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Fifth Amendment Takings & Transitions in Water Law: Compensation (Just) for the Environment

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FIFTH AMENDMENT TAKINGS & TRANSITIONS IN WATER LAW: COMPENSATION (JUST) FOR THE ENVIRONMENT*

LING-YEE HUANG**

INTRODUCTION

The fundamental, life-sustaining properties of water rest at the intersection of two highly demanding and often competitive spheres: the human society, defying gravity and geography in its quest for water, and the natural environment, evolved and adapted to the rhythms of the hydrologic cycle. A reflection of the historical patterns of rainfall and water abundance across the United States, the development of

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water law split along the one-hundredth meridian.[1] States east of the meridian have generally adopted common law riparianism while their western counterparts have generally adopted prior appropriation.[2] Current and emerging conflicts over water resources – already numerous in western states and noticeably spreading to eastern states – illustrate the inability of traditional water law systems to balance the increased human demand for water consumption with the need to sustain water resources for the natural environment.

Vast expanses of parched land and intractable battles over rivers and other water resources are common to the western United States, where providing water for human consumption is a costly endeavor. However, the relevance and applicability of these same descriptions has shifted eastward. The current drought across the normally humid and precipitation-rich southeastern states has left fields dry in Alabama and Georgia and has exposed the bed of Florida's Lake Okeechobee for the first time since record keeping began in 1931.[3] Meanwhile, protracted litigation over water rights in the west and northwest continues as a result of over-appropriated rivers that further jeopardize species and ecosystems.[4] As the population of the United States increases, the demand for water will increase, compelling state governments and Congress to reevaluate and modernize water and environmental protection laws.

A significant obstacle to the federal and state governments' ability to modify these traditional water laws and to meet the demands of competing user-groups is the looming specter of Fifth Amendment takings claims by individual holders of water rights. Although approximately one-third of states have transitioned from traditional common law riparianism to a statutory, permit-based system of regulated riparianism, the full impact of these transitions on riparian rights will become clear only as demand increases and individuals venture to the outer bounds of their water rights.[5] In prior appropriation states, the transition to compliance with federal environmental statutes has al-

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1. *See* Thomas Sarver, *Salmon, Suckers and Sorrow: Rural Cleansing Under the Shadow of the Endangered Species Act*, 8 DRAKE J. AGRIC. L. 455, 457 (2003).

2. *Id.*

3. Erika Bolstad, *Lake Okeechobee: Businesses Suffer as Lake Okeechobee Dries Up*, MIAMI HERALD, June 1, 2007, at A1; Adam Nossiter, *Drought Is Sapping the Southeast, and Its Farmers*, N.Y. TIMES, July 4, 2007, at A1. The low lake levels have also revealed high levels of arsenic contamination in the lakebed, as well as artifacts dating back 2,000 years. *See* Audra D.S. Burch & Kathleen McGrory, *Shallow Okeechobee Reveals Pool of Relics*, MIAMI HERALD, June 28, 2007, at A1; Andy Reid, *Arsenic High in Muck Taken from Lake Bed*, S. FLA. SUN-SENTINEL, July 8, 2007, at A1.

4. *See* TROUT UNLIMITED, A DRY LEGACY: THE CHALLENGE FOR COLORADO'S RIVERS 1, 7 (2002), http://www.cotrout.org/Portals/0/pdf/reports/legacy.pdf (discussing the effect of increased water demand and litigation on the environment).

5. *See generally* Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9 (2002).

ready generated a number of takings claims.[6] Motivated by contradictory objectives for consumption and conservation of water, the inevitable strengthening and probing of water law systems will undoubtedly cause takings litigation over water rights to mushroom across the future legal landscape.

This Article examines the application of the Fifth Amendment Takings Doctrine to transitions in state water law systems. These transitions include the movement of riparian states from traditional common law riparianism to pre-determined allocation systems and the progress of prior appropriation states in complying federal environmental laws and other conservation measures. Under the Takings Doctrine, state governments have generous latitude to enact and enforce state and federal conservation measures by curtailing individuals' current and future water rights.[7] Courts tend not to view these measures as physical occupations or as depriving the water right of all economic value.[8] The effect of enforcing these measures is comparable to the effect of zoning and land-use laws on real property, which courts have consistently upheld as a constitutional exercise of the state police power, not resulting in a taking that requires just compensation under the Fifth Amendment.[9] Reasoning similar to those permitting local governments to enact zoning and land-use laws without paying just compensation will often defeat an individual's taking assertion with regard to their water rights.

Part I examines the contours of water as a property right and the current Fifth Amendment Takings Doctrine. Unlike real property or other natural resources, water occupies time and space in a way that is incongruous with traditional concepts of property. Thus, applying the ever-evolving Takings Doctrine to water as property presents many challenges. Parts II and III explore some of these challenges with respect to transitions in state water law systems and analogize these transitions to zoning and amortization in land-use law. In this context, takings issues arise in different temporal frames for common law riparian rights and prior appropriation rights. In riparian systems, these transi-

6. *See generally* Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61. U. COLO. L. REV. 257, 258 (1990) ("At its crudest the claim would be that whatever uses an appropriator has been making, and that have been recognized as lawful in the past, must as a matter of property right be permitted to continue or be compensated as a taking.").

7. *Id.* at 260 (stating that "[w]ater rights have no greater protection against state regulation than any other property rights").

8. *Id.* at 261-62 (noting that courts view regulation of water rights as an acceptable legislative exercise of the police power).

9. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding that regulation prohibiting the erection of permanent habitable structures on property did not constitute taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that use restriction on property did not constitute a taking because it served a substantial public purpose).

tions affect the riparian's ability to expand or initiate new uses of water in the future, whereas in prior appropriation systems, the transitions affect the exercise of the current right.

Unifying these transitions, however, is the extent to which the law treats water rights as vested property rights, an inquiry crucial to takings litigation. Parts II and III assert that both future riparian and present prior appropriation water rights generally lack the concrete parameters of real property rights. Courts are either unlikely to recognize such water rights as compensable property rights, or courts may reframe the claim under other areas of law, such as contract law. Thus, individuals who seek to recover just compensation under the Fifth Amendment face many significant obstacles to prevailing, including establishing a water right as a compensable property right.

Despite the dissimilarity between water and real property, the reasoning that sustains zoning and land-use laws without payment of just compensation often applies to transitions in water law systems. While the language of zoning readily applies to the takings claims that result from transitions in riparian systems, proponents of conservation measures should borrow from the language of amortization to facilitate transitions in prior appropriation systems. This Article concludes by discussing the implications of these takings issues and their potential application to other areas of environmental protection and future transitions in water law.

I. BACKGROUND

This Part begins by discussing the contours of water rights as property rights and then examines the current and relevant aspects of the Fifth Amendment Takings Doctrine. The degree to which the law views water rights as property is crucial for a takings claim under the Fifth Amendment. A water right holder must demonstrate that she has a constitutionally protected property interest and that the government has "taken" that property by enacting a regulation that "goes too far."[10] Thus, regulating water rights for environmental and conservation purposes turns in part on the degree to which the law views a water right as a constitutionally protected and compensable property right. The combination of the legal limitations on a water right and the physical properties of water complicates the complainant's burden of establishing a compensable property right.[11] Not only do the federal and state governments have broad regulatory powers over water, but individual water right holders have limited rights to appropriate or receive water

10. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

11. *See* Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 26 (2002).

in conflict with federal and state mandates to protect endangered species, water quality, and other natural resources.[12]

The necessary, but often incoherent, legal framework that courts impose on water resources creates tension between private water rights and state ownership of water.[13] Omnipresent considerations such as the public trust doctrine, the federal navigational servitude, and permit or contract limitations influence the private property nature of water rights, whether riparian or appropriative.[14] For example, California applies an extremely expansive public trust doctrine that requires protection of navigable waters from harm caused by the diversion of non-navigable tributaries for irrigation and human consumption.[15] In *Mono Lake*, the Supreme Court of California sought to reconcile the uncontested need to supply water to Los Angeles with the need to protect the environmental and recreational values of Mono Lake, "a scenic and ecological treasure of national significance."[16] The court declared that the state has a duty to "protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the [public] trust."[17] The court thus imposed an affirmative duty on the state to protect public trust uses and to consider the public trust doctrine when planning and allocating water resources.[18] The holding in *Mono Lake* demonstrates the overwhelming public interest in and the communal nature of water, aspects reflected in the inherent legal limitations on water rights.

A. CONTOURS OF THE PROPERTY RIGHT IN WATER RIGHTS

The traditional analogy of property as a bundle of sticks provides a relevant point of departure for examining the property right in both

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12. *Id.*
13. *Id.* at 2.
14. *Id.* at 26. *See also* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource,* 32 ENVTL. L. 773, 792-93 (2002); U.S. v. Rands, 389 U.S. 121, 123 (1967) (holding that the government's exercise of a dominant navigational servitude was a "lawful exercise of a power to which the interests of riparian owners have always been subject").
15. Nat'l Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 721 (Cal. 1983), *cert. denied,* 464 U.S. 977 (1983). California's broad interpretation of the public trust doctrine contrasts with more narrow interpretations of the public trust doctrine. *See* People v. Emmert, 597 P.2d 1025, 1030 (Colo. 1979) (rejecting the public trust doctrine to allow the public to recreate in waters above a privately-owned stream bed); Rettkowski v. Dep't of Ecology, 858 P.2d 232, 236-37 (Wash. 1993) (declining to extend the public trust doctrine to non-navigable waters and finding that the Department's enabling statute does not permit it to assume the state's public trust duties in regulating water resources).
16. *Mono Lake*, 658 P.2d at 712.
17. *Id.* at 724.
18. *Id.* at 728.

riparian and prior appropriation water right regimes.[19] In this analogy, the rights, or sticks, include the right to exclude others, the right to possess, the right to use, and the right to alienate.[20] While these concrete rights readily apply to real property, water law originates from the concept of *res communes*[21] in which individual ownership of resources, such as air, does not exist.[22] The individual-centered "bundle of sticks" analogy is difficult to apply to water rights because the property right in water is unique, stemming from water's singular ability to sustain life and nature as a common resource.[23]

The chemical, biological, and physical characteristics of water render it an anomaly among property rights. When examining the right to water use as property, courts should reconsider traditional concepts of property law as applied to water, perhaps to limit the property right itself as well as to reduce individuals' expectations. Water supports entire ecosystems of natural flora and fauna, channels through the earth and the atmosphere via the hydrologic cycle, and provides the foundation for society and development from the most basic to the most complex level.[24] Unlike stationary natural resources, and other fugitive natural resources, water occupies time and space in such a way as to render attempts to measure or quantify it rife with un-

19. Many scholars have argued for a re-working of this "bundle of sticks" analogy for the natural environment as property. *See* Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002). As applied to natural resources, the "bundle of sticks" concept violates fundamental environmental ethics by failing to recognize the interconnectedness of people and their physical environments, and the unique characteristic of each object. Arnold argues, in his article, for a new analogy of property as a web of interests, which remedies the gaps in the bundle of sticks analogy. This web analogy affects the takings analysis by focusing on whether the government has "radically altered" the relationship between the object and the primary interest holder by shifting that primary interest to another interest holder in the web. Additionally, this web concept, presented visually as the totality of all interests in the object, tends to further the argument of this Article that restrictions on water rights for environmental protection purposes are unlikely to constitute a compensable taking, particularly when the primary interest holder is aware of the various interests in addition to her own. *See also* Duncan, *supra* note 14 (arguing that the bundle of sticks metaphor fails to adequately consider public rights in a community resource).

20. Arnold, *supra* note 19, at 285.

21. "Things common to all; things that cannot be owned or appropriated, such as light, air, and the sea." BLACK'S LAW DICTIONARY 1333 (8th ed. 2004).

22. Duncan, *supra* note 14, at 791-92.

23. *Id.* at 775-76. In his article, Professor Duncan comments that the traditional metaphor over-emphasizes individual parts, or sticks, while disregarding the entirety of the bundle and the interconnectedness among parcels of contiguous property. Thus, this microscopic and limited perspective fails to reflect the reality that ecosystem functions are not confined to real property boundaries, and defining water rights as this individualistic and isolated "bundle of sticks" is even less reflective of the properties of water.

24. *See* U.S. GEOLOGICAL SURVEY, NAT'L WATER SUMMARY 1983 – HYDROLOGIC EVENTS AND ISSUES 8 (1983)).

certainty.[25] Natural uncertainties arise from meteorological conditions and the inability to measure accurately quantities of available surface or groundwater.[26] Human-induced uncertainties arise from factors such as the diverse prioritization of values and numerous techniques to measure available water.[27]

1. The Nature of Riparian Water Rights

Riparians acquire water rights through the purchase of land that abuts a natural water course.[28] Such rights are generally incorporeal rights because they pertain to the use, rather than the ownership, of the water.[29] In an early exploration of this property right, the court in *Tyler v. Wilkinson* stated that "strictly speaking, [a riparian landowner] has no property in the water itself; but a simple use of it, while it passes along."[30] Courts traditionally preferred that riparians use the water on their tracts of riparian land or, at a minimum, in the same watershed.[31] This on-tract preference represents sound watershed management and environmental protection practices by retaining water in the same drainage basin, permitting the return of run-off flows. However, with an increasing geographic mismatch between demand and location of water resources, the preference for on-tract use has diminished accordingly.[32]

The elastic doctrine of reasonable use limits and quantifies riparian water rights.[33] It accounts for factors such as the size of the stream; the physical, chemical, and biological character of the stream; the purpose, extent, duration, and method of use; and the customary use and needs of other riparian landowners.[34] Thus, a determination of reasonableness must account for all relevant facts and circumstances, including changes in social or economic values over time.[35] This elastic doctrine provides the flexibility to incorporate environmental values into the definition of reasonableness. The use of out-dated irrigation tech-

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25. Gray, *supra* note 11, at 4.
26. *Id.*
27. *Id.*
28. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:9 (2007).
29. *Id.*
30. Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827) (No. 14,312).
31. Christine A. Klein, *On Integrity: Some Considerations for Water Law*, 56 ALA. L. REV. 1009, 1041 (2005).
32. *Id.* at 1043.
33. TARLOCK, *supra* note 28, § 3.60.
34. *Id.* (quoting Red River Roller Mills v. Wright, 15 N.W. 167, 169 (1883)). *See also* RESTATEMENT (SECOND) OF TORTS § 850A (1979) (noting similar factors for determining reasonable use: the purpose of the use, the suitability of the use to the watercourse, the economic and social value of the use, the nature and degree of the harm to other riparians, and equity and priority of use).
35. *See* RESTATEMENT (SECOND) OF TORTS § 850A (1979).

niques such as flooding fields or even watering during peak daylight hours warrants increased skepticism when readily available and efficient techniques exist.[36] For example, prioritizing modern irrigation techniques represents a method that will fold environmental protection objectives into the evaluation of reasonableness. At the same time, this elasticity may also accommodate values favoring the consumptive use of water, and the piecemeal litigation required to determine the scope of riparian rights may result in a fragmented and inconsistent approach to environmental protection.

The property right in presently exercised riparian water rights reflects the malleable parameters, which define riparian rights. The contingent ability to enjoy the water right and the inability to quantify or measure volumes of water use limits the property right.[37] State supreme courts have recognized that allocation of water among riparian users and thus the water rights depend on future riparian users as well as current users; therefore, the contours of the riparian right are bound to change with the additional users or the definition of reasonableness.[38] Courts have found vested, constitutionally protected property rights in the existing use of water, as decreed by state legislatures or under state constitutions.[39] For example, a South Dakota statute defines vested rights as domestic uses, actual application of a riparian right to a beneficial use prior to the effective date of the prior appropriation system, certain rights granted by court decree, and water rights neither abandoned nor forfeited prior to the 1907 water law.[40] Pursuant to this statute, the South Dakota Supreme Court upheld a riparian landowner's existing water rights but noted that the statute limited the accrual of unexercised riparian rights.[41]

The property right in future, unexercised riparian rights is even more tenuous than the property right in a current riparian water right. In situations where the state is implementing a transition from ripa-

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36. *See* Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 330 (1985); *see also* LYNN JENSEN & C.C. SHOCK, OR. STATE UNIV. EXTENSION SERV., STRATEGIES FOR REDUCING IRRIGATION WATER USE 1 (2001), http://extension.oregonstate.edu/catalog/pdf/em/em8783.pdf (listing general irrigation strategies designed to reduce water use).

37. *See* TARLOCK, *supra* note 28, § 3:10.

38. Hoover v. Crane, 106 N.W.2d 563, 566 (Mich. 1960) (keeping a riparian's water-use decree open for "future petitions based on changed conditions"); Little Walla Irrigation Union v. Finis Irrigation Co., 124 P. 666, 670 (Or. 1912) ("The extent of a riparian owner's right to the use of water . . . is necessarily indefinite, uncertain, and subject to fluctuations, as it must always be dependent on the future like needs of other riparian owners . . . .").

39. Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D. 1968) (holding that in a transition from riparianism to prior appropriation, the actual application of water to a beneficial use determines whether water rights have vested).

40. S.D. CODIFIED LAWS § 46-1-9 (2004).

41. Belle Fourche Irrigation Dist. v. Smiley, 204 N.W.2d 105, 107 (S.D. 1973).

rianism to prior appropriation, the unpredictable initiation of a future riparian right complicates the determination of water rights along a stream system and precludes appropriation of the remaining waters.[42]

2. The Nature of Prior Appropriation Water Rights

The second pillar of water law is the prior appropriation system, developed from customary mining practices in the western United States.[43] The essence of prior appropriation rights reduces to the expression "first in time, first in right."[44] Unlike the riparian system that attaches water rights to the ownership of riparian land, priority determines acquisition of water rights in a prior appropriation regime, independent of land ownership.[45] The three elements of acquiring a prior appropriation right are (1) an intent to appropriate the unappropriated waters of a natural water course, (2) the diversion of those waters, and (3) the application of those waters to beneficial use without waste.[46] The latter elements, diversion and the doctrine of beneficial use without waste, inject a greater sense of certainty and stability to the property right in prior appropriation water rights.

The element of diversion helped to stabilize property rights by giving notice to other potential users in the stream system and enabling quantification of water use.[47] However, western states have begun to expand the traditional concept of diversion, a move that in-stream recreational industries and environmental groups have heralded.[48] As early as 1958, Oregon established an in-stream flow right, followed by Montana in 1970 and Colorado in 1973.[49] In Colorado, the authority to appropriate water for in-stream flows lies with the Colorado Water Conservation Board, which must first determine the minimum flow levels or water volume required "to preserve the natural environment to a reasonable degree."[50] Although Colorado limits these in-stream flow rights to the Board, the Colorado Supreme Court recognized ap-

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42. *See In re* Waters of Long Valley Creek Sys., 599 P.2d 656, 661 (Cal. 1979). *See also infra* Part II.

43. TARLOCK, *supra* note 28, § 5:3.

44. *Id.* § 5.4.

45. *Id.*

46. *Id.* §§ 5:60, 5:65-66.

47. *Id.* § 5:65. *See also* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 92 (3d ed. 1997).

48. *See e.g.*, Sierra Club, Sierra Club Conservation Policies, http://www.sierraclub.org/policy/conservation/water.asp (last visited Nov. 26, 2007) ("Comprehensive programs to ensure protection of instream flows should be enacted in states and provinces where they do not now exist, and should be implemented in all states and provinces.").

49. SASHA CHARNEY, DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES 20 (2005), *available at* http://cwcb.state.co.us/Streamandlake/Documents/ISFCompStudyFinalRpt.pdf.

50. COLO. REV. STAT. § 37-92-102(3) (2007).

propriation of in-stream water for recreational purposes in 1992.[51] The court interpreted "diversion" to mean not only the actual removal of water from the natural water course but also the control of water *in* the natural water course.[52]

Following the decision to expand the definition of diversion, the Colorado legislature amended the Water Right Determination and Administration Act of 1969 to permit local government entities and water districts to apply for recreational in-stream diversions from the Colorado Water Conservation Board.[53] The Board subsequently promulgated Recreational In-Channel Diversion Rules,[54] and cities including Golden, Vail, and Breckenridge filed suit for in-stream water allocations to support whitewater rafting and kayaking courses in the Colorado River.[55] Although these recreational diversions are primarily for human benefit, that the recreational in-stream diversion results in ancillary benefits for the protection of fish and wildlife does not render the appropriation invalid.[56] Thus, the benefit of in-stream water diversion for the environment and the aquatic ecosystems is incontrovertible, demonstrating the profitability of water-dependent businesses that enhance, rather than impair, the natural environment.

The doctrine of beneficial use without waste also sculpts the property right in prior appropriation systems by enabling courts to determine a party's continuous application of water to a productive use.[57] The doctrine also serves to protect the aquatic environment by expanding the list of the beneficial uses to which a user may apply water.[58] Traditional uses include domestic, agriculture, and mining and power.[59] Expansion of these uses has led to the inclusion of newer uses, such as fish, wildlife, and in-stream protection, groundwater recharge, wetland restoration and stream-flow augmentation, and other public

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51. *See* City of Thornton v. City of Fort Collins, 830 P.2d 915, 931 (Colo. 1992).

52. *Id.* at 930.

53. Water Right Determination and Administration Act of 1969, 1969 Colo. Sess. Laws 1200, *amended by* 2001 Colo. Sess. Laws 1187 (codified as amended at COLO. REV. STAT. § 37-92-102(5) (2007)).

54. 2 COLO. CODE REGS. § 408-3 (2006).

55. Ten communities have obtained decrees for water rights, and four communities are currently awaiting final determination of their applications. *See* Colo. Water Conservation Bd., Recreational In-Channel Diversion Program, http://cwcb.state.co.us/WaterSupply/RICD.htm (last visited Nov. 26, 2007) ("There are six communities that have obtained decrees for water rights prior to the passage of Senate Bill 216: Fort Collins, Littleton, Golden, Breckenridge, Vail, and Aspen. [T]he following communities have RICD water rights decreed under Senate Bill 216: Longmont, Gunnison, Steamboat Springs and Chaffee County. RICD water rights applications are pending for: Silverthorne, Pueblo, Avon, and Durango.").

56. *City of Thornton*, 830 P.2d at 931.

57. Colo. River Water Conservation Dist. v. U.S., 424 U.S. 800, 805 (1976).

58. *City of Thornton*, 830 P.2d at 931.

59. City and County of Denver v. Sheriff, 96 P.2d 836, 844 (Colo. 1939).

interest uses.[60] One state legislature has even declared that the public interest requires protection and maintenance of in-stream flows to "preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality."[61]

The combination of diversion and the doctrine of beneficial use render water rights under the prior appropriation system more concrete than water rights under the riparian system.[62] The property contours of appropriative rights are more definite because the system operates by permits or judicial decrees that specify the place and quantity of diversion and other discrete factors.[63] Because prior appropriation quantifies the amount allocated to a water user, it is easier for one to determine when a user diverts a reduced volume as opposed to a riparian right, where the doctrine of reasonable use quantifies the amount of water used. In theory, the appropriation of water by priority also avoids piecemeal and hindsight litigation of rights along a water course because water users have a pre-determined, allocated amount. Thus, individuals who claim a Fifth Amendment taking of an appropriative water right tend to have a stronger property claim than those individuals claiming a taking of a riparian water right.

B. THE CURRENT FIFTH AMENDMENT TAKINGS DOCTRINE

The current Fifth Amendment Takings Doctrine is a product of continual judicial refinement.[64] The twelve words composing the doctrine – "nor shall private property be taken for public use without just compensation" – have generated copious litigation that covers the spectrum of property rights.[65] The doctrine prevents the 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."[66] Federal and state environmental protection regulations, such as coastal

60. TARLOCK, *supra* note 28, § 5:66.

61. IDAHO CODE ANN. § 42-1501 (2003).

62. *See* Dellapenna, *supra* note 5, at 19 ("Appropriative rights are basically a private property approach to water allocation in which the water right is defined as to quantity, time, place, manner of use, and most importantly, according to its priority relative to other users."). The importance of water in the West most likely contributes to the staunch protection of water rights as private property rights.

63. *See e.g.*, OR. REV. STAT. § 537.140 (2005).

64. *See* John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 ENVTL. L. REP. 10577 (2005) (arguing that a trilogy of takings cases reflects the Court's fairly conservative interpretation that the Takings Clause poses a slight imposition on public officials attempting to design programs in furtherance of the public welfare).

65. U.S. CONST. amend. V.

66. E. Enterprises v. Apfel, 524 U.S. 498, 522 (1998) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

management and protection of endangered species, increasingly affect individual property rights for the benefit of the public. Thus, the success or failure of individual takings claims may ultimately dictate the outcome of many conservation efforts.

As the Supreme Court stated in 1992, the two discrete groups of "categorical" compensable takings claims are physical invasions of property and regulations that deny all economically beneficial or productive use of property.[67] Courts evaluate takings claims that do not fall into either of these categories under the factors established in *Penn Central*.[68] The inquiry regarding which regulations most closely approximate the exercise of the government's eminent domain power unites these branches of the takings inquiry.[69] Where an environmental protection regulation affects individual water rights, those individuals will attempt to frame the regulation as a categorical taking, which is a clear path to just compensation, rather than arguing the *Penn Central* factors. Individuals seldom argue, and rarely succeed on the argument, that the government has physically occupied their water right through a given regulation.[70] On the other hand, the government or environmental groups that support the regulation will tend to frame the regulation under the *Penn Central* balancing factors, which require a fact-specific inquiry.[71] Case law suggests that regulatory restrictions fare better when parties characterize them as takings using the *Penn Central* factors.[72]

Physical takings are regulations that cause a permanent physical invasion of property, regardless of the physical size of the intrusion or the public purpose behind the regulation.[73] The Fifth Amendment explicitly requires just compensation for permanent physical occupations.[74] However, the Supreme Court has described these per se physical takings as "relatively rare, easily identified, and usually represent a

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67. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

68. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *See also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321-24 (2002) ("For the same reason we do not ask whether a physical appropration advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory claims.").

69. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

70. *See infra* Part II.

71. *Lucas*, 505 U.S. at 1015 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124).

72. *See* James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur?*, 9 U. DENV. WATER L. REV. 1, 69 (2005).

73. *See Lucas*, 505 U.S. at 1015 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-40 (1982) (holding that just compensation is required for permanent physical occupation resulting from the installation of television cables) and United States v. Causby, 328 U.S. 256, 265, n.10 (1946) (holding that physical invasion of airspace functions as an effective ouster of a property owner from property)).

74. U.S. CONST. amend. V.

greater affront to individual property rights."[75] Individuals claiming a Fifth Amendment taking of water rights have generally not succeeded in characterizing the effect of a governmental regulation as either a physical occupation or effective ouster.[76] The migratory characteristics and even molecular composition of water make occupying water nearly impossible in a traditional or constructive sense of the word.[77]

The second category of per se takings occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . . ."[78] The defense to this charge, however, provides that the government is not required to pay just compensation where the regulation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance" place on existing property ownership.[79] Despite the initial sense of victory among private property proponents, the ruling in *Lucas* has not had quite the expected impact, much to the relief of the environmental community.[80] In 2005, the Supreme Court significantly constricted per se takings, concluding that categorical takings under *Lucas* are a narrow exception for the extraordinary circumstance of a permanent deprivation of all beneficial use.[81] Applied to situations where the property at issue is environmental property, such as a piece of undeveloped land or unused water, it is difficult to imagine that the property is completely valueless in its natural state.[82] As the Washington Supreme Court recognized, "land may have some economic value where the [remaining] uses allowed are recreational."[83]

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75. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324.

76. However, in *Franco-Am. Charolaise Ltd. v. Okla. Water Res. Bd.*, the Oklahoma Supreme Court found a physical taking. 855 P.2d 568, 576-77 (Okla. 1990). *See also infra* notes 153-160 and accompanying text.

77. *But see infra* notes 153-160 and accompanying text.

78. *Lucas*, 505 U.S. at 1019.

79. *Id.* at 1029.

80. *See* Michael C. Blumm & Lucas Ritchie, Lucas's *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341 (2005) (arguing that, to the likely chagrin of Justice Scalia, government defendants after *Lucas* increasingly relied on background principles to defend against paying compensation because of the clear formula and ease of application of the *Lucas* exceptions).

81. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332.

82. *See Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

83. Buechel v. State Dept. of Ecology, 884 P.2d 910, 918 (Wash. 1994). *See also* Turner v. Del Norte, 101 Cal. Rptr. 93, 96 (Cal. Ct. App. 1972) (concluding that a flood plain zoning ordinance that limited use of appellants' property to parks, recreation, and agriculture did not effect an unlawful taking because appellants still had numerous ways to benefit economically from their property); Hall v. Bd. of Envtl. Prot., 528 A.2d 453, 456 (Me. 1987) (holding that denial of a sand dune permit required to build residential structures on coastal property did not render the coastal property valueless and thus did not effect a compensable taking where the landowner still had seasonal recreational use of property and where adjacent property had sold for substantial sums); Turnpike Realty Co. v. Dedham, 284 N.E.2d 891, 900 (Mass.

Courts evaluate the remainder, and majority, of takings claims under the oft-quoted *Penn Central* balancing factors, which include: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the governmental action.[84] The first factor requires examining the change in the fair market value of the property, accounting for realistic and probable uses.[85] The second factor consists of two elements: the extent of the individual's reliance on the existing regulatory scheme at the time she acquired the property, and the "extent to which the further regulation of its property was foreseeable."[86] Finally, the third factor considers the retroactive effect of the regulation and whether the regulation targets an individual.[87] The impact of governmental regulations may range from those approximating physical invasions to public programs "adjusting the benefits and burdens of economic life to promote the common good."[88] The balance of these factors relies more heavily on the economic impact and the interference with expectations than on the character of the governmental action.[89]

For certain types of property with particular environmental value or for natural resources such as water, the *Penn Central* balancing factors could include additional elements. For example, courts could evaluate the physical, chemical, and biological functions, and characteristics of natural property as a background against which to assess the reasonableness of the owner's expectations.[90] Courts should be particularly wary of consumptive uses of land and natural resources, due to an incomplete understanding of the effects and interconnectedness of ecological systems.[91]

Under this framework of property rights and the Fifth Amendment, Parts II and III of this Article focus on the application of the property aspects of riparian and appropriative rights to transitions in

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1972) (finding that the flood plain zoning that restricted development did not deprive landowner of all beneficial uses where zoning ordinance specifically permitted a variety of ecological, agricultural, and recreational uses).

84. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

85. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). *See also* Brace v. United States, 72 Fed. Cl. 337, 350 (Fed. Cl. 2006).

86. *Brace*, 72 Fed. Cl. at 354. *But see* Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (rejecting a blanket rule that "purchasers with notice have no compensation right when a claim becomes ripe").

87. *Brace*, 72 Fed. Cl. at 356.

88. *Penn Central*, 438 U.S. at 124.

89. *See* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 540 (2005). *See also Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring) (emphasizing a balanced approach and cautioning against adopting "per se rules" in either direction).

90. Arnold, *supra* note 19, at 347.

91. *Id.* at 320.

water law systems, analogizing these transitions to zoning and to amortization of non-conforming uses.

II. RIPARIAN RIGHTS IN TRANSITION

Riparian water law systems tend to undergo two main transitions that ultimately result in a pre-determined allocation of water: regulated riparianism or prior appropriation.[92] These water law transitions are often a part of states' efforts to improve and realize the need for protection of the environment and water resources.[93] Because these transitions generally protect existing riparian uses, they tend to generate takings claims based on future expansion of the riparian right. Both systems prevent the holder of a riparian right from expanding her water use on the basis of the reasonable use doctrine, the cornerstone of the riparian right. The effect on the riparian is to curtail or effectively eliminate her ability to initiate a previously unexercised right as a riparian landowner. Thus, the riparian owner argues that the regulation that authorizes the transition has effected a taking of her future, unexercised right to water use.

Despite this potential for takings claims, the riparian owner faces two significant obstacles. First, she must successfully argue that riparian water rights are a type of property protected under the Fifth Amendment. In addition to the general limitations of framing water rights as property rights, the property right in riparian water rights further escapes concrete definition because of the contingencies related to the specific nature and definition of the riparian water right.[94] Where a state legislature has defined the scope of the vested property right in water as part of the final transition, that statutory definition may constrain the riparian landowner. Moreover, a future riparian right is somewhat equivalent to a future expectation, the validity and establishment of which is questionable. Second, a riparian must succeed on the argument that the transition to regulated riparianism or prior appropriation effects a taking. The impact of these transitions is analogous to the impact of zoning laws on real property, an impact that courts generally do not recognize as a compensable taking. Applied to these water law transitions and relying mostly on the *Penn Cen-*

92. Although this Article addresses transitions from riparianism to regulated riparianism and prior appropriation simultaneously, the two systems remain distinct. Both systems operate by allocating water to users before they actually use the water. However, regulated riparianism still functions with the elements of traditional riparianism, such as sharing during times of water shortage. In prior appropriation systems, water rights are based on temporal priority and users do not share water during a shortage. *See generally* Joseph Dellapenna, *Adapting Riparian Rights to the Twenty-First Century*, 106 W. VA. L. REV. 539 (2004).

93. *Id.* at 590.

94. *See supra* Part I.

tral balancing factors, courts seem to give state legislatures the necessary room to modernize common law riparianism, producing incidental benefits for environmental protection.

The weaknesses of riparianism, which are as plentiful as historical water supplies in the eastern United States where riparianism prevails, motivate state legislatures to transition into pre-determined allocation systems.[95] Uncertainty and unpredictability resulting from the doctrine of reasonableness plague riparianism.[96] In upholding California's transition from riparianism to prior appropriation, the California Supreme Court described the uncertainty in riparian water rights as "pernicious effects."[97] Because the definition of reasonableness is dynamic, evolving as users increase their uses or as values on certain uses change, individual riparian landowners may be discouraged from making long-term investments using the local water resource.[98] The overall instability that the doctrine of reasonableness generates inhibits effective water resource management.[99]

Although riparianism's doctrine of reasonable use theoretically encourages sharing during times of shortage,[100] parties' legal rights are only adjudicated in a retrospective, piecemeal fashion. The environmental damage has often already occurred; thus, legal remedies under riparianism are curative rather than preventative, undermining the basic notions of protection and precaution. During litigation, courts hesitate to adjudicate beyond the individual parties' rights, even though the damage may extend to parties outside the lawsuit.[101] Further, the balance of interests in the reasonableness inquiry inevitably favors large, wealthy users over small, domestic users.[102] By virtue of sheer size, large volume users tend to have more economic investment in the water use and, if ruled against, have a larger radius of social and

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95. *See* Dellapenna, *supra* note 5, at 9.

96. *Id.* at 16.

97. *In re* Waters of Long Valley Creek Sys., 599 P.2d 656, 666 (Cal. 1979). *See also infra* notes 131-144 and accompanying text.

98. *In re Long Valley Creek*, 599 P.2d at 666.

99. *Id.*

100. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 35 (defining how the reasonableness of a water use "depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole."). *But see* Dellapenna, *supra* note 5, at 9-10 (identifying the logical disincentive for individual riparians to share a limited water source).

101. *See In re Long Valley Creek*, 599 P.2d at 666.

102. *See e.g.*, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) (refusing to grant an injunction where companies invested $70 million in oil and gas leases compared to the village's concern for potential, but not probable, environmental damage); Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 873 (N.Y. 1970) (refusing to enjoin the operations of a cement plant where the respondents had invested $45 million in the plant, which employed 300 workers, whereas the depreciation of the plaintiffs homes as a result of the pollution from the plant amounted to $185,000).

economic effects than the latter.[103] Thus, the interests of the larger, more affluent user will tend to outweigh the interests of smaller users.

Recognizing these weaknesses, states with traditional riparianism transitioned toward systems of water law that required allocating water in advance. Intentional or not, the move toward regulated riparianism and even prior appropriation has produced benefits for preserving the environment, by stabilizing water rights and expanding consideration of environmental objectives. For example, Florida transitioned from common law riparianism to regulated riparianism with the passage of the Water Resources Act of 1972.[104] The Act embraces paradoxical goals: simultaneously seeking to preserve natural resources and wildlife and to protect the environmental and aesthetic value of public land while enabling and managing the consumptive use and development of surface and ground water.[105]

This transition to regulated riparianism remedies common law riparianism, for example, by allowing the state permitting authority to declare uniform restrictions on all water rights during or in anticipation of times of shortage, lessening the complications posed by post-hoc litigation. Moreover, water conservation benefits arise from the legislature permitting courts to consider the beneficial application of water, along with the traditional reasonableness analysis.[106] This additional consideration imports the waste and economic efficiency analysis from the prior appropriation system.[107] Florida defines reasonable-beneficial use as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."[108] Thus, water management districts theoretically may not grant permits for environmentally unsound and wasteful applications of water.

A. THE TRANSITION TO PRIOR APPROPRIATION

In general, courts have not found that the transition from riparianism to prior appropriation or regulated riparianism constitutes a taking

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103. *Amoco*, 480 U.S. at 545; *Boomer*, 257 N.E.2d at 873.

104. FLA. STAT. ANN. § 373.016 (2006) ("such waters have not heretofore been conserved . . . the department . . . shall . . . manage those resources in a manner to ensure their sustainability."). Florida's statute is a model statute for regulated riparianism. Dellapenna, *supra* note 5, at 59.

105. FLA. STAT. ANN. § 373.016(3) (2006).

106. *Id.*

107. *Id.* § 373.016(3)(b). *See also* Dellapenna, *supra* note 5, at 61 (discussing meaning of "beneficial" in Florida's regulated riparian statute). *See generally* Concerned Citizens of Putnam County for Responsive Gov't, Inc. v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520, 521 (Fla. Dist. Ct. App. 1993) (recognizing that the dual purpose of the Florida Water Resources Act of 1972 is to conserve water resources while maximizing beneficial use).

108. FLA. STAT. ANN. § 373.019(16) (2006).

of the riparian's right to initiate a new or expanded water use in the future.[109] When addressing the nature of the property right, courts tend to find that this future right is not a vested right which requires compensation.[110] Courts also recognize existing state and federal regulations that limit water rights as compensable property rights and states' broad police power to modify or implement water laws in order to achieve greater certainty and goals related to the protection of water resources.[111] This latter prong further undermines the ability of individuals to claim a vested property right because the water right is perpetually subject to overriding federal and state interests.

Moreover, courts tend to find that the transition to a state's ultimate system of water law does not effect a taking because the curtailment of future expansion does not result from a compensable government action under the *Penn Central* analysis.[112] Rather, curtailment occurs because of the riparian's inaction or failure to comply with the statutory transition mechanism. This inaction may lead a court to find that the riparian has abandoned her water rights. Courts also find that the statutory reversion of water rights does not amount to an active government taking. Similar to zoning, an impairment of the water right or a mere diminution of its value does not constitute a taking.

For example, in addressing both the property aspect of water rights and the nature of an alleged taking, the Texas Supreme Court held that after notice and upon reasonable terms, the termination of the riparians' continuous non-use of water did not amount to a taking of their property and thus did not require just compensation.[113] Relying on the scope of the property right in the riparians' water right, the court found that the riparians held vested rights to a usufructuary use of the waters that the state owns.[114] However, the riparians did not and could not acquire vested rights to the non-use of water that they proposed to initiate at an indeterminate future date.[115] The court deter-

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109. *See e.g., In re* Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 444 (Tex. 1982) ("[A]fter notice and upon reasonable terms, the termination of the riparians' continuous non-use of water is not a taking of their property.").

110. *See* TARLOCK, *supra* note 28, § 3:92.

111. *See In re* Waters of Long Valley Creek Sys., 599 P.2d 656, 665-66 (Cal. 1979) (stating that the California Legislature's "comprehensive administrative scheme for the final determination of *all* rights in a stream system" falls within their authority).

112. *See supra* notes 92-108 and accompanying text.

113. The Supreme Court of Texas upheld an adjudication of water rights along the Upper Guadalupe River based on the Water Rights Adjudication Act. The riparian landowners challenged the narrow statutory period to determine their water rights as an unconstitutional taking of their vested rights. *In re Upper Guadalupe*, 642 S.W.2d at 444.

114. *Id.* (defining usufructuary as "the right to use, enjoy, and receive the profits of property that belongs to another.").

115. *Id.*

mined that a four-year time period, coupled with sufficient notice, was adequate to determine the scope of the riparians' use of water.[116] In Texas, a right to use water beneficially forms the basic premise of a vested water right.[117] Texas law considers non-use of the water as wasteful, and individuals cannot acquire a right to a wasteful use of water.[118]

Pursuant to the Water Rights Adjudication Act, the Texas Water Rights Commission eliminated rights that riparians asserted after the effective date of the Irrigation Act of 1895[119] and limited riparian rights to actual use between 1963 and 1967.[120] As a result, the Water Rights Adjudication Act eliminated claims to future uses in excess of water used during those years but provided for actual and public notice on several occasions prior to making final determinations.[121] Adopting the language of the Supreme Court of Oregon, the court held that the Texas legislature's statutory mechanism for transition cannot be arbitrary, unreasonable, or unduly burdensome.[122] Where one could not so characterize the government action, the court concluded that the riparian's failure to make use of the property right did not render the statutory forfeiture of that right a taking for which just compensation was required.[123]

Similarly, in *In re Deadman Creek Drainage Basin*, the Washington Supreme Court found that inaction by riparian landowners resulted in a statutory reversion of the water rights to the state rather than a compensable taking.[124] The court noted that Washington's 1917 water code

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116. *Id.* at 445 (citing Tex. Water Rights Comm'n v. Wright, 464 S.W.2d 642, 646-47 (Tex. 1971)).

117. *Id.* at 441; TEX. WATER CODE ANN. § 11.026 (2000).

118. *In re Upper Guadalupe*, 642 S.W.2d at 445.

119. The Irrigation Acts of 1889 and 1895 implemented the dual system of water rights in Texas, meaning that the state appropriates certain waters by permits but still recognizes the rights of riparian owners. *Id.* at 440.

120. *Id.* at 444.

121. The state appropriates flood waters, the waters on lands granted by Spain and Mexico, and the ordinary flow and underflow of streams on riparian lands granted after July 1, 1895. TEX. WATER CODE ANN. § 11.001(b).

122. *In re Upper Guadalupe*, 642 S.W.2d at 445 (citing *In re* Willow Creek, 144 P. 505, 514 (Or. 1914)). The court emphasized that the mechanism must be "salutary and in the interest of an orderly regulation of the use of water to be made by skilled officers who have particular knowledge in that line."

123. *Id.* at 445-46 (citing Texaco, Inc. v. Short, 454 U.S. 516, 530 (1982) ("It is the owner's failure to make any use of the property – and not the action of the State – that causes the lapse of the property right; there is no 'taking' that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a 'taking.'")). *See also In re* Yellowstone River, 832 P.2d 1210, 1219 (Mont. 1992) (holding that a statute providing for the abandonment of water rights for failure to timely file claims did not constitute a compensable taking).

124. *In re* Deadman Creek Drainage Basin, 694 P.2d 1071, 1077 (Wash. 1985). Here, the State of Washington appealed a 1982 stream adjudication that held the changes to the 1917 water code did not diminish the water available to riparians.

established prior appropriation as the dominant system of water law in the state.[125] In 1918, shortly after the passage of the water code, the court held that "a riparian owner *intending* future use could not prevent condemnation by a nonriparian for an *immediate* use" of water.[126] In this case, the court concluded that users could only acquire new water rights through the permit system.[127] Existing rights not applied to a beneficial use did not qualify as vested rights and were therefore lost.[128] The court emphasized the history and movement of case law and legislative action toward the establishment of prior appropriation and the elimination of riparian law as sufficient notice to riparians to file claims for rights other than vested rights, including consumptive, recreational, and aesthetic riparian rights.[129] Moreover, the transition mechanism provided a fifteen-year period for riparians to file their water rights, which the court found constituted adequate notice to riparian landowners to perfect their rights.[130]

In contrast to the majority of takings outcomes reflected in Texas and Washington, the California Supreme Court found that enactment of a transition statute did not authorize the State Water Resources Board to extinguish a future use of water unless the Board could show that it could otherwise promote conservation policies as effectively.[131] *In re Long Valley Creek* represents the rare case where a court has recognized a future riparian right.[132] However, the ruling in favor of riparians represents a technical victory at best because the court interpreted the Board's powers broadly, enabling the Board to place significant limitations on future riparian water rights.[133] The court held that the Board possessed the authority to define the scope of an unexercised riparian right, including lowering the priority of an unexercised riparian right in relation to all present and actively exercised water rights, which presents a fairly broad scope of government action under

125. *Id.* at 1072.
126. *Id.* at 1075.
127. *Id.* at 1072.
128. *Id.*
129. *Id.* at 1077.
130. *Id.* at 1076.
131. *In re* Waters of Long Valley Creek Sys., 599 P.2d 656, 668 (Cal. 1979). In 1966, nine claimants filed a petition with the Board for a determination of the water rights along the Long Valley Creek system. The petitioner, Donald Ramelli, filed a notice of exceptions to the Board's final determination of his water rights. For approximately sixty years prior to the determination, Ramelli and his predecessors watered approximately eighty-nine acres of riparian land. In his petition before the Board, Ramelli claimed prospective riparian rights to an additional 2,884 acres. The Board approved Ramelli's claim to the eighty-nine acres and rejected his claim for prospective irrigation water for the remaining acreage.
132. *Id.* at 668-69.
133. *Id.* at 661. Pursuant to California's Water Code, the Board is authorized to determine all claimed rights, based upon appropriation, riparian, or other bases of right, to the use of water in a stream system. CAL. WATER CODE § 2501 (Supp. 2007).

the corresponding *Penn Central* factor.[134] However, the court declined to construe the water rights determination procedure as enabling the Board to extinguish completely the petitioner's future riparian rights.[135]

California had previously recognized that a riparian right exists whether or not exercised and that dormant riparian rights are paramount to active appropriative rights.[136] The court also recognized the inherent inability of private lawsuits to provide "clarity, certainty, and security to water rights and water users."[137] The court relied on the language of and statutory definitions in the Water Code,[138] which declares a policy of conservation of water resources and application to beneficial, non-wasteful, and reasonable uses.[139] In light of these considerations, the court found clear authorization for the Board to define and limit such prospective riparian rights.[140]

Although the petitioner argued that he had a vested right to a future, non-quantified amount of water, the court found that the doctrines of beneficial and reasonable use continued to apply to any water right.[141] Thus, to the extent that a future right violated these doctrines, courts could not properly consider the right as vested.[142] The court reemphasized the state interest in promoting clarity and certainty in water rights, which would in turn "foster more beneficial and efficient uses of state waters . . . ."[143] In addition, no property rights exist in the unreasonable use of water, where courts can only determine reasonableness by considering all the needs in the stream system.[144] Thus, accepting the full scope of a vested future water right undermines state efforts to further the public interest by stabilizing present water rights.

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134. *In re Long Valley Creek*, 599 P.2d at 669 & n. 15.
135. *Id.* at 662-63.
136. *Id.* at 660.
137. *Id.* at 661.
138. *Id.* at 661-62, n.4.
139. CAL. WATER CODE § 100 (Supp. 2007) ("It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.").
140. *In re Long Valley Creek*, 599 P.2d at 661. The California Water Code states that every decree for determination of water rights shall declare "the priority, amount, season of use, purpose of use, point of diversion, and place of use of the water . . . [and] other such factors as may be necessary to define the right" to use the water with respect to each party. CAL. WATER CODE § 2769 (Supp. 2007).
141. *In re Long Valley Creek*, 599 P.2d at 663.
142. *Id.* at 661, n.3.
143. *Id.* at 668.
144. *Id.* at 665.

B. THE TRANSITION TO REGULATED RIPARIANISM

As discussed earlier, Florida's Water Resources Act of 1972 signaled the state's transition to regulated riparianism.[145] Similar to the transitions discussed above, the takings inquiry hinges on the interpretation of the nature of the riparian's property right in water. Transitions from common law riparianism to regulated riparianism are also unlikely to effect a compensable taking of a future water right. In addition to the lack of a vested property right in future uses, courts focus on the failure or non-action of riparians to comply with statutory requirements for obtaining permits, rather than the character of the government action.[146]

The Florida Supreme Court held that a developer did not have a constitutionally protected right in the water beneath its property and thus could not succeed on a takings claim for just compensation.[147] Here, the court framed the property right in water as usufructuary rather than recognizing ownership in the corpus of water.[148] Because of the migratory and transient nature of the water and its temporary location on the owner's property, the court limited the property right to use and not ownership of the corpus of water.[149] The court held that the provision of the Act that gave riparians two years to transition into the permit system did not effect a taking, noting the failure of the riparian to obtain permits within the statutory timeframe.[150] Thus, loss of the water right resulted from the riparian's abandonment, not from

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145. The Act divides responsibility for water management into five districts, organized not along political lines but instead along natural hydrological boundaries for a more accurate representation of both supply and needs. FLA. STAT. ANN. § 373.069(1) (Supp. 2007). All water users are required to obtain permits for use of water, excluding domestic uses and other exemptions for minimal adverse impacts on water resources. *Id.* § 373.219(1). The permits may last for up to fifty years for municipalities and public service corporations, but permit holders must apply to renew their permits at the end of the duration. *Id.* § 373.236. *See supra* notes 104-108 and accompanying text.

146. *See, e.g.*, Vill. of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 671 (Fla. 1979).

147. *Id.* at 670. The Water Resources Act of 1972 integrates the treatment of surface and ground water. FLA. STAT. ANN. § 373.019(20) (Supp. 2007). In this case, Jupiter Inlet Corporation planned to build a 120-unit condo complex, located approximately 1,200 feet from Tequesta's well field, which drilled into a shallow-water aquifer. *Tequesta*, 371 So. 2d at 665. As a result of excess withdrawals, intrusion of salt water threatened the shallow water aquifer as a result of the pressure imbalance between the water level in the saline inter-coastal waterway and the water level in the shallow-water aquifer. *Id.* Because Jupiter was denied a permit to withdraw water from the shallow-water aquifer, Jupiter filed suit for inverse condemnation and an injunction due to the excessive pumping by Tequesta. *Id.*

148. *Tequesta*, 371 So. 2d at 667 (ownership in reference to water rights has never meant that the overlying property owner had a property or proprietary interest in the corpus of the water itself).

149. *Id.*

150. *Id.* at 671.

any state action resulting in a compensable taking.[151] The court found that mere impairment of private property, rather than actual and direct encroachment, was consequential damage that did not entitle the owner to just compensation.[152]

C. THE ZONING ANALOGY

Under these pre-determined allocation systems, restricting the ability of a riparian to initiate new uses of water is analogous to restricting the future use of real property through zoning laws, the enactment of which the seminal *Euclid* ruling first recognized as constitutional.[153] In the same way that modern life necessitates zoning laws to achieve a balance between unchecked development and the public welfare benefits of organized development, modern demands on water supplies also necessitate a compromise between human consumptive use and protection of the natural environment. Both zoning laws for real property and the transition to a pre-determined allocation system of water law address the exercise of an unspecified future right to expand uses. Legislatures enact both types of laws based on predictions about future conditions or values. In addition, the effects of zoning laws and riparian water law transitions extend to a group of similarly-situated individuals, including the affected individuals themselves. Moreover, the restrictions ultimately benefit and further the public interest.

As a matter of substantive due process, zoning is unconstitutional where the zoning provisions are clearly arbitrary and unreasonable and have no substantial relation to public health or welfare.[154] Along the spectrum of valid zoning purposes, courts have recognized the validity of zoning for protection of the environment.[155] For example, when a landowner challenged the validity of a zoning ordinance that limited current and future use of land to agriculture in an environmentally-sensitive area, the New Jersey Supreme Court emphasized that prevention of damage to the environment "constitutes a particularly strong justification for prohibiting inimical uses."[156] Other state courts have upheld similar uses of zoning to achieve environmental goals.[157]

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151. *Id.*

152. *Id.* at 669 (citing Seldon v. City of Jacksonville, 10 So. 457, 461 (Fla. 1891)). Here, the petitioner also attempted to equate the permit denial to an effective ouster of the overlying real property. *Id.* at 670. However, the court rejected this argument, noting that the developer still retained beneficial use of the property without the water permit and that the developer nonetheless developed the property to its highest and best use, whereas in similar airspace cases, the owners were deprived of all beneficial use of their property. *Id. See generally supra* note 73.

153. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

154. *Id.* at 395.

155. Gardner v. N.J. Pinelands Comm'n, 593 A.2d 251, 258 (N.J. 1991).

156. *Id.* In passing the New Jersey Pinelands Protection Act, the legislature sought to protect and preserve the land and water resources and to deter scattered develop-

Whether zoning laws effect compensable takings under the Fifth Amendment, however, is an inquiry that resonates under either the two per se categorical takings or the *Penn Central* balancing factors.[158] Government efforts to achieve water resource protection would stagnate if faced with a takings claim every time it effected a reduction of property value.[159] As noted earlier, the Fifth Amendment Takings Doctrine does not prohibit the government from enacting regulations on private property, but it requires compensating individuals who bear an excess of the regulatory burden.[160]

Within the Takings Doctrine, the idea of conceptual severance applies to both zoning laws and water law transitions.[161] In these situations, distinct temporal frames separate the rights of the property owner or the riparian: the present right of use and the future, expanded, or additional right of use.[162] In *Penn Central*, the majority opinion referred to this idea by noting that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[163] Instead, a holistic determination examines "the character of the action and . . . the nature and extent of the interference with rights in the parcel as a whole . . . ."[164] In *Lucas*, the landowner argued that sever-

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ment in the Pinelands. *Id.* at 254. The regulatory takings claim in this case was decided under the framework that the Court provided in *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980), which the Supreme Court later abrogated in *Lingle*, 544 U.S. at 540, as conflating the substantive due process with takings jurisprudence.

157. *See, e.g.*, Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1381 (Fla. 1981) (upholding denial of permit to build along the Florida coast where increased density would cause adverse environmental impacts to an ecologically sensitive shoreline); F.S. Plummer Co., Inc. v. Town of Cape Elizabeth, 612 A.2d 856, 860 (Me. 1992) (upholding zoning ordinance to be valid exercise of town's police power); Home Builders Ass'n of Cape Cod, Inc. v. Cape Cod Comm'n, 808 N.E.2d 315, 321 (Mass. 2004) (upholding validity of zoning an entire town as a district of critical planning concern to protect the water resources).

158. *See* Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 540 (2005) (abrogating the *Agins* taking test as a due process test with "no proper place" in takings jurisprudence). *See also supra* Part I.

159. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

160. *Lingle*, 544 U.S. at 536-37 (citing First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987)).

161. *See generally* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190-214 (2004) (providing a detailed discussion of severance); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

162. Wright, *supra* note 161, at 177.

163. *Penn Central*, 438 U.S. at 130.

164. *Id.* at 130-31 (emphasis added).

ance of a portion of his land deprived the land of all economically beneficial value.[165]

However, the Court in *Tahoe-Sierra* firmly circumscribed this approach, and noted its flaw is because the "aggregate must be viewed in its entirety," and thus the destruction of one strand in the bundle of sticks does not amount to a taking.[166] The Court held that a thirty-two-month moratorium on building, which an environmental planning and development agency ordered to study growth in the Lake Tahoe region, did not constitute a categorical taking and courts should evaluate such circumstances using the *Penn Central* balancing factors.[167] Applying the "parcel as a whole" evaluation, the majority opinion noted that an interest in real property has both geographic and temporal dimensions that a court must consider together.[168] These dimensions are equally applicable to water rights, where the "metes-and-bounds" geographic dimension translates into the less concretely defined volume of water for riparian use.[169]

The ability of a property owner to prevail on a takings claim by severing a future right from the present right would render futile attempts to zone and plan land-use. When riparian water rights transition into a pre-determined allocation system, a court should not find a taking upon considering the restriction on the expansion of the future riparian right in context with the entire riparian right. Having rejected or simply not entertained this conceptual severance as applied to zoning, courts seem poised to reject this form of temporal severance following the Court's ruling in *Tahoe Sierra*.[170] In applying the "parcel as a whole" evaluation to real property, courts should consider several factors: the landowner's economic expectations of the property; whether and the extent to which one treats the property as a single economic unit; the degree of continuity between property interests; the acquisition dates of the property interests; and the effect of the regulation on the remaining lands.[171] While courts have articulated these factors in the real property context, they could undertake a similar analysis for

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165. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1009 (1992). In *Lucas*, the petitioner was a part owner of the development from which he purchased two single parcels in an area that was "notoriously unstable." *Id.* at 1038 (Blackmun, J. dissenting). The majority viewed the two single parcels in isolation, independent of the petitioner's prior ownership and development of the surrounding acreage, and found that the two parcels had no value after the application of the government regulation. *Id.* at 1020 (majority opinion).

166. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

167. *Id.* at 306, 326-27.

168. *Id.* at 331.

169. *Id.* at 331-32.

170. Temporal severance is "the taking of a temporal slice of the property pie over time." Wright, *supra* note 161, at 214.

171. Brace v. United States, 72 Fed. Cl. 337, 348 (Fed. Cl. 2006).

water rights. For example, although a riparian acquires the entirety of a riparian right on the date the riparian acquires real property, the reasonable use doctrine limits the riparian's economic expectations arising from a future expansion.[172] The effect of the transition on the present water right is non-existent, and the initiation of a future right interrupts the continuity between water uses.

Even given a compensable private property right, courts overwhelmingly find that zoning and its inevitable restrictions on the use of real property do not effect takings for which the government must pay just compensation under the Fifth Amendment.[173] Aside from the relatively narrow categories of per se takings, the remainder of takings challenges fall under the *Penn Central* balancing test, focusing primarily but not exclusively on the economic impact of the zoning regulation.[174] For example, the Supreme Court of Massachusetts found that a zoning regulation prohibiting residential structures on land in a coastal conservancy district did not effect a compensable taking, even where the ordinance became effective after the landowner acquired the property.[175]

Evaluating the claim under *Lucas*, the court found that the undeveloped lot retained a minimum value of $23,000, not including non-residential uses such as recreation, fishing and shell fishing, and installation of floats, which the ordinance specifically permitted.[176] The court noted that the *Lucas* total deprivation claim does not rest on the deprivation of the single, subjective use that the landowner intends for her property.[177] Applying the *Penn Central* balancing factors instead, the court emphasized that the property's remaining value mitigated the economic impact, and that the property's exposure to wind erosion, flooding, and other natural elements decreased the property owner's reasonable investment-backed expectations.[178] Thus, the court found that the sum of these factors did not amount to a compensable taking.[179]

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172. *Id.*

173. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 262 (1980) (finding that zoning ordinances benefited land owners as well as the community, and thus did not effect a taking that required compensation).

174. *See supra* notes 84-89 and accompanying text.

175. Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 867 (Mass. 2005).

176. *Id.* at 869 n.7, 872.

177. *Id.* at 872.

178. *Id.* (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544 (2005)). In *Gove*, the landowner inherited the land and was thus not a bona fide purchaser for value who invested reasonably in land fit for development. *Id.* at 874. The court held that the remaining value of $23,000 suggested more than a "token interest." *Id.* at 872.

179. *Id.* at 865. *See also* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981) (holding that denying a permit to build in a substantial wetland area did not constitute a taking where the primary evidence of economic impact was Estuary's own "self-serving statement" and where Estuary's expectations were based on subjective

In a similar case, a Florida court held that land-use regulations that restricted the landowner's future use of property in a resource protection area did not effect a compensable taking.[180] The zoning of the resource protection area addressed conservation concerns expressed by state legislation.[181] The landowners failed to show that the regulation denied "all or a substantial portion" of the beneficial uses of their property, even though the restrictions affected more economically valuable uses of the property.[182] Also applying the *Penn Central* balancing factors, the court found that the mere diminution of the value of the landowner's property was insufficient to establish a deprivation of all or a substantial portion of the beneficial use of the property.[183]

Although courts and litigating parties have used the zoning analogy sparingly in the water rights context, it is particularly germane for resolving takings claims of future riparian water rights. Where a riparian in Wisconsin failed to obtain the necessary permits under the regulated riparianism system, the state supreme court emphasized that the impairment of a water right does not amount to a compensable taking.[184] In conducting the takings inquiry, the court recognized the broad authority and interest of the state to prevent "the public harm of dry riverbeds replacing flowing streams."[185] The court analogized the transition process to zoning, describing the transition process as affecting "all in a particular classification alike."[186] Because the damage that the defendants suffered was only incidental and not an unreasonable burden to bear for the public good, the court found that no taking had occurred.[187]

The zoning analogy anchored the dissenting opinion of *Franco-American Charolaise*, an exceptional case where the Oklahoma Supreme Court found a compensable taking of a constitutionally protected future riparian right.[188] In this case, the Oklahoma Supreme Court ex-

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expectations to be able to build as it wished rather than reliance on existing regulations).

180. Glisson v. Alachua County, 558 So. 2d 1030, 1038 (Fla. Dist. Ct. App. 1990). The protection area contained wetlands, exceptional upland habitat, hammock zones, and active use zones. *Id.* at 1032. Each portion of the protection area permitted increasing use for development, from no construction activities in the wetlands to full development in the active use zones. *Id.* at 1032-33.

181. *Id.* at 1036-37.

182. *Id.* at 1037.

183. *Id.*

184. Omernik v. State, 218 N.W.2d 734, 743 (Wis. 1974).

185. *Id.*

186. *Id.*

187. *Id.* at 744.

188. Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 582-83 (Okla. 1990). The Oklahoma Water Resources Board determined the water rights of existing users along Byrd's Mill Spring and then allocated the remaining amount of water to the City of Ada. *Id.* at 571. The riparian owners contested this allocation as eliminating their future water rights. *Id.* at 576.

panded the scope of the vested private property right to include presently exercised and future unexercised rights to use water, bound by the doctrine of reasonableness.[189] The court declared that riparian owners enjoy a "vested common law right to the reasonable use of the stream . . . [that is] a valuable part of the property owner's 'bundle of sticks' and may not be taken for public use without compensation,"[190] pursuant to the state constitution. Departing from a majority of states, the Oklahoma Supreme Court found that the statutory mechanism to perfect riparian water rights failed to protect the full scope of the rights, highlighting the central role of the doctrine of reasonableness.[191]

However, the dissent forcefully disagreed with the majority's disregard of the zoning analogy.[192] As in zoning, the dissent opined that the legislature is free to decide that a non-continuous, future exercise of a riparian right is injurious and wasteful of water as a public resource.[193] While Oklahoma's transition to prior appropriation may limit a riparian landowner's non-quantified future exercise of his right, the regulations neither physically deprived the landowner of the present use of the water nor deprived the landowner of all economic use of his land.[194] The majority found an outright taking of the riparian right rather than simply a restriction,[195] which seems to implicate temporal severance of future rights from present rights warned against by precedent. Moreover, as concluded by the Texas and Washington Supreme Courts, the curtailment of the future exercise of a riparian right results from the riparian's inaction, rather than a compensable taking by government

189. *Id.* at 578.

190. *Id.* at 571.

191. *Id.* at 577. The court found that the 1963 water law amendments, upon which the Board determined water rights along the stream, were "fraught with a constitutional infirmity" in abolishing the right of riparian owners to assert prospective reasonable uses of stream water. *Id.* Under this statutory mechanism, riparians must assert future rights as appropriators instead of being free to use a non-quantified amount, within the bounds of reasonableness, at any given time in the future. *Id.* at 573. Furthermore, the system required quantification of a previously non-quantified amount, contrary to the basis of riparian rights. *Id.*

192. *Id.* at 582-83 (Lavender, J., dissenting).

193. *Id.* at 584.

194. *Id.* at 583. The dissent argued that the prospective or future reasonable use is not a vested right, in part because of the reasonable limitations – including forfeiture – to which the riparian rights are subject. *Id.* at 582. The dissent also argued that the majority failed to adequately recognize legislative efforts to phase out riparian law and implement prior appropriation in Oklahoma. *Id.* at 584. In 1993, the Oklahoma legislature responded to the holding in *Franco-American* by passing legislation that replaced "the incompatible dual systems of riparian and appropriative water rights . . . with an appropriation system of regulation" governed by the principles of beneficial use of water and priority in time. Heldermon v. Wright, 2006 OK 86, ¶ 9, 152 P.3d 855, 859 n.21 (Okla. 2006) (citing OKL. STAT. tit. 82, § 105.1(A) (2007)). To date, the Supreme Court of Oklahoma has not ruled on the constitutionality of this statute.

195. *Franco-American*, 855 P.2d at 577.

action.[196] Under a comprehensive *Penn Central* analysis, these considerations tend to compliment the dissent in *Franco-American* rather than the majority opinion.

These riparian transition cases, buttressed by the zoning analogy, demonstrate the difficulty for a riparian water rights holder to succeed on a takings claim for future, unexercised use, giving states wide, but not unlimited, latitude to transition from existing riparian water law provisions into more environmentally sensitive and sensible provisions. While present uses may translate into vested water rights, courts view rights to future uses as exceedingly tenuous and disruptive of an already unstable water rights regime.[197] Thus, courts are hesitant to attribute a vested and constitutionally protected property right to these future rights.[198] Even in the rare case where courts recognize a vested property right in a riparian right to future use, courts nonetheless attempt to reconcile the future right in light of the purposes and benefits of the system of water law from which riparianism transitioned.[199] This framework helps protect the environment and water resources for states but may have the unintended consequence of encouraging riparian landowners to establish unnecessary but reasonable present uses to protect their rights in the future. With an expanded list of uses, states may appropriate water previously reserved for future uses to other environmentally beneficial uses. For future riparian takings claims, this trend suggests that state legislatures may continue to strengthen water laws and, with adequate safeguards for due process, minimize payment of just compensation for the enactment of environmentally protective measures.

III. APPROPRIATIVE RIGHTS IN TRANSITION

In situations where prior appropriation rights are in transition, the takings issue arises with the reduction of water allocations for active, present uses for efficiency purposes or due to compliance with statutory regulations. When addressing just compensation under the current Fifth Amendment Takings Doctrine, courts have generally found that compliance with federal regulations does not effect compensable takings of private property rights through classifying the claim as a contract issue with relevant monetary damages.[200] As such, the question is not whether the state has the regulatory authority to constrain property

196. *In re* Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 444 (Tex. 1982); *In re* Deadman Creek Drainage Basin, 694 P.2d 1071, 1077 (Wash. 1985).

197. *See In re* Waters of Long Valley Creek Sys., 599 P.2d 656, 661 n.3 (Cal. 1979).

198. *Id.* at 668-69.

199. *See Franco-American*, 855 P.2d at 577.

200. *See* Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 534 (Fed. Cl. 2005).

uses. The rulings of the Supreme Court reveal that states have the authority to constrain uses of property for the purposes of environmental protection, to conserve natural resources by requiring greater efficiency, and to legislate more efficient administration.[201]

The transition of prior appropriation laws concurrently reflects an independent need for environmental protection and the inability of the prior appropriation system to conserve or protect water resources. The weaknesses of the prior appropriation system hinder adequate protection of natural watercourses and the surrounding environment.[202] The sense of certainty induced by the priority system, overlain with piecemeal resolution of conflicts and additional federal constraints, is often misleading.[203] Gaps in the recording of priority exist throughout prior appropriation states because many water appropriations from valuable watercourses remain unquantified.[204] In addition, the loss of water rights through forfeiture and abandonment undermine the definitiveness of priority.[205] The maze of state regulations and amendments cloud the question of certainty and require detailed examination into the historical developments of water law.[206]

Furthermore, the prior appropriation system encourages premature development of water sources and potentially unnecessary use.[207] Appropriators benefit from establishing a history of use, regardless of the application or wisdom of the use.[208] Strict adherence to prior appropriation is also problematic during times of water shortage. Junior appropriators receive water only after the senior appropriators call for their full allocation; thus, the junior appropriators tend not to receive any water at all.[209] Because users of this common resource do not share the risk of shortage evenly, senior appropriators may continue unproductive, inefficient uses of water while junior appropriators suffer the loss of potentially highly productive uses of water.[210] Finally, even where legislatures have passed environmental protection measures in accordance with the public interest, the measures tend to apply not to

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201. Sax, *supra* note 6, at 262. *See also generally* Echeverria, *supra* note 64 (discussing the Supreme Court's 2005 takings jurisprudence).

202. *See* A. Dan Tarlock, *Western Water Law and Coal Development*, 51 U. COLO. L. REV. 511, 529 (1980); Wilkinson *supra* note 36, at 322.

203. *See* A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 780-81 (2001).

204. Dellapenna, *supra* note 5, at 22.

205. Tarlock, *supra* note 203, at 780.

206. *See* Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 (Fed. Cl. 2005). *See infra* notes 229-237 and accompanying text for a discussion of *Klamath.*

207. Tarlock, *supra* note 203, at 780.

208. *See* Robert J. Glennon & Thomas Maddock, III, *In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surface Water*, 36 ARIZ. L. REV. 567, 568-69 (1994).

209. *Id.* at 569.

210. Dellapenna, *supra* note 5, at 22.

the vast majority of existing appropriations but instead to the relatively small minority of new appropriations.[211]

A. TRANSITION TOWARD INCREASED EFFICIENCY

In the quest for new sources and supplies of water in prior appropriation states, states and their water management agencies look toward increasing the efficiency of existing water uses to retain water for maintaining in-stream flows or to permit new, consumptive uses of water.[212] As discussed above, a non-wasteful use of water qualifies the concept of beneficial use.[213] Generally defined, waste is the amount of diverted water that exceeds reasonable needs according to customary practices.[214]

As states transition toward increased efficiency, existing appropriators will have a stronger basis for a takings claim, whereas new appropriators will have no basis upon which to allege a takings claim because the new appropriations of water are subject to the more stringent requirements. For existing applications of water, states and their water agencies tend to employ a combination of incentives to encourage appropriators to increase efficiency and thus reduce wasteful, existing applications of water.[215] Because these incentives are voluntary and waste enforcement tends to be lenient,[216] appropriators have virtually no basis upon which to argue a compensable takings claim. However, an eventual push for legislative action may generate takings claims as a result of transitions toward increased efficiency. Viewed under the *Penn Central* factors, however, a court reviewing this type of takings claim will likely find for the state and not require payment of just compensation. While the economic impact on the appropriator may be significant, such efficiency legislation is unlikely to completely eliminate appropriative rights. In addition, with foreseeable increased emphasis on conservation of water resources – particularly given the climate and geography of the West – the appropriator's investment-backed expectations should be minimal. Moreover, such legislation would have widespread impacts on similarly-situated individuals, lessening the burden of the government action.

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211. *Id.* at 28.

212. *See* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 983 (1998).

213. *See supra* Part I.A.

214. Neuman, *supra* note 212, at 933 (citing Steven J. Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483, 491 (1982)).

215. *Id.* at 983.

216. *Id.* at 985.

B. TRANSITION TOWARD COMPLIANCE WITH ENVIRONMENTAL STATUTES

A more dynamic, ongoing transition in prior appropriation states is the transition toward compliance with environmental statutes. From an environmental perspective, one of the biggest obstacles to the conservation of water resources and aquatic ecosystems is the inability to curtail water uses.[217] However, mandatory compliance with federal environmental statutes in the prior appropriation regime minimizes this obstacle and enables protection of water resources.[218] Enforcing these requirements, however, provokes highly contested takings litigation.[219] The statutory regulation that most frequently appears in prior appropriation systems is the Endangered Species Act ("ESA"), which seeks to protect the habitats of threatened and endangered species as a means of protecting the species themselves.[220] With its clear preservation mandate, the Supreme Court described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[221] It requires all federal departments and agencies to ensure that their actions do not jeopardize the continued existence of any endangered or threatened species, including jeopardizing species through the destruction or adverse modification of habitat.[222]

Although reducing an appropriator's allocation of water does not deprive the water user of all water, the ESA nonetheless provokes lengthy litigation over its requirements to leave sufficient in-stream flows for the protection of endangered aquatic species.[223] Aside from the exceptional and heavily criticized ruling in *Tulare Lake Basin Water Storage District v. United States*,[224] the Court of Federal Claims has taken one of two approaches: either reframing the claim as a contracts question

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217. *See generally* A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 PUB. LAND & RESOURCES L. REV. 33 (2006) (discussing the water limits question).

218. *See* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 298-99 (2006).

219. *See, e.g.*, Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 507 (Fed. Cl. 2005).

220. Endangered Species Act, 16 U.S.C. § 1531(b) (2000).

221. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

222. 16 U.S.C. §§ 1531(c), 1536(a)(2). The Act defines conserve as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which" the protection of the Act is no longer necessary. *Id.* §1532(3).

223. *See, e.g.*, Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1113-15 (10th Cir. 2003) (discussing extensive litigation under the Endangered Species Act to maintain sufficient in-stream water for the minnow).

224. *See* Klamath Irrigation, 67 Fed. Cl. at 538 (criticizing Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318-21 (Fed. Cl. 2001)).

or evaluating the claim under the *Penn Central* factors.[225] Found primarily in western states, these contracts exist where the federal government assists in constructing water infrastructure.[226] Contract terms define the property nature of contracted water rights and federal government violation of the contract requires the payment of damages, regardless of compensation under the Fifth Amendment takings law.[227] However, where a court finds that the government action is outside the scope of the contract, the court is more likely to apply Fifth Amendment takings law as in *Tulare*.[228]

The *Klamath River Basin* court applied this reframing of water contracts, holding that the plaintiffs' claim arose under contract law and not takings jurisprudence.[229] The Court of Federal Claims first examined the nature of the plaintiffs' property right, which independent sources such as federal, state, or common law defined, not the Federal Constitution.[230] The court concluded that based on a series of legislative acts in 1905, the United States held the vested water rights associated with the Klamath project.[231] The court found that the plaintiffs had protected property interests based on contracts with the United

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225. *See, e.g., Klamath Irrigation*, 67 Fed. Cl. at 534. *See also* Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122, 131-32 (Cal. Ct. App. 2006) (disagreeing with *Tulare's* conclusion and instead applying the *Penn Central* analysis).

226. Gray, *supra* note 11, at 17. *See also generally* Douglas L. Grant, *ESA Reductions in Reclamation of Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331 (2006) (arguing that water rights by contract with the Bureau of Reclamation will often be considered protected by the Fifth Amendment).

227. Gray, *supra* note 11, at 17. *See generally* Grant, *supra* note 226, at 1350-53 (discussing Bureau of Reclamation water service contracts creating property rights).

228. *Tulare*, 49 Fed. Cl. at 314. In *O'Neill*, the Ninth Circuit formulated this test for a federal government breach of contract: the plaintiff must prove that the contract provides for full water service under conditions of hydrological and regulatory drought; and contract terms must expressly and unmistakably protect plaintiff from the effects of new laws that alter the terms of the contract or laws that render the fulfillment of the terms of the contract illegal. O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995). In addition, the Supreme Court in *Winstar* added that the plaintiff may recover damages for a breach of the contract if the contract grants the government regulation impaired right and if the contract anticipates the regulation by expressly assigning liability for regulatory impairment to the government. United States v. Winstar, 518 U.S. 839 (1996).

229. *Klamath Irrigation*, 67 Fed. Cl. at 534. Here, the National Marine Fisheries Service and Fish and Wildlife Service concluded in a final biological opinion that 2001 was likely to be the "driest year on record" and that the habitat of the Coho salmon, the Upper Lake Klamath shortnose, and the Lost River suckerfish required the increase and maintenance of water levels and river flows. *Id.* at 513. The Bureau of Reclamation implemented a reasonable and prudent alternative that called for the termination of water delivery in 2001. *Id.*

230. *Id.* at 515, 519 (citing Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003); Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158 (1935)).

231. *Id.* at 523.

States.[232] However, because the United States acted in a proprietary capacity, as opposed to a sovereign capacity, when it entered into the contracts, the plaintiffs' claims arose under contract law rather than takings law.[233] The Bureau did not breach the contract under the sovereign acts doctrine, which recognizes that "the Government . . . must remain free to exercise its powers . . . ."[234]

Under the contracts framework, the court found that the plaintiffs' beneficial interests were not absolute rights because appurtenancy, beneficial-reasonable use, and, most importantly, contractual provisions that released the United States of liability for all shortages limited the rights.[235] The release of liability included hydrological shortages and "any other cause that impacts the availability of water through the system," which the court interpreted to include the regulatory drought caused by implementation of the alternative.[236] In ruling that the United States acted in a proprietary capacity, the court noted that the plaintiffs still had available to them all contractual remedies to obtain damages.[237]

In a similar case, the Court of Federal Claims instead used the *Penn Central* regulatory takings framework to evaluate a water district's allegation that implementation of a biological opinion effected a taking of their water rights.[238] The Casitas Water District operated a water project on behalf of, and according to, directives of the Bureau of Reclamation.[239] However, California's State Water Resources Control Board issued Casitas's permit to use and divert water.[240] Admittedly tempted to accept Casitas' argument that the action resulted in the

232. *Id.* at 531.

233. *Id.* The court reasoned that the contract either bound the Bureau to certain promises to provide water or to pay damages for a breach. *Id.* at 532. The contract did not confer on plaintiffs a right to protection from a taking. *Id.*

234. *Id.* at 536 (quoting Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1575 (Fed. Cir. 1997)). The test of determining the proprietary or sovereign capacity of the federal government is "whether, on balance, that legislation was designed to target prior governmental contracts." *Yankee Atomic*, 112 F.3d at 1575. Courts consider legislation by the federal government sovereign as long as its impact on contracts is "merely incidental to the accomplishment of a broader governmental objective." *Klamath Irrigation*, 67 Fed. Cl. at 537 (quoting United States v. Winstar Corp., 518 U.S. 839, 898 (1996)).

235. *Klamath Irrigation*, 67 Fed. Cl. at 535.

236. *Id. See also infra* note 252.

237. *Klamath Irrigation*, 67 Fed. Cl. at 532.

238. Casitas Mun. Water Dist. v. United States (*Casitas II*), 76 Fed. Cl. 100, 103 (Fed. Cl. 2007). *Casitas II* followed *Casitas Municipal Water District v. United States* (*Casitas I*), in which the court found that under the sovereign acts defense, the Bureau of Reclamation did not breach a contract when it required Casitas to operate the water project pursuant to a NMFS-issued biological opinion. *Casitas I*, 72 Fed. Cl. 746, 755 (Fed. Cl. 2006). *Casitas II* centered on Casitas' alternative contention that the implementation of the biological opinion effected a taking. *Casitas II*, 76 Fed. Cl. at 101.

239. *Casitas II*, 76 Fed. Cl. at 101.

240. *Id.* at 102.

functional equivalent of a physical taking, the court interpreted the *Tahoe-Sierra* clarification of physical takings and regulatory takings to preclude finding a categorical physical taking.[241] The court declined to accept Casitas' assertion that restriction of water use results in a total loss of value, although the court acknowledged that the effect of the regulation may have been the functional equivalent of a physical taking.[242] The biological opinion required Casitas to relinquish a diversion of 3,200 acre-feet of water per year, or approximately 11% of the volume of water its license permitted it apply to beneficial uses and less than 3% of the volume of water its license permitted it to divert.[243]

The outcomes in *Klamath* and *Casitas* contrast with an earlier 2001 case where the Court of Federal Claims found that implementation of Endangered Species Act requirements effected a taking from water appropriators and water contract recipients in California's Central Valley.[244] In this heavily criticized case,[245] the court stated that the promissory assurances contained in the contract formed the basis of the plaintiffs' rights, and that not even the public trust doctrine, the doctrine of reasonable-beneficial use, or state nuisance law could change them.[246] Here, the court held that the implementation of the reasonable and prudent alternative contained in the biological opinion effected a per se physical taking of the plaintiffs' property.[247] Relying on *Causby*,[248] the court emphasized that the distinction between a mere impairment of the use of property and a physical invasion turns on the question of whether the intrusion is "so immediate and direct as to subtract from

241. *Id.* at 105-6 (stating that *Tahoe Sierra* "compels [the court] to respect the distinction between a government takeover of property (either by physical invasion or by directing the property's use to its own needs) and government restraints on an owner's use of that property").

242. *Id.*

243. *Id.* at 102. Casitas' license permitted it to divert up to 107,800 acre-feet per year and apply up to 28,500 acre-feet per year to beneficial uses. *Id.* at 102 n.3.

244. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314, 319 (Fed. Cl. 2001).

245. *See infra* note 254 and accompanying text.

246. *Tulare*, 49 Fed. Cl. at 322. The Bureau and the Department concurrently operated the Central Valley Project and the State Water Project, which contracted to provide water to the plaintiffs, a water agency and a water district. *Id.* at 315. California's State Water Resources Board granted water permits to the Federal Bureau of Reclamation and California's Department of Water Resources. *Id.* Under the mandate of the ESA, the National Marine Fisheries Service and the Fish and Wildlife Service issued a biological opinion that continued delivery of water under the contracts would further jeopardize the endangered delta smelt and the winter-run Chinook salmon. *Id.* The biological opinion included a reasonable and prudent alternative, as mandated by the ESA, which limited both the time and manner of pumping water out of the stream system. *Id.*

247. *Id.* at 315-16, 320.

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

the owner's full enjoyment of the property and to limit his exploitation of it."[249]

Applied to water rights, the court noted that "a mere restriction on use – the hallmark of a regulatory action – completely eviscerates the right itself since the plaintiffs' sole entitlement is to the use of the water."[250] The court found that the government substituted itself as the beneficiary of the water contract rights and thus occupied the plaintiffs' property, rendering the water right valueless.[251] Implementation of the biological opinion alternatives caused a "regulatory drought," reducing the amount of water available for delivery under the contracts.[252] Under the Board's authority pursuant to the public trust doctrine and in response to the prevailing drought conditions in the Valley region, the Board implemented reasonable and prudent alternatives, reducing the amount of water available to the plaintiffs.[253]

Critics have noted that the holding in this case fails to consider the background principles that would have inherently limited the plaintiffs' water rights under the contract.[254] The court in *Tulare* failed to consider whether ESA enforcement applied to the contracts and whether it should limit the plaintiffs' rights as third-party beneficiaries

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249. *Tulare*, 49 Fed. Cl. at 319 (quoting *Causby*, 328 U.S. at 265).

250. *Id.* (citing Eddy v. Simpson, 3 Cal. 249, 252-53, 53 Freeman 408, 410 (1853) ("[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use")).

251. *Id.* The court rejected the government's reliance on the *Penn Central* balancing factors. *Id.* The government argued that the plaintiffs' claim could not succeed both because the preemptive federal environmental protection regulation limited reasonable investment-backed expectations and protection for endangered and threatened fish species, and because the economic loss was minimal in comparison to the overall value of the contract. *Id.* at 318-19. In its analysis, the court conflated language from both per se physical invasions takings jurisprudence and regulations that deprive property of all economic value, despite finding a taking based on the former category. *Id.* at 318.

252. *Id.* at 320. The term "regulatory drought" refers to water shortages caused by legal requirements to provide for environmental protection. *See* Gray, *supra* note 11, at 18. These shortages would not occur but for the legal requirements and tend to exacerbate the impacts of existing natural drought. *Id.*

253. *Tulare*, 49 Fed. Cl. at 315. The Tulare Lake Basin Water Storage District alleged a loss of at least 58,820 acre-feet of water in the three year period between 1992 and 1994, whereas the Kern County Water Agency alleged the loss of 319,420 acre-feet over the same period. Melinda Harm Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 560 (2002).

254. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 & n.59 (2005). *See generally* JOHN D. ECHEVERRIA, GEORGETOWN ENVTL. LAW & POL'Y INST., WHY *TULARE LAKE* WAS INCORRECTLY DECIDED 6 (Aug. 2005), http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_Law_TulareLakeIncorrect.pdf; Brittany K.T. Kauffman, *What Remains of the Endangered Species Act and Western Water Rights After* Tulare Lake Basin Water Storage District v. United States?, 74 U. COLO. L. REV. 837, 869 (2003); Cori S. Parobek, *Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 212 (2003).

whose rights derived from federal and state contracts with the Board.[255] Later in *Klamath*, the court dismissed the plaintiffs' reliance on *Tulare*, stating that "with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events."[256] Furthermore, in *Casitas*, the court conceded that it based its holding in *Tulare* on the "finality of the plaintiffs' loss rather than upon the character of the government's action."[257]

C. THE AMORTIZATION ANALOGY

A single court's diversity of approaches illustrates the potential inconsistency of future takings rulings in prior appropriation transitions. However, drawing from the language of amortization in land-use law is a means to address takings claims concerning ESA requirements and water conservation measures. In this amortization analogy, individuals should have a reasonable time to recover their financial investment in their water infrastructure, and amortization of wasteful or non-beneficial uses should avoid a Fifth Amendment takings claim. While using the contracts framework and expansive release of liability language may permit the government to have greater control over water resources and function for individual litigation, a move towards incorporating amortization from land-use laws would result in a more uniform conservation policy across prior appropriation states.

The transition to compliance with federal environmental statutes such as the ESA is comparable to amortization provisions that eliminate non-conforming uses in land-use law.[258] The majority of jurisdictions uphold the constitutionality of these provisions, which must provide a reasonable method of and time for elimination of the non-conforming use.[259] Courts may also consider the relative benefits to the

255. *Klamath Irrigation*, 67 Fed. Cl. at 538.

256. *Id.*

257. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 104 (Fed. Cl. 2007).

258. *See* Sax, *supra* note 6, at 265.

259. This majority view is contrasted by the views of states such as Pennsylvania, where the state supreme court held that "the amortization and discontinuance of a lawful pre-existing non-conforming use is per se confiscatory" and in violation of the state constitution. Pa. Nw. Distrib., Inc. v. Zoning & Hearing Bd. (*Moon*), 584 A.2d 1372, 1376 (Pa. 1991). In *Moon*, the plaintiff obtained the necessary paperwork to open an adult book store in the Township of Moon. *Id.* at 1373. Four days later, with suspect efficiency, the Zoning Board passed an ordinance imposing heavy restrictions on the location of adult enterprises and gave non-complying businesses a ninety-day period to comply with the ordinance. *Id.* The plaintiff was unable to comply and challenged the constitutionality of the provision. *Id.* The Supreme Court of Pennsylvania found that the plaintiff had a vested property right by the lawful non-conforming use and found the amortization provision offensive in that both restricted future uses and extinguished a lawful non-conforming use on an expedited timetable. *Id.* at 1376. As discussed below, the Court of Federal Claims used similar reasoning to find a taking of water rights. *See supra* notes 244-253 and accompanying text.

public compared to individuals' private injury or hardship, as well as the economic investment of the individual and whether the individual can transfer or recover its investment through a permitted use.[260] Where these factors are met, courts have generally held that amortization provisions are constitutional and do not require compensation under the Fifth Amendment because there is no constitutional bar to retroactive regulatory legislation.[261]

The majority view that such amortization provisions are constitutional prevails in states like California. In *City of Los Angeles v. Gage*, a California Court of Appeals held that an amortization provision that prohibited a defendant from continuing his non-conforming use did not effect an unconstitutional taking of the defendant's property rights.[262] The amortization provision only restricted the location of the defendant's business and provided a reasonable and ample time for the defendant to move.[263] The court found that the elimination of existing uses did not amount to a taking because the defendant still had reasonable use of his property as residential, pursuant to its original zoning.[264]

The court noted that the fundamental obstacle posed by non-conforming uses to comprehensive zoning was "one of degree," and distinguished restrictions on present use from restrictions on future use, recognizing but upholding the retroactive effect of the ordinance.[265] While not specifically employing the *Penn Central* factors, the court nonetheless emphasized the marginal economic impact upon the landowner in concluding that the ordinance did not effect a com-

260. 101A C.J.S. *Zoning & Land Planning* § 209 (2005).

261. *See* Sax, *supra* note 6, at 265.

262. City of Los Angeles v. Gage, 274 P.2d 34, 45 (Cal. Ct. App. 1954). The defendant purchased lots on which he built a two-family residential building, using part of the building to conduct a wholesale retail plumbing supply business. *Id.* at 36. In 1946, after a series of zoning reclassifications that all expressly permitted Gage's use of the property, the City passed an amortization provision for the discontinuance of non-conforming uses within five years of the effective date. *Id.* at 37. Eight years later, Gage continued to operate his business in the residential zone, and the City brought suit against Gage to enjoin his non-conforming use and to comply with the comprehensive zoning plan. *Id.* at 44.

263. *Id.* at 44.

264. *Id.* at 45.

265. *Id.* at 44.

> The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose.

Id.

pensable taking.[266] Furthermore, viewing this case under a *Penn Central* lens, the defendant's limited investment-backed expectations most likely resulted because the defendant continued operation of his non-conforming business for more than three years after the five-year expiration period had ended.[267]

The Indiana Supreme Court also upheld a zoning ordinance that required the registration of non-conforming uses.[268] The failure to register resulted in forfeiture of the non-conforming use.[269] The court concluded that under the Fifth Amendment takings doctrine, "[a] zoning ordinance that provides for the forfeiture of unregistered nonconforming uses does not fall into either [category of per se takings]."[270] The new ordinance did not cause the plaintiffs to suffer a physical invasion because it merely restricted the use of the rental property at issue, and the ordinance reduced the value of the property by 25-40%, far less than the threshold of denial of all economically beneficial use of the property.[271]

In prior appropriation states, the restrictions on water use imposed by the ESA and other conservation measures function to effectively amortize non-conforming uses of water. In this situation, the public benefit is the protection of environmental and aesthetic values, and the harm to the individual appropriator is a reduction of the amount of appropriated water. By imposing conservation measures, the original amount no longer "conforms" to the water allocation plan for a particular river basin. Unlike individual contract litigation under the ESA, amortization of excess allocations of water will uniformly address water conservation issues in prior appropriation states.

In the takings context, the amortization analogy gives courts a robust framework upon which to uphold conservation measures enacted in prior appropriation states. Although the amortization cases tend to focus explicitly on the authority of the government to enact such measures, the discussion and reasoning implicate the *Penn Central* fac-

266. *Id.* (noting that the cost of relocating the plumbing business amounted to less than 1% of Gage's minimum gross business for five years).

267. *Id.*

268. Bd. of Zoning Appeals of Bloomington v. Leisz, 702 N.E.2d 1026, 1031 (Ind. 1998). In this case, the plaintiffs purchased real property from owners who had failed to register the existing lawful non-conforming use under a newly passed zoning ordinance. *Id.* at 1027. This case signaled the state's return to the majority view from the minority view on the constitutionality of amortization provisions. *Id.* at 1032.

269. *Id.* at 1027.

270. *Id.* at 1029.

271. *Id.* For example, the Ninth Circuit found that a zoning ordinance that reduced a property's value from $2 million to $100,000, a 95% reduction, did not amount to a compensable taking. William C. Haas & Co., Inc. v. San Francisco, 605 F.2d 1117, 1118, 1120 (9th Cir. 1979).

tors that govern non-categorical takings.[272] The character of the government action feeds into the authority of the government to enact conservation measures and represents an adjusted balance of benefits and burdens, rather than an unfair targeting of particular individuals. Increasing and foreseeable prioritization of environmental values and the limited nature of the property right in water should temper individuals' subjective expectations in investing in both riparian and prior appropriation water rights. Finally, the overwhelming public gains in simultaneously stretching water resources for human use and retaining water to sustain aquatic ecosystems should offset the economic impact of reduced water delivery. This last prong of the *Penn Central* analysis corresponds most readily with the amortization analogy, enabling courts to lend greater protection to these conservation measures.

CONCLUSION

In the takings landscape for transitions in state water law systems, individual's water rights affected by a transition of state water laws face significant obstacles to establishing a successful claim for conservation. Even among other natural resources, water rights are a unique species of property rights, subject to a maze of federal and state interests that inherently limit the property nature of such rights. Because the takings inquiry necessarily depends on a court finding a constitutionally protected, vested, and compensable property right, these individuals must prove this decisive first element of the takings claim.

Where riparians claim a taking of future rights resulting from a transition of state water laws into prior appropriation or regulated riparianism, a vested property right in the future use of water is particularly difficult for one to prove. Simultaneous needs for stability in the water law system and for protection of the environment and water resources drive these transitions. Recognizing these needs, courts are willing to give states room to maneuver within the bounds of the Fifth Amendment takings doctrine without triggering the just compensation requirement. One can analogize these transitions to zoning real property, where benefits to the community restrict individual property.

Where prior appropriators claim a taking of present rights resulting from transitioning to compliance with federal environmental statutes, courts avoid the takings inquiry and attendant constitutional issues by reframing the case under contract law instead of constitutional law. Recent rulings of the Supreme Court, which narrow the types of cases that fall under the per se physical occupation takings category, guide courts that undertake the constitutional analysis. While well-

272. In post-*Lingle* takings jurisprudence, the substantial due process component is no longer a basis for a court to find compensable taking. *See supra* notes 158-160 and accompanying text.

drafted contract language benefits the government in enacting water conservation measures, a more sound and uniform approach is for legislatures to incorporate amortization into prior appropriation, facilitating a transition into more environmentally sensitive and sensible water laws.

As demand for water for human use and consumption increasingly conflicts with demands to augment or otherwise maintain water levels in natural watercourse systems, the takings conflicts that appear, primarily due to western states' compliance with federal environmental statutes, will likely shift eastward into traditional riparian states. In the future, riparian states may also experience a form of regulatory drought that gives rise to takings litigation. Careful expansion of the reasonable use doctrine that defines the bounds of a riparian water right could effectively halt many takings claims, as well as meticulous contract drafting and limitations on damages. Moreover, framing the conflict as a *Penn Central* inquiry will provide greater room for the government to persuade courts. Where riparians claim a taking of future rights to water as a result of federal environmental statute implementation, their legal arguments will mirror those discussed in this Article. The central problem for riparians remains the same, the difficulty of establishing the basic private property right in water.

Under the current Fifth Amendment takings doctrine, environmental protection goals, veiled as transitions in water laws, are likely to succeed without triggering the requirement for just compensation. This takings litigation generates environmental benefits in the form of maintaining water supplies and the attendant benefits of water quality, habitat and ecosystem preservation, and hydrologic cycle function. Ultimately, however, the environmental benefits reflect not courts' enthusiastic embrace of environmental values but instead, the relatively few cases where holders of water rights prevail in takings jurisprudence.