not apply to: . . .The appropriation or use of water, or the granting, transfer, administration, or adjudication of water or water rights . . ."

407. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313, 320-21 (2001).

408. *Id.* at 324.

fers, for example, based on the origin of the water right (e.g., riparian, appropriative, contractual) and its attributes.[409]

When the government takes property, "[n]ormally, the proper measure of just compensation . . . is 'the fair market value of [the] property at the time of the taking.'"[410] The property owner whose interest is taken must "be put in the same position monetarily as he would have occupied if his interest had not been taken."[411] When analyzing the just compensation for a water taking, courts consider whether the government action took the water right, or whether the water itself is merely a portion of a perpetual right. For example, California law distinguishes between water and water rights.[412] As a typical water right is a perpetual right to divert water at a given point in a waterway, taking this specific amount of water is like a temporary taking of the water right itself.

In *Dugan v. Rank*, a case stemming from the construction of the Friant Dam as part of the Central Valley Reclamation Project, the Supreme Court explicitly declined to hold that "the absence of specificity as to the amount of water to be taken prevents the assessment of damages . . . "[413] In *Dugan*, property owners sought an injunction to prevent the storage of water at the dam because it would impair appropriated rights and reduce riparian flows.[414] Even though the Supreme Court affirmed the dismissal of the claim against the United States and remanded the case, in addressing the specificity of the claim itself, the Court said:

> While it is true . . . that the Government did not announce that it was taking water rights to a specified number of "gallons" or, for that matter, "inches" of water, we do not think this quantitative uncertainty precludes ascertainment of the value of the taking. . . . We find no uncertainty in the taking.[415]

Addressing the manner in which to assess damages in such a case, the court said:

> In an appropriate proceeding there would be a determination of not only the extent of such a servitude but the value thereof based upon

409. *See, e.g.*, United States v. Gerlach Livestock Co., 339 U.S. 725, 752 (1950) (stating that the limiting concepts of beneficial use and waste may, for example, be relevant to some questions of valuation).

410. Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1580 (Fed. Cir. 1990).

411. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973).

412. Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 61-62 (Cal. 1939) (distinguishing between water itself and a water right).

413. Dugan v. Rank, 372 U.S. 609, 610, 623 (1963).

414. *Id.* at 614-15.

415. *Id.* at 623, 626 (citations omitted).

> the difference between the value of respondents' property before and after the taking. Rather than a stoppage of the government project, this is the avenue of redress open to respondents.[416]

In the past, Courts have used several approaches to establish fair market value. The easiest, and the one courts typically use in cases involving the taking of real estate, is comparison of the property taken against other sales or transactions of like property under like conditions where willing sellers and willing buyers establish value through arm's length transactions.[417] Alternative approaches include replacement value, diminution in value, and rental value (in temporary takings cases). Choosing the appropriate valuation approach depends upon the origin of the water right and its attributes. Typically, the same court that has determined that an unconstitutional taking has occurred determines the value of the interests in water.

A. Valuation in Riparian Water Rights Cases: Diminution in Value

A riparian water right is an attribute of a real property right. Therefore, valuation of a riparian water right requires determining the amount by which the government diminished the real property's value taking its riparian component. The diminution in value method requires a comparison of the value of the interest before and after the government action constituting the taking. Cases involving takings of riparian interests generally fall into two categories: those in which a new use of water reduces or eliminates water for the riparian use,[418] and those involving inundation by flooding thereby diminishing either the riparian or non-riparian use of the land.[419]

In *Sharp v. United States*, a 1903 eminent domain case, the Supreme Court held that a riparian landowner could receive compensation for the actual land taken by the government, but not for the diminution of value in his adjacent tracts of land.[420] In *United States v. Grizzard*, the government raised the water level on Tates Creek, a tributary to the Kentucky River, to improve navigation. A local farmer lost a portion of his land, as well as the use of a public road, which provided access to

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416. *Id.* at 626.
417. *Id.* 624-26.
418. *See, e.g.*, United States v. Gerlach Livestock Co., 339 U.S. 725, 752 (1950); Holyoke Co. v. Lyman, 82 U.S. 500, 507 (1872); Olympia Light & Power Co. v. Harris, 108 P. 940, 941 (1910).
419. *See, e.g.*, United States v. Dickenson, 331 U.S. 745, 751 (1947); United States v. Sponenbarger, 308 U.S. 256, 266 (1939) (holding no taking occurs where the inundation is possible within an historic floodway, but prospective and uncertain); United States v. Grizzard, 219 U.S. 180, 182, 185-86 (1911) (holding that plaintiff is entitled to remainder damages for inundation of property by water controlled by U.S, but a taking did not occur).
420. Sharp v. United States, 191 U.S. 341, 354 (1903).

his remaining land.[421] The trial court held that the government must compensate the farmer for the loss of the flooded land and for the easement, but not for the reduced value of the remaining property.[422] Reversing that decision, the Supreme Court extended the damage award to include the loss in value of the farmer's adjacent land on which the flooding occurred.

> Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted . . . . The determining factor was that the value of that part of the Grizzard farm not taken was fifteen hundred dollars, when the value of the entire place before the taking was three thousand dollars. A judgment for a less sum will not be that "just compensation" to which the defendants are entitled.[423]

The Supreme Court also affirmed an award that included compensation for the diminished value of the remaining land.[424] A few years later, Congress passed the Rivers and Harbors Appropriation Act of 1918, mandating compensation for taken lands and property interests, including " any injury to the part not taken."[425]

In *United States v. Dickinson*, compensation for a taking included the flooded riparian lands, and other portions of the parcel affected by the government's actions.[426] The Supreme Court reasoned that "[w]hen the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account."[427]

In *United States v. Gerlach Live Stock Co.*, a newly constructed dam eliminated the river's seasonal flood flow previously used by downstream landowners.[428] The court turned to the diminution in value approach, looking to the difference in the value of the riparian property before and after the floodwater's interference.[429] Prior to the construction of the dam, seasonal floods enhanced the richness of the soil, benefiting agricultural uses, and thus increasing the property's value.

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421. *Grizzard*, 219 U.S. at 181-82.
422. *Id.* at 182-84.
423. *Id.* at 183, 185.
424. *Id.* at 182, 186.
425. Act of July 18, 1918, ch. 155, § 6, 40 Stat. 911 (codified at 33 U.S.C. § 595 (2000)).
426. United States v. Dickinson, 331 U.S. 745, 750 (1947).
427. *Id.* at 750-51 (quoting Bauman v. Ross, 167 U.S. 548, 574 (1897).
428. United States v. Gerlach Live Stock Co., 339 U.S. 725, 730 (1950).
429. *Id.* at 752.

The court established value of the land by looking at the diminution in value of other similarly situated riparian properties.[430]

In *Dugan v. Rank*, the Supreme Court found that just compensation for taking of riparian water rights is "measured by the difference in market value of the . . . land before and after the interference or partial taking" of water.[431]

In *Loveladies Harbor v. United States*, the court used the difference in fair market value before and after the Corps of Engineers denied a permit application to fill wetlands to determine the value of the property interest taken.[432] Although the property interest taken was not a riparian water right, the court arguably characterized the interest as the right to use the riparian asset of the wetland.[433] The court found that the significant economic impact of the governmental action, as measured by the value of the property before and after the action, could demonstrate that a taking had occurred.[434] Comparable sales analysis, using a property's highest and best use less development costs, determined the value of the property before and after the taking:

> [T]he value of the property virtually has been eradicated as a result of government action. The value of the property before the taking was $2,658,000; the value of the property after the permit denial was $12,500, resulting in a diminution in value of over 99%. The significance of this impact is heightened when it is recalled that the $ 1,000 per acre figure represents a reasonable estimate of what a government entity could be expected to pay for the property, and is not the product of negotiations between a willing buyer and seller under no duress. As a result of government action, there *is* no market; the only potential buyer is a governmental unit, and the only remaining value is a nominal one.[435]

B. Valuation in Appropriative Water Rights Cases: Comparable Sales Transactions

An appropriative water right is a creature of state law. It is subject to the effects of the use of prior, or more senior, water users. An appropriative right which is "out of priority" in most years is hypothetically of little value if taken because its late-priority status means that most of the time, senior rights may be exercised to the detriment of the out-of-priority right holder.

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430. Gerlach Livestock Co. v. United States, 76 F.Supp. 87, 98 (1948) (permitting additional evidence to establish the diminution value of the property).
431. Dugan v. Rank, 372 U.S. 609, 624-25 (1962).
432. Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153, 153, 156 (1990).
433. *Id.* at 159.
434. *Id.* at 157, 160.
435. *Id.* at 160.

In the extreme case, the legislature may make unlawful behavior that it previously condoned on private property.[436] The legislature may prohibit uses of public property previously authorized by itself or its agent. From that perspective, a state legislature or a state engineer may generally prohibit a use previously regarded as beneficial without requiring just compensation.

Continuing regulation by a state officer of vested appropriative rights is similar to a state legislature refining the authority conferred by a previously issued legislative charter. The Supreme Court, applying Pennsylvania state law, considered this issue in *Rundle v. Delaware & Raritan Canal Co.*[437] The Supreme Court opined that Pennsylvania had adopted the civil law, rather than the English common law, of riparian property interests, and that civil law reserved the ownership of the water in the river to the public to permit navigational and other public uses.[438] The Pennsylvania legislature granted a license to a private party to operate a hydropower facility in the Delaware River, and when the state legislature later attempted to amend that authority to promote public uses, the licensee objected.[439] The Court responded:

> It is true that the State would have had a right to [preserve the waters of these rivers for public uses] for the public benefit, even if the rivers had been private property; but then, compensation must have been made to the owners, the amount of which might have been so enormous as to have frustrated, or at least checked these noble undertakings . . . .
>
> [H]e who accepts a license from the legislature, knowing that he is dealing with an agent bound by duty not to impair public rights, does so at his risk; and a voluntary expenditure on the foot of it gives him no claim to compensation.[440]

In *Fox v. Cincinatti*, the Supreme Court found a hydropower right subservient to the state's navigation right in a public canal.[441] Even though the canal company held a water right in the canal, the right derived from the state's permission to use a public resource.[442] The state could, therefore, terminate its navigability interest, dry up the canal, and transfer the canal right of way to a municipality for development of the road, without affecting the private water right.[443] The

436. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (stating that the state may significantly limit the use of property without compensation).
437. Rundle v. Del. & Raritan Canal Co., 55 U.S. 80, 89 (1852).
438. *Id.* at 85-86.
439. *Id.* at 83-84.
440. *Id.* at 91-93.
441. Fox v. Cincinnati, 104 U.S. 783, 783 (1881).
442. *Id.*
443. *Id.* at 783-85.

private water right existed as a subordinate right to the state's continuing interest, and therefore, the state did not take a private property interest and no compensation was due.[444]

Government action that clearly takes a ripened, certified, senior appropriative water right directly poses the question of value. In one early California case, *Collier v. Merced Irrigation District*, which involved riparian rights, the court's dicta indicated that a comparable sales approach would be appropriate to determine just compensation in an appropriative rights case.[445] The court analyzed whether "special benefits" accruing to the property owner only, and not to the public generally, by virtue of the governmental project effectuating the taking, should have reduced the value of a riparian right.[446] The court distinguished the before and after analysis, which applies in a riparian rights case, from the comparable sales approach, which applies in an appropriative rights case, holding that "special benefits" did not apply in a riparian rights case because such benefits were integrated into the before and after valuation analysis, and, thus, were not valued and awarded independently.[447]

C. Valuation in Contractually-Conferred Water Rights Cases: Replacement Value

Where the water right taken is a contractually conferred water right, courts have used the cost of replacing the property taken as a measure of just compensation. Courts can more easily apply the replacement cost approach when the owner of the interest has acted to replace the taken interest. In a water takings case, where the plaintiff has not sought replacement water, a court must determine which approach will put them in a position as if the taking did not occur.

A decision by the United States Court of Federal Claims illustrates the process of determining fair market value for a contractually conferred water right. In *Tulare Lake*, the plaintiff irrigators sought an estimated $66 million plus interest for federal actions resulting in a taking of their contractually conferred water in California's San Joaquin Valley.[448] The court used a per acre-foot valuation based on actual replacement water purchases from the California Drought Water Bank, but adopted a lower value per acre-foot for interruptible water based on comparable sales of State Water Project water.[449]

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444. *Id.* at 786.
445. Collier v. Merced Irrigation Dist., 2 P.2d 790, 794 (Cal. 1931).
446. *Id.* at 796.
447. *Id.* at 797.
448. Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed.Cl. 246, 250 (2003).
449. *Id.* at 263-64.

The court's approach in *Tulare Lake* is best characterized as a commodity approach because the court simply places value on the taken water as a commodity in the market. Under valuation theory above, undelivered water is personalty[450] of the party holding the contractual water right. However, the commodity approach distinguishes between the taking of a water right and the taking of water itself as a commodity. The distinction is not simple. Because a typical water right is a perpetual right to divert water at a given point from a particular waterway, taking a specific amount of water is like a temporary taking of the water right itself.[451]

D. Valuation in Temporary Takings Cases: Diminution in Value

Courts determine compensation for governmental takings by the loss incurred by the owner of the property interest, rather than by measuring the benefit received by the government through taking the property. Even though the government may ultimately benefit from action which temporarily takes a property interest, "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."[452]

Courts treat the valuation of just compensation in a temporary taking similar to permanent takings, except that the objective is to measure the value of an interest for a limited period of time.[453] Where the temporarily taken property is interest in real property, as with the riparian interests discussed above, the diminution in value approach is appropriate, but the period of time for valuation is limited to the period of interference with the property owner's use.[454] Where the temporarily taken property is a contractually conferred interest, the property it considered a commodity and valued as individual units, whose time components can be incorporated into the commodity value.[455]

In *United States v. General Motors*, where the United States affirmatively condemned a partial interest in a leasehold, the court based valuation on the cost of leasing alternative space within similar lease-

450. Valuation theory differs when the property taken is water held as personalty, as opposed to the right to obtain water pursuant to a water right. *See, e.g.*, Collier v. Merced Irrigation Dist., 2 P.2d 790, 796 (Cal. 1931) (distinguishing between the right to remove water and water already removed from stream, the latter of which is personalty which can be taken without compensation.).

451. Stevens v. Oakdale Irrigation Dist., 90 P.2d 58, 61 (Cal. 1939) (distinguishing between the water itself and a water right).

452. United States v. Causby, 328 U.S. 256, 261 (1946).

453. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-19 (1987).

454. United States v. Gen. Motors Corp., 323 U.S. 373, 381-84 (1945).

455. *Id.* at 380.

holds.[456] Thus, for any time in which the government takes a private property interest, whether permanently or temporarily, the court calculates compensation representing the fair market value denied to the property owner.[457] For permanent takings, the value of the parcel of land, or the value of the water right in its entirety, must be determined.[458] For temporary takings of real property, the value of the use of the property during the pendency of the taking, perhaps determined by the rental value of the property, may determine the fair market value.[459]

In *First English Evangelical Lutheran Church v. County of Los Angeles,* the Supreme Court established that compensation is due from the time the government action "takes" the property interest until it ceases to do so.[460] "'Temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[461] Similarly, in *Allenfield Associates v. United States,* the Court of Federal Claims held that a "temporary taking which denies a landowner all use of his property for a finite period of time, requires just compensation in the form of the fair market rental value of the property."[462]

One issue in the valuation of temporarily taken property is whether the government should incorporate the "going-concern value" or good will value the government takes, into the value of the taken property. In *Kimball Laundry Co. v. United States,* the Supreme Court included "going-concern value," as measured by lost profits during the period of taking, in the compensatory sum.[463] The Court relied on a water rights

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456. *Id.* at 374-75, 382. The Court also permitted inclusion of the cost to General Motors in making the partial leasehold available to the United States, as that likely would have been incorporated in any comparable leasehold situation. *Id.* at 383-84. Lessees' interests may also be compensable, but only to the extent of their rights of occupancy under their respective leases. *See* United States v. Petty Motor Co., 327 U.S. 372, 378-81 (1946).

457. *Petty Motor Co.*, 327 U.S. at 381.

458. *Id.* at 378.

459. Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1580 (Fed. Cir. 1990).

460. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319-21 (1987). The Court explicitly rejected the argument that removing a law, which previously took a property interest, thereby returning the entire interest to its owner, constitutes a sufficient remedy for the taking:

> Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. . . . [W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Id. at 319, 321.

461. *Id.* at 318.

462. Allenfield Assocs. v. United States, 40 Fed.Cl. 471, 487 (1998).

463. Kimball Laundry Co. v. United States, 338 U.S. 1, 11-12 (1949).

case, *City and County of Denver v. Denver Union Water Co.*, where the Supreme Court determined that going-concern value should be included in the rate base of a water utility for purposes of determining the amount against which they could apply a reasonable rate of return.[464]

In one aberrant case, *Monongahela Navigation Co. v. United States*, the Supreme Court used a loss of profits approach to determine value.[465] The plaintiff owned a lock and dam system which the government affirmatively condemned.[466] Because the government conferred the system upon the private corporation, and the system operator had a franchise to charge tolls for use of the system, the Court held that the compensation due to the company "[was] not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings by its owner."[467]

E. Reimbursement for Ancillary Costs

Ancillary costs may or may not be included in value depending on the circumstances. For example, in *Tulare Lake*, where the court used a commodity valuation approach, the court rejected the water district's request for reimbursement of delivery costs for the replacement water it had purchased. The court noted that the district would have paid for the delivery costs of its contracted water regardless of whether the government had taken the water.[468]

F. Date of Valuation

The fair market value of a property interest is determined at the time of the property taking.[469] The effective date of a taking depends upon the facts of the case, varying from the date of first actions to accomplish the public purpose to the date when the full impact of the governmental action on the property occurred.[470] But "whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent," a taking occurs.[471] A takings claim accrues "when

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464. City of Denver v. Denver Union Water Co., 246 U.S. 178, 191-92 (1918). *But see* 1 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 647-48 (2d ed. 1953).

465. Monongahela Navigation Co. v. United States, 148 U.S. 312, 344-45 (1893).

466. *Id.* at 324.

467. *Id.* at 328.

468. Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed.Cl. 246, 265-66 (2003).

469. Great Falls Mfg. Co. v. Att'y Gen., 124 U.S. 581, 595 (1888).

470. *See, e.g.*, United States v. Sponenbarger, 308 U.S. 256, 265 (1939) (holding the government is not liable for takings that would result regardless of the government's actions); Hurley v. Kincaid, 285 U.S. 95, 103-04 (1932) (holding that taking occurs at first action indicating that taking is intended); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (holding that intent to take alone does not establish the remedy of just compensation).

471. Gerlach Livestock Co. v. United States, 76 F.Supp. 87, 97 (Ct. Cl. 1948).

all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action."[472]

The Supreme Court indicated takings occur as soon as the government encroaches upon a private property interest, thereby acquiring a servitude.[473] However, the Supreme Court has held that in cases where takings occur over time, as a matter of fairness, a plaintiff need not initiate a cause of action until the situation surrounding the taking has stabilized.[474] A court can make a timing determination for purposes of calculating fair market value for taken water using average values for the time when the government took the water. As used in *Tulare Lake*, this is a "weighted time factor,"[475] which considers quantity and the date of water taken over a period of time.

In some circumstances, the taking itself is gradual, making it difficult for a court to determine when the taking began. Addressing one such circumstance, in *United States v. Dickinson*, where the government took riparian property by flooding when it raised the Kanawha River in West Virginia, the Supreme Court suggested:

> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action"—when they are born, whether they proliferate, and when they die . . . . The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.[476]

In *Tulare Lake*, the court measured the water impact as beginning with the mandatory implementation of the biological opinion issued by the National Marine Fisheries Service, which resulted in reduced water deliveries, even though earlier voluntary state actions reduced deliveries.[477] The court noted that any reduction in flows prior to the federal biological opinion would not be attributable to the federal government, and only upon the issuance of the federal biological opinion did the federal government force reduced deliveries to the district.[478]

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472. Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994).
473. Peabody v. United States, 231 U.S. 530, 538 (1913).
474. *See Creppel*, 41 F.3d at 632-33.
475. Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed.Cl. 246, 265 n.31 (2003).
476. United States v. Dickinson, 331 U.S. 745, 748-49 (1947).
477. *Tulare Lake*, 59 Fed.Cl. 246, 254-55.
478. *Id.* Because the court selected the Drought Water Bank sales as the appropriate measure for fair market value of the taken water, it did not need to consider the timing

G. Interest on Just Compensation

Once a landowner or water right holder establishes a taking and determines the fair market value, the government may owe interest on just compensation as well. The right to interest, or the rate of it, differs depending on the jurisdiction in which the plaintiff brings a takings claim. In most actions against the United States, interest on judgments is only available where Congress has specifically authorized it.[479] But, in a case based on the constitutional right to just compensation, judgment interest is mandatory, as it is considered a part of just compensation.[480] Because time is money, interest is logically included in the value of the right taken.

In a case dealing with government action that flooded privately owned land, the Supreme Court rejected the government's argument that interest should not apply:

> The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, "and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." The owner is not limited to the value of the property at the time of the taking; "he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking."[481]

In United States Court of Federal Claims cases, interest begins accruing on the date that the claim ripens,[482] which in takings cases is the date the taking begins. In *Tulare Lake*, the plaintiffs argued for the prime rate plus 1.5% as the rate for farm operating loans at the time, but the government referred the court to a rate set forth by Congress in 40 U.S.C. § 258e-1 based on U.S. Treasury bill rates as related to inverse condemnation cases.[483] The court adopted the interest rate, noting that the "strong judicial policy in just compensation cases . . . favors uniform interest rates in order to avoid discrimination among litigants."[484]

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for valuation purposes since "the Drought Water Bank prices were uniform throughout both 1992 and 1994." *Id.* at 265.

479. *See* Library of Cong. v. Shaw, 478 U.S. 310, 311 (1986).

480. *Id.* at 320.

481. Jacobs v. United States, 290 U.S. 13, 16-17 (1933).

482. 40 U.S.C. § 258e-1 (2000).

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

484. *Id.*

IV. REVIEW AND CONCLUSIONS

The Takings Clause of the Fifth Amendment to the United States Constitution protects property owners against the uncompensated taking of private property. While government by its very nature can limit private property owner interests to some extent, where government action includes a physical occupation of private property, the government commits a categorical or *per se* taking. Where there is no physical invasion of property, but the government's action nonetheless impair the use of the property, courts use a balancing test to weigh the gravity of the intrusion to determine if the regulation exceeded constitutional limits. In making this determination, a court must find that the regulation serves a "substantial public purpose." To assess whether the owner of private property is unfairly bearing the burden of the taking, courts generally consider a number of factors, including the effect of the regulation on economically viable private property rights, the property holder's investment-backed expectations, and the character of the government's action. Where the effect of the taking results in total loss of economic value, the government commits a *per se* regulatory taking.

There are no "bright lines" with which to evaluate takings claims. However, where the government imposes regulations on private property interests, transferring public burdens to private individuals, governmental impositions "take" constitutionally protected private property. Additionally, the Supreme Court has made clear that in each takings analysis, courts must determine which property rights were initially included in the owner's title. Where government action appears to infringe on a private property interest, state law serves as a guide to determine the extent the government action diminishes a property owner's interests.

Determining whether to apply a physical or a regulatory takings analysis depends on the facts surrounding each takings claim. For most real property interests, simply observing whether the government has physically invaded the property is often the determinative factor. This process is more difficult for water rights. An appropriative or contractual water right is different in nature from other property interests because such rights are typically usufructuary and subject to a number of limitations, such as beneficial use or priority. The United States Court of Federal Claims held in one instance that any measurable reduction in water quantity was a physical and, therefore, categorical or *per se* taking, but case law indicates that regulatory restrictions on riparian water uses are better understood as regulatory takings using a multi-factored balancing test.

State law, contracts, and federal statutes define the attributes of individual's water rights. The extent to which governmental regulatory action constitutes a taking necessarily requires investigation into the respective state law, contract, or federal statutes to ascertain the effects

of the regulation in question on those attributes. However, when courts treat water as a commodity, and the government is deemed to have taken that commodity, the private property owner may successfully claim a physical taking.

Pursuant to common law riparianism, riparian property owners hold a right to a portion of the continued natural flow of a river. Western states have to one extent or another adopted the doctrine of prior appropriation, but conflicts have arisen regarding the continued exercise of the riparian water rights that existed at the time the state embraced the prior appropriation doctrine. Courts in South Dakota, Nevada, Washington, Texas, Oregon, and Kansas have upheld legislation extinguishing unused riparian water rights. Oklahoma's Supreme Court found that even though the state adopted the prior appropriation doctrine, the state must afford unexercised common law riparian water the same constitutional protections as appropriative rights. California allows riparian rights to be limited, but not fully extinguished, if the riparian put the water to use at any time.

Under the prior appropriation doctrine, where a water user perfects a state-issued water right by putting the water to beneficial use, the government retains significant authority to affect the right via its police power. However, the state cannot unilaterally reduce the amount of the water right, except pursuant to a priority call or according to other terms or characteristics of the water right itself. Applying a regulatory takings analysis, only the particular attributes established by state law and the appropriation doctrine are constitutionally protected against governmental taking.

A perfected water right can indicate considerable investment-backed expectations, and can serve as *prima facie* evidence of a vested water right that enjoys the protection of the Takings Clause. Water rights typically include a right to reasonable access, which poses difficulties because of the vast federal ownership of land in the West. The scope of the right to access water to fulfill a usufructuary right depends greatly on the specific aspects of the specific water right prior to application of a later regulation. Government action may incidentally interfere with state-issued water rights, so long as there is statutory support for the action. As long as the government's permitting authority predates the vesting of the water rights, right of access conditions that virtually destroy the right can be justified.

Contracts can also create water rights. The constitutional protection of the Takings Clause endows vested water right owners with the power to obtain compensation for the taking of their contractually created water rights. Contractual provisions may limit the power to seek compensation under the Takings Clause if they diminish the right or subject it to continuing governmental action.

Analyses of takings claims involving contractually created water rights inevitably consider the nature and scope of the actual water

right. Case law indicates a possible diverging approach as to whether compensation is due to a water user if the government exercises a contractual condition that reduces deliveries. The Ninth Circuit has held that if the terms of the contract support such a reduction, the reduction would not constitute a taking for which compensation is due. On the other hand, the Tenth Circuit has indicated that compensation may be due under the same circumstances.

Despite the manner of their creation, state-issued water rights have always been, and continue to be, subject to beneficial use restrictions and potential public interest limitations. Although federal and state governments have implemented many beneficial use or public trust restrictions on water rights without triggering the mandate to compensate under the takings clause, the permissible extent of such limitations remains unclear.

Takings cases indicate that the appropriate value of a property interest is the fair market value at the time of the property taking. The Supreme Court has ruled that as soon as the government encroaches upon a private property interest, thereby acquiring a servitude, there is a compensable taking. However, for gradual takings, the Supreme Court has held, as a matter of fairness, that a plaintiff does not need to initiate a taking cause of action until the situation surrounding the taking has stabilized. Courts use various methods to determine timing for purposes of calculating fair market value for taken water. The method depends upon the circumstances of the case.

Where the government takes a riparian right by either taking a portion or all of the water, or by flooding the riparian property, courts determine just compensation by a valuation of the diminution of value to the property because of the taking. Courts typically use a fair market value appraisal for a property interest both before and after a governmental taking to determine the reduction in value of the property. Where the government takes an appropriative water right, a comparable sale is an appropriate measure of the value of the property interest taken. Where the government takes contractually conferred water rights, courts have used the replacement value of the water to determine just compensation. The replacement value calculation is easier if the property owner replaced the water that the government took. When the property owner does not seek replacement water, a court must determine what approach would best compensate the property owner to put the owner in a position as if the government had not taken the property. Further, where the water right owner does not replace the water, a court may also consider the income generated by the water right owner's intended use and the aggrieved water right holder's loss of good will.

Courts treat compensation for a temporary taking similar to a permanent taking. For permanent takings, the court determines the value of the parcel of land or water right in its entirety. For temporary tak-

ings, courts measure compensation by the rental value of the property or the fair market value of the property for a period during which the government has taken the property.