

ARTICLE

ESA REDUCTIONS IN RECLAMATION WATER CONTRACT DELIVERIES: A FIFTH AMENDMENT TAKING OF PROPERTY?

BY

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Two United States Court of Federal Claims cases have given different answers to the question posed in the title of this article. One case found a per se physical taking of water users' property; the other ruled water users lacked property rights protected by the Fifth Amendment. Commentators have widely criticized the finding of a per se physical taking.

This Article undertakes a more searching analysis of the takings question than appears in the two cases and the commentary. By untangling federalism complexities in reclamation law and focusing on longstanding state law regarding water distribution organizations, the article shows that water users supplied under Bureau of Reclamation (Bureau) contracts often will have Fifth Amendment property rights. The Article then shows why Bureau water delivery reductions made to comply with the ESA come within a gap in Supreme Court takings jurisprudence and suggests there is at least some chance the Court would treat delivery reductions as per se physical takings. Finally, the Article explains why it is unclear in many states whether nuisance law or the public trust doctrine constitute preexisting title limitations that would avoid any takings problem, and it suggests a litigation strategy for states concerned about the evolution of their nuisance or public trust law in this regard.

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I. INTRODUCTION

The Bureau of Reclamation in the United States Department of the Interior (Bureau) operates 476 dams and 348 reservoirs in the seventeen western mainland states.¹ A primary mission of the Bureau is to deliver water from these facilities by contract to municipalities² and irrigation districts or similar organizations.³ The contract water deliveries make up all or part of the supply for thirty-one million urban residents⁴ and for farmers irrigating ten million acres.⁵

Many of the Bureau's dams and reservoirs are on streams that are the habitat of fish species listed as threatened or endangered under the Endangered Species Act (ESA).⁶ ESA section 7 obligates every federal agency to insure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species."⁷ To comply with this mandate, the Bureau may have to refrain from storing water in a reservoir for later delivery to contract users and instead let the water flow downstream to provide habitat for protected fish species.⁸ Similarly, the Bureau may have to release water already stored to provide downstream habitat. In other circumstances, it may have to keep water in storage for species living in the reservoir rather than delivering it to contract users. In all of these situations, water that goes to species habitat will not be available for contract deliveries.⁹

The Bureau's reduction of contract water deliveries to comply with the ESA has generated three suits against the United States by municipalities, irrigation districts, and irrigation district members to recover for a taking of

¹ U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, RECLAMATION: MANAGING WATER IN THE WEST, 2004 ANNUAL REPORT v (2004), *available at* http://www.usbr.gov/library/annual_reports/FY2004/AnnualReportCoverContent.pdf.

² See 43 U.S.C. § 485h(c) (2000) (authorizing the Secretary of the Interior to enter contracts with municipalities to "furnish water for municipal water supply or miscellaneous purposes").

³ See *id.* §§ 485a(g), 485h(d)–(e) (authorizing the Secretary of Interior to enter contracts with organizations to "furnish water for irrigation purposes").

⁴ See COMM. ON ORG. TO MANAGE CONSTR. AND INFRASTRUCTURE IN THE 21ST CENTURY BUREAU OF RECLAMATION, NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCI., MANAGING CONSTRUCTION AND INFRASTRUCTURE IN THE 21ST CENTURY BUREAU OF RECLAMATION 1 (2006), *available at* <http://www.nap.edu/openbook/0309100356/html/1.html> (describing the Bureau as the largest municipal and industrial water wholesaler in the country).

⁵ *Id.*

⁶ Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 320–21 (1996); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2000).

⁷ 16 U.S.C. § 1536(a)(2) (2000).

⁸ See, e.g., *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1127–30 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) (holding that an unwilling Bureau can be ordered to reduce contract water deliveries if necessary to protect endangered species); *O'Neill v. United States*, 50 F.3d 677, 689 (9th Cir. 1995) (holding that irrigators could not compel the Bureau to deliver their full contract water amounts if that would be inconsistent with the ESA).

⁹ U.S. GEN. ACCOUNTING OFFICE, FRESHWATER SUPPLY: STATES' VIEW OF HOW FEDERAL AGENCIES COULD HELP THEM MEET THE CHALLENGES OF EXPECTED SHORTAGES 61 (2003) [hereinafter FRESHWATER SUPPLY].

their property.¹⁰ The Takings Clause of the Fifth Amendment requires the government to pay just compensation when it takes private property for public use.¹¹ All three suits were filed in the United States Court of Federal Claims, the only court with jurisdiction over takings claims against the United States for more than \$10,000.¹²

The court has reached the merits in two of the cases. Different judges decided them and reached contrary conclusions. In *Tulare Lake Basin Water Storage District v. United States* (*Tulare*),¹³ Judge John Paul Wiese ruled that reduced deliveries to the plaintiffs were per se physical takings of their property requiring just compensation.¹⁴ In *Klamath Irrigation District v. United States* (*Klamath*),¹⁵ Judge Francis M. Allegra ruled that the plaintiffs had only contract rights, not property rights in water,¹⁶ and therefore the delivery reductions could not constitute a taking of their property.¹⁷

A federal study foresees more conflicts between the ESA and Bureau water contracts.¹⁸ A former Acting Solicitor and Deputy Solicitor for the Department of the Interior predicted recently that the Supreme Court ultimately “will be compelled to address” whether delivery reductions to comply with the ESA are a taking of property under the Fifth Amendment.¹⁹

This Article undertakes a more searching analysis of the takings issue than was made in the *Tulare* and *Klamath* opinions and in harshly critical commentary on *Tulare* (*Klamath* is too new to have been the subject of published commentary). Part I addresses whether municipalities and irrigation districts with Bureau contracts, or irrigation district members, have property rights in water. A former Solicitor of the Department of the Interior has observed that the legal relationship between the Bureau and contract water users is “very murky” due to “a number of layers of complexity.”²⁰ Part II untangles the complexities that bear upon the existence of property rights. It concludes that in most, if not all, states and in

¹⁰ See *Stockton E. Water Dist. v. United States*, 62 Fed. Cl. 379, 382 (2004) (takings action by water districts, county, city, and water service company against the Bureau); *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 507 (2005) (takings action by 13 agricultural landowners and 14 water, drainage, and irrigation districts against the Bureau); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 314 (2001) (takings action by California water users against the Bureau). The plaintiffs also alleged breach of contract in the *Stockton* and *Klamath* cases.

¹¹ U.S. CONST. amend. V.

¹² Compare 28 U.S.C. § 1346(a)(2) (2000) (federal district courts have jurisdiction of takings claims if the amount sought is not more than \$10,000), with 28 U.S.C. § 1491(a)(1) (2000) (Court of Federal Claims has jurisdiction with no dollar limit).

¹³ 49 Fed. Cl. 313 (2001).

¹⁴ *Id.* at 318–24.

¹⁵ 67 Fed. Cl. 504 (2005).

¹⁶ See *id.* at 532, 540.

¹⁷ *Id.* at 532.

¹⁸ See FRESHWATER SUPPLY, *supra* note 9, at 61–62 (“[T]he potential for future conflicts over the implementation of the Endangered Species Act is strong as competition grows between instream and offstream water demands.”).

¹⁹ Roderick E. Walston, *Symposium Keynote Address*, 57 HASTINGS L.J. 1243, 1257 (2006).

²⁰ John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 1985 n.2 (2005).

most, if not all, circumstances, municipalities and irrigation districts or district members do have property rights under state law.

Part III addresses whether contract delivery reductions are a Fifth Amendment taking of property, with a focus specifically on per se physical takings. This part explains why the takings concept is less straightforward than portrayed by the *Tulare* critics. To that end, it identifies weaknesses in the critics' arguments, pinpoints a gap in Supreme Court takings precedents that leaves uncertainty about whether delivery reductions are per se physical takings, and presents a hypothetical that tends to suggest they are.

Since no one can be sure how the Supreme Court will resolve the uncertainty, however, Part IV considers whether the United States could avoid what would otherwise be per se physical takings on the ground that the property rights of municipalities and irrigation districts or district members are subject to a preexisting title limitation justifying reduced water deliveries. Part IV disputes the conventional wisdom that shortage clauses widely used in Bureau water contracts constitute such a title limitation. Part IV also shows that whether state nuisance or public trust laws constitute such title limitations is unsettled in many states, and suggests a litigation strategy for states to resolve the matter in their courts rather than wait for the Court of Federal Claims to do so.

II. BUREAU WATER CONTRACTS AND PROPERTY RIGHTS

Section 8 of the Reclamation Act of 1902 defines federal-state relations in reclamation projects.²¹ Section 8 is critical to whether municipalities and irrigation districts with Bureau contracts, or irrigation district members, have property rights under state law. The discussion below begins with some rudiments of pre-Reclamation Act western water law that provide background for interpreting section 8. It then examines section 8 in detail, drawing at times on the earlier discussion of western water law. Finally, it critiques Judge Allegra's ruling in *Klamath* that the plaintiff irrigation districts and district members had no property rights in Klamath Basin waters.

A. Pre-Reclamation Act Western Water Law

Western courts had built up a significant body of appropriation doctrine water law by the time Congress commenced the federal reclamation program in 1902.²² Two elements of that body of law bear on what Congress likely intended in section 8. These are, first, the rule that a water right is appurtenant to the land where it is used and, second, the rules defining the relationship between a water supply entity and the irrigators receiving water from it.

²¹ National Irrigation Act of 1902 § 8, 43 U.S.C. § 383 (2000).

²² See generally 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 508, 510 (3d ed. 1911) (discussing cases pertaining to appropriation doctrine water law).

1. *The Appurtenance Rule*

Appurtenance is a conveyancing concept. A deed or mortgage of land also conveys or encumbers a water right that is appurtenant to the land unless the deed or mortgage expressly provides otherwise.²³

Early western courts generally regarded a water right for irrigation as appurtenant to the land upon which the water was used.²⁴ The courts did not find appurtenance, however, unless the same person owned both the water right and the land.²⁵ The requirement of unitary ownership is attributable to the conveyancing role of appurtenance.²⁶ Under common law conveyancing, a person cannot convey something he or she does not own.²⁷ Since a deed or mortgage of land could not convey or encumber a water right unless the landowner also owned the water right, it would have been nonsensical for courts to find appurtenance when the land and water right were owned by different persons.

While appurtenance had the conveyancing effect noted above, the courts declined to give it the additional effect of making a water right inseparable from the land where it was used.²⁸ Instead, courts allowed the transfer of an appurtenant water right to new land if the change would not injure any other appropriator.²⁹ Dissatisfaction developed in some quarters with the judicial rule on transferability on the ground that this could fuel speculation.³⁰ The concern was that initial settlers in an area might obtain water rights in excess of what they actually needed for their lands with the intention of later selling part of their inflated rights for handsome profits.³¹

²³ 2 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS § 1010 (2d ed. 1912). *See generally id.* §§ 1005, 1007–08 (discussing the general effect of appurtenance being included or omitted from deeds).

²⁴ *See id.* § 1011 (“[I]n general, we will say that a water right, which secures to the owner of a tract of land water for the irrigation of the same . . . becomes appurtenant to such land.”).

²⁵ *Id.* at 1804; *see also*, *Ginocchio v. Amador Canal & Min. Co.*, 8 P. 29, 31 (Cal. 1885) (“The water supply of a mill will ordinarily pass with a conveyance of the mill, but, in order to do so, it must belong to the mill, must be the property of the owner thereof, and not that of another.”); *Smith v. Denniff*, 60 P. 398, 400–01 (Mont. 1900) (A water right, viewed as an easement in the stream, “can become legally attached [to the land where it is used] only by unity of title in the same person to both the dominant estate and the easement claimed”); *Utah Metal & Tunnel Co. v. Grosbeck*, 219 P. 248, 251 (Utah 1923) (“There must be a unity of title or right in the same person to both the superior estate and the appurtenance.”).

²⁶ *Cf. KINNEY, supra* note 23, § 1008 (if a deed conveying land is silent about water, it is presumed to convey a water right used with the land because otherwise a seller could divide water from the land thereby depriving the new land owner of the opportunity to enjoy the land to its fullest use and benefit).

²⁷ Ralph W. Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 405–06 (1924).

²⁸ *See KINNEY, supra* note 23, § 995 (“A water right . . . [b]eing an independent property right . . . may be sold independent of any land or interest in land.”).

²⁹ WIEL, *supra* note 22, § 508.

³⁰ *See* CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM, NAT’L WATER COMM’N, LEGAL STUDY NO. 1, at 17–18 (1971) (describing how Wyoming and several other western states made water rights nontransferable to abate “the evil of speculation”).

³¹ *See id.* (describing the expansionist rationale of the early restrictions on water transfers

The evil in speculation was that it would hamper new irrigation development if inflated early water rights left no unappropriated water for later settlers, and those settlers had to buy water rights from the speculators.³²

Legislatures in at least eight western states responded to the speculation concern by enacting statutes that made water rights inseparably appurtenant to the land where the water was used.³³ Critics of the inseparability statutes argued they were bad policy and were unconstitutional for impairing the inherent right of an appropriator to dispose of his property.³⁴ In time, although not all before the Reclamation Act of 1902, a number of these statutes were repealed or judicially subverted.³⁵

2. The Relationship Between a Water Supply Entity and the Irrigators Supplied

The first irrigators in the West settled on lands bordering on or close to streams and appropriated water using small individual ditches or ditches jointly owned by two or three neighbors.³⁶ Once the lands next to streams were settled and new irrigation had to be on more remote lands, engineering and financial realities made the use of small individual or joint ditches infeasible.³⁷ Water supply entities emerged that built large ditches and transported water through them for use by numerous individual irrigators.³⁸

The water supply entities were of three main types. First, privately owned nonprofit mutual corporations delivered water only to their shareholders and charged only enough to cover costs.³⁹ Second, privately owned corporations organized for the profit of their investors delivered water by contract—either to selected landowners or, more commonly, to all landowners within the capacity and service area of the corporation's facilities.⁴⁰ Since the latter corporations served the public or a segment thereof, most states regulated them as public utilities.⁴¹ Third, and last to

that were aimed at curbing the "evil of speculation").

³² *Id.*

³³ *Id.*

³⁴ KINNEY, *supra* note 23, § 1015.

³⁵ See *id.* (discussing that the supreme courts of Wyoming and Idaho overturned state statutes declaring water rights inseparable appurtenances); MEYERS, *supra* note 30, at 18 (discussing the theory behind certain states' statutes which made water rights appurtenant to land).

³⁶ 2 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 1246 (3d ed. 1911).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 552–53 (1971) (discussing early private nonprofit irrigation enterprises).

⁴⁰ See *id.* at 553–54 (discussing early private for-profit irrigation enterprises).

⁴¹ See ALFRED R. GOLZÉ, RECLAMATION IN THE UNITED STATES 97 (1961) (discussing various types of irrigation enterprises and the laws that control them); HUTCHINS, *supra* note 39, at 554–55 (discussing which enterprises are subject to public regulation); WIEL, *supra* note 36, §§ 1260–62 (discussing what constitutes a private versus public service). If the company became subject to public utility regulation, it could not evade its public service responsibilities through contract provisions. *Id.* § 1317.

appear, quasi-governmental public entities such as irrigation districts supplied water to their members.⁴²

The advent of private water supply corporations, both nonprofit and for profit, generated litigation about the legal relationship between corporation and irrigator (something that was largely avoided with the public supply entities that came along later and operated under detailed statutes).⁴³ Privately owned nonprofit mutual corporations often, though not always, held formal title to the water rights used to supply their shareholders.⁴⁴ Privately owned for-profit corporations almost always held formal title to the water rights they used to supply irrigators.⁴⁵ If a private nonprofit or for-profit corporation held formal title to the water right, the inevitable question was what rights the irrigators that it supplied had.

The courts decided that a nonprofit mutual corporation's shareholders were the beneficial owners of the water right even if they lacked formal title and their rights to receive water required compliance with corporate charter or bylaw provisions.⁴⁶ Regarding the for-profit corporation, Samuel C. Wiel reported in his 1911 treatise: "In Colorado and the arid States generally (following the lead of Colorado) the law of appropriation has so completely become the source of rights in waters, that the rights of consumers from corporations are made, as far as possible, to conform to the law of appropriation."⁴⁷ The consumers were not archetypical appropriators because they lacked formal title to a water right and could not receive water without paying the contract rate and complying with other reasonable contract terms.⁴⁸ What Wiel meant by "as far as possible" was that "[t]he right of the consumer is not merely a right of service (without any proprietary right in the water-rights or water system), but is a proprietary right in the natural stream."⁴⁹ Accordingly, said Wiel, the for-profit supply

⁴² See HUTCHINS, *supra* note 39, at 553 (discussing public nonprofit irrigation enterprises).

⁴³ See *id.* at 552 (noting early California cases that limited application of the public use doctrine in the context of private water supply corporations).

⁴⁴ *Id.* at 478.

⁴⁵ See *id.* at 552 (discussing the difference between for-profit and not-for-profit ownership and control).

⁴⁶ See *id.* at 553 (discussing early cases where courts held that just because public corporations were in charge of the handling of water did not mean that the public had a right to use that water); Samuel C. Wiel, *Water Titles of Corporations and Their Consumers*, 2 CAL. L. REV. 273, 277 (1914) (discussing how in a mutual water company, while the water title is vested in the corporation, the shareholders own the beneficial interest); Joel C. Davis, Comment, *Water Title Examinations*, 34 ROCKY MTN. L. REV. 509, 537 (1962) (discussing Colorado law). However, the charter can expressly deny the shareholders beneficial ownership of the water right. See *Dansie v. City of Herriman*, 134 P.3d 1139, 1142–43 (Utah 2006) (discussing shareholders interests in a water company's assets under Utah law).

⁴⁷ WIEL, *supra* note 36, § 1338, at 1235. Wiel was not referring here to nonprofit mutual corporations. See *id.* § 1266, at 1170 (using the term "public service companies" broadly to refer to for-profit companies whether or not they had become subject to regulation as public utilities).

⁴⁸ See, e.g., *Prosole v. Steamboat Canal Co.*, 140 P. 720, 724 (Nev. 1914) (stating a consumer is entitled to receive water "so long as he complies with the reasonable requirements of the diverting company").

⁴⁹ WIEL, *supra* note 36, § 1338.

corporation was only “a common carrier of water . . . carrying the consumers’ water to them from the natural resource.”⁵⁰ While Wiel stated this to be the law of arid states generally, he reported, that California took a different approach. A California irrigator supplied by a for-profit corporation that served the public and was regulated as a public utility had no property right in the stream but only a service right under public utility law.⁵¹

Half a century after Wiel, Frank J. Trelease—who, like Wiel,⁵² was the preeminent water law scholar of his era⁵³—cataloged the methods that various western states were using to give an irrigator receiving water from a supply corporation “some form of a state water right, a property right independent of and superior to the contract right he had from the company.”⁵⁴ Trelease reported:

Many states adopted statutes making the water appurtenant to the land. The people of Idaho wrote into their constitution that the sale, rental or distribution of water for irrigation was a public use subject to regulation, and an “exclusive dedication” to the particular use, so the irrigator could not be deprived of the annual use of the water unless he consented, or failed to pay for it. In Arizona the standard definition of an appropriation (“diversion and application to beneficial use”) was seized upon, and the sale of water was said not to be a beneficial use in itself, so that the water right was held to belong to the farmer who finally put the water on the land, and the ditch company was relegated to the position of carrier of the landowner’s water. In Colorado the courts boggled at this, since the farmer was not the diverter, and compromised by saying the appropriation was a joint one, but that this joint interest gave the farmer a property right. Wyoming and several other states devised the “secondary permit” system, under which a water distributor receives a permit to build a dam and to store water, and the consumer may obtain a water right appurtenant to his land by applying for a second permit to apply the water to use.⁵⁵

The methods Trelease identified are self-explanatory except perhaps for the

⁵⁰ *Id.*

⁵¹ *Id.* §§ 1249, 132 n.4. As a result, Wiel observed, the purchaser of California land irrigated with water from a public service corporation “takes his right as a member of the public entitled to equal service with the rest of the public, rather than as successor to any individual ‘water-right.’” *Id.* §§ 551, 588.

⁵² See Joseph L. Sax, *We Don’t Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 291 (2003) (“Samuel Wiel—the leading water law authority of his day”); see also Harrison C. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 NEB. L. REV. 76, 109 (1987) (“the great water law scholar Samuel Wiel”).

⁵³ See George A. Gould, *Tribute*, 22 LAND & WATER L. REV. 287, 287 (1987) (stating that Trelease was the “acknowledged master of water law for several decades”); Charles J. Meyers, *Tribute*, 22 LAND & WATER L. REV. 291, 291 (1987) (noting Trelease’s voluminous contributions to water law); Joseph L. Sax, *Tribute*, 22 LAND & WATER L. REV. 295, 295 (1987) (discussing value of Trelease’s work); A. Dan Tarlock, *Tribute*, 22 LAND & WATER L. REV. 299, 299 (1987) (praising contributions to the field of water law); Charles F. Wilkinson, *Tribute*, 22 LAND & WATER L. REV. 303, 303 (1987) (stating that Trelease is the “foremost scholar in Western water law”).

⁵⁴ Frank J. Trelease, *Reclamation Water Rights*, 32 ROCKY MTN. L. REV. 464, 476 (1960).

⁵⁵ *Id.*

appurtenance statutes. Those statutes rely on the common law rule that appurtenance requires unitary ownership—a water right cannot be appurtenant to land unless the landowner owns the water right as well.⁵⁶ A legislative declaration that water is appurtenant to land is another way of saying the landowner owns a property right in the water source.⁵⁷

B. Reclamation Act Section 8

The Reclamation Act of 1902 Act authorized the Bureau, then called the Reclamation Service, to build and operate facilities only for the purpose of supplying irrigation water by contract.⁵⁸ Later acts expanded the Bureau's charter to include supplying water by contract for municipal purposes,⁵⁹ selling hydroelectric power,⁶⁰ and managing its facilities to serve additional purposes that, depending on the facility, might include navigation, flood control, recreation, and fish and wildlife habitat.⁶¹

Section 8 of the 1902 Act dealt with the roles of federal and state law in reclamation projects.⁶² It remains in force unamended.

1. Text and Legislative History

Section 8 contains four clauses that are highlighted below by the addition of bracketed numbers:

[1] Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and [2] the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and [3] nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: [4] Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.⁶³

On its face, clause [1] preserves the operation of state laws regarding the control, appropriation, use or distribution of water used in irrigation, and it recognizes the validity of vested rights acquired under those state laws.

⁵⁶ See *supra* text accompanying note 23.

⁵⁷ Trelease, *supra* note 54, at 476.

⁵⁸ 4 WATERS AND WATER RIGHTS § 41.05(a) (Robert E. Beck ed., repl. vol. 2004).

⁵⁹ See 43 U.S.C. § 485h(c) (2000) (authorizing the Secretary to “enter into contracts to furnish water for municipal water supply or miscellaneous purposes”).

⁶⁰ *Id.*

⁶¹ See WATERS AND WATER RIGHTS, *supra* note 58, § 41.05(a) (describing non-agricultural water uses that have developed over the years); see also U.S. DEP'T OF THE INTERIOR, *supra* note 1, at 13, 15–18, 25–29 (discussing the major uses of the reclamation's water).

⁶² Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388 (codified at 43 U.S.C. §§ 372, 383 (2000)).

⁶³ *Id.*

Clause [2] requires the Secretary of the Interior (Secretary), as supervisor of the Bureau,⁶⁴ to proceed in conformity with such state laws in carrying out the Act. It follows that if state laws give irrigators vested rights in water supplied by a water distributor, the Secretary must proceed in conformity with those vested rights. Clause [2] qualifies the Secretary's duty to proceed in conformity with state laws by instructing him to do so "in carrying out the provisions of this Act." The qualification raises the question of whether the Secretary has to conform only when pursuing reclamation project purposes, as in reallocating water from one project purpose to another, and not when reallocating water from a project purpose to a nonproject purpose, as in releasing water for the habitat of an endangered species. However, to infer Congress intended to provide vested-rights protection for irrigators in the former situation and deny it in the latter would seem anomalous.

Clause [3] serves a highly limited function regarding interstate streams and is unimportant for present purposes.⁶⁵ Clause [4], the proviso, seems on its face to create an exception to the general disclaimer of federal preemption of state water laws found in clause [1] by establishing two federal rules on the right to use water under the act: the right depends on beneficial use, and it is appurtenant to the land irrigated. The legislative history, however, creates uncertainty about whether Congress intended such an exception. The House committee report on the 1902 act indicates clause [4] is merely a directive to the Secretary not to construct a project unless state water laws make beneficial use the basis, measure, and limit of water rights and make the rights inseparably appurtenant to the land irrigated.⁶⁶ Yet Representative Frank Mondell, who submitted the committee report to the House and was the leading spokesman for the bill on the House floor, made remarks on the floor that could be understood—at least if they are

⁶⁴ 43 U.S.C. § 373a (2000).

⁶⁵ According to the Supreme Court, Congress included this clause because of litigation then pending in the Court between Kansas and Colorado for apportionment of the interstate Arkansas River. *Wyoming v. Colorado*, 259 U.S. 419, 463 (1922). The Court explained that "Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation should be left to judicial determination unaffected by the act—in other words, that the matter be left just as it was before." *Id.*

⁶⁶ H.R. REP. NO. 57-1468, at 6–7 (1902):

In order that the water rights acquired under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the possibility of speculative use of water rights, the character of the right which is contemplated under the act is clearly defined to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use. . . . The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected.

Id. The report speaks of hoping to promote uniformity and perfection of state laws because not all western states made water rights inseparably appurtenant to the land irrigated. *See supra* text accompanying notes 28–35.

taken in isolation from the House report—to mean clause [4] was intended to establish preemptive federal rules on beneficial use and inseparable appurtenance.⁶⁷ This uncertainty may have influenced the Supreme Court in a case discussed later.⁶⁸

2. Section 8 in the Supreme Court

The Supreme Court has interpreted section 8 in several cases. It is necessary, therefore, to consider whether the Court has added a judicial gloss at variance with the text-based interpretation stated above and whether the Court has shed any light on the clause [2] qualifier “in carrying out the provisions of this Act” or on the muddled legislative history regarding whether clause [4] establishes federal rules for water rights.

a. Vested Rights Acquired Under State Law

The Supreme Court first construed section 8 in *United States v. Gerlach Livestock Co. (Gerlach)*,⁶⁹ an inverse condemnation action⁷⁰ by landowners with water rights under California’s riparian doctrine for irrigation of their grasslands by natural seasonal overflow of the San Joaquin River.⁷¹ When the Bureau built Friant Dam upstream from the plaintiffs’ lands to store high stage river flows for delivery under water contracts, the overflow irrigation of their lands ceased except for rare intervals of spill over the dam.⁷² The Court of Claims awarded the plaintiffs just compensation for a taking of their riparian rights.⁷³ The Supreme Court affirmed, saying that section 8 “directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws.”⁷⁴ The plaintiffs’ riparian rights to natural overflow were such vested rights, and full

⁶⁷ He said appurtenance and inalienability would be “an advance over the water usages of most of the States,” 35 CONG. REC. 6679 (1902), and failed to explain that the “advance” was expected to occur through the states changing their laws to qualify for federal reclamation projects. Therefore, his statement might be understood to mean that clause [4] was intended not just as an effort to shape state law but as creating federal rules on beneficial use and inseparable appurtenance.

⁶⁸ *Nevada v. United States*, 463 U.S. 110 (1983). For a discussion of *Nevada*, see discussion at *infra* notes 116–35.

⁶⁹ 339 U.S. 725 (1950). In *California v. United States*, 438 U.S. 645, 651 (1978), the Court noted that *Gerlach* was its “first case to require construction of § 8.”

⁷⁰ “Inverse condemnation” refers to a suit by a property owner against the government to recover just compensation for a taking of his property when the government has not brought condemnation proceedings. *United States v. Clark*, 445 U.S. 253, 257 (1980).

⁷¹ *Gerlach*, 339 U.S. at 727, 729–30.

⁷² *Id.* at 730.

⁷³ *Id.*

⁷⁴ *Id.* at 734. The government argued unsuccessfully that the no-compensation rule of the federal navigation servitude absolved it from liability. *Id.* at 736. But the Court viewed section 8 as congressional waiver of the navigation servitude. *See id.* at 739 (concluding that “Congress elected to recognize any state-created rights and to take them under its power of eminent domain”).

recognition of them meant just compensation had to be paid when operation of the project took them.⁷⁵ Thus, the Court gave clauses [1] and [2] of section 8 the meaning apparent on their face.

b. State Water Law and Federal Preemption

The Supreme Court dealt with conflicts between state water law and federal reclamation law in a series of four cases. In *Ivanhoe Irrigation District v. McCracken* (*Ivanhoe*),⁷⁶ the Court held that the Bureau could enforce a prohibition in Reclamation Act section 5 against delivering irrigation water to tracts exceeding 160 acres even though California law allowed delivery to larger tracts.⁷⁷ The Court characterized section 5 as “a specific and mandatory prerequisite laid down by the Congress,” and concluded that Congress did not intend “§ 8 to override the repeatedly reaffirmed national policy of § 5.”⁷⁸ In *City of Fresno v. California* (*City of Fresno*),⁷⁹ the Court decided section 8 did not bar the Bureau from implementing a reclamation law preference for irrigation use over municipal use even though state law called for the opposite preference.⁸⁰ In *Arizona v. California* (*Arizona*),⁸¹ the Court said section 8 did not require the Bureau to distribute water from its Colorado River project to users in the lower river basin states according to their state law priorities.⁸² In these three cases, then, federal law prevailed over contrary state law notwithstanding the general disclaimer of federal preemption in section 8, clause [1].

The last case in the series was *California v. United States* (*California*).⁸³ The issue was whether section 8 required the Bureau to comply with state laws when acquiring a water right for a reclamation project.⁸⁴ The Court ruled that while the Bureau had to apply for a state permit to appropriate water, the state could not impose any permit conditions inconsistent with congressional directives for the project.⁸⁵ The Court regarded *Ivanhoe* and *City of Fresno* as harmonious with this rule; in both cases, congressional directives preempted contrary state laws.⁸⁶ The Court distinguished *Arizona* as being confined to the Bureau project then before the Court, the “massive”

⁷⁵ See *id.* at 739 (“We cannot twist these words [of section 8] into an election on the part of Congress under its navigation power to take such water rights without compensation.”).

⁷⁶ 357 U.S. 275 (1958).

⁷⁷ *Id.* at 277–79.

⁷⁸ *Id.* at 291–92.

⁷⁹ 372 U.S. 627 (1963).

⁸⁰ *Id.* at 629–30.

⁸¹ 373 U.S. 546 (1963).

⁸² *Id.* at 586–87.

⁸³ 438 U.S. 645 (1978).

⁸⁴ *Id.* at 647.

⁸⁵ See *id.* at 674 (the state could impose “conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project”).

⁸⁶ *Id.* at 668 n.21. The Court added: “[w]e believe that this reading of the Act is also consistent with the legislative history and indeed is the preferable reading of the Act.” *Id.*

Colorado River project of “unique size and multistate scope.”⁸⁷ It explicitly disavowed any dictum in *Arizona* that would prevent a state from imposing water permit conditions not inconsistent with congressional directives for the project.⁸⁸

In sum, this series of four cases refines the part of clause [1] in section 8 that preserves the operation of state laws on the control, appropriation, use, or distribution of water for irrigation. That part of clause [1] does not preserve all such state laws. It does not save those that are inconsistent with congressional directives for a project. Furthermore, this refinement no doubt spills over to the other part of clause [1] requiring recognition of vested rights arising under state laws. The only rights recognized would be those arising under *operative* state laws, that is, state laws not inconsistent with congressional directives.⁸⁹ Subject to that refinement, nothing in the series of cases undercuts the *Gerlach* principle that just compensation is due when the operation of a Bureau project takes property rights created by state water laws.

c. Reallocation of Bureau-Controlled Water

California contains dictum that raises a question about the law governing stored water. After holding that the Bureau had to comply with state laws in acquiring a water right for the project, except for state laws preempted by congressional directives, the Court added that “once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law.”⁹⁰ This dictum seems to imply that federal law, and only federal law, governs waters from the time the Bureau stores them behind a dam until the Bureau releases them.⁹¹ Another implication would seemingly be that if water rights acquired under state law do not reach waters while they are stored but attach only after the Bureau releases them for distribution to irrigators, the Bureau could reallocate stored waters from irrigation to ESA habitat purposes unhindered by the Takings Clause of the Fifth Amendment.

However, the Court’s opinion five years later in *Nevada v. United States (Nevada)*⁹² dispelled these possible implications of the *California* dictum. *Nevada* is the last of three cases on the rights of irrigators in water stored or controlled by the Bureau and is most fully understood in connection with its

⁸⁷ *Id.* at 674.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 667.

⁹¹ The California Supreme Court accepted this implication two years later when it said in dictum that once water from the San Joaquin River reaches Friant Dam, it “is controlled by the United States government as part of the federal Central Valley Project and is not within the State Water Resources Development System.” *People v. Shirokow*, 605 P.2d 859, 862–63 (Cal. 1980).

⁹² 463 U.S. 110 (1983).

two progenitors, *Ickes v. Fox (Ickes)*⁹³ and *Nebraska v. Wyoming (Nebraska)*.⁹⁴ It is worthwhile to examine these cases closely to be able to evaluate Judge Allegra's reading of them in *Klamath*.

In *Ickes*, the Secretary of the Interior entered into a water delivery contract with a water users association representing irrigators in a unit of a reclamation project in Washington.⁹⁵ After delivering the contracted amounts of water for many years, the Secretary issued notices to the irrigators informing them that their water deliveries would be reduced in the future unless they paid more than specified in the contract.⁹⁶ The Secretary issued the notices in an effort to raise additional money to help fund a new unit of the reclamation project.⁹⁷

Several irrigators sued to enjoin the Secretary from enforcing the notices.⁹⁸ They alleged they had fully complied with the Reclamation Act, had paid all sums required to repay construction costs and annual operation and maintenance charges, and had acquired vested water rights appurtenant to their lands for the full water quantities they had been using.⁹⁹ The Secretary moved to dismiss the suit on the basis that the United States was an indispensable but unjoined party.¹⁰⁰ The trial court denied the motion but allowed immediate appeal, and the Court of Appeals affirmed.¹⁰¹

In his brief before the Supreme Court, the Secretary supported his claim that the United States was an indispensable party by arguing that the United States owned the project water rights, that the plaintiffs merely had executory contract claims to water, and that the relief they sought therefore amounted to specific performance of a contract with the United States.¹⁰² The Court ruled that the United States was not an indispensable party because the suit was not for specific performance of a contract. Rather, the suit was to enjoin the Secretary from acting beyond his authority by depriving the plaintiffs of vested property rights.¹⁰³ The Court said the United States did not own the water rights because Reclamation Act section 8, a state statute, and the water delivery contract all made the water rights appurtenant to the land irrigated.¹⁰⁴ Explaining further, the Court said the government diverted, stored, and distributed the water not for its own use but rather "under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights

⁹³ 300 U.S. 82 (1937).

⁹⁴ 325 U.S. 589 (1945).

⁹⁵ See *Ickes*, 300 U.S. at 89 (describing the contract between the water users association and the federal government).

⁹⁶ *Id.* at 92–93.

⁹⁷ *Id.* at 92.

⁹⁸ See *id.* at 93, 96–97.

⁹⁹ *Id.* at 91–92.

¹⁰⁰ *Id.* at 88.

¹⁰¹ *Id.*

¹⁰² *Id.* at 96.

¹⁰³ *Id.* at 96–97.

¹⁰⁴ *Id.* at 93–94.

became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.”¹⁰⁵

Ickes is notable for two points. First, the irrigators had property rights because of the appurtenance provisions in Reclamation Act section 8, state law, and the water delivery contract.¹⁰⁶ Second, since *Ickes* involved the terms upon which the Secretary would release stored water to the irrigators, it implies that the irrigators’ property rights reached the water while it was stored behind the Bureau’s dam and not merely after the Bureau released the water for distribution to them.¹⁰⁷

Nebraska was a suit for the equitable apportionment of an interstate river between states,¹⁰⁸ and the United States intervened to ask the Court to apportion water for two reclamation projects to it directly rather than to the states in which the projects were located.¹⁰⁹ The Court refused to decree an apportionment to the United States because the irrigators were the real owners of the water rights.¹¹⁰ Relying on *Ickes*, the Court said the appropriations were not made for the use of the government but for the use of the landowners.¹¹¹ It concluded: “The water right is appurtenant to the land, the owner of which is the appropriator. . . . [I]ndividual landowners have become the appropriators of the water rights, the United States being the storer and the carrier.”¹¹²

The two reclamation projects were in Nebraska and Wyoming, states having what Trelease called a “secondary permit” system.¹¹³ Under that system, the United States made water right filings for the projects in its name, and once the irrigators put the water to beneficial use, the states issued water right certificates to them individually.¹¹⁴ This fact also seemed to play into the Court’s decision.¹¹⁵ In terms of the methods Trelease identified by which different states have given property rights to water users served by a supply entity, *Ickes* relied on appurtenance while *Nebraska* relied on appurtenance and perhaps also on the secondary permit system.

Turning now to *Nevada*, the federal district court for Nevada issued a decree in 1944 adjudicating the Truckee River, which originates in California and flows into Nevada.¹¹⁶ The decree, known as the *Orr Ditch* decree, awarded the United States a large water right acquired under Nevada law with a priority of 1902 for the Newlands Reclamation Project in that state.¹¹⁷

¹⁰⁵ *Id.* at 95.

¹⁰⁶ *Id.* at 93–95.

¹⁰⁷ *Id.* at 89–90.

¹⁰⁸ 325 U.S. 589, 591–92 (1945).

¹⁰⁹ *See id.* at 611 (discussing claims by the United States to all unappropriated water in the North Platte River).

¹¹⁰ *Id.* at 614.

¹¹¹ *Id.*

¹¹² *Id.* at 614–15.

¹¹³ *Supra* note 53 and accompanying text.

¹¹⁴ *See Nebraska*, 325 U.S. at 613 (describing that the Dep’t of Interior transferred rights to states for certification).

¹¹⁵ *See id.* at 613–14.

¹¹⁶ *Nevada*, 463 U.S. 110, 113 (1983).

¹¹⁷ *See id.* at 116–17 (discussing the *Orr Ditch* litigation).

The decree also awarded the United States, as trustee of the Pyramid Lake Paiute Tribe, a small Indian reserved water right with a priority of 1859 for irrigating land within the Pyramid Lake Reservation.¹¹⁸ In 1973, the United States returned to the federal district court and argued that the *Orr Ditch* decree merely determined the Tribe's reserved water right for irrigation, and asked the court to award it an additional reserved water right to maintain the Tribe's Pyramid Lake fishery.¹¹⁹

A key feature of the Newlands Project is the Bureau's Derby Diversion Dam, a dam on the Truckee River that, as its name implies, does not store water but rather diverts it into a canal.¹²⁰ The canal delivers some of the water to nearby irrigators and transports the rest to the Carson River, where it is stored behind another Bureau dam for delivery to more irrigators.¹²¹ In the 1983 suit, the United States sought to divert less water at the Derby Diversion Dam for irrigation and instead let the water flow down the Truckee River into Pyramid Lake for fishery purposes.¹²²

The federal district court dismissed the United States' claim for an additional Indian reserved right for fish preservation as barred by res judicata.¹²³ Res judicata was still at issue when the case reached the Supreme Court.¹²⁴ The United States asserted it was only seeking "reallocation of the water decreed in *Orr Ditch* to a single party—the United States—from reclamation uses to a Reservation use with an earlier priority," and that "res judicata does not bar a single party from reallocating *its* water in this fashion."¹²⁵ The Court rejected the United States' assertion that it owned the water right for Newlands Reclamation Project lands:

Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government [by the *Orr Ditch* decree] resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of the relevant State and the contracts entered into by the landowners and the United States make this point very clear.¹²⁶

The state law to which the Court referred requires beneficial use to perfect an irrigation water right and makes the right appurtenant to the land on which it is used.¹²⁷ The contracts to which the Court referred, or at least

¹¹⁸ *Id.* at 117.

¹¹⁹ *See id.* at 118–19 (summarizing the United States' argument that *Orr Ditch* only settled irrigation rights, but not the water right relating to maintaining the Pyramid Lake fishery).

¹²⁰ U.S. Dep't of Interior, Newlands Project, <http://www.usbr.gov/dataweb/html/newlands.html#plan> (last visited Nov. 12, 2006).

¹²¹ *Id.*

¹²² *Nevada*, 463 U.S. 110 (1983).

¹²³ *Id.* at 119–20.

¹²⁴ *Id.* at 129–45.

¹²⁵ *Id.* at 121 (emphasis added).

¹²⁶ *Id.* at 126.

¹²⁷ *Id.*

most of them, provide that irrigators would have “a permanent water right for the irrigation of and to be appurtenant to all of the irrigable area . . . developed.”¹²⁸

Nevada shows that the Newlands irrigators, like the *Ickes* irrigators, have vested rights to continued supply that reach the water while it is physically controlled by Bureau facilities.¹²⁹ Because the irrigators’ rights extend to the water while it is in the Bureau’s control, the United States is not free to disregard the irrigators’ rights and reallocate some of the water it controls to tribal fishery habitat.¹³⁰

Nevada also answers the question raised earlier about the language in section 8 requiring the Secretary to proceed in conformity with state law “in carrying out the provisions of this Act.”¹³¹ This means the Secretary must conform to state law not only when reallocating water from one project purpose to another but also when reallocating water from a project purpose to a nonproject purpose, as in releasing water for fishery habitat sought by the Tribe rather than delivering it to irrigators with Bureau contracts.¹³²

Nevada appears to qualify *Ickes* in one notable respect. *Nevada* relied only on state law and Bureau water contracts in finding water rights in the irrigators. *Ickes* relied on state law, a Bureau water contract, and Reclamation Act section 8—all of which made the right to use water appurtenant to the land irrigated.¹³³ In *Nevada*, the Court might have omitted any reference to the appurtenance provision in section 8, clause [4] for either or both of two reasons. First, the legislative history on section 8 creates doubt whether the appurtenance provision in clause [4] was intended to be a federal appurtenance rule and thus a federal source of vested water rights.¹³⁴ Second, the Court’s decision five years earlier in *California* likely precludes treating the appurtenance provision as a federal source of irrigator property rights. The *California* holding that the Bureau must acquire water rights for its projects under state law is predicated on a long history “of purposeful and continued deference to state water law by Congress.”¹³⁵ If the history of deference cuts against general congressional intent to allow the Bureau to bypass state law, it should also cut against a federal source of property rights for irrigators. Regardless of the Court’s reasons in *Nevada* for omitting any reference to the section 8, clause [4] appurtenance provision, the omission is of no consequence for future cases where state law gives irrigators vested rights to continued supply under any of the methods Trelease identified.

In *Klamath*, Judge Allegra downplayed the significance of the Court’s statements in *Ickes*, *Nebraska*, and *Nevada* that irrigators supplied by the

¹²⁸ *Id.* at 126 n.9.

¹²⁹ *Id.* at 122–25.

¹³⁰ *Id.*

¹³¹ *Id.* at 121–22; see also text at *supra* note 61.

¹³² *Nevada*, 463 U.S. at 122.

¹³³ *Ickes*, 300 U.S. 82, 93–94 (1937).

¹³⁴ See *supra* Part II.B.2.

¹³⁵ *California*, 438 U.S. 645, 653 (1978).

Bureau have vested water rights. He discounted *Ickes* because of its procedural posture, and he regarded the *Nebraska* and *Nevada* statements as dicta.¹³⁶ While the Court's *Nebraska* statement might have been gratuitous, Judge Allegra's views of *Ickes* and *Nevada* seem unduly cramped.

Procedurally, *Ickes* arose upon a motion by the Secretary to dismiss for nonjoinder of an indispensable party.¹³⁷ The motion itself did not challenge any of the plaintiffs' allegations, including the allegation that they had vested water rights.¹³⁸ However, the Secretary argued to the Court that the United States was an indispensable party because it owned the water rights and the plaintiffs only had executory contract rights.¹³⁹ The Secretary's argument in support of his motion to dismiss directly controverted the plaintiffs' allegation that the plaintiffs owned the water rights.¹⁴⁰ The Court's statement that the irrigators had vested property rights, not just contract rights, was integral to resolving the indispensable party issue.¹⁴¹ Of course, given the procedural context, the Court's ruling for the plaintiffs did not establish that they actually had vested property rights. The plaintiffs still had to prove on remand that they put all the water the Bureau delivered to them to beneficial use on their lands and complied with their contract payment obligations before they would actually have vested property rights.¹⁴² If they proved that on remand, the Court's opinion leaves no doubt that the plaintiffs would have vested property rights.¹⁴³

In *Nevada*, the United States sought to avoid res judicata by arguing that it was the owner of the Newlands Project water rights, and that res judicata does not bar an owner from reallocating how it uses its own property.¹⁴⁴ The Court's statement that the Newlands Project irrigators were the beneficial owners of the water rights went to the heart of what was contested before the Court.¹⁴⁵ The statement was hardly gratuitous.

In summary, *Ickes*, *Nebraska*, and *Nevada* dovetail with the text-based interpretation of section 8 set out earlier in this section on federal reclamation law. They support the proposition that if operative state laws regarding the relationship between a water supplier and the irrigators it supplies vest property rights in the irrigators to continuance of their supply, the Bureau in its capacity as a water supply entity must proceed in conformity with those property rights.

¹³⁶ *Klamath*, 67 Fed. Cl. 504, 518, 520 (2005).

¹³⁷ *Ickes*, 300 U.S. at 87–88.

¹³⁸ *Id.*

¹³⁹ *Id.* at 96.

¹⁴⁰ *Id.* at 91–92.

¹⁴¹ *Id.* at 94, 96–97.

¹⁴² *Id.* at 88, 94, 96 (discussing that beneficial use was the basis of the right to use water, but that the right was not the issue before the Court); *Ickes v. Fox*, 137 F.2d 30, 33 (D.C. Cir. 1943) (ruling in subsequent appellate court case that plaintiffs must prove beneficial use).

¹⁴³ *Ickes*, 300 U.S. at 94–96.

¹⁴⁴ *Nevada*, 463 U.S. 110, 139 (1983).

¹⁴⁵ *Id.* at 127, 134.

d. Types of Bureau Water Contracts

The Bureau uses two basic types of irrigation water contracts—repayment contracts and water service contracts.¹⁴⁶ A repayment contract obligates an irrigation district to repay its share of the project construction costs allocated to irrigation¹⁴⁷ plus its share of annual operation and maintenance charges.¹⁴⁸ The repayment period can be up to forty years and can be preceded by a development period of up to ten years.¹⁴⁹ Repayment is of principal only; no interest is paid.¹⁵⁰ The irrigation district distributes the water it receives from the Bureau to individual irrigators and collects revenues from them necessary to repay construction costs and pay annual operation and maintenance charges.¹⁵¹ Although repayment contracts have their origin in the Reclamation Act of 1902, they presently are governed by section 9(d) of the Reclamation Project Act of 1939.¹⁵² For this reason, they are also known as 9(d) contracts.

In contrast, a water service contract obligates an irrigation district to pay only an “appropriate share” of the construction costs allocated to irrigation and the annual operation and maintenance charges.¹⁵³ The share that is “appropriate” can vary annually with the irrigators’ ability to pay taking into account drought, depressed crop prices, or similar problems.¹⁵⁴ A water service contract runs for a fixed term not to exceed forty years.¹⁵⁵ Water service contracts are also known as 9(e) contracts for the provision of the Reclamation Project Act of 1939 that first authorized and still governs them.

In 1956, Congress required the Bureau to include in both existing and future 9(e) contracts, if requested by the other party, a right of renewal on mutually agreeable terms and conditions.¹⁵⁶ Another provision of the 1956 legislation applicable to both 9(d) and 9(e) contracts requires the Bureau to

¹⁴⁶ In addition, if project facilities have excess storage or carrying capacity, the Bureau can contract to store and carry water for irrigators not within the project. *See* 43 U.S.C. §§ 523–524 (2000) (popularly known as the Warren Act). The Bureau no longer enters into such contracts, but honors old ones that have not expired. U.S. BUREAU OF RECLAMATION, RECLAMATION MANUAL: POLICY WTR P03 PROHIBITION ON FUTURE CONTRACTS FOR THE SALE OR USE OF PROJECT WATER OR SURPLUS PROJECT WATER PURSUANT TO THE WARREN ACT OF 1911 (Jan. 10, 2001), *available at* <http://www.usbr.gov/recman/wtr/wtr-p03.pdf>.

¹⁴⁷ 43 U.S.C. § 485h(d)(2) (2000). The 1902 Act contained no restrictions regarding with whom the Bureau could contract to deliver irrigation water.

¹⁴⁸ *See id.* § 485e (authorizing the Secretary to penalize delinquent payments of construction and operation and maintenance charges).

¹⁴⁹ *Id.* § 485h(d)(3).

¹⁵⁰ *See id.* § 485a(d).

¹⁵¹ *Id.* §§ 491–92 (excluding interest from the definition of “construction charges”).

¹⁵² Act of Aug. 4, 1939, c. 418, § 9(d), 53 Stat. 1187, 1195 (codified as 43 U.S.C. § 485h(d) (2000)).

¹⁵³ 43 U.S.C. § 485h(e) (2000).

¹⁵⁴ *See* 84 CONG. REC. 8741 (1939) (citing “draught depressed farm prices and other factors” as reasons for temporary relief for irrigators).

¹⁵⁵ 43 U.S.C. § 485h(e) (2000).

¹⁵⁶ Act of July 2, 1956, ch. 492, § 1, 70 Stat. 483 (codified as amended at 43 U.S.C. § 485h-1(1)–(2) (2000)).

provide that the other party shall have a permanent right to a stated share or quantity of the project's available water supply upon complete repayment of its share of construction costs, subject to a duty to continue paying its share of annual operation and maintenance costs.¹⁵⁷

As noted earlier, the Bureau delivers water by contract not only for irrigation but for municipal use.¹⁵⁸ The Bureau's municipal water contracts are also of two basic types, and these more or less parallel the two types of irrigation water contracts. The contracting municipality can agree either to repay its share of construction costs allocated to municipal supply plus annual operation and maintenance charges or alternatively to repay only an appropriate share of construction costs plus annual operation and maintenance.¹⁵⁹

In *Ickes, Nebraska*, and *Nevada*, the Court said irrigators who received water under repayment contracts had property rights. The Court did not address whether irrigators supplied under water service contracts have property rights or merely contract rights to water service. Nor did the Court address whether municipal water contracts can result in property rights. Those two issues are analyzed below.

i. Water Service Contracts

Reclamation Act section 8 is a logical starting point for analyzing whether 9(e) irrigators have property rights or only contract service rights. The disclaimer in section 8, clause [1] of federal interference with state water law "or any vested right acquired thereunder" is broad enough to apply to water service contracts as well as repayment contracts. The fact that 9(e) contracts are for a fixed term should not disqualify irrigators from having property rights under section 8. A leasehold in real property for a fixed term is a property interest protected by the Takings Clause.¹⁶⁰ Furthermore, the various state methods that Trelease catalogued for giving irrigators property rights—appurtenance, exclusive dedication, emphasis on the beneficial use element of an appropriation, joint appropriation, and a secondary permit system¹⁶¹—are no less applicable to a fixed term than to a perpetual right.¹⁶²

¹⁵⁷ 43 U.S.C. § 485h-1(4) (2000).

¹⁵⁸ See *supra* note 2 and accompanying text.

¹⁵⁹ 43 U.S.C. § 485h(e), 485h(c) (2000).

¹⁶⁰ See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

¹⁶¹ See *supra* note 54 and accompanying text.

¹⁶² Also, the fact that water service contract provisions limit the right to water should not disqualify the irrigators from having property rights under state law. The rights of irrigators under repayment contracts are similarly subject to contract provisions, such as making required repayment installments. As a matter of historical antecedent, private water contracts limited the rights of irrigators served by for-profit water supply corporations, and the corporate charter and bylaws limited the rights of irrigators served by mutual corporations. Yet these limitations did not prevent the irrigators from having property rights under state law. See *supra* notes 46–50 and accompanying text.

So far, then, it appears that 9(e) irrigators should have property rights under state law. But two potential complications must now be considered. The first arises from California's longstanding view that irrigators supplied by a private for-profit corporation serving all landowners who could be supplied by its system have only service rights as public utility consumers, not property rights.¹⁶³ Some people have analogized 9(e) irrigators to public utility consumers.¹⁶⁴ The California Supreme Court seemed equivocal about the analogy in its *Ivanhoe* opinion.¹⁶⁵

Although the status of 9(e) irrigators might be unsettled in California, their status is not so problematic everywhere in the West. As noted earlier,¹⁶⁶ Wiel reported that in numerous other western states, irrigators who were supplied by a private for-profit corporation supplying all landowners in its service area had water rights, not just service rights.¹⁶⁷ In those states, even if the Bureau's role under 9(e) contracts were analogized to that of a public utility, the irrigators it supplies would have property rights under state law.¹⁶⁸

The second complication relates to the preemption rule of *California*, which makes state water law inoperative if it is inconsistent with a congressional directive.¹⁶⁹ This rule means that even if state law would otherwise give 9(e) irrigators property rights, they will have only service rights if Congress has so directed. The Senate committee report on the 1956 legislation providing for renewal of 9(e) contracts and giving both 9(d) and 9(e) contract holders a permanent right upon complete repayment of their share of construction costs states: "The bill avoids any attempt to provide a water right, as recognized under State laws, but does give assurance of the right to permanent water service to the extent that a water supply is available."¹⁷⁰ Perhaps this statement could be read as a congressional directive that irrigators shall have no more than service rights, and not water rights, even after completion of repayment.

But a different interpretation seems more appropriate. The Court based its narrow *California* federal preemption rule—that is, state law is not

¹⁶³ See *supra* note 51 and accompanying text.

¹⁶⁴ See Arthur A. Maass, *Administering the CVP*, 38 CAL. L. REV. 666, 671–72 (1950). The Senate Report on the 1956 amendment providing a right of renewal for 9(e) contracts indicates that water service contracts were also known as utility type contracts. S. REP. NO. 84-2241, at 2 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 2979, 2980–81.

¹⁶⁵ *Ivanhoe Irrigation Dist. v. All Parties & Persons*, 306 P.2d 824 (Cal. 1957), *rev'd*, *Ivanhoe*, 357 U.S. 275 (1958). The California court said the Bureau's water supply activities under 9(e) contracts "resemble those of a public utility acting in a propriety capacity" (although it then opined that state public utility law would require the Bureau to continue water delivery to 9(e) irrigators). 306 P.2d at 851. But it also said the irrigators had "water rights," citing to the appurtenance reasoning in *Ickes*, and it added that the Bureau would violate well-established constitutional protections if it were to deprive the irrigators of their water rights. *Id.*

¹⁶⁶ *Supra* notes 47–50 and accompanying text.

¹⁶⁷ WIEL, *supra* note 36, § 1338.

¹⁶⁸ *Id.*

¹⁶⁹ *California*, 438 U.S. 645, 679 (1978) (holding that state-imposed conditions were valid as long as such conditions were not inconsistent with congressional directives).

¹⁷⁰ S. REP. NO. 84-2241, at 1 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 2979, 2979.

preempted absent an inconsistent congressional directive—on a long history “of purposeful and continued deference to state water law by Congress.”¹⁷¹ Given the long-standing practice of federal deference to state water law, Congress arguably intended in the 1956 legislation merely to refrain from creating federal water rights in irrigators and instead to allow state law to determine whether 9(e) irrigators have water rights.¹⁷² The inclusion in the 1956 legislation of language nearly identical to Reclamation Act section 8, which Congress added to the original bill draft “to avoid any possibility that [the 1956 legislation] might be construed to depart from the basic policy of section 8 of the Reclamation Act of 1902,”¹⁷³ bolsters this interpretation. In sum, once all the complexities are sorted out, 9(e) irrigators likely have property rights in addition to their contract rights if that is what state law gives them.

ii. Municipal Water Contracts

As noted, the Reclamation Act of 1902 authorized the Bureau to enter into contracts only to deliver water for irrigation.¹⁷⁴ Accordingly, the disclaimer in section 8, clause [1] of federal interference with state laws refers only to state laws on water used in irrigation and vested rights acquired under them.¹⁷⁵ When Congress later authorized the Bureau to contract to deliver water for municipal purposes, it did not make a corresponding change in the section 8, clause [1] disclaimer to include municipal water. Therefore, that disclaimer is of no help to municipalities in establishing property rights under state law.

While this leaves municipalities in a more muddled position than irrigators, the critical question is whether Congress intended to preempt state law giving municipalities a property right in water supplied to them. The long history of federal deference to state water law noted above suggests that the omission of Congress to amend section 8, clause [1] when it authorized municipal water supply was more likely an oversight than a directive that municipalities should not have property rights state law would otherwise give them.

As for Trelease’s catalog of methods states use to create property rights in persons receiving water from a water supply entity, all but one of the methods can operate with municipal water contracts as readily as with irrigation water contracts. The exception is Idaho’s exclusive dedication method because it is expressly limited to water used in agriculture.¹⁷⁶

¹⁷¹ *California*, 438 U.S. at 653.

¹⁷² See Act of July 2, 1956, Pub. L. 84-643, § 4, 70 Stat. 483, 484 (“The Secretary in carrying out the provisions of this Act, shall proceed in conformity with [state] laws . . .”).

¹⁷³ S. REP. NO. 84-2241, at 3. Compare § 4, 70 Stat. at 484, and 43 U.S.C. § 383 (2000).

¹⁷⁴ See Reclamation Act of 1902, Pub. L. No. 57-161, §§ 4, 8, 32 Stat. 388, 390 (1902) (codified as amended at 43 U.S.C. §§ 383, 419, 461 (2000)).

¹⁷⁵ See *supra* note 76–89 and accompanying text.

¹⁷⁶ IDAHO CONST. art. XV, § 4.

Perhaps Idaho could still give municipalities property rights under appurtenance reasoning.¹⁷⁷

C. The Klamath Case

The Klamath Reclamation Project delivers irrigation water by contract for land in southern Oregon and northern California and also provides water for several national wildlife refuges.¹⁷⁸ The Bureau stores project water principally “in Upper Klamath Lake on the Klamath River in Oregon.”¹⁷⁹ Upper Klamath Lake lacks capacity, however, to store extra water during wet years to carry over for use in dry years.¹⁸⁰ On April 6, 2001, the Bureau announced that, due to a drought, it was terminating the delivery of irrigation water from upper Klamath Lake for the remainder of the year in order to provide critical habitat for two endangered fish species in upper Klamath Lake and a third endangered fish species downstream in the Klamath River.¹⁸¹

Six months later, fourteen Klamath irrigation districts and thirteen individual irrigators¹⁸² sued the United States to recover just compensation for a taking of their property.¹⁸³ Later, they added a breach of contract claim.¹⁸⁴ Upon cross-motions for summary judgment regarding the takings claim, Judge Allegra ruled that the plaintiffs lacked property rights protected by the Takings Clause of the Fifth Amendment.¹⁸⁵

1. Judge Allegra's Opinion

Judge Allegra began by rejecting the plaintiffs' assertion that the Reclamation Act section 8 proviso on beneficial use and appurtenance conferred on them property rights in Klamath waters.¹⁸⁶ He ruled that whether they had property rights in the waters depended on state law.¹⁸⁷

Turning to Oregon law, Judge Allegra focused on a 1905 statute authorizing the United States to file notice with the state engineer of its

¹⁷⁷ Cf. IDHAO CODE § 42-1402 (2002) (a water right shall be an appurtenance of the land on which it is used).

¹⁷⁸ See *Klamath*, 67 Fed. Cl. 504, 509 (2005) (“The Klamath Project provides water to about 240,000 acres of irrigable land, as well as several national wildlife refuges.”); *Kandra v. United States*, 145 F. Supp. 2d 1192, 1196 (D. Or. 2001) (stating that the project provides water for the lower Klamath and Tule Lake national wildlife refuges).

¹⁷⁹ *Klamath*, 67 Fed. Cl. at 509.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 512–13; see *Kandra*, 145 F. Supp. 2d at 1196–97, 1199 (discussing the biological opinion issued by the Fish and Wildlife Service that led to the termination of irrigation deliveries).

¹⁸² *Klamath*, 67 Fed. Cl. at 507.

¹⁸³ *Id.* at 513–14. Later, they added a breach of contract claim. *Id.* at 514.

¹⁸⁴ *Id.* at 514.

¹⁸⁵ *Id.* at 506, 540. Judge Allegra later denied interlocutory appeal of his property rights ruling. *Klamath Irrigation Dist. v. United States*, 69 Fed. Cl. 160 (2005).

¹⁸⁶ *Klamath*, 67 Fed. Cl. at 516–23.

¹⁸⁷ *Id.* at 516–17.

intent to use specified waters for a reclamation project and declaring that upon such filing the waters specified “shall be deemed to have been appropriated by the United States,” provided the United States followed up by submitting final project plans to the state engineer within three years and authorizing construction within four years.¹⁸⁸ The United States filed notice in 1905 with the state engineer of its intent to use all the unappropriated waters of the Klamath River basin for the Klamath project, and later it timely met the other statutory requirements.¹⁸⁹ Therefore, Judge Allegra ruled that the United States obtained appropriative water rights under the statute with a 1905 priority.¹⁹⁰

Judge Allegra also read the 1905 statute as having a further effect. The statute stated that the waters described in the government’s notice of intent “shall not be subject to further appropriation under the laws of this state” and that “[n]o adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this State.”¹⁹¹ Judge Allegra concluded that these provisions prevented the plaintiffs from obtaining property rights in water under state law by putting project water to beneficial use on their lands.¹⁹²

Having concluded that the plaintiffs did not have property rights in water under state law, Judge Allegra then considered whether the contract rights they had were within the Takings Clause. Although he acknowledged that contract rights against the United States are property under the Takings Clause,¹⁹³ he also noted that the Federal Circuit—which has appellate review of Court of Federal Claims cases¹⁹⁴—limits takings recovery for such contract rights under two rationales.¹⁹⁵ First, if the United States contracts in its commercial or proprietary capacity, rather than its sovereign capacity, the other party’s remedies arising from the contract must sound in breach of contract rather than in takings law.¹⁹⁶ Second, although a contract right is property under the Takings Clause, no governmental taking of the other party’s property occurs if the party retains the range of remedies associated with vindication of a contract;¹⁹⁷ and this is true even if it is ultimately

¹⁸⁸ *Id.* at 523.

¹⁸⁹ *See id.* at 523–24.

¹⁹⁰ *Id.* at 523.

¹⁹¹ *Id.*

¹⁹² *See id.* at 527. Judge Allegra also found that if any plaintiffs had pre-1905 water appropriations, they had surrendered them in post-1905 contracts with the Bureau in exchange for contract water deliveries. *Id.* at 524.

¹⁹³ *See id.* at 531 (citing *Lynch v. United States*, 299 U.S. 571, 529 (1934), which held that contract rights fall within the ambit of Fifth Amendment protections).

¹⁹⁴ 28 U.S.C. § 1295(a)(3) (Supp. 2002) (exclusive jurisdiction of appeals from the Court of Federal Claims).

¹⁹⁵ *Klamath*, 67 Fed. Cl. at 531 (“the Federal Circuit has cautioned against commingling takings compensation and contract damages” (internal quotation marks and citation omitted)).

¹⁹⁶ *Id.* (citing *Hughes Commc’ns Galaxy v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001)).

¹⁹⁷ *See Klamath*, 67 Fed. Cl. at 531–32 (citing *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002) (quoting *Castle v. United States*, 48 Fed. Cl. 187, 219 (2000))).

determined that no breach occurred.¹⁹⁸ Judge Allegra found that both rationales fit the facts, that is, the Bureau entered into the Klamath contracts in its proprietary capacity and contract remedies were available to the plaintiffs.¹⁹⁹ He thus concluded that the plaintiffs had no takings claim of any kind.²⁰⁰

Finally, Judge Allegra opined—without actually ruling, since the parties had not yet completed briefing of the issue—that there likely was no breach of contract.²⁰¹ He reasoned that most of the contracts contained water shortage clauses authorizing reduced deliveries and, regardless, the sovereign acts doctrine made the contracts subject to any later legislation of general applicability, including the ESA, that would hinder the government's contract performance.²⁰²

2. *What Judge Allegra Overlooked*

Judge Allegra noted that soon after Congress enacted the Reclamation Act in 1902, western states “began to pass reclamation legislation, often prompted by the desire of luring a project within their borders.”²⁰³ He went on to suggest that the 1905 Oregon statute was an example of such legislation.²⁰⁴ Unfortunately, however, Judge Allegra ignored the factual and legal context of the “luring” statutes and consequently misperceived the intended effect of the 1905 Oregon statute. This misperception caused him to forgo inquiring whether any other provisions of Oregon water law gave the plaintiffs property rights to Klamath water.

a. *The Factual and Legal Context of the 1905 Oregon Statute*

The appropriation doctrine allocates water to users during times of shortage according to time priority, that is, the dates their appropriations were established.²⁰⁵ When the water supply is insufficient to satisfy all appropriations, water officials deny water to appropriations in inverse order of priority, thus ensuring that the more senior appropriations are satisfied.²⁰⁶

¹⁹⁸ *Id.* at 532.

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at 532–33 (distinguishing from *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003); *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003)).

²⁰¹ *See Klamath*, 67 Fed. Cl. at 535–37 (citing Reed D. Benson, *Whose Water is It? Private Rights and Public Authority over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 397–98 (1997)).

²⁰² *Klamath*, 67 Fed. Cl. at 535–37; *see also* *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (explaining “that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign”).

²⁰³ *Klamath*, 67 Fed. Cl. at 523.

²⁰⁴ *Id.*

²⁰⁵ MEYERS, *supra* note 30, at 4.

²⁰⁶ *See id.*

As a consequence, relative priority dates are crucial in determining whether a particular appropriation will be filled during shortages.

Originally, when the appropriation doctrine was governed entirely by common law, an appropriation's priority was the date the appropriator commenced construction of water diversion or storage works if he then proceeded with due diligence to complete the works and put the water to beneficial use.²⁰⁷ Between 1890 and 1920, however, most western legislatures enacted permit systems for water appropriation,²⁰⁸ and in so doing changed the rule so that priority was fixed as the date when an appropriator applied for a permit if he then completed the project within a time specified in the permit.²⁰⁹

The rules on fixing priority dates, under both the common law and permit systems, created a problem for federal reclamation projects. Before the Bureau could commence construction or file a permit application, as required to fix a priority date, engineering investigation and design work had to be done and the project had to be authorized—a process that typically took many years with the Bureau's large and complex projects. Consequently, there was a risk that other parties with simpler and smaller projects would come along and get earlier priority dates, leaving insufficient unappropriated water in the river for the Bureau project to be feasible.²¹⁰ In Trelease's vivid and apt phrasing, a smaller project might “cut the heart out” of a larger Bureau project.²¹¹

In response, various western states enacted statutes taking different approaches to solving the problem. Trelease reported:

[Statutes in several states] insure an early priority date by allowing the United States to reserve unappropriated waters in advance of filing formal applications for permits. The same result is reached in other states by permitting state officials to withdraw water from appropriation. In Utah the governor may suspend the right of the public to appropriate, for the benefit of projected Bureau projects, and in California the State Department of Finance has made broad filings on unappropriated water that were later assigned to the United States in aid of the Central Valley Project.²¹²

The 1905 Oregon statute was yet another approach. It allowed the United States to file a notice of intent to use water and thus be deemed to have an appropriation as of that date so long as it submitted final plans for the project to the state engineer within three years and authorized the project within four years.²¹³

²⁰⁷ See *id.* at 9.

²⁰⁸ *Id.* at 12–13.

²⁰⁹ GEORGE A. GOULD ET AL., CASES AND MATERIALS ON WATER LAW 61 (7th ed. 2005).

²¹⁰ See, e.g., *Tanner v. Bacon*, 136 P.2d 957 (Utah 1943) (dealing with the Deer Creek Reclamation Project).

²¹¹ Frank J. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 25 (1967).

²¹² Trelease, *supra* note 54, at 467.

²¹³ Trelease likely omitted reference to the 1905 Oregon statute because by the time of his writing, the state legislature had repealed the statute, *Klamath*, 67 Fed. Cl. 504, 531 (2005).

As noted, Judge Allegra read the 1905 Oregon statute to go beyond solving the priority problem for the United States. Specifically, he inferred that the statute also barred irrigators supplied by the Klamath Project from acquiring individual property rights to that water under state law.²¹⁴ Judge Allegra relied on two clauses in the statute for this conclusion. The first declared that the waters described in the United States' notice of intent to use "shall not be subject to further appropriation under the laws of this state." The second stated that "[n]o adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this state."²¹⁵

Judge Allegra's literal interpretation of these two clauses defies common sense. Section 8 of the Reclamation Act preserves the operation of state laws regarding the use of water for irrigation and also protects vested rights acquired under those laws. There is no reason why the 1905 Oregon legislature would have intended, in a statute designed to lure Bureau projects to the state by solving the priority date problem, to disadvantage its own citizens by denying them property rights in Bureau water that Oregon law would otherwise give them, while citizens of other states receiving Bureau water would not be so hindered. More likely, the legislature intended those two clauses to serve some other purpose.

The key to identifying the true purpose lies, ironically, in Judge Allegra's observation that the 1905 Oregon statute did not require the United States to put the water to beneficial use.²¹⁶ The statute only required the United States to file a notice of intent to use water, provided it followed up by filing final project plans within three years and authorizing the project within four years. The water right that the statute gave the United States was not an appropriation in the traditional sense because that requires beneficial use of water.²¹⁷ The disparity between the United States' statutory water right and a traditional appropriation explains why the legislature did not declare that the United States "shall have" an appropriation but instead declared that it "shall be deemed to have" an appropriation. A standard definition of "deem" is "to regard as."²¹⁸ So the legislature was saying that the United States should be regarded as having an appropriation even if it was not a traditional one.

(reporting the statute was repealed in 1953), and replaced it with one authorizing the United States to reserve unappropriated waters until it could apply for water permits. Trelease, *supra* note 54, at 467, 467 n.21.

²¹⁴ *Klamath*, 67 Fed. Cl. at 525–27, 525 n.33.

²¹⁵ *Id.*

²¹⁶ *Id.* at 525.

²¹⁷ *See Nev. Ditch Co. v. Bennett*, 45 P. 472, 479–80 (Or. 1896).

An appropriation proper is not made until there has been an actual application of the water claimed, to some beneficial purpose . . . [s]o that actual user for a beneficial purpose is the true and only final test touching the question whether a party's claim has ripened into a valid appropriation. There can be no constructive appropriation . . .

Id.; *see* MEYERS, *supra* note 30, at 4, 7.

²¹⁸ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 487 (3d ed. 1992).

The lack of a traditional appropriation for the United States under the statute likely explains why the legislature thought it advisable to declare that the waters described in the government's notice of intent "shall not be subject to further appropriation" and that "[n]o adverse claims to the use of the water . . . shall be acquired."²¹⁹ To remove any doubt about the effect of a statutorily "deemed" appropriation, the first of the two clauses puts the waters off limits to appropriation by others, and the second one puts the waters off limits to adverse riparian rights claims.²²⁰

Trelease drew a distinction between external and internal relations in a water supply project that provides a useful way to talk about the 1905 Oregon statute. He said most states regard a water supply entity as owner of the project appropriation for external purposes, such as protecting the project water supply against outside persons who might claim water rights in conflict with the project. Internally, however, these states regard project water users as having property rights against the distributor to protect their individual supplies.²²¹ Using Trelease's distinction, the Oregon legislature clearly aimed the 1905 statute at external relations—the problem of outsiders making appropriations during the Bureau's investigation and planning process that might cut the heart out of the Bureau project. The statute solved the problem by deeming the United States to have an appropriation and, to remove any uncertainty arising from the nontraditional nature of the government's appropriation, by declaring that outsiders cannot appropriate the water or use it under the riparian doctrine. Reading the statute to reach internal relations as well as external relations is undue and uncomprehending literalism. No reason exists why the legislature would have wanted to aim the statute internally to the disadvantage of its citizens receiving Bureau water if other Oregon law would give them property rights.

b. Other Oregon Water Law

Oregon law has made a water right appurtenant to the land where it is beneficially used since before the Klamath Project.²²² Appurtenance was the basis for the Supreme Court's conclusions in *Ickes* and *Nevada* that reclamation project irrigators had vested property rights in project water.²²³ It should follow that the appurtenance rule of Oregon water law

²¹⁹ Act of Feb. 16, 1905, ch. 228, § 2, 1905 Or. Laws 401, 401–02.

²²⁰ Oregon still had the riparian doctrine in 1905, as well as the appropriation doctrine. *See, e.g.*, 3 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 459–460, 463 (1971) (explaining that the Oregon Supreme Court first recognized riparian rights in 1876 and that in 1909 the legislature acted to "recognize, but to limit, the vested right of a riparian who had actually applied water to beneficial use prior to the enactment").

²²¹ Trelease, *supra* note 54, at 476.

²²² *See Nev. Ditch Co.*, 45 P. at 481 ("[T]he appropriator may sell and convey his lands in connection with which the appropriation was made, and the water rights acquired thereby will pass appurtenant to the land.").

²²³ *See supra* text accompanying notes 95–107, 108–28.

would produce the same result for the Klamath Project irrigators—unless some quirk of state water law prevents that result.

Complicating things is an 1891 Oregon statute, still in force, that declares the sale, rental, or distribution of water to all landowners adjacent to or within the reach of delivery works is a franchise subject to rate regulation.²²⁴ In 1932, the Oregon Supreme Court applied the statute to a for-profit water supply corporation.²²⁵ Furthermore, the court interpreted it to mean that the corporation owned the water right and the consumers it supplied had only contract rights, not property rights.²²⁶ This decision aligned Oregon law with what Wiel reported two decades earlier to be the California law regarding water users supplied by for-profit corporations selling or renting water to the general public.²²⁷

If the 1891 statute were to apply to the Bureau in delivering water by contract to the Klamath irrigators, the irrigators would have no property rights. But the statute should not apply. It provides that the legislature or an authorized state official can fix water rates, provided that the rates shall not be “lower than will allow the *net profits* of any ditch, canal, flume or system thereof to equal the prevailing legal rate of interest on the amount of money” invested in the works.²²⁸ The statute is aimed at for-profit water supply entities; that excludes the Bureau.

Although the statute, read literally, does not apply to the Bureau, the Oregon court’s California-like interpretation of it leads to a remaining applicability issue if any of the *Klamath* irrigators received water under a water service contract rather than a repayment contract (a point on which Judge Allegra’s opinion is silent). The issue is the same one upon which the California court equivocated in *Ivanhoe*: is the Bureau’s delivery of water under a water service contract sufficiently analogous to the sale or rental of irrigation water by a private for-profit corporation that water service contract irrigators should have only service rights and not property rights? Just as the issue is unsettled in California because of the state court’s equivocation, it appears to be unsettled in Oregon due to a lack of any case law.

D. Summary

In numerous western states, irrigators and municipalities receiving water under Bureau contracts likely have state-created property rights in the supply source independent of the contracts. In California, Oregon, and

²²⁴ Act of Feb. 18, 1891, 1891 Or. Laws 52 (codified at OR. REV. STAT. § 541.010(1) (2005)) (providing for allocation of surface water in Oregon).

²²⁵ *In re Waters of Walla Walla River*, 16 P.2d 939, 941 (Or. 1932). *Eldredge v. Mill Ditch Co.*, 177 P. 939, 941 (1919), had held the statute did not apply to a nonprofit mutual corporation delivering water only to its shareholders.

²²⁶ *In re Waters of Walla Walla River*, 16 P.2d at 941. At the same time, the court acknowledged that *Eldredge* was still good law. *Id.*

²²⁷ See *supra* text accompanying note 51.

²²⁸ OR. REV. STAT. § 541.010(2) (2005) (emphasis added).

perhaps some other states, however, irrigators and municipalities may or may not have state-created property rights if they receive water under water service contracts. Regarding the many irrigators and municipalities with property rights acquired under state law, the next question is whether the Bureau's reduction of water deliveries to them in order to comply with the ESA would violate the Takings Clause of the Fifth Amendment.

III. TAKINGS LAW AND WATER RIGHTS

A. *The Structure of Takings Law*

Apart from formal eminent domain proceedings, the Supreme Court has recognized two basic types of takings: physical takings and regulatory takings.²²⁹ A physical taking occurs when "the government physically takes possession of property,"²³⁰ or as restated, where there is "direct government appropriation or physical invasion of private property."²³¹ The classic example of physical invasion is government construction or authorization of a dam that permanently floods upstream land.²³² Such government action is a *per se* taking²³³ unless the property owner's title was subject to a preexisting limitation that allowed the government to appropriate or physically invade the property.²³⁴

A regulatory taking occurs when the government does not physically appropriate or invade private property but regulates it in a way so onerous as to be tantamount to appropriation.²³⁵ The concept of a regulatory taking goes back to Justice Oliver Wendell Holmes's famous dictum in 1922 that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²³⁶ The vague "too far" standard has generated considerable litigation. In 1978, the Court reviewed its regulatory takings cases in *Penn Central Transportation Co. v. City of New York*²³⁷ and reported that they contained no set formula but instead used a multifactor balancing approach requiring "essentially ad hoc, factual

²²⁹ See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (*Tahoe-Sierra*), 535 U.S. 302, 321–22 (2002)) (discussing the difference between physical takings and regulatory takings).

²³⁰ *Tahoe-Sierra*, 535 U.S. at 322.

²³¹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

²³² See, e.g., *United States v. Lynah*, 188 U.S. 445 (1903) (dams in the Savannah River in South Carolina caused flooding of plaintiff's land); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (dam erected across Fox River in Wisconsin caused flooding of plaintiff's land).

²³³ See, e.g., *Brown*, 538 U.S. at 233 (citing *Tahoe-Sierra*, 535 U.S. at 322) (stating that our jurisprudence involving physical takings "involves the straightforward application of *per se* rules").

²³⁴ See, e.g., *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987) (federal navigation servitude is such a preexisting title limitation).

²³⁵ *Lingle*, 544 U.S. at 537.

²³⁶ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

²³⁷ 438 U.S. 104 (1978).

inquiries.”²³⁸ The Court also embraced the continued use of multifactor balancing and identified three factors of “particular significance.”²³⁹ The first two are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”²⁴⁰ The third factor is “the character of the governmental action.”²⁴¹ Regarding the third factor, the Court indicated that if a regulation adjusts the benefits and burdens of economic life to promote the public interest, that weighs against finding a taking.²⁴² In practice, proof of a regulatory taking under the *Penn Central* multifactor balancing is no easy task.²⁴³

In two cases since *Penn Central*, the Court has declined to test regulations under multifactor balancing and instead found per se takings. In *Loretto v. Teleprompter Manhattan CATV Corp.*,²⁴⁴ a state regulation required apartment landlords to allow cable television companies to install cable facilities upon their buildings. The Court said that when government authorizes the permanent physical occupation of property, there is a taking without regard to the public interests it serves and even though the economic impact on the owner is minimal.²⁴⁵

In *Lucas v. South Carolina Coastal Council*,²⁴⁶ beachfront management regulation enacted to accomplish ecological and other public purposes²⁴⁷ prevented the owner of two lots from constructing any permanent habitable structures on them. The regulation made the lots valueless.²⁴⁸ The Court held that when a regulation denies all economically beneficial use of land, it is a taking of the land without regard to the public interests advanced.²⁴⁹ Such regulation is a taking unless the owner’s title was subject to a preexisting limitation under the state’s law of property or nuisance allowing the denial of all economically beneficial use.²⁵⁰

²³⁸ *Id.* at 124.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *See id.* (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”).

²⁴³ *See* Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 582 (2002) (reporting that the Supreme Court, as of 2002, had never found a taking using the *Penn Central* factors).

²⁴⁴ 458 U.S. 419 (1982).

²⁴⁵ *Id.* at 434–35.

²⁴⁶ 505 U.S. 1003 (1992).

²⁴⁷ *See id.* at 1021–22 n.10.

²⁴⁸ *See id.* at 1020.

²⁴⁹ *Id.* at 1015.

²⁵⁰ *Id.* at 1027–29.

B. Where Bureau Water Delivery Reductions Fit in the Takings Structure

1. The Tulare Opinion and Its Critics

The plaintiffs in *Tulare* were California water districts with contracts for water from a state project that shared a coordinated pumping system in the Sacramento-San Joaquin Delta with a Bureau project.²⁵¹ When the Bureau restricted pumping from the delta from 1992 through 1994 to meet its ESA responsibilities, the water supply for the state project was necessarily reduced. Although some plaintiffs were affected more than others, the aggregate reduction of supply to all of them over the three years was about ten percent.²⁵²

The United States argued *Penn Central* balancing should govern whether the reductions were a taking because the government did not physically invade the plaintiffs' property but merely regulated the pumping of water from the delta.²⁵³ It further argued there was no taking under *Penn Central* because the economic impact of the 1992–1994 delivery reductions on the plaintiffs was very small relative to the total benefits from past and future contract deliveries and because the plaintiffs lacked reasonable investment-backed expectations in light of longstanding regulatory concern regarding fish and wildlife.²⁵⁴ If *Penn Central* balancing governed, the plaintiffs likely would have lost.

Judge Wiese ruled, however, that the water delivery reductions were a per se physical taking,²⁵⁵ which left only the issue of whether the plaintiffs' property interests were subject to any preexisting title limitation that would allow the government to cut their water deliveries to comply with the ESA. Judge Wiese found no such title limitations for reasons to be noted later. The United States did not appeal but instead settled with the *Tulare* plaintiffs for \$16.7 million.²⁵⁶

Commentators have nearly unanimously criticized Judge Wiese's opinion.²⁵⁷ They have particularly lambasted his ruling that the water

²⁵¹ See *Tulare*, 49 Fed. Cl. 313, 314–15 (2001).

²⁵² The total contracted deliveries for all plaintiffs for the three years were 3,815,700 acre-feet. *Id.* at 315. The delivery shortfalls totaled at least 378,240 acre-feet. *Id.* at 316.

²⁵³ See *id.* at 318.

²⁵⁴ See *id.* at 318–19 (noting that the economic loss asserted was “de minimis” and that plaintiffs' expectations were limited by concerns over fish and wildlife).

²⁵⁵ See *id.*

²⁵⁶ Thomas L. Sansonetti, *Transcript, Water Issues During the First Term of the Bush-Cheney Administration*, 6 WYO. L. REV. 353, 361 (2006). Sansonetti, who was the Assistant Attorney General for the Environment and Natural Resources Division of the Justice Department at the time, explained that “the court ordered the government to pay \$24 million with interest at \$1,000 a day. Attorney fees in the case were over \$1.7 million By negotiating a settlement in which we did not concede liability for future cases, we did significantly reduce the trial court's monetary award.” *Id.*

²⁵⁷ See, e.g., WATERS AND WATER RIGHTS, *supra* note 58, § 41.05(c) n.359 (describing the decision as “analytically weak” for several reasons and noting that this criticism is “echoed” by Brian E. Gray, *The Property Rights in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2002)); Benson, *supra* note 243, at 555 (describing that the decision is “fundamentally flawed” in at least

delivery reductions were a per se physical taking rather than a regulatory taking in the *Penn Central* balancing category.²⁵⁸ Their main criticisms are the following: first, there was no physical invasion because a water right is only a usufructuary interest and as such is incapable of being physically invaded.²⁵⁹ Second, the per se *Loretto* taking category is limited to permanent physical occupation, and the delivery reductions in *Tulare* were not permanent.²⁶⁰ Third, treating reduced water deliveries as a physical taking is inconsistent with *Lucas* and other Supreme Court land use regulation cases.²⁶¹

The discussion below examines these criticisms and finds them all flawed. Although the criticisms are unpersuasive, it does not necessarily follow that delivery reductions like those in *Tulare* are per se physical takings. Indeed, the discussion points out a gap in Supreme Court takings precedents that leaves that issue uncertain, though the discussion also presents a hypothetical that tends to suggest such delivery reductions might well be per se physical takings.

2. *Usufructuary Rights*

Generally, western states regard water flowing in rivers within state borders as owned by the public or by the state in trust for the public.²⁶² A water right, whether obtained under the riparian doctrine or the appropriation doctrine, is a usufruct, that is, it confers no ownership of the flowing water but only allows its holder to take and use waters belonging to the public or the state.²⁶³ A usufruct is an incorporeal interest,²⁶⁴ that is, an intangible.²⁶⁵ This does not mean, however, that a water right cannot be the subject of a physical taking.

The Supreme Court found just such a taking in *Dugan v. Rank*.²⁶⁶ Landowners along the San Joaquin River claiming to own riparian and other water rights²⁶⁷ in the river alleged that the Bureau's storage of water upstream behind Friant Dam left insufficient water in the river to supply their water rights. The Court held that the allegation, if proved, would establish a partial taking.²⁶⁸

two ways).

²⁵⁸ WATERS AND WATER RIGHTS, *supra* note 58, § 341.05(c) n.359 (calling Judge Wiese's takings analysis "novel, if not bizarre").

²⁵⁹ Brief of Natural Resources Defense Council as Amicus Curiae Supporting the United States at 11 n.1, *Colvin Cattle Co., Inc. v. United States*, No. 06-5012, 2006 WL 3085559 (Fed. Cir. Nov. 1, 2006).

²⁶⁰ Benson, *supra* note 243, at 580; Leshy, *supra* note 20, at 2011–12.

²⁶¹ Leshy, *supra* note 20, at 2010–13.

²⁶² HUTCHINS, *supra* note 39, at 5–6.

²⁶³ *Id.* at 151.

²⁶⁴ *See id.* at 445.

²⁶⁵ BLACK'S LAW DICTIONARY 782 (8th ed. 2004).

²⁶⁶ 372 U.S. 609 (1963).

²⁶⁷ *Id.* at 614.

²⁶⁸ *Id.* at 620.

A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land Therefore, when the Government acted here “with the purpose and effect of subordinating” the respondents’ water rights to the Project’s uses “whenever it saw fit,” “with the result of depriving the owner of its profitable use, (there was) the imposition of such a servitude (as) would constitute an appropriation of property for which compensation should be made.”²⁶⁹

Clearly, the Court viewed the Bureau’s upstream storage activities as a “seizure” or “appropriation” of property—a traditional physical taking not governed by multifactor balancing. The Court’s treatment of *Dugan* as a traditional physical taking makes sense. Although a water right may be incorporeal, it entitles its owner to take physical possession of tangible water molecules and use them.²⁷⁰ The Bureau’s actions deprived the plaintiffs of physical control of water molecules to which they had a right.

Dugan does not stand alone in Supreme Court takings jurisprudence. *Gerlach*²⁷¹ is similar both factually (even involving Friant Dam interference with downstream water rights) and in outcome. *Gerlach* contains no hint of multifactor balancing. In *International Paper Co. v. United States*,²⁷² the government’s World War I requisition of all the hydropower capable of being produced at a certain power company’s plant also ended International Paper’s use of water at its mill because all of its water had to go instead to the plant.²⁷³ The Court stated: “[International Paper’s] right was to the use of the water; and when all the water that it used was withdrawn from [its] mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use.”²⁷⁴ There was no hint in the opinion of multifactor balancing, so the Court

²⁶⁹ *Id.* at 625 (citations omitted).

²⁷⁰ *Cf. Bailey v. Idaho Irrigation Co.*, 227 P. 1055, 1056 (1924) (“An appropriator is entitled to have the full quantity of water called for by his appropriation flow in the natural stream, or in his ditch or canal, in such a way that he can enjoy its use . . .”).

²⁷¹ See *supra* text accompanying notes 69–73. The Bureau stored flowing water behind its dam that otherwise would have reached the plaintiffs’ grasslands downstream by natural overflow and thus irrigated them. The Bureau’s purpose in storing the water was to supply irrigators with Bureau contracts.

It has been pointed out that in *Gerlach*, the government took water away from one group of irrigators and gave it to another group of irrigators, while in *Tulare* and *Klamath* the government took water away from a group of irrigators to benefit the public at large by protecting the aquatic environment. Leshy, *supra* note 20, at 2008. While that is true, the difference does not affect the point made in the text that a water right can be the subject of a physical taking in the traditional sense. Furthermore, if there is a physical seizure or appropriation in the traditional sense, the difference in governmental purpose—benefiting a second group of farmers versus benefiting the public at large—is unimportant because the public interest served by the government action is relevant only under *Penn Central* balancing, not in per se takings cases.

²⁷² 282 U.S. 399 (1931).

²⁷³ *Id.* at 405–06.

²⁷⁴ *Id.* at 407.

evidently saw the case as a traditional physical taking of International Paper's right to water.²⁷⁵ *Dugan*, *Gerlach*, and *International Paper* refute the idea that there can be no physical taking of a water right because it is a usufructuary interest.

Furthermore, these three cases are conceptually sound. In an earlier physical taking case, the Court observed that the Takings Clause does not use the term "property" "in its vulgar and technical sense of the physical thing" but rather "in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."²⁷⁶ The Court elaborated: "When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that, which we denominate ownership."²⁷⁷ Viewing *Dugan* and *Gerlach* in this light, the Bureau substituted itself in relation to physical water molecules in the San Joaquin River in place of the plaintiffs by controlling the molecules for federal project purposes rather than allowing them to flow downstream to the plaintiffs.²⁷⁸

3. Temporary Versus Permanent Physical Invasion

As noted, Judge Wiese's critics have asserted that the delivery reductions in *Tulare* could not have been a per se physical taking because they only lasted three years, while *Loretto* requires permanent physical occupation for a per se taking.

a. The Loretto Takings Categories

In *Loretto*, the Court divided its takings precedents into three categories according to whether they involved "a permanent physical occupation" of property, "a physical invasion short of occupation," or "a regulation that merely restricts the use of property."²⁷⁹ Cases in the first category are per se takings²⁸⁰ while those in the other two are subject to multifactor balancing to determine the taking question.²⁸¹

²⁷⁵ Cf. *Washoe County v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (treating *International Paper* and *Dugan* as physical takings cases).

²⁷⁶ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945).

²⁷⁷ *Id.* at 378.

²⁷⁸ Cf. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002) ("A regulatory taking, by contrast [to a physical taking], does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.").

²⁷⁹ *Loretto*, 458 U.S. 419, 430 (1982); see also *id.* at 428 (separating flooding cases categorically into cases involving "permanent physical occupation, . . . a more temporary invasion, or government action outside the owner's property that causes consequential damages within").

²⁸⁰ See *id.* at 426, 432 (concluding that a permanent physical occupation by the government is a taking without regard to multifactor balancing).

²⁸¹ See *id.* at 432, 433, 436 n.12 (finding that a temporary physical invasion is subject to a

The regulation challenged as a taking in *Loretto* prohibited residential landlords from interfering with the installation of cable television facilities on their property.²⁸² The case obviously did not belong in the third category because the regulation authorized the physical invasion of the plaintiff's apartment building rather than merely restricting her use of it. As between the first two categories, the Court held there was a permanent physical occupation because she had to allow the equipment on her building "[s]o long as the property remains residential and a [cable television] company wishes to retain the installation."²⁸³

The Court justified treating permanent physical occupation as a per se taking on the ground that "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property."²⁸⁴ It gave three reasons why such an invasion is so serious. First, the owner has no right to possess and use the occupied space and cannot exclude the occupier from possession and use of it.²⁸⁵ Second, the owner is forever denied any control of the property, even nonpossessory use.²⁸⁶ Third, the owner cannot dispose of the occupied space for value because a purchaser would be unable to possess and use it.²⁸⁷

b. Loretto in the Lower Federal Courts

Lower federal courts have disagreed about what distinguishes "a permanent physical occupation" from "a physical invasion short of occupation." The Second Circuit decided that each of the three reasons given in *Loretto* for the seriousness of permanent physical occupation is a required element for a permanent physical occupation.²⁸⁸ Under this approach, a physical invasion is not permanent unless the owner is forever denied control of the property invaded. Temporary denial is not enough.²⁸⁹

The Federal Circuit took a contrary view in *Hendler v. United States*.²⁹⁰ "[P]ermanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is a term of finite duration" ²⁹¹ Going further, the Federal Circuit said "temporary" refers to government occupancy "that is transient and relatively inconsequential, and thus properly can be viewed as

balancing test to determine whether it is a taking).

²⁸² *Id.* at 423.

²⁸³ *Id.* at 439.

²⁸⁴ *Id.* at 435.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 436.

²⁸⁷ *Id.* at 435–36.

²⁸⁸ *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 93 (2d Cir. 1992); *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 325 (N.D.N.Y. 1997).

²⁸⁹ *Loretto*, 458 U.S. at 435.

²⁹⁰ 952 F.2d 1364 (Fed. Cir. 1991).

²⁹¹ *Id.* at 1376.

no more than a common law trespass [A] truck driver parking on someone's vacant land to eat lunch is an example."²⁹²

The Federal Circuit later refused to apply the *Hendler* statements literally in *Boise Cascade Corp. v. United States*.²⁹³ The court said the statements were intended "merely . . . to focus attention on the *character* of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration."²⁹⁴ After *Hendler* but before *Boise Cascade*, the Federal Circuit held in *Skip Kirhdorfer, Inc. v. United States*²⁹⁵ that the Navy's seizure of a locked warehouse early in the morning by breaking and entering, and its subsequent control of the warehouse for about nine months,²⁹⁶ constituted a per se *Loretto* taking.²⁹⁷ The *Kirhdorfer* court read *Hendler* as ultimately distinguishing between a "permanent" and a "temporary" invasion based on "the nature of the intrusion, not its temporal duration."²⁹⁸ It concluded: "A 'permanent' physical occupation,' as distinguished from a mere temporary trespass, involves a substantial interference with property rights. . . . Breaking and entering constitutes a substantial physical intrusion on [plaintiff's] property."²⁹⁹ When the Federal Circuit later disavowed literal interpretation of *Hendler* in *Boise Cascade*, it did not mention *Kirhdorfer*. Presumably the "substantial interference with property rights" standard in *Kirhdorfer* remains a valid interpretation of *Loretto* in the Federal Circuit.

If the United States had appealed Judge Wiese's finding of a per se physical taking in *Tulare* to the Federal Circuit,³⁰⁰ there is at least a chance the Federal Circuit would have affirmed the finding. While the Bureau did not break and enter in *Tulare*, Judge Wiese described its intrusion as follows:

In the context of water rights, 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 Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.³⁰¹

The Federal Circuit might have concluded that a physical invasion of this

²⁹² *Id.* at 1377.

²⁹³ 296 F.3d 1339 (Fed. Cir. 2002).

²⁹⁴ *Id.* at 1356 (emphasis added).

²⁹⁵ 6 F.3d 1573 (Fed. Cir. 1993).

²⁹⁶ The Navy seized the warehouse on December 13, 1988, allowed a third party to possess it, and disclaimed any further control of it in August 1989. *Id.* at 1577.

²⁹⁷ *Id.* at 1583.

²⁹⁸ *Id.* at 1582.

²⁹⁹ *Id.*

³⁰⁰ 28 U.S.C. § 1295(a)(3) (2000) (Court of Appeals for the Federal Circuit has exclusive jurisdiction of appeals from the Court of Federal Claims).

³⁰¹ *Tulare*, 49 Fed. Cl. 313, 319 (2001).

nature is a substantial enough interference to constitute a permanent physical occupation.

The greater question, of course, is what the Supreme Court would do regarding the required duration of government intrusion on facts like *Tulare* or *Klamath*.

c. A Closer Look at Loretto

In *Loretto*, the Court provided guidance on the difference between a permanent physical occupation and a physical invasion short of occupation by placing various precedents in one category or the other. In the first category were cases of government or government-authorized permanent flooding of land and installation of utility poles on land.³⁰² In the second category were cases involving 1) intermittent flooding of private property, 2) a public easement of passage over a private pond, and 3) a requirement that the owner of a shopping center open to the public allow people to enter to exercise free speech and petition rights subject to reasonable time, place, and manner restrictions.³⁰³ In these latter cases, said the Court, the physical invasion was not a permanent physical occupation because it was temporary.³⁰⁴

The Court's choice of the words "permanent" and "temporary" is imprecise. The public's use of the private pond and its exercise of speech and petition rights in the shopping center could be expected to endure as long as the television cables and boxes might be on Loretto's apartment building. Yet the Court regarded only the cables and boxes as permanent.³⁰⁵ If the duration of the physical invasion does not differentiate *Loretto* from the other two situations, what does? The continuity of the physical invasion differs. The public would not continuously pass over the pond or speak and petition in the shopping center, whereas the cables and boxes would be present continuously as long as the building remained residential and the cable television company wanted them there.

If a certain continuity of physical invasion is required for permanent physical occupation, must the invasion also be of unlimited or at least great duration? The *Loretto* opinion is muddled on that. The Court noted that the cables and boxes could remain on Loretto's property indefinitely, and one reason it gave for why permanent physical occupation seriously invades an owner's rights was that the owner is denied any control of the property forever.³⁰⁶ But the Court also found "instructive"³⁰⁷ the World War II case of *United States v. Pewee Coal Co.*,³⁰⁸ which it summarized as follows:

³⁰² See *Loretto*, 458 U.S. 419, 428–29 (1982).

³⁰³ See *id.* at 433–34, 435 n.12.

³⁰⁴ *Id.* at 435 n.12.

³⁰⁵ *Id.* at 434–38.

³⁰⁶ *Id.* at 435.

³⁰⁷ *Id.* at 431.

³⁰⁸ 341 U.S. 114 (1951). *Pewee* was one of two wartime takings cases that the Court found instructive. In the other one, the government regulated the use of property but did not

[*Pewee*] unanimously held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking, though members of the Court differed over which losses suffered during the *period* of Government control were compensable. The plurality had little difficulty concluding that because there had been an "actual taking of possession and control," the taking was as clear as if the Government held full title and ownership.³⁰⁹

The period of government control was about five and one-half months.³¹⁰ *Pewee* indicates that government possession or control of property need not continue for unlimited or great duration to be a per se physical taking.³¹¹

Although the Court did not mention it, *Pewee* is just one of several wartime takings cases where the government's seizure or requisition of private property for a limited period was a per se physical taking. One of these cases even involved water, namely, *International Paper Co. v. United States*.³¹² The others involved a laundry,³¹³ a leased building,³¹⁴ and a leased warehouse.³¹⁵ Furthermore, the wartime takings cases remain good law. The Court has continued to cite them in its most recent takings cases as examples of per se physical takings.³¹⁶ The wartime cases leave no doubt

physically invade it in any manner, and there was no taking. *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958).

³⁰⁹ *Loretto*, 458 U.S. at 431 (emphasis added) (quoting *Pewee*, 341 U.S. at 116) (No other Justice challenged this portion of the opinion.).

³¹⁰ See *Pewee*, 341 U.S. at 115 (explaining that the government control lasted from May 1, 1943 until October 12, 1943).

³¹¹ See *id.* (holding that there has been a taking when government control only lasted 5.5 months).

³¹² 282 U.S. 399 (1931); see also *supra* notes 272–75 and accompanying text.

³¹³ See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (explaining that the government's temporary occupation of the laundry "preempted the trade routes, [and] it [the government] must pay compensation for whatever transferable value their temporary use may have had").

³¹⁴ See *United States v. Petty Motor Co.*, 327 U.S. 372, 374–75 (1946) (stating the government's actions resulted in the temporary taking of the leased building).

³¹⁵ See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (explaining that the case should be retried on the principle of the "market rental value of . . . a building on a lease by the long-term tenant to the temporary occupier").

³¹⁶ See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citing *Pewee*, 341 U.S. 114 and *Gen. Motors Corp.*, 323 U.S. 373 (1945)); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *Pewee*, 341 U.S. 114, *Gen. Motors Corp.*, 323 U.S. 373 (1945), and *Petty Motor Co.*, 327 U.S. 372 (1946)); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (citing *Pewee*, 341 U.S. 114 (1951) and *Gen. Motors Corp.*, 323 U.S. 373 (1945)).

A lower federal court has sought to explain away the wartime cases as just early instances of *Lucas* because they all involved government appropriation of 100% of the owner's property, thus depriving the owner of all economically beneficial use during the period of the appropriation. See *Juliano v. Montgomery-Ostego-Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 327 (N.D.N.Y. 1997). But *Lucas* was not a physical taking case. It held that even though a property owner retains possession of his property, there is a per se taking if regulation makes the possession economically valueless. *Lucas*, 505 U.S. 1003, 1028–29 (1992). Unlike *Lucas*, the wartime cases involved government dispossession of the owner.

that a physical invasion for a limited time, as short as five and one-half months, can be a per se physical taking.

Full assessment of the wartime takings cases, however, requires making an additional comparison between them and a case like *Tulare*. In the wartime cases, the government physically invaded *all* of the owner's property for a limited period, while in *Tulare* it physically invaded *part* of the owners' property for a limited period.³¹⁷ While the wartime cases show that the combination of total invasion and limited period is serious enough to constitute a per se taking, the Court apparently has never considered whether the combination of partial invasion and limited period would be serious enough to constitute one.

This gap in the Court's takings precedents leaves uncertainty. Predictability is not a hallmark of takings law, and it remains to be seen how the Court will resolve the uncertainty. It is heuristically useful, however, to ponder whether there can be any real doubt that the government would have had a per se duty to pay just compensation in the wartime cases had it physically appropriated half of a mine, a third of a laundry, a quarter of a leased building, or an eighth of a leased warehouse for the period of the war.

4. *Lucas and Other Supreme Court Land Use Cases*

Perhaps the cleverest argument against treating reduced water deliveries as a per se physical taking is that this would be inconsistent with *Lucas*. As noted, *Lucas* established that beachfront regulation denying an owner all economically beneficial use of his land was a per se regulatory taking.³¹⁸ With *Loretto* already having established that permanent physical occupation is a per se taking, the Court would not have had to create a new per se taking category in *Lucas* if it had been willing to regard regulatory deprivation of all economically beneficial use as tantamount to physical occupation. So the argument made from *Lucas* is that since the Court did not regard regulatory deprivation of all economically beneficial use as amounting to physical occupation, ESA regulation that reduces the water supplied to appropriators for beneficial use cannot amount to physical occupation either.³¹⁹

Undeniably, there is a parallel between the two fact situations. The beachfront regulation reallocated the use of Lucas's two parcels from his intended residential development to ecological and other public purposes. Similarly, in the water situation exemplified by *Klamath* and *Tulare*, ESA regulation reallocates water contracted for irrigation or municipal use to species habitat use.

But the parallel is not complete. The beachfront legislation did not oust Lucas from possession of the lots. There was no physical taking, so the Court created a per se regulatory taking category. In *Klamath* and *Tulare*,

³¹⁷ See *Tulare*, 49 Fed. Cl. 313, 316 (2001) (explaining plaintiff's argument that they were deprived of differing amounts of water over a three year period).

³¹⁸ See *Lucas*, 505 U.S. at 1029.

³¹⁹ See generally Leshy, *supra* note 20, at 2010.

implementation of the ESA ousted the contract water users from physical possession of water molecules to which they had a right. There was a traditional physical taking.

Another argument made against treating the *Klamath* and *Tulare* situations as per se physical takings is that this would be inconsistent with the Court's decisions upholding land use regulations like zoning and set back requirements.³²⁰ Again, however, these land use regulations are distinguishable from *Klamath* and *Tulare* because they do not oust the owner from possession. The owner remains in possession and can still use the land in various ways not barred by the regulation.

IV. PREEXISTING TITLE LIMITATIONS

Government appropriation of property is not a taking if the owner's title was subject to a preexisting limitation that allowed the government's action.³²¹ Judge Wiese found no preexisting title limitation in *Tulare* that would justify the water delivery reductions.³²² He ruled that shortage clauses in the plaintiffs' water contracts with the state, which relieved the state of liability for a water shortage, did not limit the plaintiffs' title as against the federal government because the United States was not a party to the contracts or an intended beneficiary.³²³ He also found that California common law on nuisance and the public trust doctrine, and a unique state constitutional provision on reasonable water use, did not impose any such title limitation.³²⁴ The State Water Resources Control Board had sanctioned full water delivery to the plaintiffs in decision D-1485. Judge Wiese ruled that D-1485 fixed the plaintiffs' rights to water until formally changed by the board or declared illegal by a California court, and neither had happened.³²⁵ The fact situation in *Tulare* is unlikely to recur in future ESA water takings cases. It is worthwhile, therefore, to examine the issue of preexisting title limitations from a broader perspective.

³²⁰ See *id.* at 2010–11 (also pointing out that the Court of Appeals for the Federal Circuit refused to find a per se taking when the government restricted the Boise Cascade Corporation from logging on 40 acres of its 200 acre tract to the protect northern spotted owl).

³²¹ See, e.g., *Lucas*, 505 U.S. at 1028–29 (giving examples of limitations such as a riparian owner's interest in "submerged lands . . . bordering on a public navigable water held subject to [the] Government's navigational servitude"); see also *United States v. Willow River Power Co.*, 324 U.S. 499, 510–11 (1945) (explaining that there was no taking when the government reduced the head of water at a private hydroelectric plant because the plant's property interest was subject to federal navigation servitude).

³²² See *Tulare*, 49 Fed. Cl. 313, 320–24 (2001).

³²³ See *id.* at 320–21 (explaining that these contracts referred only to insulating the state agency from liability).

³²⁴ See *id.* at 322 ("None of the doctrines to which defendant resorts—the doctrine of reasonable use, the public trust doctrine or state nuisance law—are therefore availing.").

³²⁵ *Id.* at 324.

A. Shortage Clauses in Bureau Contracts

Bureau water contracts usually contain a clause exculpating the United States from liability for shortages due to specified causes, such as drought or operational error, or to “any other causes.”³²⁶ Even if contracting municipalities and irrigation districts, or district members, have property rights under state law, contract terms shape their property rights.³²⁷ A shortage clause is undoubtedly a preexisting title limitation.

It is still necessary, however, to ascertain the exact content of that limitation. The Ninth and Tenth Circuits have interpreted the phrase “any other causes” broadly to include a shortage caused by the Bureau’s ESA compliance.³²⁸ But their interpretations were not made in the takings context. Instead, the cases dealt with the rule that ESA section 7 applies only to discretionary actions of federal agencies.³²⁹ The issue was whether Bureau water contracts impose a nondiscretionary duty to deliver water that immunizes them from ESA section 7. Both circuits found ESA section 7 applicable because the Bureau’s contract duty was tempered by the phrase “any other causes.”³³⁰ Thus, the Ninth Circuit held that irrigators could not compel the Bureau to deliver their full contract water amounts if that would be inconsistent with ESA section 7.³³¹ The Tenth Circuit ordered an unwilling Bureau, at the behest of environmental groups, to reduce irrigation and municipal water deliveries as needed to protect an endangered species.³³²

Whether the Bureau can or must reduce contract water deliveries to comply with the ESA is an entirely different issue from whether reduced deliveries require just compensation. Regarding just compensation, it is doubtful whether “any other causes” can validly be read to include ESA compliance, at least in the case of repayment contracts. The Bureau possesses only the contracting authority that Congress gave it.³³³ Its

³²⁶ See 4 WATERS & WATER RIGHTS, *supra* note 58, § 41.05(c) (listing cases interpreting exculpatory clauses).

³²⁷ See *Fremont-Madison Irrigation Dist. v. U.S. Dep’t of the Interior*, 763 F.2d 1084 (9th Cir. 1985) (holding an irrigation district was not deprived of property rights of water storage and beneficial use when a storage dam collapsed because a clause in the Bureau contract specifically absolved the United States from liability for water shortage due to failure of storage facilities); *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 731–32 (E.D. Cal. 1993) *aff’d sub nom*; *O’Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) (holding that the Bureau contract defines the extent of the water right).

³²⁸ See, e.g., *O’Neill*, 50 F.3d at 684 (concluding that “any other causes” includes a water shortage “resulting from the mandate of valid legislation”).

³²⁹ 50 C.F.R. § 402.03 (2005).

³³⁰ *O’Neill*, 50 F.3d at 684; *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1127–30 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004).

³³¹ *O’Neill*, 50 F.3d at 680.

³³² See *Rio Grande Silvery Minnow*, 333 F.3d at 1114 (affirming trial court’s preliminary injunction), *vacated*, 355 F.3d 1215 (10th Cir. 2004) (leaving it to the trial court on remand to decide whether to vacate a preliminary injunction but holding that the appeal was moot and vacating the earlier appellate opinion as moot).

³³³ See, e.g., *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (“[A]n administrative agency’s power to regulate in the public interest must always be

authority to enter into repayment contracts goes back to the Reclamation Act of 1902, in which Congress intended section 8 to enable irrigators to acquire property rights in water under state law.³³⁴ Furthermore, Representative Mondell stated during the House debate on the 1902 Act: “The settler or landowner who complies with all the conditions of the act secures a *perpetual* right to the use of a sufficient amount of water to irrigate his land.”³³⁵ Congress likely intended in section 8 that irrigators should be able to obtain perpetual property rights under state law sufficient to irrigate their lands. That is what the law of western states generally gives them, and it is doubtful that any congressional directive exists elsewhere in federal reclamation law preempting operation of that state law.³³⁶

It would be inconsistent with Congress’s intent in section 8 to claim that the Bureau’s statutory authority to enter into repayment contracts includes authority to use “any other causes” language in a shortage clause with intent to include a shortage caused by ESA compliance. That broad a usage of “any other causes” would undercut state property rights in water contrary to section 8. To keep “any other causes” within the Bureau’s contracting authority, the phrase could be read as a Tenth Circuit dissenter read it, that is, as limited to unpredictable causes beyond the Bureau’s control such as facility failure.³³⁷ This narrower reading would not prevent the Bureau from reducing water deliveries to comply with the ESA even if the reduction would be a taking, for courts will not enjoin a taking if a suit for just compensation is available.³³⁸

With water service contracts, the validity of a broadly intended “any other causes” provision is clouded by the previously noted uncertainty in some states about whether the water users have only public utility-type service rights rather than property rights under state law.³³⁹ If they have only service rights, section 8 likely would not render a broadly intended “any

grounded in a valid grant of authority from Congress.”).

³³⁴ See *supra* Part II.B.

³³⁵ 35 CONG. REC. 6679 (1902) (emphasis added).

³³⁶ The 1956 legislation cited *supra* note 156, and described in the text accompanying it, guarantees 9(d) and 9(e) contract holders “a stated share or quantity of the project’s available water supply.” *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126, (9th Cir. 1998), said a project’s “available” water supply may shrink as the Bureau devotes water to species habitat to comply with ESA section 7. But it would be a perverse reading of legislation intended mainly to shore up the rights of 9(e) water users. See S. REP. NO. 84-2241, at 1–2 (1956), *as reprinted in* 1956 U.S.C.A.N. 2979, 2979–80, to say that it reduces the property rights 9(d) users acquired under state law before 1956. In fact, if the 1956 legislation were so interpreted, it might well be a taking of 9(d) water users’ pre-1956 property rights acquired under state law.

³³⁷ *Rio Grande Silvery Minnow*, 333 F.3d at 1151 (Kelly, J., dissenting).

³³⁸ See *First English Evangelical Lutheran Church v. County of Glendale*, 482 U.S. 304, 314–15 (1987) (asserting that the Fifth Amendment serves not to limit the government’s interference with property rights, but instead to secure compensation in the event of a taking); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28 (1985) (noting the Court’s previous holding that “[equitable] relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking” (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984))).

³³⁹ See *supra* text accompanying notes 163–64.

other causes” provision beyond the Bureau’s contracting authority. But if the water users have property rights under state law, the Bureau’s authority to use a broadly intended “any other causes” provision should be as doubtful as with repayment contracts.

B. State Nuisance and Property Law

Lucas indicated that preexisting title limitations include background principles of state nuisance and property law.³⁴⁰

1. Existing Nuisance Case Law

The common law doctrines of public and private nuisance unquestionably limit the exercise of water rights in some respects.³⁴¹ The specific question of interest, however, is whether the diversion of water under a water right is a nuisance if it harms or kills fish, especially ESA-protected fish. Cases can be found that may seem to speak to this question and offer different answers, but upon closer examination they are not on point.

A number of western states have cases allowing appropriators to completely dewater a stream.³⁴² Although complete dewatering will obviously kill fish, these cases are not authority that killing fish cannot be a nuisance. The cases involved disputes between competing water appropriators, and the courts did not get into whether killing fish would be a nuisance.³⁴³

³⁴⁰ *Lucas*, 505 U.S. 1003, 1029 (1992).

³⁴¹ See A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.92 (2006) (public nuisance); RESTATEMENT (SECOND) OF TORTS § 822 (1979) (defining private nuisance as an invasion of another’s interest in land that is intentional and unreasonable or is otherwise actionable under rules on negligence, recklessness, or abnormally dangerous conditions). The California Supreme Court, for example, has long regarded diversion dams that interfere with public navigation as a public nuisance. See *Miller & Lux v. Enter. Canal & Land Co.*, 75 P. 770, 772 (Cal. 1904) (recognizing that the state, which was not a party to the suit, might be able to compel removal of an irrigation dam if it interfered with public navigation); *People v. Russ*, 132 Cal. 102, 106 (Cal. 1901) (dams that block public navigation may be enjoined as a public nuisance); *Yolo County v. City of Sacramento*, 36 Cal. 193, 195–96 (1868) (a diversion dam that obstructs public navigation may be a public nuisance).

³⁴² *E.g.*, *Hammond v. Rose*, 19 P. 466, 467 (Colo. 1888) (allowing diversion of “all the water from the bed” of a stream); *Mettler v. Ames Realty Co.*, 201 P. 702, 704 (Mont. 1921) (upholding the “right of an appropriator to the use of all the waters of a stream”); *Avery v. Johnson*, 109 P. 1028, 1030 (Wash. 1910) (case remanded to allow water use “even to the full extent of the stream”).

³⁴³ *E.g.*, *Huning v. Porter*, 54 P. 584, 586–87 (Ariz. Terr. 1898) (assigning priority of rights among multiple claimants); *Hammond*, 19 P. at 466 (dispute between an appropriator and a riparian landowner); *Mettler*, 201 P. at 704 (discussing doctrine of riparian doctrine verses appropriation doctrine water rights); *Avery*, 109 P. at 1030 (decision based on law of appropriation); *Malad Valley Irrigation Co. v. Campbell*, 18 P. 52, 53 (Idaho 1888) (dispute between completing appropriation in which the court concluded plaintiff was owner of “all the waters of the stream”).

In contrast to the dewatering cases, a California court of appeal held it was a public nuisance for an irrigation district to divert water from a river into its canal without installing a screen to prevent fish from being drawn into the canal and dying.³⁴⁴ But the appellate court affirmed a lower court decree that allowed the district to divert if it would install and maintain a screen to protect the fish.³⁴⁵ The case does not address whether the exercise of a water right when done properly, rather than in callous disregard of modest feasible precautions, would be a public nuisance if it harms or kills fish.³⁴⁶

In short, it appears that no western state court has yet squarely passed on whether the noncallous exercise of a water right would be a nuisance if it harms fish.

2. Existing Property Case Law (The Public Trust Doctrine)

The property law of numerous states includes the common law public trust doctrine, which limits private ownership of the beds of navigable waters in order to protect public rights of navigation, fishing, and commerce in the waters.³⁴⁷ In the celebrated case of *National Audubon Society v. Superior Court*,³⁴⁸ the California Supreme Court held that the public trust doctrine also limits water rights and requires the state to curtail diversions under existing rights to protect the ecological and recreational values of instream flows “whenever feasible,”³⁴⁹ or as restated, “so far as consistent with the public interest.”³⁵⁰ Recently, a California court of appeal stressed that public trust uses will not always prevail because the state water board has discretion in striking a balance between them and conflicting municipal and agricultural water uses.³⁵¹ *National Audubon* was the first case in the West to hold that the public trust doctrine limits private water rights.

As for other reclamation states, the Idaho Supreme Court indicated in dictum it would be willing to reach the same result as *National Audubon*,³⁵² but the next session of the state legislature passed a statute barring

³⁴⁴ *People v. Glenn-Colusa Irrigation Dist.*, 15 P.2d 549 (Cal. Ct. App. 1932).

³⁴⁵ *Id.* at 550, 554 (affirming the lower court’s judgment in an action to enjoin diversion “until such time as a fish screen is constructed and maintained, by defendant”).

³⁴⁶ *Cf.* RESTATEMENT (SECOND) OF TORTS § 821B (1979) (explaining that public nuisance requires “unreasonable interference” with a public right). Even if the interference is deemed intentional, the determination of whether it is reasonable or unreasonable turns on weighing “the gravity of the harm against the utility of the conduct.” *Id.* at cmt. e.

³⁴⁷ *See* WATERS AND WATER RIGHTS, *supra* note 58, §§ 30.02(b)(1), 30.02(d) (discussing *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), and its influence upon “a large number of courts”).

³⁴⁸ 658 P.2d 709 (Cal. 1983).

³⁴⁹ *Id.* at 728.

³⁵⁰ *Id.*

³⁵¹ *State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d 189, 272 (Ct. App. 2006). The court rejected a claim that public trust water uses prevail over existing private water rights whenever possible. *Id.*

³⁵² *See Idaho Conservation League, Inc. v. State*, 911 P.2d 748, 750 (Idaho 1995) (stating that “the public trust doctrine takes precedent even over vested water rights”).

application of the public trust doctrine to water rights.³⁵³ The Washington Supreme Court ruled that the state's water administration agency could not apply the public trust doctrine to water rights because it lacked statutory authorization to do so.³⁵⁴ The Arizona Supreme Court struck down a statute precluding consideration of the public trust doctrine in a water rights adjudication.³⁵⁵ The court left it up to the adjudication master to determine whether the doctrine applies "to all, some, or none" of the water rights claims filed in an adjudication,³⁵⁶ and it said nothing about how to resolve conflicts between existing water rights and public trust water uses.

In sum, the status of the public trust doctrine as a title limitation on water rights is uncertain at best in western states except for California and perhaps Arizona. Even in California, public trust water uses might or might not prevail over existing municipal and agricultural water rights in a given fact situation.

3. *Evolution of Nuisance and Public Trust Law*

Nuisance and the public trust doctrine, like other common law doctrines, are dynamic rather than static. Although the Court said in *Lucas* that a longstanding property use by similarly situated owners generally implies the lack of any common law prohibition against the use, it also noted that nuisance law can evolve with changing knowledge or circumstances to bar a formerly permissible use.³⁵⁷ Likewise, when the California court held in *National Audubon* that the public trust doctrine limits water rights to protect public values, it noted that the doctrine had evolved previously in the state "in tandem with the changing public perception of the values and uses of waterways."³⁵⁸

Even though nuisance and public trust law can evolve, not every newly decreed restriction on property will qualify as a limitation that was always inherent in the owner's title. The Court said in *Lucas* that to be a preexisting limitation, the restriction must be supported by "an objectively reasonable application of relevant precedents."³⁵⁹ The Court acknowledged, however, that this test doubtless leaves "some leeway" in interpreting relevant precedents.³⁶⁰

"Some leeway" appears to be an understatement. Courts routinely have to decide how broadly or narrowly to read precedents.³⁶¹ Broad reading

³⁵³ Act of Mar. 19, 1996, ch. 342, § 1, 1996 Idaho Sess. Laws 1148-49 (codified at IDAHO CODE ANN. § 58-1203 (2006)).

³⁵⁴ *Rettkowski v. Dep't of Ecology*, 858 P.2d 232, 239 (Wash. 1993).

³⁵⁵ *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999).

³⁵⁶ *Id.*

³⁵⁷ *Lucas*, 505 U.S. 1003, 1031 (1992).

³⁵⁸ *Nat'l Audubon*, 658 P.2d 709, 719 (Cal. 1983).

³⁵⁹ *Lucas*, 505 U.S. at 1032 n.18.

³⁶⁰ *Id.*

³⁶¹ See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 72 (1960) [hereinafter *THE BRAMBLE BUSH*]; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 99, 341-42 (1960) [hereinafter *THE COMMON LAW TRADITION*].

utilizes various techniques, e.g., relying on dicta regardless of how gratuitous or expansively stated³⁶² and discerning in a series of cases an underlying broad principle that was never actually stated.³⁶³ Narrow reading also uses various techniques, perhaps the most common being to focus on the factual or procedural setting of a case and find no wider significance to it.³⁶⁴ As Karl Llewellyn noted, both broad and narrow reading of precedents are legitimate techniques of interpreting cases, and the same court in the same opinion might read welcome precedents broadly and unwelcome ones narrowly.³⁶⁵ Although the Court has yet to flesh out the “objectively reasonable” test, there may be many occasions when either a narrow or a broad reading of precedent would meet it.

Whether a court considers particular precedents on nuisance or the public trust doctrine welcome (and reads them broadly) or unwelcome (and reads them narrowly) can depend greatly on what the court considers to be sound water resource policy. Two competing policy views exist regarding western water rights. Each has adherents among leading water law scholars of the modern era. Charles J. Meyers favored the security-of-use approach to water rights:

the reason for the endurance of the appropriation system is found in the economic goals that the system serves. The system promotes investment by giving security of use. Prior appropriation said in effect: Come West, take up land and water, and they shall be yours. Thus the national (as well as regional) goals of settlement and development of the West were served (and continue to be served) by the appropriation system.³⁶⁶

Trelease, who also favored the security-of-use approach, linked it to broader American property law:

The allocation of property rights in water resources follows the pattern set for other resources like minerals or like land itself. . . . [M]ost [water uses] require a substantial investment in facilities for withdrawing and using it. The use of water is usually the basis of an enterprise which has a value as a going concern. The purpose behind much of water law is to insure that water users will receive a future water supply that will enable them to continue their uses, plan for the future and realize their expectations. While the law gives absolute and unqualified certainty to few property interests and may ascribe different degrees of security to different interests in or uses of a resource, it generally

³⁶² See THE COMMON LAW TRADITION, *supra* note 361, at 83.

³⁶³ See THE COMMON LAW TRADITION, *supra* note 361, at 83; THE BRAMBLE BUSH, *supra* note 361, at 74.

³⁶⁴ See THE BRAMBLE BUSH, *supra* note 361, at 72–73. The discussion of nuisance cases, *supra* text accompanying notes 341–45, focused on the facts of the cases in finding them dispositive regarding whether exercise of a water right is a nuisance if it kills fish. In *Klamath*, Judge Allegra focused on the procedural setting of *Ickes*, *Nebraska*, and *Nevada* in an effort (unsuccessful, as was argued earlier in this Article) to turn many of the Court’s statements into dicta that he then chose to ignore). *Klamath*, 67 Fed. Cl. 504, 519–21 (2005).

³⁶⁵ See THE BRAMBLE BUSH, *supra* note 361, at 72–75.

³⁶⁶ MEYERS, *supra* note 30, at 6.

follows strong policy of encouraging enterprise and development with a system of property rights that will give some assurance that the activity will not be subjected to premature termination without compensation.³⁶⁷

The security-of-use approach cuts against reading nuisance and public trust precedents broadly to find preexisting title limitations on water rights that would bar formerly permissible water uses in order to protect fish.

Joseph L. Sax is the leading proponent of the opposing water-as-a-public-resource approach to water rights:

Water, as a necessary and common medium for community development at every stage of society, has been held subject to the perceived societal necessities of the time and circumstances. In that sense water's capacity for full privatization has always been limited. The very terminology of water law reveals that limitation: terms such as "beneficial," "non-wasteful," "navigation servitude," and "public trust" all import an irreducible public claim on waters as a public resource, and not merely as a private commodity.³⁶⁸

This approach, which sees minimal parallel between water and land, cuts in favor of reading nuisance and public trust precedents broadly to support preexisting title limitations on water rights to protect fish.

It remains to be seen how the policy tension might play out regarding the evolution of nuisance and public trust law in various western states. Useful insight can be gained, however, by bearing in mind a cynical reality: Appellate judges in all the reclamation states, whether or not they are initially appointed or elected, must face the electorate to retain their seats.³⁶⁹ An example from Idaho is instructive in this regard. The Idaho Supreme Court held three to two that the federal Wilderness Act impliedly reserved water to maintain river flows in three wilderness areas in the state, and that the quantity reserved was all the water unappropriated as of the date each area was designated wilderness.³⁷⁰ The decision caused public outrage.³⁷¹ Seven months after the decision, the author of the majority opinion was defeated for reelection by an overwhelming vote—a defeat attributed to her reserved rights opinion.³⁷² After the election, but before the defeated justice's term expired, the court reheard the case. The chief justice, who was part of the original three-to-two majority and would face reelection in two years, changed her vote to create a new three-to-two majority for the

³⁶⁷ FRANK J. TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW*, NAT'L WATER COMM'N, LEGAL STUDY NO. 5, at 5–6 (Sept. 7, 1971).

³⁶⁸ Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269 (1990).

³⁶⁹ For individual states, see Am. Judicature Soc'y, *Judicial Selection in the States*, <http://www.ajs.org/js/select.htm> (select a state from the map, then follow "Current Methods of Judicial Selection" hyperlink) (last visited Nov. 12, 2006).

³⁷⁰ *In re SRBA*, No. 24546, 1999 WL 778325, at *8 (Idaho Oct. 1, 1999).

³⁷¹ Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 140 (2002).

³⁷² *Id.* at 142 (stating there was a "torrent of immediate and widespread adverse reaction," including a call by the Idaho statesman to not reelect the author of the opinion, Justice Silak).

view that the Wilderness Act did not create any reserved water rights.³⁷³ The two members of the original majority who adhered to their earlier views on rehearing were the defeated justice and a justice, age sixty-one, who would retire from the court before coming up for reelection.³⁷⁴

Another example from Idaho illustrates the same dynamic in an ESA context. The Snake River originates in Wyoming and flows through central Idaho before turning north and ultimately crossing into Washington and discharging into the Columbia River, its largest tributary.³⁷⁵ Recently, the federal district court for Oregon ruled that an ESA biological opinion regarding the Bureau's proposed operation of eleven water projects on the upper Snake River was invalid for failing to adequately protect endangered salmon species in the Snake and Columbia Rivers. The court remanded the biological opinion for correction of its flaws.³⁷⁶ The decision provoked a joint response by Idaho's congressional delegation that stated in part:

Let there be no mistake: We will protect Idaho's water Once again, a federal judge is trying to run the river with blatant disregard for the critical needs of the Northwest. He is clearly advocating for one side while ignoring the necessary balance between people and the environment. . . . [W]e will watch very carefully the way that the region responds to the judge's ruling, particularly with regard to the way the remand order is implemented.³⁷⁷

The excoriating and threatening tone of this statement no doubt reflects a political calculation by Idaho's senators and representatives as to what will aid their reelection. It would hardly be surprising if an Idaho judge were to make a similar political calculation in deciding whether the time has come for Idaho nuisance law to evolve to make the exercise of a water right a public nuisance if it harms endangered species, or in deciding whether the Idaho statute barring application of the public trust doctrine to water rights is valid.³⁷⁸

A future takings case by Idaho municipalities, irrigation districts, or district members against the United States for ESA reductions in contract water deliveries will not be in an Idaho state court; it will be in the Court of

³⁷³ See *Potlatch Corp. v. United States*, 12 P.3d 1260, 1270–71 (Idaho 2000) (Trout, C.J., dissenting) (acknowledging her changed attitude towards the doctrine of federal reserved water rights).

³⁷⁴ Justice Jesse R. Walters, Jr. was born December 26, 1938. IDAHO BLUE BOOK 2003–2004, 200. He retired from the court in 2003. See Fred Hoopes, *A Career That Shines*, 46 ADVOCATE (Idaho), June 2003, at 4.

³⁷⁵ *Am. Rivers, Inc. v. NOAA Fisheries*, No. CV-04-0061-RE, 2006 WL 1455629, at *1 (D. Or. May 23, 2006).

³⁷⁶ *Id.* at *11.

³⁷⁷ *Litigation/Environment: American Rivers, Inc. v. NOAA Fisheries/ESA*, WESTERN STATES WATER, Issue No. 1671 (May 26, 2006).

³⁷⁸ See Act of Mar. 19, 1996, ch. 342, § 1, 1996 Idaho Sess. Laws 1148–49 (codified at IDAHO CODE ANN. § 58-1203 (2006)). See generally Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461, 487 (1997) (arguing against the validity of the statute).

Federal Claims.³⁷⁹ If the case goes before a judge like Judge Allegra, the decision reached about the evolution of Idaho nuisance law, or about the validity of the statute barring application of the public trust doctrine to water rights, might be quite different than an Idaho state court would have reached.

Idaho is not representative of all western states. The California Supreme Court based *National Audubon* on public perception in California regarding the values of instream flows, a public perception differing greatly from that in Idaho.³⁸⁰ With varying public perceptions among western states, one might expect state nuisance and public trust law regarding limitations on water rights to evolve differently. Courts in states with large and rapidly growing urban centers may be more adventurous than courts in more rural states where the political influence of irrigation interests remains more significant.

For less adventurous states, an interesting question is whether they can do anything about the risk of getting a more adventurous Court of Federal Claims judge in takings litigation. For more adventurous states, the parallel question is whether they can do anything about the risk of getting a less adventurous claims court judge. States concerned about this might consider invoking a technique long used by state and local governments when issuing bonds to finance public works projects plagued by legal uncertainties that would adversely affect bond sales: engineer litigation designed to resolve the legal uncertainties.

An Idaho bond case illustrates this technique. There, a state agency wanted to enter into a joint venture with a private power company to build a dam and hydroelectric plant,³⁸¹ but there were various unsettled questions about the agency's legal authority to do so.³⁸² The agency directed one of its officials to join with the private company in filing an application for the project with the Federal Power Commission, but the official refused on the ground that the agency lacked authority to proceed.³⁸³ The agency could have fired the official and hired a replacement willing to join in the application, but that would have left the legal issues unsettled and made the revenue bonds the agency needed to issue to finance the project unsaleable. Instead of firing the recalcitrant official, the agency brought a mandamus action to compel him to file the application.³⁸⁴ The official defended on the ground that the agency lacked legal authority to participate in the project.³⁸⁵ The trial court, and ultimately the Idaho Supreme Court, resolved the unsettled legal issues and cleared the way for sale of the bonds.

³⁷⁹ See *supra* note 12 and accompanying text.

³⁸⁰ See *Nat'l Audubon*, 658 P.2d 709, 719 (Cal. 1983) (noting the objective of the public trust has evolved in tandem with changing public perception of values and uses of waterways).

³⁸¹ *Idaho Water Res. Bd. v. Kramer*, 548 P.2d 35, 40 (Idaho 1976).

³⁸² See *id.* at 50–72 (discussing the various unsettled questions).

³⁸³ *Id.* at 40.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 55.

A state might do something similar to fill in gaps in its nuisance and public trust law as to preexisting title limitations on water rights. In a less adventurous state, for example, an official in the state fish and game agency might sue state water administrators in state court on a nuisance or public trust theory to compel them to curtail exercise of a nonfederal³⁸⁶ water appropriation harmful to fish. Alternatively, state water administrators might curtail or threaten to curtail an appropriation, and then the appropriator (backed financially by an irrigation trade association) could file suit against the state administrators in state court. Likely intervention by environmental groups would assure vigorous presentation of their views on the issue. Even if the court finds a stringent preexisting limitation on water rights under nuisance or public trust law, at least the issue will have been resolved by state judges rather than a distant Court of Federal Claims judge interpreting state precedent.

V. CONCLUSION

Whether the Bureau's reduction of contracted water deliveries to comply with the ESA is a taking of property raises a series of issues. In many instances, contracting municipalities and irrigation districts or district members will have property rights protected by the Fifth Amendment Takings Clause. Whether a given delivery reduction takes property, however, depends greatly on whether the action is classified as a per se physical taking or as a regulatory taking judged by *Penn Central* multifactor balancing. Although proper classification is uncertain because of a gap in Supreme Court takings precedents, the Court's cases on temporary takings during wartime provide at least some basis to conclude that reduced water deliveries belong in the per se physical taking category. If that conclusion is accepted, a delivery reduction would be a taking unless the water right was subject to a preexisting title limitation that allowed the reduction. State common law regarding preexisting title limitations on water rights under nuisance and the public trust doctrine is unsettled in most western states. A state eager to control the evolution of that law could pursue litigation in state court that would take interpretive discretion away from the Court of Federal Claims in takings cases concerning its residents.

³⁸⁶ If the diversion were federal, the United States presumably would be an indispensable party, and the suit would have to be in federal court unless it came within a provision of the McCarran Amendment, 43 U.S.C. § 666(a) (2000), allowing suit in state court for the administration of water rights previously determined in a general adjudication.