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“Protecting Species through the Protection of Water
Rights”

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Protecting Species through the Protection of Water Rights
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Whenever a threatened or endangered specie's habitat includes surface waters, groundwater, or riparian zones, private water rights are likely impacted. For example, a government mandate that water of a certain quantity, flow, or temperature remain in a stream to preserve an endangered fish may require farmers to forego using water to which they have a right under state law. Similarly, water users may be prohibited from withdrawing water from a reservoir that serves as breeding habitat for an endangered waterfowl. These and a multitude of other conflicts between species protection and water use raise two fundamental questions: (1) Do the endangered species or the possessor of the water right have first claim to the water? (2) How does the resolution of this conflict affect the protection of species, on the one hand, and the socially optimum use of water, on the other hand?

Heretofore, species protection advocates and government regulators have presumed the answer to the first question to be obvious and beyond debate – the species have first claim on whatever water is necessary. This presumption is often founded in a moral claim that nature trumps mere human claims to nature's bounty, but also is said to be implicit in the mandatory, nondiscretionary responsibilities of the government under the Endangered Species Act (ESA). The answer to the second question follows from this presumption – species protection is, on principle and by Congressional declaration, the socially optimum use of water.

Property rights advocates and possessors of water rights object that the presumptive preference for species protection over other water uses is in conflict with constitutional protection of property rights. The point of the 5th amendment takings clause, they argue, is that, no matter what Congress determines to be in the public interest and no matter how important it is thought to be, there must be compensation for property rights taken as a result of government action. From this perspective, the wisdom of species protection is entirely independent from the government's responsibilities under the takings clause. That clause in no way prohibits government from taking property to protect species, it only requires that compensation be paid.

But as a practical matter, species protection and compensation of affected property owners are unavoidably linked. Resources devoted to compensating property owners cannot be devoted to species protection or other public purposes. This does not mean, however, that compensation for losses resulting from ESA-based regulations will necessarily undermine or lessen species protection. To the contrary, as I argue in this chapter, the constitutional protection of property rights in general and water rights in particular will often promote the objective of species protection by reducing the perverse incentives inherent in regulation and in property rights made contingent by that regulation and other legal factors. The relationship between species protection and the exercise of water rights is not a zero sum game. By getting the incentives right we can create new value that can be devoted to both species protection and other productive uses of water.

Although the ESA is sometimes said to allow for no compromise, that cannot be an acceptable or viable public policy. Achieving zero impact on endangered species is

like achieving zero pollution,¹ at some point the marginal benefits of additional gains in species protection will be less than the opportunity costs of achieving those gains. Usually, whether explicitly or implicitly, species protection is compromised to competing values when those values exceed the benefits of species protection.² When such accommodation does not occur, net social welfare is diminished. The pretence of species protection being only about science leads us to obscure these value choices and leave them to government scientists. It also leads us to view private property as a threat to species protection, rather than an institution that can contribute to the overarching goal of species survival.

Thus, the public policy objectives must be: 1) to achieve a level of species protection consistent with other public values dependant on scarce water resources and 2) to maximize the net social benefit (including species protection) derived from water resources by establishing institutional arrangements that get the incentives right. Contrary to the prevailing view among both species protection advocates and defenders of private property, getting the incentives right requires a combination of private rights, public rights and government regulation.

As an initial step toward getting the incentives right where endangered species and water meet, this chapter has two basic objectives: 1) to explore the current framing of the species protection-water rights debate, what I later describe as the “species protection-takings dance;” and 2) to suggest how a reframing of that discussion can lead to a sort of symbiotic relationship between endangered species protection and property rights that are both secure and well-defined.

The next section summarizes the state law bases of private water rights, the relationship between the ESA and private water rights, and the sources of federal authority to adopt and implement the ESA. Part II examines the apparent conflict between species protection and water rights and provides several illustrative examples. Parts III to V describe and critique the current framing of the issues. Part III discusses two federal court cases in which ESA-based regulations have been found to result in unconstitutional takings and suggests a general framework for understanding the relationship between ESA-based regulations and the takings clause. Part IV considers several theories, based on existing law, for avoiding future takings holdings. Part V examines legal innovations intended to avoid takings claims in the event existing alternatives prove ineffective. Parts VI and VII propose a better way to think about the relationship between species protection and private rights in water. Part VI suggests how greater reliance on property rights can create positive incentives and eliminate perverse incentives arising from regulation and resultant threats to property interests. Part VII discusses the positive role for property rights and markets in species protection and recommends several measures for achieving that objective.

I. State Water Law and the ESA

¹ See, WILLIAM BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974).

² Professor Dale Goble of the University of Idaho argues persuasively that “a decision that a species is endangered or threatened (or jeopardized under the section 7 consultation standard) is not a purely scientific determination because it requires an ethical/policy decision that the risk the species faces is unacceptably large. While this decision is based on science (or legally is required to be), the acceptability question is not science.” Thesis presented to faculty colloquium, Lewis & Clark Law School, April 21, 2009, and confirmed in email message from Professor Goble to James Huffman, June 4 2009.

As a consequence of deeply rooted historical practice and express federal deference, state law provides the foundation for water allocation in the United States. In the colonial and early post independence periods the common law riparian doctrine recognized a right in all riparian landowners to the reasonable use of adjacent waters, subject only to public rights to navigate, fish and bathe in navigable waterways. As a general rule, that approach remains the law in states on, and east of, the 100th meridian. During the second half of the 19th century, in the territories and states of the arid American west, the right to use water was acquired by appropriating water to a beneficial use. A few of those states retained aspects of the riparian doctrine, resulting in mixed (and mixed-up) systems.

Under the riparian doctrine rights are correlative meaning that riparian landowners may use water for purposes and in amounts that are reasonable in relation to the uses of other riparians and to the capacity of the water source. The volume or flow of a riparian right thus varies with the available supply and the demands of other riparian landowners. Under the appropriation doctrine, water rights are fixed with respect to quantity (or flow) and priority. This means that each user has an exclusive right to the full amount of his water right unless the supply is insufficient to satisfy the rights of all senior rights holders drawing from the same source. Rights to groundwater are allocated on the basis either of overlying surface ownership or capture. Most states have superimposed permitting processes on their common law rights systems, originally as a means of establishing better records of established rights and more recently as an opening for government control of water allocation through the police power.

In the ESA, Congress took special notice of these state water laws, declaring “the policy of Congress [to be] that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”³ Although this expression of cooperative intent contrasts with Congress’ total deference to state water authority in prior laws,⁴ the mere reference to water, but not land, as requiring cooperation with the states underscores Congress’ recognition of the states’ longstanding, leading role in water allocation. On the other hand, one might read Section 1(c)(2) as evidencing a Congressional intent to break with the total deference of earlier legislation. However the declaration with respect to state water authority is understood, there should have been no doubt that the mandatory prescriptions of the ESA and state recognized water rights would be in frequent conflict, particularly in the appropriation doctrine states. A water rights system allowing total depletion of stream flows inevitably will conflict with the mandatory protection of species dependant on some minimum quantity and condition of water in the stream.

One solution to such conflicts, anticipated in the ESA, is the acquisition of water rights where species protection requires restriction of those rights. Section 4(a) authorizes the federal government “to acquire by purchase, donation, or otherwise, lands, waters, or interest therein.”⁵ Not surprisingly, this section is seldom mentioned in discussions of the ESA and seldom has been used in the implementation of the Act.

³ 16 U.S.C. § 1531(c)(2) (2000).

⁴ For example, Congress declared in The Reclamation Act no intent “to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder,” 43 U.S.C. § 383 (2000).

⁵ 16 U.S.C.A. § 1534(a)(2).

Rarely does any government exercise authority to purchase property if it can accomplish its purposes by regulating the use of property without judicially mandated compensation to the affected owners.

Of course the ESA is not the only federal law impacting on private water rights. Although Section 1 of the Act suggests that beyond species protection a central purpose is to facilitate U.S. compliance with several referenced treaties and international agreements, the constitutional authority for the Act, like the authority for most other federal regulation of water rights, derives from the commerce clause of Article I, Section 8.⁶ The commerce clause has been firmly linked to navigable waters at least since the Supreme Court's 1824 decision in *Gibbons v. Ogden*.⁷ Since then, the commerce regulating powers of the federal government have proven to have few limitations,⁸ so there is little doubt that Congress has significant authority to regulate private rights in water where necessary to the exercise of its commerce clause powers. Central among those commerce clause powers, but also rooted in preexisting public rights of navigation on navigable waters, is the federal navigational servitude pursuant to which the federal government assures that the navigable waters of the United States remain unobstructed.⁹

The foregoing summary descriptions of state water law, the ESA, and the sources of federal power over water suggest the following conclusions: 1) To the extent Congress' power to enact the ESA derives from the commerce clause, claims by affected private water rights owners should be analyzed as regulatory takings absent facts establishing a categorical taking.¹⁰ 2) Where the ESA, either by design or in effect, serves to protect public rights established prior to the vesting of affected private water rights, there can be no taking because nothing is taken under those circumstances. 3) Considered together these conclusions lead the government and most species protection advocates to assert that the ESA serves to enforce a preexisting public right in species protection and therefore is an effective trump on any takings claim put forward by a private water right owner.

II. Species Protection vs. Water Rights

Ever since the famous snail darter case in which the Supreme Court held that the ESA forbade the continued construction of a large dam in order to protect an endangered and obscure fish,¹¹ the statute has led to conflict between species protection and human

⁶ "Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes; . . ."

⁷ 9 Wheat. (22 U.S.) 1, 190 (1824). "All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation."

⁸ The only federal laws held not to fall within the commerce regulating power since the New Deal were the Gun Free School Zone Act (United States v. Lopez, 514 U.S. 549 (1995)) and the Violence Against Women Act (United States v. Morrison, 529 U.S. 598 (2000)).

⁹ See, U.S. v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

¹⁰ The general rule under current Supreme Court takings law is that, absent a physical occupation (*Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982)) or total loss of economic value (*Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992)), the existence of an unconstitutional taking depends on an ad hoc assessment of 1) the economic impact of the regulation, 2) the owner's reasonable investment-backed expectations, and 3) the character of the regulatory action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

¹¹ *TVA v. Hill*, 437 U.S. 153 (1978).

enterprise. Although the Tellico Dam was ultimately completed after Congress exempted it from the ESA's constraints,¹² the very public controversy surrounding the dispute set the stage for four decades of continuous political and legal battle over the impact of the ESA on private property rights. More than a few of these conflicts have pitted water use against species preservation. A few recent examples are illustrative.¹³

- For most of a century farmers in southern Oregon and northern California have relied on irrigation water from a Bureau of Reclamation project on the Klamath River. A severe drought in 2001 led the bureau to curtail water delivery to the farmers in order to sustain three ESA protected fish species. For some farmers the loss of a season's crops was economically devastating, so they sued seeking compensation under the takings clause. That lawsuit is still pending in the Federal Circuit Court of Appeals where final resolution awaits the Oregon Supreme Court's answers to three state property law questions referred by the federal court.¹⁴ It is reasonable to conclude that the curtailment of water withdrawals contributed to the survival of the endangered fish, but that objective could have been achieved without doing economic harm to Klamath River farmers. The Klamath irrigators' claim is for compensation, not that they should have been permitted to dewater the river.
- Farmers in the Carson-Truckee Basin have been engaged in a decade's long dispute with the Pyramid Lake Paiute Tribe (PLPT) over federal project water drawn from Pyramid Lake located on the Tribe's reservation. Upstream diversions, especially the Newlands Project operated by the Truckee-Carson Irrigation district, have caused the lake to fall below the minimum levels needed to support populations of endangered Cui-ui and Lahontan Cutthroat Trout. In 1989, the PLPT sued the Secretary of Interior to block the release of water for agricultural purposes.¹⁵ In 1990, Congress passed the Truckee-Carson-Pyramid Lake Water Rights Settlement Act mandating development of a process for revision of the operating criteria for the Truckee River including the federal dams. These processes are meant to take account of agricultural, urban and species protection water needs.
- Both farmers and city folk in California's Central Valley depend on water from rivers that provide habitat to endangered Chinook salmon and Delta smelt. Pursuant to the ESA, various restrictions have been placed on irrigators, resulting in numerous lawsuits and ongoing political controversy. The Central Valley Project (CVP) is the largest federal water

¹² See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 684 (2d ed. 1998).

¹³ All of these examples are discussed in greater detail with citations to the relevant authorities in Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 30-32 (2004).

¹⁴ *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504, 526-27 (2005), 75 Fed. Cl. 677 (2007), 2009 Ore. LEXIS 4. For a not entirely objective account of the Klamath litigation see DAN TARLOCK AND HOLLY DOREMUS, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS (2008).

¹⁵ *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, (9th Cir. 1989)

management project in the US, and provides water to users under contracts with the Bureau of Reclamation. The Westlands Water District draws Project water pursuant to a 1963 contract. In 1990 and 1993, after the Sacramento River winter-run Chinook salmon and the Delta Smelt of the Sacramento-San Joaquin Delta were designated threatened species, water allocated to Westlands from the CVP was cut by fifty percent. Westlands and the farmers effectively lost in court when the US Court of Appeals for the 9th circuit vacated all of the district court's rulings because the United States had not waived its sovereign immunity and the district court lacked jurisdiction.¹⁶ The US Supreme Court affirmed the decision.¹⁷

- In Eastern Washington's Methow Valley, irrigators' rights to transport water across federal lands were restricted by the Forest Service in an effort to assure adequate water for endangered salmon and steelhead. The irrigators and local governments challenged the government's authority to impose such restrictions. The court ruled that the Forest Service had the power to restrict the use of water transported over federal lands because "the permits, from their inception, provided government with unqualified discretion to restrict or terminate the rights-of-way" under 16 U.S.C.A. § 475.¹⁸
- Irrigators, the City of Albuquerque and the State of New Mexico all challenged the federal government's decision to curtail withdrawals from the Middle Rio Grande River to protect the endangered Rio Grande silvery minnow. The minnows prevailed in court, but Congress intervened to effectively overturn the court's decision. As the court in *Rio Grande Silvery Minnow v. Keyes* stated, the litigation was the convergence of two issues, "one targeting the survival of the silvery minnow in its critical habitat under the ESA, the other challenging the impact of that designation on New Mexico's agricultural communities and burgeoning urban centers under the National Environmental Policy Act, 42 U.S.C. § 4321, which requires all federal agencies to examine the environmental impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).¹⁹

In the context of these and many other disputes, objectors to ESA-based restrictions on water use have relied upon four different theories, only one of which has been successful thus far. Courts have rejected the argument that species protection, despite the historically dominant role of the states in wildlife management and regulation, falls outside the reach of Congress' commerce clause powers.²⁰ This is not surprising given the almost unlimited reach of the commerce power since the New Deal. The courts have also rejected claims made on behalf of water users holding contractual rights to water delivery from federal projects, although that argument is raised again in the

¹⁶ Orff v. United States, 358 F.3d 1197 (9th Cir. 2004).

¹⁷ Orff v. United States, 545 US 596 (2005).

¹⁸ Okanagan County v. NMFS, 347 F.3d 1081 (9th Cir. 2003).

¹⁹ Rio Grande Silvery Minnow v. Keyes 333 F.3d 1109 (10th Cir. 2003) (vacated on appeal).

²⁰ See, e.g., GDF Realty Investments v. Norton, 326 F.3d 622 (5th Cir. 2003) and Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

Klamath litigation.²¹ A third line of argument has been that the combination of state sovereignty over and ownership of waters within a state exempts states and those holding water rights under state authority from ESA regulations. Although courts have not passed judgment on this theory, it is very unlikely to succeed given the Supreme Court's upholding of federal reserved rights²² and its conclusion that the concept of state ownership of water, like state ownership of wildlife,²³ is only an expression of the importance these resources have for the public.²⁴ Thus, the only chink in the considerable armor of the ESA may prove to be the 14th amendment takings clause. But, as I argue in this chapter, a strong takings clause does not necessarily obstruct achievement of the species protection objectives of the ESA. To the contrary, enforcement of the takings clause can benefit species protection by reducing the perverse incentives of the existing regime, by creating positive incentives for species and habitat preservation, and by imposing the discipline of market pricing on government decision making.

III. Taking Property Versus Taking Species

Where ESA regulations restrict the exercise of state recognized water rights and the federal government fails to exercise its acquisition authority under Section 4(a), the takings clause of the Fifth Amendment to the United States Constitution may be implicated. When, if ever, do ESA-based regulations of private water rights result in the unconstitutional taking of private property? That question has never been addressed by the United States Supreme Court, but two federal courts of appeals have found that takings can result from ESA-based regulations.

As noted above, California's Central Valley is home to endangered Chinook salmon and Delta smelt. During the summers of 1992 to 1994, Central Valley irrigators were required to reduce water withdrawals below the levels authorized pursuant to their rights under California law. Takings claims were filed in the United States Court of Federal Claims, and for the first time an enforcement action under the ESA was held to result in an unconstitutional taking in *Tulare Lake Water Basin Storage Dist. v. United States*.²⁵ The court concluded that the mandated withdrawal reductions, measurable in acre feet, constituted physical appropriations of the water and thus per se takings consistent with the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*²⁶ The decision was celebrated by property rights advocates but widely criticized by environmentalists as based on a misunderstanding of the nature of water rights under California law, and for applying the per se takings test where regulatory takings analysis

²¹ Most federal water contracts shield the government from liability for failure to deliver a full supply of water. These provisions have been held to apply to water delivery reductions made necessary by the ESA. See, e.g., *O'Neill v. United States*, 50 F.3d 677, 681-84 (9th Cir. 1995); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003). In the Klamath case, this issue was certified by the Federal Circuit Court of Appeals to the Oregon Supreme Court, where it is pending. *Klamath Irr. Dist. v. United States*, 2009 Ore. LEXIS 4.

²² *Cappaert v. United States*, 426 U.S. 128 (1976).

²³ *Hughes v. Oklahoma*, 441 U.S. 322 (1979)

²⁴ *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 951 (1982).

²⁵ 49 Fed. Cl. 313 (2001).

²⁶ *Supra* note 10.

was argued to be appropriate.²⁷

In 1956 Casitas Municipal Water District agreed with the United States to repay, over forty years, the construction costs of the Ventura River Project in return for “the perpetual right to use all water that becomes available through the construction and operation of the Project.” In the same year, California issued permits allowing Casitas to appropriate the Project water. Thirty-eight years later, Casitas was ordered to construct a fish ladder and provide water sufficient for the survival of the endangered West Coast steelhead trout.²⁸ Casitas sued for compensation in the Court of Federal Claims. The Court granted the government’s motion for summary judgment,²⁹ but a divided United States Court of Appeals for the Federal Circuit reversed and remanded for the trial court to consider the takings claim.³⁰ The majority agreed with the *Tulare* court that there was a physical taking of water constituting a categorical taking. The dissent echoed the view of *Tulare* critics that regulatory takings analysis should apply. The government petitioned for rehearing and rehearing en banc, both of which petitions were denied.³¹

A third controversy, also noted above, is currently before the Federal Circuit Court of Appeals. When the Bureau of Reclamation terminated water deliveries to Klamath Basin irrigators to protect three species of endangered fish in 2001, the irrigators sought compensation in the Court of Federal Claims for alleged taking of private property and deprivation of contractual rights. The Court of Claims found against the irrigators on both claims.³² The case was appealed to the Federal Circuit and that court determined that the resolution of the takings question turned on issues of Oregon law that the court certified to the Oregon Supreme Court for resolution.³³ The Oregon Court agreed to examine the certified issues on the ground that their resolution is preliminary to and possibly determinative of the irrigators’ takings claims in federal court.³⁴ An Oregon court decision is pending. Because the certified questions relate to whether users of Bureau of Reclamation water have property rights under state law, the Oregon court’s decision will be closely watched by the 140,000 farmers receiving Bureau water nationwide.

However, an Oregon Supreme Court conclusion that Bureau of Reclamation water users do not have a property right will not conclude the issue in any other state. Furthermore, even if Bureau water users have no protected property interest, other Oregon water rights holders may still have viable takings claims. Based on the two federal cases discussed above, the critical issue will continue to be whether ESA based limitations on water rights should be analyzed as categorical or regulatory takings. Under the categorical takings analysis of *Loretto*, water rights holders will prevail as in *Tulare*

²⁷ See .e.g., Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVIRONMENTAL LAW 551, 555-556 (2002).

²⁸ *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1280-82 (2008).

²⁹ *Casitas Municipal Water District v. United States*, 72 Fed.Cl. 746 (2006); *Casitas Municipal Water District v. United States*, 76 Fed.Cl. 100 (2007).

³⁰ *Casitas*, 543 F.3d. at 1279.

³¹ *Casitas Municipal Water District v. United States*, 556 F.3d 1329 (2009).

³² *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504, 526-27 (2005) (holding that the irrigators had no property rights or equitable interests under Oregon law); *Klamath Irr. Dist. v. United States*, 75 Fed. Cl. 677 (2007) (holding that the sovereign acts doctrine gave the U.S. a complete defense against breach of contract claim).

³³ *Klamath Irr. Dist. v. United States*, 2008 U.S. App. LEXIS 15013, p. 2.

³⁴ *Klamath Irr. Dist. v. United States*, 2009 Ore. LEXIS 4, p. 4.

and *Casitas*. But if the regulatory takings analysis of *Penn Central* applies, water rights owners are almost certain to go uncompensated when ESA based regulations limit their use of water.

Stepping back from the particulars of these cases and from the Supreme Court's strained takings jurisprudence, it is useful to frame the takings question with reference to the purported source of authority relied upon by Congress in enacting the ESA. When Congressional enforcement of the federal navigation servitude impacts on the exercise of private water rights, there is no infringement of those rights because the navigation servitude is a public right that predates the vesting of any private rights. For example, federal regulation of navigation obstructing structures in and over the Mississippi River or other waterways that are navigable in fact cannot infringe the rights of riparian property owners whose titles have never included authority to obstruct navigation. In enforcing the navigation servitude Congress does not take private rights, rather it prevents the private taking of public rights.

Similarly, where Congress asserts that federal reserved water rights justify constraints on private water rights there also may be no basis for takings claims. Reserved water rights are proprietary interests existing within each state's water rights regime and subject to enforcement on the same terms as any private proprietary claim.³⁵ Under the Supreme Court's reserved rights doctrine, for example, the National Park Service has rights to the water necessary for achieving Yellowstone's purposes, dating from the park's creation in 1872. Thus a federal reserved water right will exempt the federal government from takings claims brought by any appropriator with a later priority,³⁶ which in the case of Yellowstone is all private water users given the very early date of Yellowstone's creation. The theory for this federal reserved rights "exemption" from takings claims is straight forward. However, application of the doctrine has created extensive uncertainty for private water users because the federal rights are almost always implied and there is pervasive uncertainty about the quantity of water reserved to the federal government.

The federal navigation servitude and federal reserved water rights (like any federal property right) have in common that they help to define the boundaries of private water rights in the same way as do other private rights. The nature and scope of one property right is bounded by the nature and scope of other property rights, whether public or private. Where a takings claim fails because of the navigation servitude or a federal reserved right, it is because there is no private right to be taken. A private claimant never possessed the right to obstruct navigation nor to interfere with a federal right reserved prior to the private appropriation.

The same relationship exists between private claims and public rights asserted

³⁵ The concept of reserved water rights is rooted in the understanding that the United States held the original right to use water arising and flowing on lands owned by the federal government. The Supreme Court has concluded that when those lands were reserved from private acquisition under the Homestead Act and other land disposal acts of Congress, sufficient water to satisfy the purposes of the reservations was impliedly reserved as well. The concept was first applied to Indian reservations in *Winters v. United States*, 207 U.S. 564 (1908) and later to reservations for particular federal purposes in *Arizona v. California*, 373 U.S. 546, 597-598 (1963).

³⁶ When the reserved rights doctrine was first conceived in *Winters, id.*, private rights holders reasonably thought that their prior appropriative rights had been taken. But a century of precedent and expansion of the doctrine to apply to federal reservations has buried such claims under the weight of *stare decisis*.

pursuant to what Justice Scalia labeled “background principles” of state property law.³⁷ Background principles include common law nuisance and the public trust doctrine pursuant to which the public has rights that predate and therefore function as limits on the scope of private water rights. Private water rights affected by public action taken to protect these public rights never included the right to be free from such effects. Thus the navigation servitude and federal reserved rights enforced by Congress and background principles of common law enforced by the states help to define the nature and scope of private rights in water. In the context of a takings claim, they help answer the question of whether the claimed property right exists, not whether an existing property right has been taken.

But where federal action under the ESA is not rooted in enforcement of the navigation servitude or exercise of federal reserved or other property rights – where it is effectively an exercise of delegated state police powers – the *Tulare* and *Casitas* cases underscore that it is not a foregone conclusion that affected water rights owners have no takings claim against the federal government. With respect to water supplied from federal projects under contract between the water user and the United States, the threat of takings claims might easily be eliminated through a contract provision allowing for non-delivery when necessary to comply with the ESA. But because virtually all of these contracts date back several decades to the time of project construction, the opportunities for such contractual protection of the federal government must await contract expiration and renewal. Even then, it appears that the government has been slow to revise contracts with an eye to limiting its potential liability for ESA based water delivery restrictions.³⁸ But where existing contracts include no such provision and where ESA-based restrictions apply directly to state recognized water rights, the prospect of more cases like *Tulare* and *Casitas* is thought by most species protection advocates to seriously threaten the effectiveness of the ESA.³⁹

The usual explanation for this pessimism is that governments cannot afford to pay the price of compensating affected water rights owners. While this claim seldom reflects a serious assessment of the actual costs of compensation, the objection is rooted more in disagreement with the core principle of the takings clause than in a concern for the public fisc. Most species protection advocates, like most mainstream environmentalists, view the protection of property rights as a lesser good, if a good at all, than the protection of species and the environment. But belief in a higher good does not carry the argument in a rule of law regime. Absent acceptance of the proposition that secure and well defined property rights can serve rather than obstruct the objective of species protection, the reality of the takings clause requires that species protection advocates propose legal

³⁷ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

³⁸ A 1991 GAO report on the renewal of Central Valley Project water delivery contracts urged consideration of the government’s ESA responsibilities and noted that the eleven contracts renewed to date were subject to modifications to assure compliance with federal environmental laws including the ESA. But the report went on to conclude, nevertheless, that “the Bureau must deliver the full volume of water specified in the contracts . . . unless draught conditions or other unavoidable causes prevent this.” GAO/RCED 91-175 *Changes Needed before Water Service Contracts are Renewed* 11 (1991).

³⁹ The 10th Circuit Court of Appeals ruled in *Rio Grande Silvery Minnow v. Keys*, that even lacking specific reference to ESA based restrictions on delivery of contract water, the Bureau of Reclamation could curtail delivery of water pursuant to contract language precluding liability where there is a water shortage “due to draught or other causes.”

rationales for avoidance of the constitutional requirement of compensation.

IV. Avoiding the Takings Clause

An obvious way for the government to avoid future takings claims is to provide for compensation to affected property owners when ESA-based constraints are imposed. But when such compensation was proposed in the 2000 Farm Bill, most water rights owners were adamantly opposed. Farmers objected that federal acquisition of water rights for endangered species protection could lead to forced sales at prices set by the government, but earlier opposition to states allowing for the purchase and sale of instream flows suggests that many farmers would object to federal acquisition of water rights even if only from willing sellers. There is a widespread fear among defenders of the family farm that any loss of water rights will be another nail in the coffin of already struggling western agriculture. But this to-the-barricades view on the part of farmers may leave them with nothing. In light of the Supreme Court's expansive interpretation of the public use language of the 5th amendment,⁴⁰ there is little doubt that water rights can be taken by eminent domain for ESA purposes.

History evidences, however, that governments will virtually always prefer uncompensated regulation over purchase by eminent domain. Absent a Supreme Court affirmation of the holdings in *Tulare* and *Casitas*, few governments will resort to eminent domain, even if Congress or state legislatures managed to appropriate the necessary funds. Governments are always loath to pay for their impacts on private property absent clear physical takings for government facilities, or a court order. Invariably it is argued that compensation will deplete governments' limited resources making it impossible to pursue important public purposes like species protection. "Government hardly could go on," wrote Justice Holmes in oft quoted language, "if to some extent values incident to property could not be diminished without paying for every such change in the general law."⁴¹ If we accept today's broad understanding of Holmes' proposition, the only alternative if the public purposes of the ESA are to be achieved, is to avoid court ordered compensation by convincing courts that, pursuant to one theory or another, compensation is not constitutionally required.

Drawing on other language from the Holmes opinion quoted above, one approach is to engage in a balancing of public and private interests – to determine whether a particular regulation goes "too far" in impacting on private property.⁴² Such balancing is the central feature of the Supreme Court's regulatory takings doctrine. Absent physical invasions or total loss of value, the "too far" balancing approach applies in all takings cases.⁴³ The problem with this approach in any regulatory context, including those resulting in conflicts between water rights and endangered species protection under the ESA, is that property rights are made necessarily contingent. They are contingent on the perceived importance of the conflicting public purposes, and those public purposes will almost always be found to justify limits on property. Property rights become mere interests and water rights owners become mere stakeholders among the many who will

⁴⁰ See, *Kelo v. City of New London*, 545 U.S. 469 (2005)

⁴¹ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

⁴² *Id.* at 415.

⁴³ See note 10 *supra*.

collaborate in water management.⁴⁴

Property rights in water are also made contingent, and thereby less protected under the takings clause, by liberal interpretation of the beneficial use, waste, and public interest standards of appropriation doctrine. Western water law has long limited appropriators to beneficial uses, a concept originally intended to preclude speculation and waste, and later relied upon by established users like irrigators and miners to exclude newer desired uses like instream flow and habitat maintenance. Some now urge that the doctrine be applied by courts and water administrators to pick and choose among vested water uses based upon changing perceptions of the public interest. It is also suggested that the traditional prohibition on waste gives judges and administrators similar discretion to adjust existing water uses without regard to established priorities and quantities. Liberally construed, the statutory public interest standard that generally applies to permit grants and transfer approvals also allows for discretion contributing to the ever-more contingent nature of water rights.

Another takings clause-evading theory is that the ESA preempts state law, including state water laws pursuant to which water users claim a right to use water that has been determined necessary to species protection.⁴⁵ But the takings clause as applied to the federal government would be eviscerated if, in the preemption of state law, property rights established under that state law become null and void. To the contrary, the act of preemption would result in the taking of any property rights existing under the preempted state law. If the federal government cannot take the property of individuals, all of which exists under state law, surely it cannot take the property rights of everyone by preempting state law. By its very existence, the takings clause contradicts the argument that federal law can preempt state property laws. Or, alternatively, one might conclude that if and when federal law preempts state property law, the federal government is required to compensate for property taken as a result.

In the context of federal laws relating directly to water use and allocation, there has never been any doubt that the federal government must defer to vested property rights under state law. In the 1866 and 1870 mining acts Congress acknowledged the validity of water rights under state law.⁴⁶ The 1877 Desert Land Act explicitly affirmed that the right to use water on lands acquired under the Act “shall depend upon bona fide prior appropriation,” and that any unappropriated waters on such lands would be subject to private appropriation under state law.⁴⁷ The previously mentioned Reclamation Act similarly deferred to state authority over water.⁴⁸ In 1952 Congress reaffirmed the central role of the states in defining and enforcing water rights by waiving its sovereign immunity, explicitly allowing the United States to be “joined as a defendant in any suit

⁴⁴ One such effort undertaken by the Western Governors’ Association and the Western States Water Council led to what become known as the Park City Principles. See D/ Craig Bell, et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 303, 303-304 (1996).

⁴⁵ See, e.g. Melissa K. Estes, Comment, *The Effect of the Federal Endangered Species Act on State Water Rights*, 22 ENVIRONMENTAL LAW 1027, 1044 (1992) (arguing that failure of an ESA amendment mandating federal deference to state water law could only mean that Congress intended for the ESA to trump state allocation in the face of direct conflict).

⁴⁶ Mining Act ch. 262, §9, 14 Stat. 251, 253 (1866); Act of July 9, 1870, ch. 235, §17, 16 Stat. 217, 218 (1870)

⁴⁷ Desert Land Act, ch. 107, §1, 19 Stat. 377, 377 (1877).

⁴⁸ *Supra* note 4.

[in state court] for the adjudication of rights to the use of water of a river system or other source.”⁴⁹

At least some of the foregoing theories for takings clause avoidance might hold water, so to speak, if water users have nothing more than a permitted privilege that the state is free to withdraw or limit. But that cannot be the nature of private water rights if those rights are to provide the stability and security necessary to wise and efficient water utilization. State and federal courts have repeatedly ruled, as did the Court of Claims in *Tulare* and *Casitas*, that water rights are property. Much is sometimes made of the fact that water rights are usufructuary, meaning that they are rights of use and not of physical possession, but this is a distinction without a difference for purposes of the takings clause. The prospect of use (including non-consumptive use) is what gives all property value. To suggest that use rights can be taken without infringing the 5th amendment would, again, eviscerate the takings clause. That clause requires just compensation when property is taken. The measure of just compensation is use value as reflected in the market.

V. Taking Water Rights by other Means

If *Tulare* and *Casitas* are the law of the land, government will have to compensate where a water right owner is precluded from using specific quantities of water to fulfill endangered species requirements. The only way government can avoid compensating, short of revoking or waiving the regulatory constraint, is to prove the existence of superior government or public rights like those founded in the public trust and navigation servitude. One such source of public rights, suggested by Professor Dan Tarlock, is what he labels “federal regulatory rights.”⁵⁰ The concept is that at least some regulations effectively create federal or public rights that insulate the government from takings claims by affected property owners.

If all federal regulations create rights superior to regulated private rights there can be no takings and the takings clause is a nullity, at least with respect to the federal government. This cannot be the case, not least because for over a century the takings clause had application only to the federal government and no provision of the constitution can be understood to have no practical consequence. The argument might be salvaged if only some federal regulations affecting property create federal regulatory rights. But there is no rational basis for finding some, but not all, regulations to be the source of federal rights. Congress could declare that certain regulations create federal rights, but, if the consequence of such a declaration is to insulate the government from takings claims, Congress will have every incentive to make such a declaration in every regulation affecting private property. Thus the idea of federal regulatory rights is nothing more than a poorly disguised effort to shield government from legitimate compensation claims.

Any regulatory constraint on water use can be measured in concrete volume or flow terms, and thus qualify as a categorical physical taking. But because flows vary with the time of day and season of the year, meaning that particular water rights may or may not be affected by particular regulations, some courts are sure to conclude that there

⁴⁹ McCarran Amendment, 66 Stat. 560, 43 U.S.C. §666(a).

⁵⁰ A. Dan Tarlock, *Western Water Rights and the Act*, in KATHRYN A. KOHM (ED.), *BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE* 167 (1990).

is no physical taking when regulations impose variable restraints. In such cases courts will be left to apply the regulatory takings analysis of *Penn Central*, pursuant to which property rights are balanced against public purposes. The case law since *Penn Central* makes clear that property rights are seldom found to outweigh the public's purposes, so it is safe to assume that ESA-based regulations that are found not to result in a physical taking will not require compensation unless there is a total loss of economic value in the affected property. Governments can be counted upon, therefore, to insist that ESA-based regulations do not result in physical takings or total loss of economic value and to design regulations to make those claims plausible.

Another approach to limiting the federal government's exposure to takings claims could be the reform of state water law with an eye to making water rights less secure and more contingent. The federal government can encourage changes in state law through unfunded mandates or subsidies conditioned on desired changes. Particularly when states are strapped for revenue, they show little resistance to federal carrots. Most state water administrators also are predisposed to making water rights more contingent, thereby expanding their own powers to manage the water resource. Absent the sort of appreciation for the incentive benefits of secure property rights advocated in this chapter, the only downside to greater contingency of water rights that will be recognized by the states is the unlikely prospect that courts would require compensation for piecemeal curtailment of property rights in water. With rare exceptions,⁵¹ courts have held that, in calculating the extent of property taken, the denominator is the whole legal parcel, not some portion of that interest, even if severable.⁵²

For most states, an effective path to greater contingency in water rights is expansion of the traditional public trust doctrine and related common law doctrines including public nuisance. In the name of an evolving common law, many state courts and some state legislatures have reinterpreted historic common law doctrines that have long been the "background principles" helping to define the nature and extent of property rights. For example, the public trust doctrine which from early common law has guaranteed public rights to fishing and navigation in tidal and other navigable waters has been reinterpreted to guarantee public rights of beach access across private uplands⁵³ and public access to all waters that can be used for any form of recreation.⁵⁴ Michael Blumm and many others have urged that courts should similarly reinterpret historic common law doctrines to limit land and water uses that were once clearly an attribute of private property rights.⁵⁵ Such changes in common law doctrine are claimed to be in the long tradition of common law evolution and therefore within the reasonable expectations of property owners. Because property owners should anticipate such changes in the common law rules, it is argued, there is no unconstitutional taking of affected property rights.

VI. Shifting the Focus to Incentives for Species Protection

⁵¹ *Loveladies Harbor v. United States*, 28 F.3d 1171, 1180 (Fed. Cir. 1994).

⁵² *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978).

⁵³ *Raleigh Avenue Beach Association v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005).

⁵⁴ *Montana Coalition for Stream Access v. Curran*, , 682 P.2d 163 (Mt. 1984).

⁵⁵ See Michael C. Blumm & Lucas Ritchie, Lucas's *Unlikely Legacy: The Rise of Background Principles in Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005).

Much energy, emotion and resource is expended by all parties to this species protection-takings dance. Water rights owners see their livelihoods threatened by uncompensated species protection regulations and environmentalists see their species protection objectives threatened by cases like *Tulare* and *Casitas*. The environmentalist worries are encouraged by government insistence that it cannot afford to compensate affected property owners. While agricultural water users claim they should be compensated for losses resulting from species protection, they oppose the occasional proposal to actually provide for such compensation. Clearly they are relying on the courts to follow *Tulare* and *Casitas* and the government's plea of impecuniosity to lessen ESA-based restraints on their use of water. The ESA-takings dance is more about rent seeking through the legislative and administrative processes than it is about protecting species or property rights. Environmentalists seek species protection benefits at the expense of private property owners and property owners seek insulation from the market power of environmentalists. The incentives are wrong, and it will be difficult to get them right because the solution requires that species protection advocates embrace property rights and water rights holders accept a water market to which all potential water users have equal access.

Although water rights owners are generally pleased with the holdings in *Tulare* and *Casitas*, takings law in general and their personal experience in particular give them little reason for optimism about future protection of their water rights. The same is true for riparian and submerged land owners. Thus their incentive is to avoid having ESA-based regulations apply to them. "Shoot, shovel and shut-up" is not an idle threat. The incentive to eliminate endangered species on one's property or to destroy habitat that might attract such species is powerful if one believes the alternative is a prohibition on the use of one's water or land. Perhaps more important, in light of the extensive habitat destruction that has already taken place throughout the country, is the lack of incentive in the existing regime for habitat restoration. A recent Montana case in which the Montana Supreme Court found a public right of access to the waters and private submerged lands of Mitchell Slough that had been privately restored as fish and wildlife habitat illustrates the problem. The owners had invested over a million dollars in the restoration work on the assumption that they could control access. When the court held that there was public access to the restored habitat, the owners announced that they would not invest in maintenance of the restored habitat.⁵⁶ This is not a surprising reaction, given the almost certain resource destruction that results from open access.

The ESA, like most regulatory regimes, also creates perverse incentives for what have come to be called "stakeholders." A mere assertion of interest in species protection entitles any individual or interest group to seek influence in the process, including for purposes incidental or unrelated to species preservation. Those seeking to stop a development, for example, normally can participate in the ordinary permitting process, but chances for success are much greater if an endangered species can be found. Absent the restraint of a compensation requirement, regulators have little incentive to resist such rent seeking behavior. An illustration of such rent seeking was the successful campaign to curtail logging over vast areas of the Pacific Northwest in the name of protecting spotted owls. While many who argued for owl protection were genuinely concerned for

⁵⁶ See Jeff Hull, *For the Love of a Ditch*, 5 MONTANA QUARTERLY 21 (Spring, 2009)

the owl, at least a few acknowledged that protecting owls was the means to the larger objective of curtailing logging. The ESA provided a trump card over those concerned for the timber industry and the jobs it provided. Similar examples exist in every region of the country.

Even if the search for threatened or endangered species does not succeed, the high costs of participation in the administrative process can induce settlement by resource users and developers, including compromise of vested property rights. Administrative challenge and litigation are familiar strategies for inducing settlement and compromise. Developers faced with the all or nothing consequence of an endangerment determination will be forced to settle even if they believe there is a high probability of prevailing when the process is finally concluded. The trumping nature of a determination of endangerment thus distorts the weighing of costs and benefits. Although it is widely asserted that the ESA does not allow for cost-benefit analysis, Dale Goble's previously mentioned work demonstrates that something resembling balancing of competing interests is inherent in the ESA.⁵⁷

VII. Property Rights, Markets and Species Protection

The length and intensity of the species protection versus water rights debate launched by the ESA will lead most advocates on both sides to conclude that there is no middle ground. The assumption on both sides seems to be that for water dependent species to survive, water rights must give way. Implicit in this assumption is that there will be no compensation to affected water rights owners, both because the government cannot afford it and because, by one theory or another, private water rights are legally inferior to the public's interest in species protection. But there is some middle ground that would provide greater security to water rights owners and incentives for private species protection while lessening the existing perverse incentives for species and habitat destruction.

As the example of Montana's Mitchell Slough illustrates, private individuals will invest in habitat restoration and wildlife protection, but only if their property rights are reasonably well-defined and secure against trespass. While it may offend the egalitarian sensibilities of some who are excluded, there is no reason to believe that the tragedy of the commons is less likely to occur where water or wildlife, rather than any other resource, is effectively a commons. Private actors, both individual and collective, will invest in species protection, but not if there is reason to expect that their property rights will be found to be contingent and their investment will be for naught. This is not to suggest that all species protection will be accomplished privately. That is obviously not the case due to public goods related market failures. But the public goods nature of much species protection should not lead us to abandon the significant powers of private initiative and markets where they do serve the objectives of the ESA.

To encourage private investment in species and habitat protection several things will have to happen:

- Water rights must be clearly defined and strictly enforced. The same is true of associated private rights in riparian and submerged lands. As this chapter makes clear, much in existing law and policy leads water rights in particular to

⁵⁷ *Supra* note 2.

be contingent. Principle sources of contingency include the “too far” test for regulatory takings, the various and variable claims of public rights in water, and the significant discretion inherent in the identification of endangered species and the enforcement of ESA-based and other police power restrictions on water rights.

- The contingencies arising from the “too far” takings standard will be remedied only by clearer definition of what constitutes a taking of private property and an understanding that restrictions on use have at least as much impact on investment and management incentives as do physical occupations of property. Recognition that market value is rooted in use value, rather than possession, is particularly important in the context of water. The fact that water rights are usufructuary should make no difference in the determination of whether or not a taking has occurred.
- Where it has not already occurred, state water law regimes should be reformed in two respects for water markets to facilitate private investment in species and habitat protection and restoration. 1) Beneficial and reasonable use standards must encompass all water uses including instream flow maintenance and habitat for fish and wildlife. 2) Restraints on water rights transfers must be eliminated except to the extent they are necessary to protect other vested water rights. The vague public interest discretion granted to state water administrators in many water transfer statutes contributes to the contingent nature of water rights and should be made far less discretionary, not eliminated.
- State water laws should be reformed to permit and facilitate commodity sales of water. Although temporary water use transfers have long taken place on an informal basis, state laws have generally discouraged or prohibited formal commodity markets in water. In light of the seasonal and annual variability of water supplies, commodity transfers will often make sense where permanent rights transfers do not. Greater flexibility in water use can only facilitate species and habitat protection.
- Water use by individuals and organizations without water rights under state or federal law must be policed and curtailed. The level of illegal water use, particularly in the West, is significant and thus contributes to the contingent nature of property interests in water.⁵⁸
- Due to the public goods nature of species protection in some circumstances, government regulation of and ownership of water rights are important and necessary parts of species protection, even with recognition that private investment can play a much more significant role than it does presently. Such a mixed system of public and private action requires that public actions respect private rights and that compensation be provided when private rights are taken, whether or not compensation is constitutionally required. As noted above, the

⁵⁸See, David E. Filippi, *The Impact of the Endangered Species Act on Water Rights and Water Use*, 48 RMMLF-INST 22 (2002).

ESA anticipates the acquisition of private rights in Section 5.

VIII. Conclusion

Conflict between species protection and water rights will never be eliminated. But the magnitude of the conflict can be much reduced – from all-out warfare to isolated skirmishes – if both sides take a more practical and less principled approach. One difficulty is that species protection advocates have to give up more on principle than do the defenders of property rights. They have to abandon the claim that constitutional protections of property have no relevance for water rights. That difficulty should be overcome, however, by a realization that species protection and other environmental values can and do benefit from more secure rights in water. A second difficulty is that water rights claimants have to accept a water market open to all wishing to bid. That difficulty should be overcome by a recognition that voluntary sale at a mutually agreeable price is preferable to the forced sale of eminent domain. A third difficulty is that government will have to pay market value when species protection requires regulation resulting in the taking of private water rights. This may prove to be the biggest challenge of all, unless the law as set forth in *Tulares* and *Casitas* becomes the law of the land.