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Fissures in Constitutional Bedrock

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Rick Frank, Executive Director of the Center for Law, Energy & the Environment at the University of California School of Law and moderator of the panel, introduced the panel and gave a short summary of the topic.

Professor John Echeverria from Vermont Law School spoke first regarding the recent U.S. Court of Appeals for the Federal Circuit decision in *Casitas Municipal Water District v. United States.* In *Casitas,* the appellate court held that an Endangered Species Act requirement that a dam operator pass a portion of the water through a fish ladder was a physical taking of the water. For background, Mr. Echeverria summarized that a takings issue occurs when there is a property interest which has been taken by some kind of government action. Mr. Echeverria went on to outline the basic doctrines of regulatory takings. The Supreme Court held that the *Penn Central* test applies when evaluating a takings issue. Under this analysis, the court looks to any economic impacts resulting from the government regulating action, what degree of interference exists with investments in the regulated activity, and the character of the government action. The analysis is deferential to the government regulation. Furthermore, the Supreme Court has held that the *per se Lucas* takings rules apply rarely, and only when the regulation renders private property valueless, or if the government regulatory action involves a physical occupation. These rulings make the *Casitas* case interesting because the appellate court held the regulation to be a physical taking, which would subject the regulation to the stricter *per se Lucas* test. The basis for the appellate decision was a U.S. Court of Federal Claims case, *Tulare Lake Irrigation District v. United States.* In this case the judge ruled that since a certain amount of water was required to be left in the river, it was a physical taking and subject to the *per se* test. Interestingly, the U.S. Court of Appeals for the Federal Circuit distinguished *Casitas* from cases applying the *Penn Central* test and rationalized that the amount of water required to flow through the fish ladder was a physical taking. Mr. Echeverria noted that now *Casitas* throws into question what regulations regarding water use are considered takings. He argues that the *Casitas* decision conflicts with Supreme Court precedent on the matter and that the deferential *Penn Central* test should apply. Mr. Echeverria opines that courts will overturn or confine the *Casitas* decision.

Next Professor Christine Klein from the University of Florida, Levin College of Law, gave a presentation regarding the dormant Commerce Clause. Professor Klein started by outlining the facts behind the most famous Dormant Commerce Clause decision in the water law realm, *Sporhase v. Nebraska.* She then explained that since *Sporhase,* the water law practitioners have continued to cite the holding of the case, "groundwater is an article of commerce," without looking to further precedent. Professor Klein then recommended that the legal

community should start looking at the water issue again. In support of this conclusion, she then pointed to three common misunderstandings about the *Sporhase* holding and the dormant Commerce Clause. First, *Sporhase* asked and answered the wrong question. In that case the Court analyzed whether groundwater was an article of commerce. Instead, the Court should have analyzed whether the state regulation imposed an impermissive burden on commerce. Whether the regulation in question imposes an impermissive burden is the standard on which other Dormant Commerce Clause cases rest, and that should be the question when discussing water as well. Second, after *Sporhase* a lingering disconnect remains between the Dormant Commerce Clause and the Commerce Clause. In water issues the Dormant Commerce Clause has become merely a mantra that water is an article of commerce. But the Commerce Clause tells us that the regulation of water and land is a quintessential state function. The result of these two conflicting holdings evidences a disconnect regarding the permissible extent of federal or state regulation of water. To overcome this disconnect, Professor Klein recommends that water attorneys begin looking for guidance in dicta from cases such as *Rapanos*. Third, Professor Klein points out that since *Sporhase*, water law has not recognized that not all water is the same. In fact current Dormant Commerce Clause thinking does not look to whether the water at issue is surface or groundwater, whether it is water as right or water as a resource, or what water rights doctrines govern the use of the water. Professor Klein believes that an analysis of what and how the water is regulated informs the constitutional analysis better than a blanket rule on all water.

Charles DuMars of Law and Resource Planning Associates, P.C., next spoke regarding the Compact Clause. He noted that the under the Compact Clause, a fundamental question exists as to what control a state has of its own resources. As an example of that struggle, he compared an interstate Commerce Clause case, *Sporhase v. Nebraska*, to *Kansas v. Colorado*, a case which led to an interstate compact. Mr. DuMars noted that these cases appear irreconcilable. He explained that the holding in *Sporhase* amounted to a ruling that under the Dormant Commerce Clause, states had no control as to the export of water. Then he noted that under the equitable apportionment language in *Kansas v. Colorado*, every state has an absolute right to get a determination from the Supreme Court regarding the available water the state can use. Mr. DuMars noted then that the question is whether a state can protect its water arguing the allocation of the compact governs, or does the ruling in *Sporhase* prohibit a states protection of its water resources in this fashion? Mr. DuMars then argued that because Congress must ratify interstate compacts, the compacts convert into federal law upon ratification. As such, the signatory states may pass

legislation regarding that allocation of water under the compact without fear of the Dormant Commerce Clause control. In Mr. DuMars opinion, this includes reasonable limitations upon the export of water.

Ryan McLane

COMMENTS FROM THE SOLICITOR, U.S. DEPARTMENT OF INTERIOR, WASHINGTON, D.C., HILLARY TOMPKINS

Solicitor Tompkins was a stay-at-home mother, who was teaching part-time in a law school when Ken Salazar offered her a position as the Solicitor in the U.S. Department of Interior. Tompkins was born in Zuni, New Mexico on the Navajo Nation Reservation. However, Tompkins was adopted by a non-native American family and grew up in New Jersey. She did not meet her Navajo family until she was fifteen years old.

Tompkins finds her experience as a child telling in terms of the impact that the policies of the Department of the Interior have on peoples' lives. Tompkins noted that her life has been a direct product of Federal Indian Policy. Federal Indian Policy also allowed her to receive a great education at excellent schools under the Navajo Nation Scholarship.

Tompkins started her career representing Pueblo Indians in New Mexico in water law proceedings. It was then that she gained the appreciation for water law. She discussed the need to balance complexities in the practice of water law including the unpredictability of mother nature; the unpredictability of the courts; the lengthy process of adjudicating water rights; the challenge of unadjudicated water rights; the history of agriculture in the western United States; the history of Indian water rights; the Endangered Species Act; the Clean Water Act; and the role of the federal government on interstate rivers. However, Tompkins offered one unifying message: "Water is the Core of Our Survival."

Tompkins spoke of her experience in the Department of Interior, and she praised Ken Salazar as being very enthusiastic, with a vision to implement change. She discussed several issues the department is currently addressing, including impacts of climate change, adaptive management, ecosystem restoration, and new energy projects. She stated that the department and the Solicitor's Office are working to become more engaged across disciplines.

Overall, Tompkins' message was that things are changing at the federal level, and she extended an invitation to everyone to work together to find opportunities to ensure the availability of our natural resources for future generations

Kathlyn Bullis