

1-1-2011

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Recommended Citation

Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365 (2011).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol51/iss2/1>

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PHYSICAL TAKINGS, REGULATORY TAKINGS, AND WATER RIGHTS

Josh Patashnik*

INTRODUCTION

In the West, few types of private property are more valuable than the right to divert and use water from lakes, rivers, and streams. Like other forms of property, this right is protected by the Takings Clause of the Fifth Amendment of the U.S. Constitution, which requires federal, state, and local governments to pay just compensation when they take private property for public use.¹

Not all claims arising under the Takings Clause are analyzed in the same manner. Courts have long distinguished between physical appropriations of property by government and regulations that merely impose economic burdens on property owners. When the government physically appropriates private property, “it has a categorical duty to compensate the former owner.”² When, however, the government imposes economic burdens on property owners through regulation, but does not physically appropriate property, courts will determine whether compensation is due by conducting an “essentially ad hoc, factual inquir[y]” that

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I owe thanks to Buzz Thompson, for supervising my research and for his enthusiasm for water law; to Dave Owen and Rod Walston, for their helpful comments; and to Steve Macfarlane, Bill Shapiro, Charlie Shockey, and Deedee Sparks at the U.S. Department of Justice—Environment and Natural Resources Division field office in Sacramento, for their guidance and mentorship. The arguments made in this paper are solely mine, and do not reflect the views of the Department of Justice or any of the individuals named above. All errors, of course, are mine alone as well.

1. U.S. CONST. amend. V.

2. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

balances a number of relevant factors.³ With few exceptions,⁴ courts are generally reluctant to find a taking in the regulatory context.⁵ As a result, the question of whether to apply a categorical physical takings rule or the *Penn Central* regulatory takings balancing test often plays a central role in determining whether property owners are paid compensation.

In its landmark 2002 opinion in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Supreme Court drew a stark line between physical and regulatory takings,⁶ putting an end to speculation that the two lines of cases were merging into one.⁷ Although this sharply dichotomous approach has not met with universal

3. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). In *Penn Central*, the Court identified several factors as particularly important in determining whether a taking has occurred, including the decline in value of the property, the plaintiffs' investment-backed expectations, what remains of the plaintiffs' property right, and the physical character of the governmental action. *Id.* at 125.

4. The Supreme Court has identified two categories of regulatory action that, like physical takings, are to be analyzed under a categorical rule requiring compensation. The first, *Loretto*-type takings, are regulations that require property owners to submit to a "permanent physical occupation" by the government or by a third party. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); see also *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987). The second, *Lucas*-type takings, are regulations that deprive a property owner of "all economically beneficial uses" of her property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original). The potential applicability of the *Loretto* and *Lucas* rules in the water rights context is discussed in Part II *infra*.

5. See, e.g., Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 26 (1995) (noting that "[c]ourts only rarely find regulatory takings"); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 329 (1997) (noting that "lower courts typically give no consideration to the possibility of requiring compensation outside the context of existing categorical takings").

6. 535 U.S. at 323 (holding that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation that there has been a 'regulatory taking,' and vice versa").

7. Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 574 (2003) (arguing that prior to *Tahoe-Sierra*, temporary development moratoria—the government action at issue in that case—seemed to be a "natural context for an extension" of the *Lucas* rationale that some regulatory takings should be subject to a per se rule requiring compensation); Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 ENVTL. L. 1, 9 (2003) (suggesting that *Lucas*'s treatment of some regulatory takings as practically equivalent to physical takings had led the *Tahoe-Sierra* plaintiffs to believe that the Court would expand further the category of regulatory takings subject to a per se rule).

acclaim,⁸ the Court appears committed to the principle that all takings claims must be analyzed as either a regulatory taking, a physical taking, or a *Loretto*- or *Lucas*-type taking subject to a categorical takings rule (essentially equivalent to treating them as physical takings).⁹

This approach creates an obvious problem in the context of water rights: restrictions on the diversion and use of water in some respects resemble regulatory action, but in other respects, they bear significant physical characteristics. It is not immediately apparent which category alleged takings of water rights fall into. That problem is the subject of this paper. I conclude that, although alleged takings of water rights cannot fit neatly into either category, the best approach is to treat them as subject to a categorical rule, requiring the government to pay compensation whenever it deprives owners of the ability to use their water in a manner otherwise permissible under background principles of state law.¹⁰

This article proceeds in three main parts. Part I provides a short history of the past century's water-rights takings jurisprudence. The history reveals that, although early water-rights takings cases that were decided before the Supreme Court had clearly articulated the distinction between regulatory and physical takings, alleged takings of water rights have often been treated as subject to a categorical rule requiring compensation. The past decade has witnessed a series of cases in which this conclusion has been re-examined. In the majority of these cases, though not in all of them, courts have reaffirmed the principle that, at least in

8. See, e.g., Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5, 19 (arguing that the distinction helps to "render incoherent the entire body of takings law"); Andrea L. Peterson, *The False Dichotomy between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra's Distinction between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381, 392-93 (2007) (arguing that courts should ask instead whether principles of fairness require the payment of compensation, regardless of whether the taking is regulatory or physical).

9. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005).

10. The concept of "background principles" refers to the set of state property and tort doctrines that impose pre-existing limitations on the rights of property owners. These limitations "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-29 (1992). See discussion *infra* Part III.A.

certain factual settings, government-mandated reductions in the amount of water owners of water rights may use are to be treated as categorical takings. Most recently, in *Casitas Municipal Water District v. United States*,¹¹ the Federal Circuit undertook perhaps the most thorough judicial examination of the question to date and applied a categorical physical takings analysis.

Yet neither the Federal Circuit in *Casitas*, nor the parties or amici in that case, nor courts or commentators addressing the question in other factual settings, have conducted a thorough evaluation of the numerous rationales offered for treating water-rights takings as either physical or regulatory. Part II catalogues, and highlights the flaws in, these rationales, concluding that there are serious problems—rooted in logic, practicality, and precedent—with treating all alleged water-rights takings as either regulatory or physical. Part II then proceeds to consider the lines some courts and commentators have proposed drawing, whereby some alleged water-rights takings would be analyzed as regulatory takings and others would be analyzed as physical takings. While this approach holds out some promise of creating a water-rights takings doctrine that closely tracks the physical/regulatory distinction in the land context, I conclude that such a doctrine is unlikely to succeed. It would produce distinctions between different kinds of restrictions on water rights that would be arbitrary and meaningless in practice, and that bear no relationship to the degree of intrusiveness or harm that an owner of a water right has suffered. By drawing comparisons to the approaches taken by courts in resolving alleged takings of mineral rights, trade secrets, and interest accrued on legal judgments, I conclude that while the physical/regulatory framework can be adapted fairly well to other non-real forms of property, it is uniquely poorly suited to alleged takings of water rights.

Finally, Part III lays out the case for adopting a categorical takings rule, requiring alleged water-rights takings to be treated as essentially physical, rather than regulatory. This approach would be somewhat overprotective of property rights: it is likely that the government would have to pay compensation in some cases where it would not have

11. 543 F.3d 1276 (Fed. Cir. 2008).

been required to if finer distinctions could be drawn. But, for several reasons—most notably, the variety of background principles limiting the exercise of water rights—there will likely not be many of these cases. Moreover, the benefits of adopting a categorical rule are numerous. A categorical approach refocuses judicial attention away from tantalizing but ultimately fruitless physical-or-regulatory inquiries and toward the more important, but often ignored, question of background limitations on the exercise of water rights; it provides a bright-line approach that avoids costly and fact-intensive litigation over whether to treat a taking as physical or regulatory; it furthers principles of federalism by reaffirming the primacy of state property law in water allocation; and a categorical approach will promote the development of this body of law by explicitly pitting competing potential uses of water against each other. These benefits likely outweigh any drawbacks to adopting a categorical rule.

I. EVOLUTION OF WATER-RIGHTS TAKINGS DOCTRINE

A. *The Twentieth Century*

Modern water-rights takings jurisprudence relies heavily on a handful of twentieth-century Supreme Court decisions.¹² These cases introduced both of the key principles underlying recent lower-court decisions. First, the nature of a property right in water is limited by a variety of background principles that often permit the government to regulate water rights in the public interest without paying compensation. Second, however, when the government seeks to curtail water diversions in a manner that exceeds its authority under those background principles, it will usually be found to have effected a categorical taking.

The Court's first major foray into this legal field in the twentieth century came in 1908, in *Hudson County Water Co.*

12. For a more thorough discussion of past water-rights takings cases than is merited here, see James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur?*, 9 U. DENV. WATER L. REV. 1, 23–56 (2005). Courts have entertained similar claims since the early days of the republic, prior to the development of modern takings jurisprudence. See generally John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287 (2004).

v. McCarter.¹³ In that case, the petitioner, an owner of riparian rights in New Jersey's Passaic River,¹⁴ planned to divert water and sell it to users on Staten Island.¹⁵ Robert McCarter, the attorney general of New Jersey, sought to enjoin the petitioner from transporting the water to another state.¹⁶ Among other arguments, the petitioner contended that such an order would constitute a taking of its riparian right for which the Fifth Amendment required compensation.¹⁷ In rejecting the takings claim, Justice Holmes, writing for the Court, concluded that a riparian right is "subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."¹⁸ Because the petitioner's riparian right never encompassed the right to transfer water out of the state, New Jersey could not be said to have taken it.¹⁹

It is important to understand the basis for the Court's holding in *Hudson County*. In its brief before the Federal Circuit in *Casitas*, the government contended that the *Hudson County* Court had "declined to apply a per se physical takings analysis," demonstrating that alleged water-rights takings are to be "evaluated by apply[ing] a regulatory takings analysis."²⁰ But this conclusion is problematic for two reasons. First, at the time *Hudson County* was decided, the regulatory takings doctrine did not exist; it was not until fourteen years later, in *Pennsylvania Coal Co. v. Mahon*,²¹ that the Court first held the government liable for a

13. 209 U.S. 349 (1908).

14. Under the common law riparian rights doctrine prevalent in most of the eastern United States, an owner of property adjacent to a waterway holds a number of rights, including the right to reasonable use of the flow of the waterway. See generally 78 AM. JUR. 2D *Waters* §§ 30–32 (2002).

15. *Hudson County*, 209 U.S. at 353.

16. *Id.*

17. *Id.* at 354.

18. *Id.* at 356.

19. *Id.* ("[I]t appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.").

20. Brief of Appellee the United States at 54, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153), 2008 WL 396616 at *54.

21. 260 U.S. 393 (1922).

regulatory taking.²² Thus, the fact that the Court entertained a takings claim in *Hudson County* at all suggests that it thought it was confronting a potential physical taking. Second, as discussed above, the language of the opinion makes clear that *Hudson County* was decided not on the grounds that a physical taking could not have occurred, but that there had been no taking because there were initial, background limitations on the owner's property right.²³ Since the government may successfully raise such a defense even in cases that would otherwise constitute categorical physical takings,²⁴ there is no reason at all to believe that the *Hudson County* Court was rejecting a physical takings approach in water rights cases.

Indeed, in other cases, the Court did analyze alleged water-rights takings under a categorical rule. While it was not until decades later, in *Penn Central*, *Loretto*, and *Tahoe-Sierra*, that the Supreme Court fully articulated the distinction between regulatory and physical takings, the language used by the Court in these earlier cases—holding the government liable for takings of water rights—describes physical deprivations of property, rather than the sort of overly burdensome regulation found to constitute a taking in *Mahon*. The first of these cases was *International Paper Co.*

22. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325 (2002) ("As we noted in *Lucas*, it was Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* that gave birth to our regulatory takings jurisprudence." (citation omitted)).

23. Other commentators have read *Hudson County* differently, arguing that the case was, in fact, decided by applying an (as-yet-nonexistent) regulatory takings analysis, rather than on background principles grounds. See, e.g., John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 VT. J. ENVTL. L. 579, 605 (2010). But this claim is ultimately unpersuasive. The *Hudson County* Court repeatedly spoke of property rights being limited by other considerations. 209 U.S. at 355–56 ("The limits set to property by other public interests . . ."; "The private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health." (emphasis added)). This language of property rights being limited clearly indicates that the Court believed the plaintiff's property right, from the outset, did not extend so far as he had claimed—not, by contrast, that his property right was valid but that the government's regulation did not disturb it enough to be considered a taking.

24. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992) (citing *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900), for the proposition that the government will not be held liable for alleged physical takings that simply enforce "pre-existing limitations upon the land owner's title," such as the federal navigational servitude).

v. United States.²⁵ In *International Paper*, the government ordered the petitioner to forego its right to divert and use water from the Niagara River during World War I, so that a power plant could use it instead to generate electricity for industrial production.²⁶ The Court held the government liable for a taking:

The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to *take the use . . .* [T]he government *intended to take and did take the use of* all the water power in the canal²⁷

The Court's emphasis on the government's taking of the use of the water in *International Paper* indicates that, as later courts and commentators have recognized, it concluded that a physical taking had occurred.²⁸ The opinion is bereft of the sort of language about government regulation overstepping its bounds, or going too far, that one would expect to find in a regulatory takings decision of that era.²⁹

Other important twentieth-century water-rights takings precedents arose in California from the operation of the federal government's Central Valley Project (CVP). The CVP, in tandem with the state's parallel State Water Project, significantly reworked the hydroscape of California.³⁰ In two of these cases, *United States v. Gerlach Live Stock Co.*,³¹ and *Dugan v. Rank*,³² riparian landowners along the San Joaquin River brought suit against the federal government, whose construction of Friant Dam upstream of their lands deprived the landowners of seasonal overflow to which they claimed a riparian right.³³ The Supreme Court held that the

25. 282 U.S. 399 (1931).

26. *Id.* at 405.

27. *Id.* at 407–08 (emphasis added).

28. *E.g.*, *Washoe County, Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (identifying *International Paper* as a physical takings case); Douglas L. Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1365–66 (2006) (same).

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

30. See generally DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* 233–43 (1985).

31. 339 U.S. 725 (1950).

32. 372 U.S. 609 (1963).

33. *Dugan*, 372 U.S. at 610–11; *Gerlach*, 339 U.S. at 729–30.

government's plan to impound water behind Friant Dam amounted to a physical taking of the landowners' water rights, since the water to which they had a riparian right had been physically prevented from reaching their land.³⁴ Justice Clark, speaking for a unanimous Court in *Dugan*, recognized that because "[a] seizure of water rights need not necessarily be a physical invasion of land," the government could be said to have physically taken water rights even if it left undisturbed the land to which those rights were appurtenant.³⁵

In *Ivanhoe Irrigation District v. McCracken*,³⁶ however, a third case stemming from the CVP, the Court declined to find a taking of water rights. The respondents contended that two provisions of federal reclamation law prohibiting CVP water from being sold for use on farms exceeding 160 acres in size constituted a taking of their contractual water rights.³⁷ In holding that no taking had occurred, the Court concluded that because the water rights in question were subject to "the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges," the acreage provision merely enforced pre-existing limitations on the respondents' property rights.³⁸ Thus, just as *Gerlach* and *Dugan* confirm the Court's holding in *International Paper* that restrictions on water rights, at least in certain circumstances, constitute categorical physical takings, *Ivanhoe* provides another example of the principle applied in *Hudson County* that the government will not be required to pay compensation for regulations that reflect

34. *Dugan*, 372 U.S. at 625 (holding that the government's actions "constitute[d] an appropriation of property for which compensation should be made"); *Gerlach*, 339 U.S. at 752–53 ("No reason appears why those who get the waters should be spared from making whole those from whom they are taken.").

35. *Dugan*, 372 U.S. at 625; see also Scott Andrew Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation, and Ecological Protection in the Western Water Law Context*, 17 N.Y.U. ENVTL. L.J. 1063, 1112 (2009) ("[The Court] recognized that the property at issue is the water itself, not the land on which the water is going to be used. (Invasion of that land would constitute a separate physical taking.) Thus, when the government orders that the water be redirected from the right holder's uses to the government's uses, it has taken physical command—or physical occupancy—of the property for its own purposes.").

36. 357 U.S. 275 (1958).

37. *Id.* at 277–78, 294.

38. *Id.* at 295–96.

background limitations on water rights.

B. Tulare Lake and Subsequent Cases

Takings jurisprudence generally, and the distinction between physical and regulatory takings specifically, developed significantly in the last few decades of the twentieth century. In addition, the proliferation of federal environmental statutes in the 1960s and '70s created the potential for allegations of water-rights takings in a variety of new factual contexts that seemed more susceptible to regulatory takings treatment than earlier cases had been. It was thus not entirely clear whether courts would continue to apply a categorical rule to alleged takings of water rights. In 2001, however, Judge John Wiese of the Court of Federal Claims issued a much-discussed opinion that did just that. In *Tulare Lake Basin Water Storage District v. United States*, irrigators in the San Joaquin Valley, who had water contracts with the federal and state governments, claimed that the Bureau of Reclamation had effected a taking when it reduced water deliveries to them in order to comply with its obligations under the Endangered Species Act (ESA) to protect endangered winter-run Chinook salmon.³⁹ In holding the government liable—the first time a court had ever found that ESA-based restrictions on water rights constituted a Fifth Amendment taking⁴⁰—the court employed a physical takings analysis:

Case law reveals that the distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is “so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it.”⁴¹

The court equated the restrictions on water use with the

39. 49 Fed. Cl. 313, 314–15 (2001).

40. Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 552 (2002).

41. *Tulare Lake*, 49 Fed. Cl. at 319 (quoting *United States v. Causby*, 328 U.S. 256, 265 (1946)). The court analogized the government’s action in *Tulare Lake* to the frequent flights at low altitude over a landowner’s property in *Causby*, reasoning that in both cases the government, while not taking physical possession of the plaintiffs’ property, had imposed such a severe burden on the property as to leave the plaintiffs in essentially the same position as if the land had been physically taken.

impoundment of water behind a dam in *Gerlach* and *Dugan*, because “whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference.”⁴² It also refused to accept the government’s claim that background limitations on the plaintiffs’ water rights under California law precluded the finding of a taking, holding that a decision by the State Water Resources Control Board (SWRCB) had already determined that state law posed no barrier to the exercise of the plaintiffs’ water rights.⁴³

Tulare Lake prompted a good deal of scholarly response. A few commentators defended the court’s application of a categorical physical takings rule to the government conduct.⁴⁴ Most commentators, however, took issue with both the court’s application of a categorical rule and its cursory treatment of California water law.⁴⁵ In the critics’ view, because “the government did not divert the water for its own use, but instead regulated how plaintiffs could apply it to their uses,”

42. *Id.* at 320.

43. *Id.* at 321–24.

44. See Jesse W. Barton, *Tulare Lake Basin Water Storage District v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL’Y J. 109, 136 (2002) (arguing that a physical takings analysis is appropriate, even in the absence of a physical invasion of property, because the “core right of the interest” in water is the right to use it, which merits the protection of a categorical rule); Grant, *supra* note 28, at 1372 (“[I]mplementation 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.”).

45. See 4 WATERS AND WATER RIGHTS § 41.05(c) n.359 (Robert E. Beck ed., 2004) (describing the decision as “analytically weak” and its takings analysis as “novel, if not bizarre”); John D. Echeverria & Julie Lurman, “Perfectly Astounding” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 361 (2003) (accusing *Tulare Lake*’s physical occupation theory of contradicting both Supreme Court and Federal Circuit precedent); Brittany K.T. Kauffman, Note, *What Remains of the Endangered Species Act and Western Water Rights After Tulare Lake Basin Water Storage District v. United States?*, 74 U. COLO. L. REV. 837, 870 (“It is . . . more accurate to say that the water user’s ability to use the water was restricted by government regulation rather than physically taken by the government.”); John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 2010–11 (2005); Cori S. Parobek, Note, *Of Farmers’ Takes and Fishes’ Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 213 (2003) (arguing that *Tulare Lake* “misunderstands the physical occupation test and the nature of water rights”).

a physical takings analysis was inappropriate.⁴⁶ And the court had seemingly ignored clear California case law holding that courts have an independent duty, apart from any SWRCB decision, to apply background state law limitations on water rights, including the requirement that all appropriated water be put to beneficial use.⁴⁷

Although the Justice Department decided to pay compensation rather than appeal *Tulare Lake*, the case's value as precedent has been somewhat eroded by subsequent opinions. In *Klamath Irrigation District v. United States*,⁴⁸ a fellow judge on the Court of Federal Claims criticized Judge Wiese's ruling in *Tulare Lake* as being "wrong on some counts [and] incomplete in others."⁴⁹ *Klamath* took issue mainly with *Tulare Lake*'s treatment of state law,⁵⁰ though it did recognize in a footnote that its physical occupation holding had been the "subject of intense criticism."⁵¹ A panel of the California Court of Appeal took more direct aim, concluding that *Tulare Lake*'s categorical physical takings approach was "flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation."⁵² Other courts, however, remained favorably inclined to the physical takings approach in *Tulare Lake*, suggesting that the government could be said to have effected a physical taking if it "physically reduced the quantity of water" available to a water right owner, even if no diversion or appropriation was involved.⁵³ Aside from the California Court of Appeal in *Allegretti*, considering the issue in a

46. Benson, *supra* note 40, at 584 (emphasis omitted).

47. *Id.* at 574–75 (citing *EDF v. East Bay Mun. Util. Dist.*, 605 P.2d 1, 10 (Cal. 1980) and *People ex rel. State Water Res. Control Bd. v. Forni*, 126 Cal. Rptr. 851, 871 (Cal. Ct. App. 1976)).

48. 67 Fed. Cl. 504 (2005).

49. *Id.* at 538.

50. *Id.*

51. *Id.* at 538 n.59.

52. *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1275 (2006).

53. *Washoe County, Nev. v. United States*, 319 F.3d 1320, 1327 (Fed. Cir. 2003) (favorably citing *Tulare Lake* but declining to find a taking since the government had merely refused a permit application for a water pipeline project to cross federal land); *see also Hage v. United States*, 82 Fed. Cl. 202, 211 (2008) (finding a physical taking where the government "actively prevented [the plaintiffs] from accessing the water through threat of prosecution for trespassing and through the construction of the fences").

groundwater context,⁵⁴ no other court has clearly disavowed *Tulare Lake*'s physical takings holding, despite the torrent of academic criticism it occasioned.⁵⁵

C. Casitas

The Federal Circuit's 2008 opinion, in *Casitas Municipal Water District v. United States*,⁵⁶ is the most thorough judicial exploration since *Tulare Lake*—indeed, in many ways it is more thorough than *Tulare Lake*—of the physical/regulatory takings distinction as applied to alleged takings of water rights. Yet, if anything, the primary effect of *Casitas* will be to add even more confusion to the mix than existed before the case. The Federal Circuit found a physical taking in *Casitas*, but based its opinion on factual circumstances so unique to the case that it remains an open question how, or whether, it will be applied as precedent in more ordinary settings.

Casitas concerned the operation of the Ventura River Project, authorized by Congress in 1956.⁵⁷ In 2003, in response to a biological opinion issued by the National Marine Fisheries Service (NMFS), the plaintiff water district constructed a fish ladder, allowing endangered steelhead trout on the Ventura River to bypass a diversion dam redirecting a portion of the river's flow into the Robles-Casitas Canal, which transports water from the river to the Casitas Reservoir.⁵⁸ In order for the fish ladder to function,

54. *Allegretti* concerned the validity of Imperial County's conditional approval of the plaintiff's application for a permit to activate a well on his property. The county had approved the permit on the condition that Allegretti not extract more than 12,000 acre-feet of water per year from the well, a condition he claimed amounted to a taking. 138 Cal. App. 4th at 1267. Given the differences between groundwater and surface water allocation law in California, and the county's discretion in approving the well permit in the first place, it is an open question whether *Allegretti* is useful precedent in cases concerning alleged takings of surface water rights—though the language of the court's opinion is sufficiently broad as to seem applicable in surface water takings cases too.

55. As discussed in Part I.C *infra*, Judge Wiese himself felt compelled to renounce *Tulare Lake* in his *Casitas* opinion, an opinion that was then reversed by the Federal Circuit.

56. 543 F.3d 1276 (Fed. Cir. 2008).

57. Pub. L. No. 84-432, 70 Stat. 32 (1956). All of the facilities at issue in the case, including the Casitas Dam, the Casitas Reservoir, the Robles Diversion Dam, and the Robles-Casitas Canal, were constructed pursuant to the Project and are located in Ventura County, California, northwest of Los Angeles.

58. *Casitas*, 543 F.3d at 1282.

the water district had to release some of the water it had diverted that otherwise would have flowed into the reservoir.⁵⁹ The water district filed suit against the federal government in 2005, alleging a breach of contract and a Fifth Amendment taking of its water.⁶⁰ The case arrived at the Federal Circuit at the summary judgment stage, on appeal from a Court of Federal Claims opinion authored by none other than Judge Wiese, who departed from the approach he had taken in *Tulare Lake*, finding in *Casitas* that no physical taking had occurred.⁶¹ Though he deemed the question “not . . . an easy one to decide” and pronounced himself “tempted” to use a physical takings approach, he concluded that the stark line the Supreme Court drew in *Tahoe-Sierra* precluded him from doing so.⁶²

Under the facts as assumed for the purposes of the government’s summary judgment motion, the Federal Circuit reversed and applied a categorical physical takings rule.⁶³ The court found the case analogous to *International Paper, Gerlach*, and *Dugan*, because, as in those cases, “the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the [plaintiff’s canal].”⁶⁴ The court also brushed aside the possibility that background principles of California law might have placed pre-existing limitations on *Casitas*’s water right.⁶⁵ In fact, its treatment of this issue was even more superficial than the *Tulare Lake* court’s. In that case, the court at least cited a comprehensive SWRCB opinion as justification for declining to take up a background-limitations inquiry.⁶⁶ In *Casitas*, by contrast, the Federal

59. *See id.*

60. *Id.* For reasons not relevant to the takings discussion here, both the Court of Federal Claims and the Federal Circuit rejected *Casitas*’s breach-of-contract theory. *Id.* at 1284–86.

61. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (2007).

62. *Id.* (“Although from the property owner’s standpoint there may be no practical difference between the two, *Tahoe-Sierra* admonishes that only the government’s active hand in the redirection of a property’s use may be treated as a per se taking.”)

63. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

64. *Id.* at 1291.

65. *See id.* at 1288, 1295.

66. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001).

Circuit baldly (and dubiously) stated that the government had conceded that Casitas had a valid water right.⁶⁷ In part because of this failure to address the background principles defense, once the Federal Circuit denied the government's petition for an *en banc* rehearing of the case,⁶⁸ the SWRCB urged the federal Department of Justice to seek certiorari from the Supreme Court.⁶⁹ The Solicitor General decided against this course of action, however, and the case was remanded to the Court of Federal Claims for trial.⁷⁰

Casitas has not yet prompted nearly as much attention from commentators as *Tulare Lake* received,⁷¹ but its physical takings approach has led some to speculate that it could produce a proliferation of successful takings challenges to federal and state water regulations under the ESA and other statutes.⁷² Russ Baggerly, a Casitas board member opposed to the suit, predicted that if *Casitas* "stands as good law, there isn't going to be enough money in the treasury to deal

67. *Casitas*, 543 F.3d at 1288. While the scope of the government's concession is disputed, the government certainly had not conceded that Casitas's proposed use of its water did not violate the beneficial use requirement, public trust doctrine, and other pre-existing limitations under California law. The government did not develop these arguments as thoroughly as it might have, perhaps accounting for the Federal Circuit's cursory treatment of the issue at the summary judgment stage. See *Casitas Mun. Water Dist. v. United States*, 556 F.3d 1329, 1331 n.1 (Fed. Cir. 2009) (Moore, J., concurring in denial of rehearing *en banc*). Yet, given the centrality of these background principles to the case, see Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States' Motion for Partial Summary Judgment on Liability at *4–5, *Casitas*, 543 F.3d 1276 (No. 2007-5153), 2007 WL 4984849 [hereinafter SWRCB Amicus Brief], the Federal Circuit's failure to say more about this issue is puzzling, to say the least.

68. *Casitas*, 556 F.3d 1329. Judge Moore, joined by two other judges, wrote an opinion concurring in the denial of rehearing *en banc*. *Id.* at 1331. Judge Gajarsa, joined by two other judges, wrote an opinion dissenting from the denial of rehearing *en banc*. *Id.* at 1333.

69. Letter from Tara L. Mueller, Deputy Attorney General of the State of California, on behalf of Edmund G. Brown, Jr., Attorney General of the State of California, to Gregory G. Garre, Solicitor General of the United States (Oct. 20, 2008), available at <http://www.esablawg.com/esalaw/ESBlawg.nsf/d6plinks/KRII-7KQ3XZ>.

70. Jennifer Koons, *Supreme Court: Obama Admin Declines to Appeal Key Water-Rights Case*, GREENWIRE, July 21, 2009, available at <http://www.eenews.net/public/Greenwire/2009/07/21/1>.

71. For the most thorough discussion of the *Casitas* opinion written to date, see Echeverria, *supra* note 23.

72. See Jennifer N. Horchem, Comment, *Water Scarcity: The Need to Apply a Regulatory Takings Analysis to Partial Restrictions on Water Use*, 48 WASHBURN L.J. 729, 754 (2009).

with all the takings claims all across the country.”⁷³ That conclusion is premature and is likely wrong. Though its opinion is not a model of clarity, the Federal Circuit does not appear to have held that all takings of water rights are to be treated as categorical physical takings. Rather, the court’s analysis rested entirely on the premise that because the water in question had already been diverted from the Ventura River into the Robles-Casitas Canal, the government “physically caused Casitas to divert water away” from its conveyance and back into the river.⁷⁴ Though the court never explicitly said so, the clear import of its holding is that if the government truly had “just require[d] that water be left in the river,” a regulatory takings analysis would likely apply.⁷⁵ The wisdom and viability of this distinction is open to question—and is explored in Part II.C.1—but it is clear that the factual circumstances present in the *Casitas* case will be relatively rare.⁷⁶ Most potential plaintiffs in water-rights takings cases are not dam owners who operate a fish ladder, but rather owners of appropriative rights to divert water directly from a river or stream. *Casitas* says even less than *Tulare Lake* about how to analyze these run-of-the-mill cases. Far from being a landmark water-rights takings precedent, *Casitas* seems likely to be instead remembered as a relatively minor case.

This leaves water-rights takings doctrine in a state of considerable uncertainty. This is not necessarily a bad thing; as Professor Joseph Sax has argued, “uncertainty—a fear that the alternative could be worse—may be the incentive

73. Zeke Barlow, *Ruling Favors Casitas District*, VENTURA COUNTY STAR, Sept. 27, 2008, available at <http://www.calcoast.org/news/coast0080927.html>; see also Zeke Barlow, *Casitas Suit Could Set Major Precedent*, VENTURA COUNTY STAR, Apr. 25, 2007, available at <http://www.vcstar.com/news/2007/Apr/25/casitas-suit-could-set-major-precedent/> (quoting Professor Echeverria, after the Court of Federal Claims ruling in *Casitas*, but before the appeal, as saying that the case “could potentially convert every regulation of water use into an unconstitutional taking and basically freeze the government in its tracks”).

74. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1295 (Fed. Cir. 2008).

75. *Id.* at 1294.

76. In particular, after *Casitas*, federal agencies confronted with similar situations are all but certain to ask appropriators to design diversion systems in a manner that simply requires water to be left instream, effectively mooting *Casitas* by regulatory design.

needed to bring all the relevant actors to the table in search of a mutually acceptable solution.”⁷⁷ In at least some cases, this has been an effective alternative to litigation.⁷⁸ But it seems unlikely that deliberately leaving this area of law unsettled is a viable long-term solution. If the West experiences increasing water scarcity over the next several decades, the number of potential takings claims can be expected to rise. Given the frequency with which courts have been asked to adjudicate water-rights takings claims this decade, the odds that all, or even most, of these conflicts will be settled out of court is low. At some point, the Federal Circuit, and possibly the Supreme Court, will likely need to clarify the doctrine.

II. THE RATIONALES FOR PHYSICAL AND REGULATORY TAKINGS TREATMENT, AND WHY THEY FAIL

Among the difficulties courts have had so far in resolving the various justifications offered for both a categorical physical takings approach and a regulatory takings approach is that the arguments in favor of each are often conflated in ways that make it difficult to understand precisely which factors are supposed to determine the outcome of any given case. In this Part, I look independently at each of the primary justifications offered for applying a categorical rule to all water-rights takings, for applying a *Penn Central* regulatory takings rule to all water-rights takings, and for attempting to distinguish between different kinds of water-rights takings, such that some would be treated as physical and some would be treated as regulatory. I conclude that while some rationales are better than others, none are fully satisfactory.

77. Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2377, 2384 (2000). It is a view shared by some members of Congress. Former New Mexico Senator Pete Domenici has said, “I do not know . . . whether we want them [irrigators in New Mexico] to go to court and see if they really have water rights under the Endangered Species Law.” *Id.*

78. See, e.g., Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 111 (2003) (detailing an agreement by the federal government to make cash payments to compensate farmers in New Mexico for water left in the Pecos River when a native fish, the Pecos bluntnose shiner, was listed as endangered).

A. *Rationales for a Categorical Physical Takings Approach*

Some commentators have argued in favor of treating essentially all water-rights takings as physical takings. Professor Scott Andrew Shepard, for instance, has argued that the physical/regulatory takings dilemma in the water rights context “is a false one: water-rights takings fit neatly into current doctrine as physical takings, and are straightforwardly subject to compensation.”⁷⁹ There are three primary rationales that have been offered for using this approach.

1. *The Tulare Lake rationale: immediacy and directness*

The weakest of the three rationales offered is the one advanced by the *Tulare Lake* court: water-rights takings can be analogized to the categorical taking found in *United States v. Causby*, because in both cases, the government’s impairment of a property right is “so immediate and direct” as to render the plaintiff unable to “use [the] land for any purpose.”⁸⁰ This argument fails for several related reasons. First, in *Causby*, there *was* an actual physical invasion: military aircraft overflow the plaintiffs’ property, physically invading their airspace.⁸¹ In an otherwise identical situation lacking a physical invasion—where aircraft noise and smoke afflicted a plaintiff’s property but the aircraft passed only over adjacent land—the Tenth Circuit declined to find a taking.⁸² Thus, *Causby* cannot be said to stand for the proposition that a categorical takings rule should apply, even in the absence of a physical invasion, if the governmental action nevertheless is so direct and immediate as to deprive the plaintiff of all use or value of her land.

There is, of course, a case that does stand for that

79. Shepard, *supra* note 35, at 1111.

80. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) (quoting *United States v. Causby*, 328 U.S. 256, 265 (1946)). For a similar argument, see Barton, *supra* note 44, at 130.

81. *United States v. Causby*, 328 U.S. 256, 259 (1946).

82. *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962). *Batten* explicitly distinguished *Causby* on the grounds that no physical invasion of the plaintiff’s land had occurred. *Id.* at 584. *But see* *Martin v. Port of Seattle*, 391 P.2d 540, 545 (Wash. 1964) (“We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff’s land.”).

proposition: *Lucas v. South Carolina Coastal Council*.⁸³ And, indeed, water-rights takings seem like a strong candidate for the *Lucas* categorical rule requiring compensation for regulatory actions that deprive an owner of “all economically beneficial or productive use of land.”⁸⁴ But there is an obvious hurdle to finding a taking of water rights under the *Lucas* rule. The *Lucas* rule applies only when a plaintiff is deprived of all economically beneficial use of her parcel of land as a whole.⁸⁵ In most water rights cases, including both *Tulare Lake*,⁸⁶ and *Casitas*,⁸⁷ the plaintiff is deprived of only a small portion of her water right, meaning that the “parcel as a whole”—the water right in its entirety—has not been rendered entirely valueless.⁸⁸ If the entire water right were taken, the plaintiff would be able to make a strong *Lucas*-type claim, but otherwise such an argument will fail.⁸⁹ That has

83. 505 U.S. 1003 (1992). Some commentators have noted that the fact that the Supreme Court developed a new category of per se takings liability in *Lucas* indicates that it did not believe that deprivation of all value would suffice to create a *Loretto*-type physical invasion—because if it had believed that, the Court could simply have applied the *Loretto* rule rather than creating the new deprivation-of-all-use rule. Leshy, *supra* note 45, at 2010.

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

85. *Id.* at 1016 n.7; see also *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 568 (1984).

86. See 49 Fed. Cl. 313, 315–16 (2001) (noting that the water district was deprived of between zero and three percent of its allocation).

87. See 76 Fed. Cl. 100, 102 & n.3 (noting that the water district was deprived of approximately three percent of its allocation).

88. Benson, *supra* note 40, at 586 (“Looking at the parcel as a whole in *Tulare* means looking at the whole water right.”).

89. It is possible that even if the entire water right were taken, a *Lucas* claim could still fail because the water right might be said to be part of the same “parcel” as the land to which it is appurtenant, and that “parcel” retains economic value. Cf. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987) (not applying *Lucas*-type test to coal, even if all of the coal was taken, because it is considered part of a larger parcel of land). This rationale might be better suited to riparian rights, which are directly bound to riparian land and cannot be transferred separate from it, than to appropriative rights, which can be transferred independently. See JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 28 (4th ed. 2006). In any case, the question is mostly an academic one, since water rights—either riparian or appropriative—are rarely abrogated in their entirety, and when they are, a categorical rule has been applied on independent grounds. See, e.g., *Int'l Paper Co. v. United States*, 282 U.S. 399, 405–06 (1931). A more difficult question would arise if a water right were abrogated in its entirety, but only temporarily; in other contexts, the

been the result reached in ESA-based suits concerning real property, where courts have refused to apply a physical takings analysis, and have also refused to award compensation under *Lucas*, where the plaintiff was deprived of all economically beneficial use of only part of her property.⁹⁰

2. *The “last strand in the bundle” rationale*

A second argument often raised in favor of applying a physical takings analysis to water rights is that because water rights are usufructuary rights only, restrictions on water use effectively deprive owners of the “last strand in the bundle” of property rights in water.⁹¹ That is, because a water right consists only of the right to use water, restrictions on use completely eliminate an owner’s property interest in the water at issue—as opposed to restrictions on land use, which leave owners with, among others, the rights to possess and dispose of the property.

The principal problem with this theory of physical takings is that the Supreme Court has never endorsed it, and in fact seems to have rejected it. In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,⁹² Chief Justice Rehnquist, writing in dissent, would have adopted this approach in awarding compensation to landowners forbidden by state statute from mining coal under their property. Because, in his view, the regulation “does not merely inhibit one strand in the bundle, but instead destroys completely any interest” in the coal, a categorical takings rule should have applied.⁹³ The Court,

Court has declined to find a taking where the plaintiff was deprived of all the value of his property but only temporarily. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330–31.

90. *E.g.*, *Seiber v. United States*, 364 F.3d 1356, 1366–69 (Fed. Cir. 2004); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353–55 (Fed. Cir. 2002).

91. See, *e.g.*, *Int’l Paper*, 282 U.S. at 407; *Tulare Lake*, 49 Fed. Cl. at 319 (“In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water.”); Amicus Curiae Brief of Pacific Legal Foundation in Support of Appellant Casitas Municipal Water District at 7, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153), 2007 WL 4618651 (“[B]ecause a denial of private water use terminates the only private interest, transferring it to the public, and leaving no rights in the hands of the former owner, physical taking principles should apply under the logic of *Tahoe-Sierra*.”).

92. 480 U.S. 470 (1987).

93. *Id.* at 518 (Rehnquist, C.J., dissenting) (citation omitted). In support of

however, came to a different conclusion. It held that absent a physical appropriation of property, or a *Loretto*-type permanent physical occupation of part of the property, a categorical rule would not be applied even if the regulation “destroy[ed] . . . real property interests.”⁹⁴ This holding is in accord with the Court’s language in *Loretto*, where Justice Marshall emphasized that the reason a permanent physical occupation should be subject to a categorical rule is not that it takes the last strand in the bundle of property rights, but that it “chops through the bundle, taking a slice of every strand.”⁹⁵ Where, by contrast, a property owner’s rights are limited from the outset by other principles of property law, the fact that a regulation takes the only remaining strand is irrelevant to the question of whether a physical or regulatory takings analysis should apply.⁹⁶

Applying a categorical rule to all alleged takings that deprive an owner of the last strand in her bundle of property rights would also have strange practical consequences. First,

his argument that a regulation destroying the last strand in a bundle of property rights should be subject to a categorical takings rule, Chief Justice Rehnquist cited *Andrus v. Allard*, 444 U.S. 51 (1979). That case, however, held only that a categorical rule would *not* apply where only one strand in the bundle was destroyed and other strands remained; it was silent on the question of what analysis should be used where the only strand in the bundle was destroyed. See *Allard*, 444 U.S. at 65–66 (“At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”).

94. *Keystone*, 480 U.S. at 489 n.18. Other courts have also applied a regulatory takings analysis to regulations that take the right to mine coal, even though the Supreme Court has held (in *Mahon* and other cases) that the right to mine is the only strand in the bundle of property interests in coal. See, e.g., *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1150 (Fed. Cir. 1995).

95. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

96. A related, but slightly different, argument is that a categorical rule should apply whenever a regulation takes a right “whose importance is so central to the property interest” that without it, “the other rights have little meaning because the loss is so complete.” Barton, *supra* note 44, at 130. But this inquiry, too, is orthogonal to the question of whether a regulatory or physical takings approach should apply. If the government restricts a “core” right, courts are more likely to award compensation under the *Penn Central* regulatory takings balancing test. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716–18 (1987) (finding a regulatory taking under *Penn Central* when the government restricted the right to devise property, a right the Court deemed to be critical). A physical invasion or appropriation is still required, however, before a categorical rule applies.

it would totally divorce the physical/regulatory takings distinction from its grounding in physical appropriation and invasion; even purely regulatory governmental actions, with no hint of any physical intrusion, could result in categorical takings under that rule. Second, perversely, the rule would afford greater protection to more limited forms of property ownership; the fewer strands in one's bundle of property rights to begin with, the greater the risk that a particular state action will take the last strand and thus expose the government to categorical takings liability, even if that action would amount only to a potential regulatory taking of more robust forms of property ownership.⁹⁷ It is difficult to see what conceivable justification there could be for such an odd rule.

3. *The "permanently gone" rationale*

A somewhat more persuasive rationale for applying a categorical rule to water-rights takings concerns the physical consequences of restrictions on water use. Whereas other types of regulation—prohibiting development on part of a parcel of land, for instance, or requiring minerals to be left in the earth unmined—do not physically deprive the property owner of any property, water molecules taken by the government or left in a stream are “permanently gone,” unrecoverable by the owner.⁹⁸ The argument is aided by an analogy to wartime mining cases, where the Supreme Court found a taking only when the government physically seized and operated a mine, extracting minerals from it, rather than merely ordering it to cease operations.⁹⁹

97. Thus, some commentators have noted the strange result that, under this rule, usufructuary rights in water, which are more uncertain and less absolute than property rights in land, would be subject to a greater degree of takings protection than land ownership. See, e.g., Leshy, *supra* note 45, at 2011; Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 369–70 & n.295 (2009) (collecting cases declaring property rights in land to be stronger than property rights in water).

98. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008); see also Grant, *supra* note 28, at 1371–72.

99. Compare *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165–66 (1958) (no taking because “the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them. All that the Government sought was the cessation of the consumption of mining equipment and manpower in the gold mines and the conservation of such equipment and manpower for more essential war uses”

Yet, there are several problems with applying this theory to water-rights takings. First, a water right does not confer ownership of particular molecules of water; it confers only the right to use the water.¹⁰⁰ The fact that water rights are usufructuary does not mean they cannot be subject to a physical taking,¹⁰¹ but it means that the question is not whether the water *molecules* have been physically taken, but whether the right to *use* the water has been. The distinction is a logical one because water, unlike coal or land, is a perennial resource, constantly renewing itself. A molecule of water may conceivably be used several times by the same owner of water rights, depending on patterns of evaporation and precipitation. Whereas a unit of land or coal, once taken, can never be recovered by the owner, a water right confers the ability to use a particular quantity of water each year, and the fact that a reduction in water appropriation was mandated in a particular year has no lasting effect on the quantity of water available to the owner in future years. It is thus directly analogous to the development moratorium in *Tahoe-Sierra* and the mining moratorium in *Central Eureka*: all are temporary restrictions on current economic activity that do not necessarily prevent the plaintiff from resuming that activity in the future.¹⁰²

This important distinction, between actual seizure of a water right and other forms of physical interference with water rights, is often overlooked by courts. In *Hage*, for instance, the Court of Federal Claims found a physical taking on the grounds that, by erecting a fence around a stream so that the plaintiff's cattle could not access the water to drink,

(citation omitted)), *with* United States v. Pewee Coal Co., Inc., 341 U.S. 114, 116 (1951) (finding a taking where the government required mine workers to conduct operations as agents of the government, placed placards reading "United States Property!" outside of mines, and removed coal from the mine).

100. See, e.g., *Eddy v. Simpson*, 3 Cal. 249, 252 (1853) ("[T]he right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."); see also SAX ET AL., *supra* note 89, at 27; Leshy, *supra* note 45, at 2009.

101. See *infra* Part II.B.1.

102. See Horchem, *supra* note 72, at 746–47 ("One could imagine, however, that value was lost on developments, property taxes, or rental income during the thirty-two months the developers sat idle while the moratorium was in place [in *Tahoe-Sierra*]. Whatever purpose for which the land could have been used during those thirty-two months 'is forever gone.'" (quoting *Casitas*, 543 F.3d at 1296)).

the Bureau of Land Management had physically ousted the plaintiff from access to the water.¹⁰³ Yet it is clear that the right to use the water was not physically taken, because the BLM had done nothing to use the water itself or to prevent the plaintiff from using the water by other means, such as building a diversion ditch.¹⁰⁴

A second major problem with the “permanently gone” rationale is that courts have held that the physical/regulatory distinction hinges particularly on the “character of the governmental action,” rather than its consequences.¹⁰⁵ And, as Professor Melinda Harm Benson has argued, “it is not uncommon for regulatory actions to have physical results.”¹⁰⁶ In *Keystone*, for instance, the outcome did not hinge on the possibility that the owner of the coal would be able to extract it at some point in the future; rather, the Court emphasized that no physical taking had occurred even if, from the owner’s perspective, the ability to remove the coal had been destroyed forever.¹⁰⁷ Nor does the fact that a regulation might cause a plaintiff’s interest in a piece of property to vanish transform a regulatory takings claim into a physical takings claim. In *Forest Properties v. United States*, the Army Corps of Engineers denied the plaintiff’s application for a permit under § 404 of the Clean Water Act—a classic regulatory action.¹⁰⁸ The plaintiff alleged a physical taking, on the theory that the permit denial would have the effect of physically depriving him of his property. The plaintiff’s deed contained a reversionary clause returning the property to the former owner, a local water district, if the land was not excavated and filled within a certain period of time; this excavation could not be effected because of the permit denial.¹⁰⁹ The court rejected that argument, concluding that the fact that a regulation might have the effect of causing a

103. *Hage v. United States*, 82 Fed. Cl. 202, 211 (2008).

104. Joseph M. Feller, Making It: The Legend of Wayne Hage 8 (Nov. 6–7, 2008) (11th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Environmental Regulation) (on file with author).

105. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

106. Benson, *supra* note 40, at 584.

107. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 498–99 (1987).

108. 177 F.3d 1360, 1363 (Fed. Cir. 1999).

109. *Id.* at 1362.

physical deprivation of property did not make a physical takings analysis appropriate.¹¹⁰

B. Rationales for a Regulatory Takings Approach

Other commentators have suggested that a regulatory takings approach is better suited to the water rights context. It is more difficult to argue that all water-rights takings should be subject to regulatory treatment rather than a categorical rule, since Supreme Court precedent clearly indicates that a categorical rule is appropriate for at least some water-rights takings. Yet at least three justifications have been offered for subjecting all water-rights takings claims to a regulatory takings analysis.

1. The “only a usufructuary right” rationale

The most widespread of these justifications is the claim—made by, among others, the dissenting judge on the Federal Circuit panel in *Casitas*—that because water rights are usufructuary, nonpossessory rights, they cannot be the object of a physical taking or physical invasion, and must thus, be analyzed as a regulatory taking.¹¹¹ There are several points to be made in response. First, there is no authority for the proposition that only possessory rights can be the subject of physical takings. To the contrary, the water rights at issue in *International Paper*, *Gerlach*, and *Dugan* were usufructuary, but this did not prevent the Supreme Court from applying a categorical, physical takings rule. And there are a variety of other types of nonpossessory property interests, including easements and leaseholds, that have been the subject of physical takings.¹¹² In these cases, the takings analysis

110. *Id.* at 1365.

111. See, e.g., *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1298 (Fed. Cir. 2008) (Mayer, J., dissenting in part) (“[B]ecause *Casitas* possesses a usufructuary interest in the water and does not actually own the water molecules at issue, it is difficult to imagine how its property interest in the water could be physically invaded or occupied.”); *Horchem*, *supra* note 72, at 748 (“Here, the water district only had a right to use water—a non-possessory property interest—which cannot be physically occupied by a mere restriction on use.”); *Parobek*, *supra* note 45, at 213 (“[T]he regulation could not have resulted in a physical invasion because the District did not have possession of the water, but rather the mere use of it.”).

112. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (leaseholds); *United States v. Welch*, 217 U.S. 333 (1910) (easements); see also Barton H. Thompson, Jr., *Takings and Water Rights*, in *WATER LAW: TRENDS*,

proceeded no differently than it would have if it had been a possessory right in question. While it may be accurate to say that nonpossessory property rights cannot be physically *invaded*, physical invasion is not a necessary condition of a physical taking. If the government expropriates the official title to one's home, a physical taking has occurred regardless of whether the government ever physically invades or occupies the property.

Moreover, it is wrong to describe water rights, as some advocates of a regulatory-takings approach do, as mere usufructuary rights whose exercise is simply regulated by restrictions on water diversions.¹¹³ Water rights are better viewed as usufructuary rights with significant physical components: they appertain to a specific piece of land and they are valid only on that land.¹¹⁴ In nearly all states, an appropriation is valid only for off-stream consumption—no appropriation can be made for instream use.¹¹⁵ Moreover, in order for a water right to be perfected, “some element of possession or other control [of the water] is essential.”¹¹⁶ A requirement that an owner of a water right leave some of her allotment in the stream does not merely regulate her use of the water; it actually eliminates these physical incidents of the water right. This elimination occurs because the water in question is no longer being put to beneficial use on the land to which it appertains, and the water right owner is no longer

POLICIES, AND PRACTICE 47 (Kathleen Marion Carr & James D. Crammond eds., 1995).

113. See, e.g., Benson, *supra* note 40, at 584 (contending that the regulation merely “places limits on how [the water] right can be exercised to protect the common good (in this case, species protection)”).

114. See, e.g., High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120 P.3d 710, 717 (Colo. 2005) (“Because they are perfected only by actual use, appropriations of surface water and tributary ground water . . . have a *situs* that includes the point of diversion and the place where the actual beneficial use occurs.”) (emphasis added); Salt Lake City v. Silver Fork Pipeline Corp., 5 P.3d 1206, 1220 (Utah 2000) (“[W]ater rights are appurtenant to land on which the water is beneficially used.”); Dermody v. City of Reno, 931 P.2d 1354, 1358 (Nev. 1997) (“[W]ater rights are appurtenant to benefitted [sic] land.”); 78 AM. JUR. 2D *Waters* § 6.

115. SAX ET AL., *supra* note 89, at 142 (“Only Alaska and Arizona explicitly allow private individuals or organizations to hold appropriations for instream flows.”); see also Jesse A. Boyd, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 NAT. RESOURCES J. 1151 (2003) (surveying state instream flow laws).

116. Fullerton v. State Water Res. Control Bd., 90 Cal. App. 3d 590, 599 (1979).

exercising any physical possession or control over the water. Put simply, the owner of the water right has no legal ability to use it in the manner the regulation requires.¹¹⁷ Treating water-rights takings no differently than run-of-the-mill restrictions on property use ignores these important physical dimensions of the water right that restrictions on water appropriations destroy.

2. *The “no right to exclude” rationale*

Other commentators have emphasized that the hallmark of a physical taking or an invasion is the loss of the right to exclude others from one’s property,¹¹⁸ and that because users of water rights lack the right to exclude, a categorical takings rule is inappropriate.¹¹⁹ This argument is at odds with the twentieth century Supreme Court water-rights takings precedents, which applied a categorical rule even though the right-to-exclude analysis would have been no different.¹²⁰ It is also at odds with more recent Supreme Court doctrine that has applied a categorical rule to governmental takings of other non-real property interests, where the right to exclude is no more readily evident than it is in the water rights

117. Indeed, although there is no case law directly on point, there is a possibility that an owner of a water right subject to pumping restrictions could be found to have forfeited a right to any water the government requires to be left instream, if the regulation endures for long enough. *See* *Sears v. Berryman*, 623 P.2d 455, 459 (Idaho 1981) (forfeiture occurs “where the appropriator fails to make beneficial use of the water for a continuous five year period”). Some courts will refuse to find forfeiture in cases where the failure to make beneficial use occurred due to circumstances over which the appropriator had no control, *Jenkins v. State, Dep’t of Water Res.*, 647 P.2d 1256, 1262 (Idaho 1982), but others may not.

118. *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

119. SWRCB Amicus Brief, *supra* note 67, at 19–20.

A water right holder . . . has no right to the exclusive use of water in the stream By definition, then, a restriction on an appropriator’s right to take and use water from the stream, as the biological opinion did here, lacks the essential defining feature of a permanent physical occupation or invasion: the ouster from or intrusion on a possessory interest in property which prevents the owner from excluding others from possession and use of that property.

Id.

120. If anything, the right to exclude was weaker in *International Paper*, *Gerlach*, and *Dugan* than in *Casitas*, because those cases concerned riparian rights. Owners of riparian rights hold only a conjunctive right to beneficial use of the water, shared with other riparian users—in contrast with appropriative rights, which confer the right to sole use of a specific quantity of water.

context.¹²¹ Some scholars, moreover, have questioned whether the right to exclude is really the hallmark of property ownership that it is widely believed to be.¹²²

More importantly, there *is* a ready analogue of the right to exclude in the water rights context: the ability of a senior appropriator to enjoin junior appropriators and non-appropriators from removing water from a river or stream, if their doing so would impede her ability to withdraw her full allotment of water.¹²³ It is true that a water right owner does not, until she withdraws the water from the river, have the right to exclude others from the use of any particular molecule of water.¹²⁴ But she does have the right to exclude everyone but appropriators senior to her from using the waters of the stream, as a whole, in a manner that would interfere with her appropriation. She can exclude upstream users by bringing suit to enjoin their use of the water, and she can exclude downstream users by diverting the water and making beneficial use of it on her land. When the government imposes restrictions on the amount she may divert, it does not affect her right to exclude upstream users; she may still bring suit against them. The restriction does,

121. See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). In *Brown* and *Webb's*, the Court applied a categorical rule to governmental appropriations of interest earned on funds required to be deposited in court-supervised accounts.

122. See, e.g., Eric T. Freyfogle, *Goodbye to the Public-Private Divide*, 36 ENVTL. L. 7, 16–17 (2006).

123. *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. 8, 26 (1929) (“So far as the rights of the prior appropriator are concerned any use which defiles or corrupts the water so as to essentially impair its priority and usefulness for the purpose for which the water was appropriated by the prior appropriator is an invasion of his private rights for which he is entitled to a remedy both at law and in equity.”); Barton, *supra* note 44, at 132 (“[T]he right to use, the chief characteristic of a water right, necessarily includes the right to exclude others from using the water, similar to a landowner’s right to exclude others from entering his property.”).

124. *Palmer v. R.R. Comm’n*, 167 Cal. 163, 168 (1914) (“One may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be a part of the stream.”); *Parks & Canal Mining Co. v. Hoyt*, 57 Cal. 44, 46 (1880) (“[A]lthough [an] appropriator may be entitled to the flow of the stream undiminished, the water in the stream *above his ditch* is not his personal property The appropriator certainly does not become the owner of the very body of the water until he has acquired control of it in conduits or reservoirs”).

however, deprive her of her right to exclude downstream users, for she can no longer undertake the action that prevents junior appropriators and non-appropriators downstream from using the water to which she has a priority above them. If the language from *Loretto* and *Kaiser Aetna*, suggesting that the loss of the right to exclude is the primary characteristic of a physical invasion or occupation of property, is given full effect, then the loss of the right to exclude downstream users of water surely suffices to make a categorical physical takings rule appropriate, even though the right to exclude upstream users is not affected.¹²⁵

3. *The “obvious and undisputed” rationale*

A third argument for applying a regulatory takings analysis arises from a somewhat puzzling footnote in Justice Stevens’s majority opinion in *Tahoe-Sierra*. In distinguishing physical from regulatory takings, Justice Stevens opined that “[w]hen the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed.”¹²⁶ In its brief before the Federal Circuit in *Casitas*, the government cited this language several times in arguing that no such physical invasion had occurred.¹²⁷

It is difficult to know precisely what Justice Stevens meant by this footnote, or how it can be applied as precedent. There are, after all, many instances in which it is not at all obvious or undisputed whether a physical or regulatory takings analysis should apply.¹²⁸ There are many such cases in the water rights context alone; the *Casitas* court pointed

125. Cf. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831–32 (1987) (finding a loss of the right to exclude, and thus a permanent physical occupation under *Loretto*, “even though no particular individual is permitted to station himself permanently upon the premises”).

126. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 n.17 (2002).

127. Brief of Appellee the United States, *supra* note 20, at 44–45.

128. See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (applying a categorical takings rule despite a lack of consensus among the parties that such a rule was appropriate); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1197 (Fed. Cir. 2004) (noting that it is “not so clear” whether the government effected a physical taking by seizing and destroying potentially diseased hens); *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (recognizing the difficulty in determining when the *Loretto* permanent physical invasion categorical rule should apply); see also Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 937.

out that even in *International Paper*, *Gerlach*, and *Dugan*, it was not clear from the outset that any taking had occurred.¹²⁹ Moreover, it is hard to see how such a rule could be applied. Wherever the line is drawn between physical and regulatory takings, it seems inevitable that some cases will fall close to that line; in those close cases it will not be obvious and undisputed which test should be used.¹³⁰ Justice Stevens may have simply been endorsing the view put forth by other jurists and commentators—that categorical takings rules are normally disfavored, because they are “too blunt an instrument” to determine whether compensation is required.¹³¹ But that general principle is simply too vague to provide much guidance as to what sort of analysis should apply in any individual situation.

C. Possible Lines Distinguishing Physical and Regulatory Takings of Water Rights

Because neither a physical nor a regulatory takings approach seems to fit in all cases, the possibility of drawing a line, whereby some alleged water-rights takings would be treated as physical and others would be treated as regulatory, carries intuitive appeal. There are two main distinctions that have been proposed: first, between active and passive governmental activity, and second, between regulations that require water to be kept instream for environmental uses and regulations that transfer water to consumptive use by the government or by a third party.

1. The active/passive distinction

In 1990, more than a decade before *Tulare Lake* opened a new era in water-rights takings jurisprudence, Professor Sax perceived that “the only new water law regulation that would *prima facie* raise a taking problem is a release requirement: requiring existing appropriators to make releases in order to augment instream flows for public purposes such as

129. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1293 (Fed. Cir. 2008).

130. See Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 454 (2004).

131. *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001); see also Leshy, *supra* note 45, at 2014.

ecosystem protection and public recreation.”¹³² Such a requirement, Sax argued, “might well be viewed as a ‘physical invasion.’”¹³³ That same rationale was the one relied upon by the Federal Circuit in *Casitas*: in the court’s view, because the NMFS biological opinion required *Casitas* to release water it had already removed from the Ventura River, “[t]he United States actively caused water to be physically diverted away from *Casitas*.”¹³⁴ In fact, the government urged the court to adopt such a distinction, though it apparently did not anticipate that the court would determine that *Casitas*’s situation fell on the “active” side of the active/passive line.¹³⁵ The distinction was also advocated by other commentators before *Casitas* was decided,¹³⁶ and has been used by some courts.¹³⁷

The main appeal of this distinction is that it is closely tied to notions of physical appropriation: once water has been removed from a river or stream, any requirement that it be physically returned seems more akin to a seizure than to regulatory action. But there are several problems with crafting a rule along these lines. The first is that, on its own, the rule seems to be both overinclusive and underinclusive: It is overinclusive because, in other settings, courts sometimes do apply a regulatory takings analysis even to government actions that impose active, affirmative duties upon property owners.¹³⁸ At the same time, a rule relying on an active/passive distinction is underinclusive because it describes cases as regulatory takings that Supreme Court

132. Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 263 (1990).

133. *Id.*

134. *Casitas*, 543 F.3d at 1294. According to the court, the government had admitted that it “did not just require that water be left in the river, but instead physically caused *Casitas* to divert water away from the Robles-Casitas Canal and towards the fish ladder.” *Id.* at 1295.

135. Brief of Appellee the United States, *supra* note 20, at 49 (arguing that in *International Paper*, *Gerlach*, and *Dugan*, unlike in *Casitas*, “the government caused water to be physically diverted away from the user”).

136. See, e.g., Kauffman, *supra* note 45, at 870–71 (“Unlike the government’s active use of the water in *International Paper*, in *Tulare* the government passively required the water users to leave the water in the stream.”).

137. See, e.g., *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1275 (2006) (distinguishing a “passive restriction, which require[s] . . . water users to leave water in the stream” from active diversion or appropriation).

138. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177 (Fed. Cir. 2004).

precedent suggests should be subjected to a categorical takings rule. In *International Paper*, for instance, the government's restriction was passive: it required user A to leave water in the stream so that user B could divert it instead.¹³⁹ Similarly, in *Gerlach* and *Dugan*, the government did not require the plaintiffs to put water back in the stream; it prevented them from being able to make use of water in the first place—from the water right owner's perspective, a passive restriction.¹⁴⁰ These cases suggest that while a requirement that a water right owner release water already diverted may be sufficient to subject an alleged taking to a categorical rule, the active/passive distinction is not necessary, since there will be cases in which a categorical rule is applied to even passive regulation.¹⁴¹

A second problem with the active/passive distinction is that, in practice, it is not an easy rule to administer. First, the line between active and passive restrictions will be blurry in many cases, and will require expensive and fact-intensive litigation about the nature of an appropriator's diversion system. In *Casitas*, for instance, it was not clear from the outset whether the requirement that water sent down a fish ladder should qualify as active, since the water had already been removed from the Ventura River, or as passive, because of the physical proximity of the fish ladder to the river and the fact that the water was ultimately returned to the river after passing through the fish ladder.¹⁴² It will also often be difficult to determine what the appropriate temporal reference point is for characterizing a taking as active or

139. *Int'l Paper Co. v. United States*, 282 U.S. 399, 405–06 (1931).

140. *Dugan v. Rank*, 372 U.S. 609, 616 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 730 (1950). To be sure, the water in these cases was no longer physically present in the stream as it passed the plaintiffs' property, because it had been delivered to other users. But, as far as the plaintiffs themselves were concerned, it was unquestionably a passive restriction: they were required to do nothing at all.

141. This result should not be surprising. More than forty years ago, Professor Frank Michelman noted in his seminal article on takings that “[a] physical invasion test . . . can never be more than a convenience for identifying clearly noncompensable occasions. It cannot justify dismissal of any occasion as clearly noncompensable.” Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1228 (1967) (emphasis in original).

142. See *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1300 (Fed. Cir. 2008) (Mayer, J., dissenting).

passive; a creative government attorney will no doubt attempt to describe a release requirement as simply a retroactive limitation on water diversion designed to restore the passive status quo before the diversion occurred.¹⁴³

A more serious difficulty with the active/passive distinction is that the distinction is likely to prove arbitrary and meaningless in practice, and create perverse incentives for water rights owners.¹⁴⁴ Most owners of water rights will view pumping restrictions and release requirements as essentially equivalent: they each have the same impact on economic activity, leaving the owner in the same place.¹⁴⁵ Deciding whether to apply a categorical or regulatory takings rule—based on a distinction so divorced from the substantive values underlying the special treatment of physical invasions of real property—is formalism at its worst: it will result in disparate treatment of landowners in essentially the same position. It will also presumably spur property owners to develop diversion and wildlife protection systems that take water out of the river as soon as possible, in order to gain takings protection against a potential future release requirement—an incentive that is neither economically nor

143. The *Casitas* court rejected this argument under the facts of that case, but the outcome might have been different had the Ventura River Project not been operational for so many years before the need for a fish ladder arose. *Id.* at 1292 n.13 (opinion of the court) (“Contrary to the government’s assertions, the appropriate reference point in time to determine whether the United States caused a physical diversion is not before the construction of the Project but instead the status quo before the fish ladder was operational.”).

144. See Tara L. Mueller, Background Principles of California Water Law: The Threshold of a Water-rights Takings Claim 29–30 (Nov. 6–7, 2008) (arguing that the distinction between pumping restrictions and a release requirement is “artificial” and “makes no sense and is unworkable in practice”) (11th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Environmental Regulation) (on file with author); Amicus Curiae Brief of Amicus Curiae Natural Resources Defense Council in Support of the United States at 23, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153), 2007 WL 4984848 [hereinafter NRDC Amicus Brief] (“It is questionable whether there is any meaningful distinction between a requirement that water be left in the river and a requirement that water be passed through a fish ladder on its way down the river.”).

145. The same is not true in the land context; in this sense, water rights are qualitatively different. For real property interests, permanent physical occupation, but not regulation, “forever denies the owner any power to control the use of the property.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). It is only in the water rights context that a physical invasion burdens the property owner no more than a use regulation.

environmentally beneficial.¹⁴⁶ Thus, although drawing a line between active and passive restrictions on water use does, at first blush, seem to mirror the physical invasion rule for real property, it is not well suited to achieving the same end.

2. *The consumptive use/instream flow distinction*

The other primary distinction that has been proposed would apply a categorical takings rule when the government restricts water rights in order to permit itself or a third party to make consumptive use of the water, but use a regulatory takings approach when confronting restrictions on water rights designed to preserve water for instream use. This distinction has been widely endorsed by judges,¹⁴⁷ advocates,¹⁴⁸ and commentators,¹⁴⁹ and is the most promising and realistic approach for treating some water-rights takings as physical and others as regulatory. Importantly, it is compatible with Supreme Court water-rights takings precedent; *International Paper*, *Gerlach*, and *Dugan* were all examples of the government restricting the water right of one user to transfer the water to another user. Nevertheless, the doctrinal and practical difficulty that this approach would entail weighs heavily against it.

First, the Supreme Court has made clear that, outside the water context, a regulation does not become a physical taking simply because it causes a transfer of property from

146. See *Casitas*, 543 F.3d at 1300 (Mayer, J., dissenting) (“To differentiate between [active and passive governmental actions] on a deceptively simple theory of ‘diversion’ creates a perverse system of incentives, whereby form is elevated over substance, because self-selected methods of regulatory compliance can be manipulated and negotiated to arrive at preferred Fifth Amendment results.”).

147. See, e.g., *id.* (“Here, the government did not invade, seize, convey or convert *Casitas*’ property to consumptive or proprietary use.”); *Washoe County, Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (“In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use . . .”).

148. See, e.g., Brief of Appellee the United States, *supra* note 20, at 49; NRDC Amicus Brief, *supra* note 144, at 24; Amicus Curiae Brief of Law Professors in Support of the United States’ Petition for Rehearing and/or Rehearing En Banc at 9–10, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (No. 2007-5153), available at http://mainelaw.maine.edu/news/pdf/blog_signed_casitas_brief.pdf (last visited Sept. 2, 2010) [hereinafter Law Professors’ Amicus Brief].

149. Kauffman, *supra* note 45, at 871 (“In *Tulare*, the government did not take the water and use it for another purpose . . .”); Leshy, *supra* note 45, at 2008; Parobek, *supra* note 45, at 213.

one party to another. In *Yee v. City of Escondido*,¹⁵⁰ the plaintiff landlords argued that a rent-control ordinance amounted to a physical invasion of their property by transferring wealth to renters.¹⁵¹ The Court rejected that argument, noting that many regulations, including traditional zoning practices, have the effect of transferring wealth.¹⁵² The rent-control setting made the transfer in the case at hand “more *visible* than in the ordinary case,” but the Court nonetheless insisted that “the existence of the transfer in itself does not convert regulation into physical invasion.”¹⁵³ There is nothing to suggest that this principle is limited to rent-control ordinances, and no reason to believe that an A-to-B transfer should convert a regulatory action into a physical taking only in the water context.

There are also a variety of conceptual oddities about the consumptive use/instream flow distinction. Most obviously, the question of whether a particular governmental action would be treated as a regulatory or a physical taking would hinge on factors both temporally and spatially separated from the interaction between the government and the owner of a water right. From the owner’s perspective, that interaction is complete once the government has forced her to forego an appropriation from a river or stream; she presumably does not care, and may not even know, whether the water is used for instream purposes or for consumptive use. If, as the Supreme Court has suggested, a categorical physical takings rule is justified on the grounds that physical invasions and appropriations are more burdensome on property owners than mere regulation,¹⁵⁴ then the distinction between consumptive use and instream flow would seem to make little sense. The focus in a takings inquiry is on the loss suffered by the property owner,¹⁵⁵ and that loss is no greater when the government or a third party makes consumptive use of water

150. 503 U.S. 519 (1992).

151. *Id.* at 529.

152. *Id.*

153. *Id.* at 529–30.

154. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

155. See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652–53 (1981) (Brennan, J., dissenting); *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is what has the owner lost, not what has the taker gained.”).

it has taken.

Nor is it clear that the distinction could actually be administered. A single molecule of water is used numerous times, for many different purposes, during its journey in a river or stream. Water left instream to protect endangered species is likely to be consumptively used further downstream by junior appropriators; similarly, water left instream in order to permit a downstream user to make consumptive use of the water—the *International Paper* scenario—may well further instream environmental purposes *en route*. If governmental restrictions on water rights serve both to augment instream flows and to facilitate consumptive use that would not otherwise have been possible, as they often will, the distinction between the two is of little help in determining what sort of takings analysis should apply. To rely on this distinction, courts would have to inquire into the government's subjective motivation for imposing restrictions on owners of water rights—a recipe for confusion and unpredictability.

Moreover, even in theory, the distinction between consumptive use and instream flow is rather hazy, and the trend toward permitting appropriation and acquisition of water rights for instream purposes is making the distinction hazier. Some courts have held that keeping water for instream environmental purposes qualifies as consumptive use.¹⁵⁶ As the Federal Circuit wrote in *Casitas*, in response to the government's attempt to distinguish consumptive-use cases from instream-flow cases, "[i]f this water was not diverted for a public use, namely protection of the endangered fish, what use was it diverted for?"¹⁵⁷

The distinction between consumptive use and instream flow is particularly tenuous in light of the increasing use of

156. *E.g.*, *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 996 (D.N.M. 2002) (concluding that water used to benefit endangered species was being put to "beneficial consumptive use" as required by the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948).

157. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1293 (Fed. Cir. 2008). Note that in *Casitas*, the outcome likely did not hinge on the court's rejection of the consumptive use/instream flow distinction: the court seemed to rely primarily on the active/passive distinction in applying a physical takings analysis. Under the court's rationale, even if the government had actively required *Casitas* to release water down the fish ladder for a non-consumptive purpose, a physical takings analysis would have applied anyway.

state appropriation law to set aside water for instream flow purposes.¹⁵⁸ California is unique in its continuing refusal to allow the government or private organizations to acquire water rights for instream purposes.¹⁵⁹ In *Casitas*, the government and its amici emphasized this point in order to argue that the government could not have taken the water in question for instream use.¹⁶⁰ There is some irony, of course, in the government's tactical decision to rely on an antiquated, environmentally unfriendly provision of California law in order to defend its actions on behalf of endangered trout. More to the point, though, it is a defense that can succeed only in California, and perhaps not for much longer, if the state legislature decides to adopt the approach to instream flows taken by other Western states. In jurisdictions that permit the acquisition of water rights to be dedicated to instream flow, the distinction between regulatory action and a physical seizure of water rights is very narrow indeed, if perceptible at all. Why would a state governmental agency ever pay to acquire water rights to be used to augment instream flow, if the same result could be achieved at no cost by enacting a regulatory statute that requires water to be left instream?

3. *What makes water rights different?*

It is worth a closer examination into what separates alleged takings of water rights from takings of other forms of property—is the physical/regulatory takings framework flawed generally, or is the water context uniquely poorly suited to it? There is good reason to believe the latter is true. As Professors John D. Echeverria and Julie Lurman have noted, aside from water-rights cases, the argument that wildlife-protection regulations should be treated as physical takings “has met with almost complete failure in the federal and state courts.”¹⁶¹ Yet in water cases, the argument has

158. See Boyd, *supra* note 115, at 1152.

159. SAX ET AL., *supra* note 89, at 141.

160. Brief of Appellee the United States, *supra* note 20, at 35 n.10; SWRCB Amicus Brief, *supra* note 67, at 22–23 (“Under state law, only *Casitas* legally is entitled to appropriate and take physical control of the water [T]he United States currently has no legal right to appropriate, divert, use or exercise any physical control of Ventura River water for any purpose.”).

161. Echeverria & Lurman, *supra* note 45, at 377 & n.243 (collecting non-water-rights cases in which courts have refused to treat restrictions on

been significantly more successful. Intuitively, in adjudicating takings claims, judges seem to feel there is something about water that distinguishes it from other forms of property.

A comparison of the facts underlying wildlife protection cases demonstrates why this is so. Typical of the non-water wildlife regulation cases is *Boise Cascade Corp. v. United States*.¹⁶² In *Boise Cascade*, the plaintiff claimed that the federal government had effected a categorical taking of its property by obtaining an injunction prohibiting it from logging trees that were home to endangered northern spotted owls.¹⁶³ It claimed that the government had taken its right to exclude the owls and surveyors from the Fish and Wildlife Service, amounting to a physical occupation subject to the *Loretto* rule.¹⁶⁴ In rejecting this argument, the court noted that, notwithstanding the plaintiff's claim to the contrary, it was easy to distinguish between the regulation at issue and a *Loretto* physical occupation: the government had clearly not authorized a physical invasion of the property,¹⁶⁵ aside from sending surveyors to monitor the owls—an action the court regarded as effecting an essentially *de minimis* harm.¹⁶⁶ It was impossible to mistake the government's regulation for a seizure of the land to establish a wildlife refuge for the spotted owls, which would unquestionably be a categorical physical taking.

The government has argued that water rights cases are no different.¹⁶⁷ But they are—what was clearly distinguishable in *Boise Cascade* is no longer distinguishable in the water context: the government's action may be simultaneously both a regulatory restriction on use and a physical seizure. Modern takings jurisprudence is based upon the usually sensible idea that any particular

development designed to protect wildlife as physical takings).

162. 296 F.3d 1339 (Fed. Cir. 2002).

163. *Id.* at 1341–42.

164. *Id.* at 1352.

165. *Id.* at 1354 (“Boise claims that application of *Loretto* is appropriate here because it views occupation by wild spotted owls as indistinguishable from a forced government intrusion upon its land. These two situations are, however, very different.”).

166. *See id.*

167. Brief of Appellee the United States, *supra* note 20, at 44 (citing *Boise Cascade*, 296 F.3d at 1354).

governmental action must be either regulatory or physical, and cannot be both. In water cases, however, a landowner is unlikely to be able to tell any difference between the two, and characterizing a particular governmental action as one or the other, even if sometimes possible in theory, is likely to be literally impossible in a large number of cases.¹⁶⁸ The difficulty characterizing governmental actions also separates water rights from the mining cases cited by the government: in the mining context, there can be no mistaking a regulatory restriction for a physical seizure.¹⁶⁹ The government either takes physical possession of the mine and minerals or it does not; courts can easily distinguish between the two situations.¹⁷⁰

Even in cases concerning alleged takings of other forms of intangible property, the physical/regulatory framework makes far more sense than it does in water cases. In *Brown v. Legal Foundation of Washington*,¹⁷¹ for example, the Court applied a categorical takings rule to the practice, common to all fifty states, of requiring lawyers holding clients' funds to place the money in interest-bearing accounts, with the proceeds used to fund legal services for low-income residents.¹⁷² Because the money in question was actually transferred to a separate account, the Court had no trouble concluding that the transfer was more akin to a physical taking than to a regulation.¹⁷³ Likewise, when confronting alleged takings of trade secrets or intellectual property, courts can apply a categorical rule in a situation where the government makes use of the privileged information or disseminates it to a third party, while employing a *Penn Central* regulatory balancing test when it does not.¹⁷⁴ Like in the land and mining cases, but unlike in water cases, in

168. See *supra* notes 155–160 and accompanying text.

169. Brief of Appellee the United States, *supra* note 20, at 40–42 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951)); see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

170. *E.g.* *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 165–66 (“[I]t is clear from the record that the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them.”).

171. 538 U.S. 216 (2003).

172. *Id.* at 220–21.

173. *Id.* at 235.

174. See *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring) (proposing such a distinction).

intellectual property cases it will be fairly easy to determine which analysis should be applied, because the property owner is made demonstrably worse off.

III. ADVANTAGES OF A CATEGORICAL RULE

If neither a regulatory nor physical takings analysis is particularly well suited to resolving alleged water-rights takings, and if the main distinctions that might be drawn between the two present significant conceptual and practical difficulties, the fact remains that *some* approach—imperfect though it may be—must be used in determining whether the government is to be required to pay compensation in these cases. In this Part, I offer a variety of rationales for adopting a categorical rule, requiring the government to compensate owners of water rights whenever it requires them to forego an appropriation or diversion of water that is otherwise permissible under background principles of state property law.¹⁷⁵ This rule will almost certainly result in the government being held liable for more takings claims than it would be if finer distinctions between physical and regulatory takings of water rights could realistically be drawn. There is good reason to believe that the number of such overcompensatory cases will be limited, however, and will

175. The Supreme Court has been somewhat opaque in articulating what sorts of legal doctrines qualify as background principles that can defeat takings claims. The Court has suggested that it may limit the category to nuisance-like common law principles. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Justice Kennedy, by contrast, has indicated a willingness to consider a wider array of law, including, apparently, some statutes. *Id.* at 1035 (Kennedy, J., concurring) (“The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1982)). For discussion, see Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1016 (1997). More recently, in the wake of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held that a state statute does not become such a background principle immediately upon its adoption, courts have found newly developed state law to constitute a background principle if it is “consistent with the historical role played by the sovereign” in regulating. *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004); see also Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 355–58 (2005). Because all of the principles that might be at issue in water rights cases—the beneficial use requirement, public trust doctrine, public nuisance law, and wildlife protection laws—are deeply rooted in the historical role of government in general, and Western water law in particular, they seem likely to qualify as background principles.

only arise where the government has acted outside the scope of its traditional power to protect wildlife. By contrast, the main alternative—applying a *Penn Central* regulatory takings rule in all or most cases, despite the poor doctrinal fit—is likely to be dramatically undercompensatory.¹⁷⁶ The benefits of applying a categorical rule, moreover, are many.

A. Refocusing the Inquiry on Background Principles of Property Law

Perhaps the greatest advantage of adopting a categorical takings rule in water rights cases is that the outcome of such cases would then hinge on whether the plaintiff had a property right in the first place in the use of the water in question.¹⁷⁷ The inquiry into the nature of the property right is “logically antecedent” to the takings analysis, because if the use of water proposed by the plaintiff is already barred by water law principles, such as the beneficial use requirement or the public trust doctrine, the government cannot be liable for taking a nonexistent property right.¹⁷⁸ Even if the government physically appropriates property, if the result is an outcome that could have been achieved through regulation, courts will refuse to find a taking.¹⁷⁹

Yet discussion of background principles of state water law has been extremely limited in the major water-rights takings cases of the past decade. The *Tulare Lake* court relied solely on a decision of the California State Water Resources Control Board, refusing to conduct an independent analysis;¹⁸⁰ the *Casitas* court dodged the question entirely by claiming, dubiously, that the government had conceded the issue.¹⁸¹ It seems rather odd that so central a question seems to have been almost entirely ignored by courts, but one likely

176. See *supra* note 5 and accompanying text.

177. Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 28 (2002) (“[I]f other courts . . . apply a categorical takings standard, the determination *vel non* of the property right in water will be conclusive in water rights takings cases.”).

178. *Lucas*, 505 U.S. at 1027.

179. See, e.g., *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1197 (Fed. Cir. 2004); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1182 (Fed. Cir. 1994); *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 113 (1999).

180. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001).

181. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288 (Fed. Cir. 2008); see also *supra* note 67 and accompanying text.

explanation is that, as Professor Brian Gray has argued, federal judges are "[r]eluctant to delve into the nuances" of state water law doctrines with which they are unfamiliar.¹⁸² When given the chance, judges are apt to prefer focusing their analysis on the familiar and legally interesting question of whether a physical or regulatory takings test should apply. If, on the other hand, they apply a categorical rule from the outset, rendering the physical/regulatory distinction moot, judges will be more likely to perform a complete and thoughtful examination of background state property law principles, since only those principles will remain at issue.

There is ample reason to believe, moreover, that background principles should determine the outcome of water-rights takings cases. First, they more accurately track the impact of a regulation on a water right owner than the physical/regulatory distinction does: the clearer it is that a regulation has deprived the owner of a right she previously held, the stronger her claim for compensation. By contrast, whether the owner of a water right is fortuitous enough to have built a diversion system resembling Casitas's, or to have been excluded by a fence as rancher Hage was, is totally unrelated to the economic and equitable factors that should determine whether compensation is appropriate. Second, background principles provide a sort-of built-in balancing test: because the beneficial use requirement and public trust doctrine, among others, already take into account a variety of relevant factors in determining the extent of water rights, a *Penn Central* regulatory takings analysis would be largely duplicative.

Third, and most significantly, the principles themselves account for the unique features of water rights. In arguing against a categorical physical takings rule, some commentators have pointed out that the qualified, uncertain nature of water rights makes them ill-suited to categorical takings treatment.¹⁸³ Others have compared appropriators to

182. Gray, *supra* note 177, at 9. A related reason why background principles have not figured prominently in recent cases may be that the federal government, as the defendant in many takings cases, is reluctant to rest its takings defense too heavily on principles of state law, fearful that to do so would be to concede that *California v. United States*, 438 U.S. 645 (1978), was correctly decided and that its own water rights are subject to state appropriation law.

183. See, e.g., SWRCB Amicus Brief, *supra* note 67, at 18 ("The qualified

industrial polluters, contending that they should be no more entitled to takings protection than polluters were when the Clean Water Act and other environmental statutes removed their (quite lucrative) right to pollute waterways.¹⁸⁴ Still, others have argued that the long history of fish protection statutes should preclude finding a taking in the ESA setting.¹⁸⁵ At root, however, these are claims about the nature of the property right in water, and they are best addressed at the background principles stage of the takings inquiry. If, in any particular case, a water right truly is limited—by nuisance law, the public trust doctrine, the beneficial use requirement, or the historical reach of fish protection statutes—in ways that permit the government regulation at issue, then the government will not be liable, categorical rule or no. If, by contrast, the particular regulation in question is not contemplated by background property law principles, and the water right is thus not limited by them, then there is no reason for treating water rights as less susceptible to a categorical rule than other forms of property. In short, a focus on the nature of the property right in water will direct judicial attention to the factors that should be at the center of the inquiry, but for which the physical/regulatory distinction serves as a poor proxy in the water rights context.

B. A Bright-Line Rule That Reduces Uncertainty

Among the greatest shortcomings of the current doctrine is that it is all but certain to result in costly, unpredictable, fact-intensive litigation. Whether an alleged taking is analyzed under a categorical rule depends on a variety of factors unique to particular cases, such as the presence of a fence around a river or the design of a diversion system. In future cases, courts may be asked to determine what rule should apply if water is used first for instream use and then consumptively, or if the government restricts water rights in

nature of a water right under California law makes it impossible to characterize a restriction on water use as a physical taking.”); Leshy, *supra* note 45, at 2011 (applying a categorical rule to water-rights takings “would be most anomalous, because water rights are . . . much weaker and more fragile than rights in land”).

184. See Sax, *supra* note 132, at 272–73.

185. Law Professors’ Amicus Brief, *supra* note 148, at 6–7.

one river to move water to a different river for instream use. The endless variety of fact patterns that may arise in such cases will naturally generate confusion. The need to avoid such a situation and adhere to a bright-line rule was one of the Court's primary rationales for adopting the categorical rule for permanent physical occupations in *Loretto*.¹⁸⁶ Just as the *Loretto* categorical rule "avoids otherwise difficult line-drawing problems" in determining how large an occupation need be before compensation is required,¹⁸⁷ so too would a categorical rule in the water context avoid the difficult problems courts have encountered in determining what sorts of regulations should qualify as physical appropriations.

This bright-line rule will also further the important goal of promoting well-functioning water markets. Water markets will not operate well if water rights are uncertain,¹⁸⁸ hinging on a physical-or-regulatory takings analysis that cannot be performed predictably or consistently by courts. It is far easier for prospective buyers and sellers of water rights to understand how courts will apply background principles of state property law, which are likely to be better defined and less fact-specific than the physical/regulatory distinction has been.¹⁸⁹ The critical factor is not simply whether compensation is paid in every case to owners of water rights; functioning markets exist in forms of property, like permits to graze livestock on federal land, that are not afforded takings protection.¹⁹⁰ Rather, what is needed is clarity. Buyers and

186. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

187. *Id.*

188. *See, e.g.*, Thompson, *supra* note 112, at 43–44 ("[T]he market paradigm only works with secure and definite water rights. Markets will not form if there is uncertainty about whether the government will honor the traded rights."). Granted, the primary source of uncertainty confronting water markets stems from natural variances in precipitation levels, not regulation. But providing predictable takings protection, when appropriate, would nonetheless alleviate at least a second major source of uncertainty.

189. It is true that in some circumstances, the determination of whether a particular water use is reasonable under state law—and thus whether the owner had a vested right in that use of water—will itself be fact-dependent and uncertain. *See* Gray, *supra* note 177, at 13. But even in those cases, applying a categorical rule will at least remove the second layer of uncertainty, concerning which takings analysis should apply.

190. Leshy, *supra* note 45, at 2023–24 ("Markets can and do function all over the place without property rights being stringently protected. There is an active market in permits to graze livestock on federal land, for example, even though

sellers of water rights must be able to rely on their assessment, in any given situation, as to whether compensation will or will not be paid for a given use of water, so they can adjust their valuation of the water accordingly, as with grazing permits. But buyers and sellers will presumably be far more reluctant to engage in water market transactions if the doctrine effectively precludes them from knowing in the first place whether compensation is likely to be paid.

C. *Promoting Principles of Federalism*

A third important effect of applying a categorical rule would be to promote principles of federalism by placing state property law at the center of takings jurisprudence. It would thus allow states to have a substantial say in determining how frequently compensable takings of water rights occur within their jurisdiction.¹⁹¹ In states like California that have adopted legal doctrines limiting the ability of appropriators to divert water in a manner harmful to fish,¹⁹² compensable takings will be relatively rare. By contrast, in states like Colorado that afford strong protection to appropriative rights even in situations where the exercise of those rights threatens to harm wildlife, more takings will occur.¹⁹³

Not everyone, of course, will consider the promotion of federalism to be a worthwhile end in itself. But there are several reasons why it is both appropriate and necessary in this particular instance. First, the control of water appropriation has historically been a function of the states, rather than the federal government.¹⁹⁴ It would be a dramatic transfer of power to Washington—and, in places,

federal law is absolutely clear that such permits carry with them no property right.”).

191. Gregory J. Hobbs, Jr., *Ecological Integrity and Water Rights Takings in the Post-Lucas Era*, in *WATER LAW: TRENDS, POLICIES, AND PRACTICE* 74, 77 (Kathleen Marion Carr & James D. Crammond eds., 1995) (noting that if state property law plays a determinative role in adjudicating alleged water-rights takings, “[t]he outcome will vary from state to state”).

192. See SWRCB Amicus Brief, *supra* note 67, at 4–13.

193. Hobbs, *supra* note 191, at 75 (collecting and discussing Colorado cases); Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 733–34 (2008) (describing Colorado as “an anomaly among Western states” in the strength of the property rights it recognizes in water).

194. See, e.g., *California v. United States*, 438 U.S. 645, 662 (1978); *Cal. Or. Power Co. v. Portland Beaver Cement Co.*, 295 U.S. 142, 164–65 (1935); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899).

could threaten to eviscerate state water law—if federal bureaucrats could effectively override state appropriation decisions at will. Preserving a key role for state water law, moreover, is in keeping not just with this broad historical principle but with specific directives of Congress—most notably in the Reclamation Act,¹⁹⁵ the Endangered Species Act,¹⁹⁶ and the Clean Water Act¹⁹⁷—to afford deference to state law in enforcing environmental statutes. Courts have rightly refused to read these mandates as suggesting that state property law can entirely trump federal environmental statutes.¹⁹⁸ But they have cited it as evidence that the ESA was not intended to wholly displace state law or preclude deference to state administrative proceedings,¹⁹⁹ and as the basis for granting standing to irrigation districts organized under state law to challenge ESA enforcement.²⁰⁰ Placing state water law at the center of water-rights takings jurisprudence would be in line with this vision of state law as playing a circumscribed—but still significant—role in mediating between federal environmental statutes and individual citizens. The federal government would not be precluded from enforcing the ESA, even in circumstances where doing so would interfere with state water rights. But it would mean that the federal government would have to pay compensation when it enforces the act in a manner incompatible with state water rights, thus providing states with a limited degree of influence over the frequency and ramifications of ESA enforcement within their borders.

A categorical takings rule would also promote federalism by refocusing attention on the state political and administrative processes that bear responsibility in the first instance for recognizing and policing water rights. Reliance

195. 43 U.S.C. § 383 (2006).

196. 16 U.S.C. § 1531(c)(2) (2006).

197. 33 U.S.C. § 1251(g) (2006).

198. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992); *see also* Parobek, *supra* note 45, at 192 & n.118 (noting that § 1531(c)(2) of the ESA was adopted instead of a stronger provision, advocated by Western water users, that would have mirrored § 101(g) of the Clean Water Act and prevented the ESA from interfering with the exercise of state water rights); A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1, 19 (1985).

199. *Sierra Club v. City of San Antonio*, 112 F.3d 789, 797–98 (5th Cir. 1997).

200. *Westlands Water Dist. v. U.S. Dep't of Interior*, 850 F. Supp. 1388, 1425 (E.D. Cal. 1994).

on these processes would serve both to reduce the frequency of water-rights takings litigation and to place democratically accountable state officials, who are more likely than federal judges to have expertise in water allocation, at the center of reconciling conflicts between appropriative and instream uses. For instance, one of the oddities about the *Casitas* case is that the SWRCB, the California agency tasked with approving and modifying applications for water rights, went to great lengths arguing, in both the Federal Circuit,²⁰¹ and Court of Federal Claims,²⁰² that a regulatory takings analysis should apply and that background principles of state law barred *Casitas*'s takings claim. Yet the SWRCB itself could have rendered the entire case moot simply by modifying *Casitas*'s appropriative water permit, as it retained the legal authority to do.²⁰³ The SWRCB may have been reluctant, for political or administrative reasons, to take the more direct step of modifying *Casitas*'s permit itself, hoping federal courts would employ a regulatory takings analysis, side with the United States, and make such action unnecessary. Had it known that a categorical rule would be applied, however, the SWRCB may have sought to modify *Casitas*'s permit before the litigation ever commenced. In future cases, such a course of action would both steer conflicts between water users and the government toward a more appropriate forum for resolution, and, by forcing potential plaintiffs to engage with state administrative processes, provide them with an incentive to seek compensation through the political process rather than through litigation, as some commentators have advocated.²⁰⁴ If this succeeds in reconciling landowners to the goals of the ESA, it might also reduce political barriers to the listing of species and general enforcement of the Act.²⁰⁵

201. SWRCB Amicus Brief, *supra* note 67.

202. Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States' Motion for Partial Summary Judgment on Liability, *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100 (Mar. 29, 2007) (No. 05-168L) (on file with author).

203. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 447 (1983) (holding that the SWRCB has a continuing affirmative duty to reassess water rights permits in light of the public trust doctrine, and that "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs"); *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 626 (1989).

204. Leshy, *supra* note 45, at 2025–26.

205. See Thompson, *supra* note 5, at 349–50 (noting the tendency of minimal

D. Strengthening and Developing State Water Law Doctrines

Finally, by placing background principles of state law at the center of takings cases, a categorical rule would contribute to the development of that body of law. There are a wide variety of state law principles that might be relevant to water-rights takings cases. Indeed, in surveying the field of such principles in the wake of the Supreme Court's decision in *Lucas*, Professor Sax noted that while the *Lucas* majority seemed to believe its background-principles holding would lead to more findings of compensable takings, the strength of pre-existing restrictions on water rights would likely produce the opposite result in the water context.²⁰⁶ Between the requirement of beneficial use, the public trust doctrine, state wildlife protection laws, and the ESA itself, the government would retain a number of viable defenses to alleged takings of water rights, even under a categorical rule. The breadth of these doctrines provides a major explanation for the often-overlooked reality that, despite widespread predictions to the contrary,²⁰⁷ *Tulare Lake* has given rise to only a barely noticeable trickle of successful water-rights takings claims.

A number of these doctrines, though, would benefit from further judicial development—particularly in cases where competing consumptive and environmental uses of water are explicitly considered in tandem. Commentators have long urged courts, for instance, to update and police more carefully the beneficial use requirement.²⁰⁸ One of the main factors inhibiting doctrinal development, however, is that courts have relatively few occasions to consider the continuing reasonableness of past water allocation decisions in light of competing uses to which the water in question may be put; in a vacuum, it is difficult to pronounce any but the most blatantly wasteful uses as non-beneficial.²⁰⁹ Courts are far

compensation rules to foster "societally inefficient investment in political opposition" to the ESA).

206. Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 945 (1993) ("Paradoxically, the majority's rejection of evolution, change and contemporary expectations is calculated to work against the owners of water rights.").

207. See, e.g., Kauffman, *supra* note 45, at 883.

208. See, e.g., Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27, 42 (1996) ("[W]e need to get serious about the long-standing yet ineffectual requirement that all water uses be beneficial.").

209. *E.g.*, *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45

more likely to vigorously police the beneficial use requirement in a factual setting where a different use of the water is readily evident.²¹⁰ A water-rights takings case stemming from enforcement of the ESA is precisely such a setting. It seems largely self-evident that an agency's determination that water is necessary to avoid placing a listed species in jeopardy should factor into courts' determination of whether a competing use that would threaten the species conforms to the beneficial use requirement.²¹¹ Forcing courts to confront such a tradeoff directly would provide a ready avenue for this question to receive appropriate judicial treatment. Similarly, while courts have recognized that the public trust doctrine can serve as a governmental defense to takings liability,²¹² few courts have considered its specific application as a defense to an alleged taking of appropriative water rights. Were they to do so, the result could be an invigorated public trust doctrine in states that have yet to fully embrace it.²¹³ Because most courts are generally disposed to side with the government in water-rights takings cases,²¹⁴ confronting these questions in such cases seems likely to yield more robust versions of the beneficial use and public trust doctrines.

A renewed focus on background principles is equally apt to further the development of other common law wildlife protection tools. Nuisance law might operate as a takings defense, since some states have cases holding that killing fish

P.2d 972, 1007 (Cal. 1935) (holding that drowning gophers is not a beneficial use).

210. *In re Alleged Waste and Unreasonable Use of Water by Imperial Irrigation Dist.*, Cal. Water Res. Control Bd. Decision No. 1600 sec. 8.4.1 (1984) (citing *Joslin v. Marin Mun. Water Dist.*, 429 P.2d 889 (Cal. 1967)) ("One of the most important factors to be considered in evaluating the reasonableness of IID's present use of water is identification of other beneficial uses to be made of water which could be conserved."), available at <http://www.sci.sdsu.edu/salton/iidAllegedWasteofWater.html>.

211. See Jeffrey A. Wilcox, Note, *Taking Cover: Fifth Amendment Jurisprudence as a Tool for Resolving Water Disputes in the American West*, 55 HASTINGS L.J. 477, 500–01 (2003).

212. *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 985–86 (9th Cir. 2002).

213. See Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1, 19–20 (2006).

214. *SAX ET AL.*, *supra* note 89, at 383 (noting that courts "have been very deferential to governmental water regulation" when confronting takings claims).

constitutes a public nuisance.²¹⁵ Most of these cases concerned water pollution rather than appropriation, however, and there is little case law on the specific question of whether the non-callous exercise of a water right is a nuisance if harmful to fish.²¹⁶ Similarly, many states, including California, have statutory and common law requirements obligating dam operators and other property owners to protect fish in the course of their activities.²¹⁷ These laws have roots dating all the way back to the Framers.²¹⁸ And yet, these laws have been almost entirely ignored in mediating contemporary conflicts. For example, California's version, which provides a rather clear mandate to dam owners to protect fish,²¹⁹ has been the subject of almost no litigation.²²⁰

If takings cases can help breathe new life into these overlooked provisions of state law, and force courts to consider their applicability to modern conditions, it would be a substantial benefit regardless of whether the government is required eventually to pay compensation or not. Adapting and modernizing these state common-law tools to address contemporary problems, moreover, is faithful to the oldest traditions in American water law, which has always evolved

215. *E.g.* *State ex rel. Priegel v. N. States Power Co.*, 8 N.W.2d 350, 351 (Wis. 1943); *State ex rel. Wear v. Springfield Gas & Elec. Co.*, 204 S.W. 942, 945 (Mo. App. 1918); *People v. Truckee Lumber Co.*, 48 P. 374, 374 (Cal. 1897).

216. *Grant*, *supra* note 28, at 1376. Some state courts have held that appropriators may completely dewater a stream without committing a public nuisance, an action that would seem likely to harm fish, but those courts did not explicitly consider the impact of appropriations on fish. *See, e.g.*, *Mettler v. Ames Realty Co.*, 201 P. 702, 704 (Mont. 1921); *see also Avery v. Johnson*, 109 P. 1028, 1030 (Wash. 1910).

217. Law Professors' Amicus Brief, *supra* note 148, at 4.

218. *See Hart*, *supra* note 12, at 288; *see also Hope M. Babcock, Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 889 (2000).

219. CAL. FISH & GAME CODE § 5937 (West 2009) ("The owner of any dam shall allow sufficient water at all times to pass through a fishway . . . to keep in good condition any fish that may be planted or exist below the dam.").

220. *NRDC v. Patterson*, 333 F. Supp. 2d 906, 918 (E.D. Cal. 2004) (noting that *Cal. Trout, Inc. v. Superior Court*, 218 Cal. App. 3d 187 (1990), is the only California appellate decision to construe § 5937); *see also Robert B. Firpo, The Plain "Dam!" Language of Fish & Game Code Section 5937: How California's Clearest Statute Has Been Diverted from Its Legislative Mandate*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1349, 1358 (2008) ("Untested and unused, the statute has wallowed in obscurity.").

as necessary to suit the economic and geographic conditions in each state.²²¹

CONCLUSION

The distinction between physical and regulatory takings is hardly a model of a clear and logical legal rule. It is, rather, a rough shortcut that generally does a decent job of determining when a compensable taking has presumptively occurred. The distinction itself carries little significance; its utility lies in its ability to track underlying factors—the nature of the governmental action in question, the burden placed upon property owners—that are significant. Water rights appear to be one form of property, however, for which the distinction is uniquely poorly suited to performing its ordinary function. Attempting to apply the distinction in the water rights context will be impossible in some cases, and in other cases it will produce a doctrine that is largely incoherent, in tension with longstanding precedent, and apt to produce outcomes that hinge on ultimately irrelevant considerations.

The only practical alternatives, it seems, are second-best solutions. Courts could shoehorn all or most water-rights takings claims, even those that seem not to fit, into the regulatory takings bin, applying a *Penn Central* balancing test. This rule would likely be quite undercompensatory, producing very few takings, even in cases that intuitively feel analogous to compensable takings in other factual settings. Alternatively, courts could apply a categorical takings rule, as I suggest. This would be slightly overcompensatory, but more in keeping with precedent, and more logical, than applying a blanket regulatory takings rule. But perhaps more importantly, this approach would be likely to produce a sounder water-rights takings jurisprudence overall. Instead of the long list of factors to be considered in a *Penn Central* analysis, a water-rights takings claim should hinge above all

221. See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446–47 (1882). Some might respond that this approach would leave state courts open to judicial takings claims. The Supreme Court's recent decision in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, while not foreclosing that possibility, makes clear that state courts retain a good deal of leeway to mold common law doctrines without creating takings liability. 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring).

on one overarching question: is the use of the water the plaintiff seeks to engage in already restricted by pre-existing, background limitations inherent in her water right? In many—perhaps most—cases, the answer will be yes, and the court will find no taking; in some cases the answer will be no, and compensation will be ordered. But more important than the outcome in any given case would be the clear message this approach would send: state water law is to be at the heart of defining when property has been taken under the Fifth Amendment, and state water law doctrines must explicitly consider the tradeoffs between competing uses of water in determining the limitations on the private exercise of water rights. To the extent a categorical takings rule would push Western water law down that road, it would be a healthy change indeed.