ABSTRACT

This paper describes the rules governing so-called inverse condemnation claims and then examines how these rules apply to takings claims arising from water regulation and management. Courts generally approach inverse condemnation claims by asking two questions: whether the claimant possesses “property” and, if so, whether the property has been “taken?” In water takings cases, the threshold property issue is often more important, and analysis of the issue more frequently leads to rejection of takings claims, than in other types of takings litigation. The threshold property issue is often dispositive in water takings cases because state property law frequently defines property interests in water as having a narrow scope and various background principles of federal or state law bar water takings claims. As to the takings issue, contrary to a few judicial rulings to the contrary, there appears to be no sound reason for not applying takings doctrine to claims arising from regulation and management of water in the same fashion that it applies to claims arising from other types of government actions. The paper closes with some speculations about how the advent of climate change and its impacts on water resources may influence future takings litigation involving water.

Introduction

This paper addresses how the Takings Clause of the U.S. Constitution applies to the regulation and management of water resources in the United States. It is designed to provide an introduction for attorneys who are relatively new to the topic. It is also intended to help experienced practitioners identify cutting-edge issues in takings litigation involving water. An overarching goal of the paper is to explain how recent case law developments fit (or do not fit) into the larger doctrinal framework governing this subject area.

The paper is organized as follows. Section I provides a thumbnail sketch of modern inverse condemnation doctrine. (Governments can, of course, acquire water interests directly using the eminent domain power, but that application of the Takings Clause is outside the scope
of this paper.) Section II provides a general description of the different circumstances in which takings issues have arisen from the regulation and management of water. Section III examines how the special, qualified nature of property rights in water affect the analysis of takings claims involving water. Section IV describes how the tests for identifying “takings” have been and should be applied in the water context. Section V looks to the future, focusing on how predicted climate change may affect takings litigation involving water.¹

I. A Thumbnail Sketch of Modern Takings Doctrine.

The Takings Clause of the Fifth Amendment to the U.S. Constitution states: “nor shall private property be taken for public use, without just compensation.” Similar provisions are included or have been read into the state constitutions.

Courts generally decide inverse condemnation cases using a two-part inquiry: does the claimant possess “property” and has the property been “taken?” See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000–1001 (1984). (There is the additional requirement for a valid claim for financial compensation under the Takings Clause that the government action serve a “public use,” that is, a lawful public purpose, but that issue seldom looms large in inverse condemnation cases. See generally John Echeverria, “Takings and Errors,” 51 Ala. L. Rev. 1047 (2000)).

a. The Property Issue.

The Takings Clause imposes outer limits on what kinds of interests will qualify as “property” within the meaning of the Constitution. See Eastern Enterprises v. Apfel, 525 U.S. 498 (1998). But whether an asserted interest actually rises to the level of being property, and the nature and scope of asserted property interests, are determined by resort to some “independent source,” typically state law. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). In addition, so-called “background principles” of nuisance or property law may affirmatively preclude the assertion of a property entitlement to engage in a particular use of property. Lucas, 505 U.S. at 1027-31.

b. The Takings Issue.

There are three situations in which inverse condemnation claims are governed by more or less per se, or automatic, rules. (Reasons why these categorical rules may be less than completely categorical are explored in John Echeverria, “Making Sense of Penn Central,” 39 Environmental Law Reporter News & Analysis 10471 (2009)). These include outright government seizures of possession and control of private property, see, e.g., United States v. Pewee Coal Co., 341 U.S. 115 (1951), permanent (or indefinite) physical occupations of private property by government or

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Outside of these categorical situations, courts resolve takings claims by analyzing the facts and circumstances of each case, generally focusing on the economic impact of the government action, the degree of interference with investment-backed expectations, and the character of the government action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In all events, regulation of the use of property results in a taking only in “extreme circumstances.” *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985). See also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 529 (2005) (the goal of regulatory takings analysis is to identify measures that are “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”).

A critical issue in takings law is the definition of the relevant property for the purpose of measuring the economic burden on the claimant. Under the so-called parcel as a whole rule, the burden of a regulatory restriction or other government action must be evaluated “in relation to the parcel as a whole.” *Penn Central*, 438 U.S. at 130-31. If the rule were otherwise, takings claimants could convert virtually every regulation into a compensable taking by asserting a taking of the specific interest or portion of the property affected by the restriction. See *Concrete Pipe & Prods, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993). Importantly, while the parcel rule applies in regulatory takings cases governed by *Penn Central* and *Lucas*, it does not apply in direct appropriation or physical-takings cases. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-23 (2002). The theory underlying this distinction is that appropriations and physical invasions are particularly intrusive and therefore should be treated as takings regardless of their economic impact, making application of the parcel rule to measure economic impact superfluous in these two types of cases.

Finally, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v City of Tigard*, 512 U.S. 374 (1994), the Supreme Court ruled that a government requirement that would amount to a taking if imposed outside of the permitting process cannot be imposed as condition of a permit without triggering takings liability unless there is an “essential nexus” between the purpose served by the “exaction” and the objective of the regulatory program and a “rough proportionality” between the burden imposed by the exaction and the harm the regulatory program seeks to address. Recently, in *Koontz v St Johns Water Management District*, 133 S.Ct. 2586 (2013), the Supreme Court ruled that the *Nollan/Dolan* standards apply to conditions imposing monetary obligations as well as in the situation where the government has denied a permit because the land owner refused to accept a government demand for an exaction that would have triggered *Nollan/Dolan* review.

II. Varieties of Inverse Condemnation Claims Involving Water.
At the risk of oversimplification, most takings cases involving water fit into about half a dozen different categories.

a. Government-Caused Flooding.

Takings claims have frequently arisen from flooding caused by dams and other similar infrastructure projects. The Supreme Court’s first inverse condemnation case involved flooding. See Pumpelly v. Green Bay Co., 80 U.S. 166 (1871). Permanent inundations of private property caused by government action are said to result in per se takings. See Loretto. In Arkansas Game & Fish Commission v. United States, 133 S.Ct. 511 (2012), the Supreme Court ruled that repetitive yet temporary inundations of private property may, but will not necessarily, result in takings as well. This decision has given a boost to pending claims that, for example, the government took private property by opening spillways along the Mississippi River during flooding in 2011 and inundating the land behind the spillways. See Quebedeaux v. United States, 112 Fed.Cl. 317 (2013) (declining, in light of Arkansas Game & Fish, to dismiss a taking claim based on the opening of the Morganza Spillway). Compare Big Oak Farms, Inc. v. United States, 105 Fed. Cl. 48, 59 (2012) (pre-Koontz ruling rejecting claim that activation of the Birds Point-New Madrid Floodway resulted in a taking). Another case that may be affected by Arkansas Game & Fish involves claims by St. Bernard Parish and private property owners in southeastern Louisiana that the construction of the 76-mile Mississippi River–Gulf Outlet (“MR–GO”) caused a taking because the outlet degraded protective coastal wetlands and channeled floodwaters towards New Orleans during Hurricane Katrina. See Saint Bernard Parish v. United States, 88 Fed Cl. 528 (2009).

b. Government Restrictions on Water Withdrawals.

The obverse of takings claims involving too much water are takings claims in which government action allegedly created a situation where there was too little water. Regulatory restrictions on surface water diversions, often driven by environmental concerns, have given rise to a series of takings cases filed in federal and state court. See, e.g., Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313 (2001); South Yuba Water Management District v. State Water Resources Control Board, 2014 WL 1681330 (Cal.App., 2014) (unpublished mem.). Unlike the flood cases, which have often been successful, claims based on restrictions on diversions have generally failed, with the notable exception of the Tulare Lake case, discussed below.

Restrictions on groundwater withdrawals have also given rise to takings claims. In the overwhelming majority of cases the courts have rejected the claims. See David Owen, “Taking Groundwater,” 91 Washington University Law Review 253, 284-85 (2013) (collecting cases). Indeed in only one (relatively recent) case has a court concluded that a restriction on groundwater use resulted in a taking and just compensation should be paid. See Bragg v. Edwards Aquifer Authority, 2013 WL 4535935 (Tex.App. 2013). A petition to review that decision is currently pending before the Texas Supreme Court.
c. Government Control of Water Pollution.

Another set of water takings cases have involved government regulations designed to prevent water pollution. The courts have consistently rejected this type of takings claim. Thus, for example, in *City of Houston v. Trail Enterprises*, 377 S.W. 3d 873 (Tex. 2012), the court ruled that a city ordinance prohibiting oil drilling within 1000 feet of a lake that served as a public water supply did not effect a taking. *See also Appolo Fuels Inc v. United States*, 381 F.3d 1338, 1350-51 (Fed. Cir. 2004) (designation of area as “unsuitable for mining” under the Surface Mining Control and Reclamation Act not in taking, in part because designation was designed to prevent water pollution); *Machipongo Land and Coal Co., Inc. v. Com.*, 799 A.2d 751 (Pa. 2002) (prohibition of mining to prevent acid-mine drainage not a taking). So-called “perc” tests, which are designed to prevent septic pollution from residential development, often impose drastic restrictions on the opportunity to develop private land. So far as I know, this type of pollution-control regulation has not generated successful takings cases.

d. Government-Caused Pollution of Water.

There is at least one example of the obverse of the water pollution-control cases, that is, the claim that government-caused pollution results in a taking. In *Mildenberger v. United States*, 643 F.3d 938 (Fed Cir 2011), the Federal Circuit affirmed dismissal of a claim based on the theory that the Army Corps’ of Engineers manipulation of water levels in Lake Okeechobee and the release of polluted water through the St. Lucie River and Saint Lucie Canal resulted in a taking.

e. Government-Caused Erosion.

There have been numerous takings cases arising from the erosion of private lands caused by levees and breakwaters or other similar government construction projects. Given the gradual nature of the erosion process, cases in this category have frequently raised questions about whether the claim is ripe or, alternatively, whether it is time-barred. In *United States v. Dickinson*, 331 U.S. 745, 749 (1947), the Supreme Court adopted the basic rule that an erosion takings claim does not accrue until the situation has “stabilized.” Government efforts to remedy an erosion problem have been held to toll the applicable statute of limitations. *See Banks v. United States*, 314 F.3d 1304 (Fed. Cir. 2013). A pending case in this category is *Biloxi Marsh Lands Corp. v. United States*, 111 Fed.Cl. 385 (2013), in which owners of property alongside MR-GO allege that expansion of the channel as a result of erosion resulted in the taking of 150,000 acres of their land.


The obverse of an erosion-takings case is a case based on the theory that a government restriction on filling tidelands or other submerged lands results in a taking. This category
includes, for example, the significant volume of hotly contested cases involving prohibitions on filling of wetlands. *See, e.g., Walcek v. United States*, 303 F.3d 1349 (Fed.Cir.2002).

g. Changes to Water Allocation Systems.

A final type of water takings case involves wholesale legislative modification of a state’s water allocation system. For example, in *Franco-American-American Charolaise, Ltd. v. Oklahoma Water Resources Board*, 855 P. 2d 568 (1990), the Oklahoma Supreme Court held that the legislature’s abrogation of a riparian water rights system in favor of a prior appropriation system constituted a taking under the Oklahoma Constitution. Modifications of state water allocation systems by common law courts could conceivably give rise to “judicial takings” claims, but the viability of this theory remains unsettled after the Supreme Court’s decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010).

III. The Threshold Property Issue in Water Takings Cases.

As discussed, the existence, nature and scope of the alleged “property” interest are threshold issues in every takings case. But the property issue looms especially large in takings cases arising from the regulation or management of water.

a. The Distinctive Physical and Social Characteristics of Water.

The particular importance of the property issue in water-takings is attributable to the distinctive physical characteristics of water as well as its special social functions. First, water, in contrast with land, is highly variable in quantity, on a daily, seasonal and year-to-year basis. One notable consequence of this variability is that, under the prior appropriation system, relatively junior appropriators may have no legal entitlement to water during low-water periods. A property right that comes and goes with the weather, so to speak, is different from most property rights.

Second, the utility of water resources often depends upon and is magnified by shared use of the resource by many citizens. An obvious example is the use of navigable waters as unobstructed channels of commerce.

Third, uses of water are often highly interdependent. Many, perhaps most, water users depend on “return flows” from upstream water uses in order to meet their water needs. Groundwater pumping by one landowner can cause water to migrate underground, to the possible detriment of neighbors’ ability to access water from their lands.

Fourth, the scarcity and high value of water have produced certain distinctive public-interest limitations on property rights in water. The use it or lose it principle of traditional western water law is the classic illustration: if a holder of an appropriative right stops using the water, the owner will be deemed after some period of time to have given up his water right,
freeing the water for appropriation by someone else. This legal rule is based on the principle that if an owner is not making productive use of his property society should have the right to make an uncompensated transfer of the property to someone who will make productive use of the resource. In the real estate context, by contrast, the law obviously does not divest an owner of title to a residential or commercial building simply because the owner is not making productive use of the property. The principle that the holder of a water right can claim no entitlement to make “wasteful” use of water is another example of a special, public-interest limitation on property rights in water.

Modern environmental concerns have given rise to new demands for regulation and management of water to serve the public interest. But, as the preceding discussion hopefully demonstrates, the notion that private property rights in water should be qualified because of the special character and great public importance of water resources is hardly new.


An elaborate body of highly varied state law creates and defines private interests in water. Traditionally at common law, surface waters is the East were governed by riparian doctrine while surface waters in the West were governed by the system of prior appropriation. Five different legal systems are said to govern groundwater: the rule of capture, correlative rights, reasonable use doctrine, prior appropriation, and the Second Restatement of Torts' Doctrine of Reasonable Use. See generally Barton Thomson, Jr., John Leshy, and Robert Abrams, Legal Control of Water Resources, Cases and Materials (5th ed. 2103). Today, extensive statutory law overlays the common law rules governing both surface waters and groundwater in most states. Id. The character and outcome of takings cases involving water often are affected to a significant degree by the nature of the underlying water interest at stake.

In some water-takings cases there will be a question whether a takings claimant can even identify a protected property interest in water at all. For example, in Mildenberger v. United States, 643 F.3d 938 (Fed Cir 2011), the court rejected a claim that riparian landowners suffered a taking of their rights to view wildlife, to boat, fish or swim in the waters adjacent to their properties, and to have the waters adjacent to their properties free from pollution, on the ground that these asserted “rights” were not among the recognized property rights of riparian property owners under Florida law. By contrast, in Edwards Aquifer Authority v Day, 369 S.W.23d 814, 839 (Tex. 2012), the court rejected the government’s argument that groundwater pumping restrictions could not result in a taking of the water beneath the plaintiff’s land because, under the Texas rule of capture, property owners have no right to bar neighbors from using pumps to drain the water from beneath their land.

Even when there is a recognized property right in water, it may have a special, narrow scope. In all or most of the western states, the public owns the water itself (that is, the molecules making up the water), and private parties can only acquire “usufructory” interests in water. See
Robert Adler, Robin Craig and Noah Hall, Modern Water Law: Private Property, Public Rights, and Environmental Protections 121 (2013) (“beneficial use is ‘the basis, the measure, and the limit’ of an appropriative water right”). For some purposes, the distinction between ownership of the physical water and a right to use the water will be of little consequence; for example, all a farmer requires from a water right is the ability to divert the water and “use” it to irrigate his fields. If he is barred from watering his crops he suffers the same burden as a result of the interference with his usufructuary interest that he would suffer if he owned the water itself. In other contexts, however, the takings analysis may well be affected by the character of the property interest in water, as discussed below.

The case of Arkansas Game & Fish illustrates how the nature and scope of a property right in water might be relevant to the resolution of a takings claim. All of the lower federal courts addressing the takings claim ignored the potential relevance of the state-law definition of the underlying riparian rights. However, in an amicus brief filed in the U.S. Supreme Court, Professor Robert Abrams and others pointed that the plaintiff had no vested entitlement to unaltered river flows in view of the legal rights of other riparian owners, such as the Army Corps of Engineers, to modify the river flow to serve their own reasonable needs. Justice Ruth Ginsburg, writing for the Court, acknowledged the potential relevance of the issue to the proper disposition of the takings claim. 133 S. Ct. at 522 & n.1. But she ruled that the issue had been waived, underscoring the fact that litigators need to pay more attention to the threshold property issue in order to properly represent their clients in water takings cases.

Finally, it is noteworthy that some select states have so qualified private interests in water that it is debatable whether they qualify as property as at all. Two remarkable but little noticed provisions of the California Water Code, sections 1392 and 1629, provide:

Every permittee [or licensee], if he accepts a permit [or license], does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit [or license] . . . in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State . . . of the rights and property of any permittee [or licensee] . . . of any rights granted, issued, or acquired under the provisions of [the law governing the appropriation of water].

Cal. Water Code § 1392, 1629 (West 2011). Comparable statutes are found in Arizona, Ariz. Rev. Stat. Ann. §45-159 (West 2003), and Oregon, Or. Rev. Stat. §537.390 (2003). On their face, these provisions preserve public authority to reclaim water rights previously granted to private water rights upon payment of the water right’s original cost, which will certainly be far below the current market value of these interests. Despite the lack of attention these provisions have received, they seem to mean exactly what they say. See Joseph Sax, “Reserved Public Rights in Water,” 36 Vermont Law Review 535 (2012).

c. Background Principle Limitations on Water Rights.
Assuming a claimant can point to a protected property interest in water, so-called “background principles” of state or federal law may affirmatively preclude a claim of entitlement to exercise the property right. Two examples will suffice to illustrate the potential importance of background principles in the water context.

**Navigation servitude.** The most venerable background principle for takings purposes is the navigation servitude, which precludes government liability under the Takings Clause for government actions designed to protect or promote navigation. See *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (rights of “riparian owner in the submerged lands . . . bordering on a public navigable water” are held subject to the federal navigational servitude). The navigational servitude derives from the Commerce Clause of the U.S. Constitution and, by virtue of the Supremacy Clause, overrides conflicting state property law. The navigation servitude grows out of the special public importance of maintaining unobstructed use of navigable waterways, discussed above.

While all riparian lands bordering a navigable waterway are subject to the navigational servitude, the servitude applies only to government actions that are related to promoting navigation. *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000). There has been a good deal of litigation focused on whether government activities in or affecting navigable waters are within the scope of the federal navigational servitude. Compare *Palm Beach Isles*, supra (environmental-protection objectives not within the scope of the navigation servitude) with *Mildenberger v. United States*, 91 Fed. Cl. 217, 248 (2010.), aff’d on other ground, 643 F.3d 938 (Fed Cir 2011) (release of polluted water from Lake Okeechobee in order to protect the structural integrity of levees surrounding the lake was within the scope of the navigation servitude).

**Public Trust Doctrine.** The public trust doctrine is also frequently invoked as a background principles defense in takings litigation. Under this common law doctrine, the state owns and has a duty to manage tidal and navigable waters, together with the lands beneath them, in trust for the public. See generally *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). While the doctrine was originally understood to focus on navigation, commerce and fishing, various state courts “over time have developed the doctrine alongside the public's changing uses of water to incorporate additional public purposes, including traveling, bathing, recreating, hunting, protecting the ecosystem, preserving scenic beauty, and maintaining access to the waters.” Melissa Scanlan, “Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast,” 65 South Carolina Law Review 295, 308 (2013).

The public trust doctrine defeats takings claims because it imposes an overarching limitation on private property interests in public trust resources. Thus, for example, courts have held that the doctrine precludes takings claims based on regulatory prohibitions on filling tidelands, see, e.g. *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002); *McQueen v. South Carolina Coastal Council*. 580 S.E.2d 116 (S.C. 2003), on limitations on
mining activity that threaten to pollute public trust waters, see, e.g., *Machipongo Land and Coal Co., Inc. v. Com., supra*, or on mandates that a land developer allow public access to an area subject to the public trust. *See, e.g., National Association of Homebuilders v. New Jersey Department of Environmental Protection*, 64 F.Supp.2d 354 (D.N.J. 1999).

The most famous modern public trust case, *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), has figured prominently in takings cases arising from restrictions on water diversions. The California Supreme Court discussed in detail the relationship between the appropriative water rights system and the California public trust doctrine. The court ruled that the state’s “continuing supervisory control” over water resources subject to the trust “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.” *Id.* at 445. The court recognized that the government has the power to grant permission to private parties to divert and use water, even if “this . . . [activity] does not promote, and may unavoidably harm, the trust uses at the source stream,” *id.* at 446, but the exercise of this power cannot create an entitlement to harm trust resources.

Because the California public trust doctrine bars anyone from “acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust,” it follows that a restriction on pre-existing water use to protect public trust resources from harm does not result in a taking. The California Court of Appeal recognized and applied this reasoning in *United States v. State Water Resources Control Board* 182 Cal.App.3d 82 (1986). The case involved a legal challenge to the Board’s adoption of new water quality standards for salinity control and for protection of fish and wildlife in the Sacramento-San Joaquin River Delta. The U.S. Bureau of Reclamation objected to these standards on the ground that they “would result in impairment of its vested appropriative rights.” *Id.* at 149. The Court rejected the argument stating that “[t]he issue is now clearly controlled by *National Audubon.*”

In that case the Supreme Court clarified the scope of the ‘public trust doctrine’ and held that the state as trustee of the public trust retains supervisory control over the state’s waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust.

*Id.* Quoting *National Audubon*, the Court concluded that in exercising its supervisory function over public trust resources the Board was “not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs,” and “[n]o vested rights bar such reconsideration.” *Id.*, quoting *Nat. Audubon*, 33 Cal.3d at 447 (emphasis added).

Despite the clarity of the California courts’ position the that public trust doctrine functions as a background principle barring takings claims, the U.S. Court of Federal Claims has fumbled the public trust doctrine in two separate cases. The silver lining for government defendants is that neither case produced a precedential decision. In the notorious case of *Tulare*

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2 Notorious because the U.S. Department of Justice declined to prosecute an appeal from the adverse decision of the claims court, notwithstanding the availability of solid legal arguments for
Lake Irrigation District v. United States, 49 Fed. Cl. 313 (2001), the claims court upheld takings claims based on restrictions on water deliveries from the Sacramento–San Joaquin Delta imposed pursuant to Endangered Species Act. The court rejected the government’s argument that the claim was barred by the public trust doctrine. As a threshold matter, the court “accept[ed] the proposition that [a water user has] no right to use or divert water . . . in a way that violates the public trust.” Id. at 321. But the court offered two reasons for why, in its view, the public trust doctrine could not serve as a defense to the takings claim in this case. First, it ruled that the original water permit issued by the State Water Resources Control Board (SWRCB) represented an authoritative determination by a branch of state government that “define[d] the scope of the plaintiffs’ property rights,” id. at 322, and that determination was binding on a federal court unless and until it was modified by the SWRCB or a state court. Second, the claims court believed the question whether the public trust doctrine requires a modification of the water permit involved “a complex balancing of interests,” a task for which a federal court “is not suited and with which it is not charged.” Id. at 323-24.

As I have explained in detail elsewhere, see John Echeverria, The Public Trust Doctrine as a Background Principles Defense in Takings Litigation,” 45 UC Davis Law Review 931 (2012), this analysis was plainly mistaken. First, contrary to the claims court’s reasoning, issuance of a water permit does not immunize a permit holder from the public trust doctrine: as the California Supreme Court explained in National Audubon, the doctrine by its own force “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.” Nat’l Audubon, 658 P.2d at 727. Second, again contrary to the view of the claims court, no balancing of interests is required to determine whether the public trust doctrine precludes a claim of entitlement to the use of water. Rather, for the reasons discussed above, the only pertinent issue in deciding whether the public trust doctrine bars a takings claim is whether the regulated water use is harmful to public trust resources. Under National Audubon, the SWRCB can appropriately engage in a balancing of interests in deciding whether to issue a permit for a project that will unavoidably harm public trust resources, but the scope of the board’s discretionary authority does not determine how the public trust doctrine affects private property interests in water. Unfortunately, the United States did not pursue an appeal in the Tulare Lake case, meaning that an appellate court did not have the opportunity to correct the errors committed by the claims court.

Subsequently, in Casitas Municipal Water District v. United States, the claims court (indeed the same judge) revisited the issue of whether the public trust doctrine operates as a defense to a takings claim. This case arose from restrictions on diversions at a water supply project on the Ventura River designed to protect endangered steelhead trout. The claims court ultimately dismissed the claim for lack of a ripe claim, and that ruling was upheld on appeal. But in what amounts to extended dictum the claims court discussed whether the claim was barred by the public trust doctrine. The court abandoned its prior reasoning in Tulare Lake for concluding that the public trust doctrine did not bar the takings claim, but adopted new reasons that are equally flawed. First, the court ruled that the public trust doctrine can only serve as a defense to doing so. See Bettina Boxall, U.S. to Pay $16 Million in Water Rights Case, L.A. Times, Dec. 22, 2004, at B1; Juliet Eilperin, U.S. to Pay Farmers in Calif. Water Flap, Wash. Post, Dec. 22, 2004, at A03.
a taking claim based on state government action, not federal government action. This argument is mistaken because the public trust doctrine qualifies a property interest for the purpose of a takings claim in the same fashion regardless of whether the claim is based on state or federal government action. Second, conducting the balancing analysis it eschewed in Tulare Lake, the court concluded that the balance tipped in favor of the claimant. Setting aside the issue of whether the court applied the balancing analysis fairly (it did not, in my view), the more basic flaw with the court’s approach was in choosing to apply a balancing analysis to resolve the takings issue, for the reasons discussed above.

Hopefully the U.S. Court of Federal Claims will get the California public trust doctrine right eventually, but it has not done so yet.

IV. Applying the Takings Tests in the Water Context.

It has been more than 100 years since the Supreme Court last directly addressed whether a regulation constitutes a taking of a water right in the case of Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). The Court rejected the claim that a New Jersey law restricting the export of water from a New Jersey river to the neighboring state of New York resulted in a taking of the plaintiff’s riparian water right. The Court declared:

[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, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.

Id. at 356. Hudson County predates the development of modern takings doctrine and the Court’s analysis is certainly difficult to categorize in terms of modern takings law. But at a minimum Hudson County would seem to counsel restraint in applying the Takings Clause in the water context. This suggestion has not always been followed

a. Applying the Physical Takings Theory.

As discussed, it is well established that permanent physical occupations or invasions of private property should be regarded as per se takings. It is logical to apply that principle in the context of water in the same fashion that it applies in any other context. Thus, when government dams and other infrastructure projects permanently flood private lands with water there is generally little dispute that a taking has occurred. Indeed, cases involving government-caused flooding represent the foundation of the modern per se takings rule for permanent physical invasions.

Because claimants asserting a physical taking are not required to establish a serious economic burden on the property as a whole, they naturally seek, in all types of takings cases, to argue that their claims should be analyzed under the physical takings theory rather than as potential regulatory takings. See, e.g., Yee v. City of Escondido, 503 U.S. 519 (1992) (rejecting argument that mobile home rent control should be regarded as a physical taking). Likewise in the water context specifically, litigants commonly attempt to reframe what in reality are
regulatory claims into physical takings claims. Generally speaking, these efforts have filed, with
some notable exceptions.

b. Analyzing Regulatory Takings Analysis.

Starting from first principles, there is no sound reason for applying anything other than
traditional regulatory takings analysis to takings claims arising from regulatory restrictions on
the use of water. The *Penn Central* analysis has been applied to takings claims arising from
regulatory restrictions on a wide variety of property interests and there is no apparent reason why
the same analysis should not apply to takings claims arising from restrictions on water use
Moreover, the limited nature of the property interest in water makes it especially incongruous to
attempt to characterize a regulatory constraint on the use of water as a physical invasion or
occupation. As discussed above, a water rights holder typically holds only a usufructuary interest
in water, and has no claim to ownership of the water itself. It seems to follow that a regulatory
restriction on a use right has to be analyzed as a potential regulatory taking.

In accordance with this reasoning, most courts have declined to analyze takings claims
involving water as potential physical takings claims. *See, e.g., Edwards Aquifer Authority v
Day, supra* (rejecting argument that regulatory restriction on groundwater pumping should be
treated a physical taking); *Allegretti & Co. v. Cnty. of Imperial, 42 Cal Rptr. 3d 122, 132
(Ct.App. 2006)* (same)

This is not to suggest that there are not some complexities in applying regulatory takings
analysis to water regulations, including the question of how to apply the relevant parcel rule in
this context. One important question is whether a property interest in water should be considered
as a unit together with the land which is served by the water interest. Some cases appear to
proceed on the assumption that the water interest may be considered independently from the
land. *See Tulare Lake.* But when a water right is used to support a particular use of a specific
piece of land, and especially when a water interest is legally appurtenant to a particular parcel of
land, there is a strong case for including the land in the analysis. In the pending *Bragg* case in
Texas, the Edwards Aquifer Authority is seeking review in the Texas Supreme Court in part on
the ground that the lower court failed to assess the economic impact of the restriction on
groundwater pumping on the value of claimant’s agriculture lands on which the water is used.

Second, there are complexities even if one focuses on the water right alone. Given the
physical variability of water flows and the different priorities under an appropriative water
system, a water right does not confer a guarantee to a fixed quantity of water year in and year
out. In some years, when precipitation is abundant, a water rights holder will be able to use the
full amount of her appropriation. But in other, drier years, the holder may have to accept a
reduced amount of water or even do without completely. If new regulatory constraints are
imposed, for example to maintain minimum stream flows to protect a fishery, the effect may be
an increase in the risk of reduced water availability in any given year. Depending on the
weather, the new restrictions could produce a shortfall in water deliveries immediately or the appearance of a shortfall could be delayed. The most straightforward way to assess the economic impact of a regulatory limit on water use is probably to compare the value of the water right without regulation (when shortages would be dictated by natural variability) with the value of the water interest subject to regulation (when shortages would be dictated by a combination of natural variability and “regulatory shortages”). This appears to be the most straightforward way to apply the with-and-without measure of economic impact in a water takings case, assuming for the sake of argument that the takings analysis can appropriately focus on the water interest alone.

In the Tulare Lake case the claims court (mistakenly in my view) declined to apply a traditional regulatory takings to a regulatory limit on water use imposed pursuant to the Endangered Species Act. Instead, the claims court ruled that the plaintiffs established a per se physical taking. The court offered several arguments to support this conclusion, none of which has any merit, as I have discussed at greater length elsewhere. See John Echeverria, “Is Regulation of Water a Constitutional Taking?,” 11 Vermont Journal of Environmental Law 581 (2010). The court said the regulation was a physical taking because it rendered the property valueless. This reasoning is plainly mistaken because a regulation that has such a drastic negative impact may trigger the Lucas regulatory takings rule, but it does not support the conclusion that there has been a physical taking. In addition, the assertion that the regulation rendered the property valueless rested on an implicit assumption that the parcel rule did not apply in the first place, a premise that would have been correct only if traditional regulatory takings test did not apply; in others words, the court’s analysis simply begged the question at issue. Finally, Judge Wiese thought the conclusion that the physical takings test applied drew support from several older Supreme Court decisions, but in fact those cases involved direct appropriations, rather than physical occupations, and therefore are distinguishable. See id at 598-99.

In the subsequent case of Casitas Mun. Water Dist v. United States, 76 Fed. Cl. 100, 103 (Fed. Cl. 2007), the claims court reversed itself. Relying principally on the Supreme Court’s intervening decision in Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), which clarified the distinction between regulatory takings claims and physical takings claims, the court reached the (in my view) correct conclusion that takings claims based on regulation of water use should be evaluated as potential regulatory takings. On appeal from that ruling, the Federal Circuit did not dispute that regulatory restrictions on water use should generally be analyzed as regulatory takings. See Casitas Mun Water Dist. v. United States, 543 F.3d 1276, 1296 n. 16 (Fed. Cir. 2008) (declining to “opine on whether Tulare was rightly decided”). Other courts have criticized the ruling in Tulare Lake and declined to follow it. See, e.g., Allegretti & Co. v. Cnty. of Imperial, 42 Cal Rptr. 3d 122, 132 (Ct.App. 2006) (“W[e disagre with Tulare Lake’s conclusion that the government’s imposition of pumping restrictions is no different than an actual physical diversion of water”); In sum, after all the sturm
and drang occasioned by the Tulare Lake takings ruling, its per se physical takings theory seems to be dead and buried.

On appeal in the Casitas case, while the Federal Circuit declined to embrace the theory that a restriction on water use constitutes a taking, it ruled that the plaintiff still presented a viable per se physical takings claim because the regulators required that water be passed through newly constructed fish ladders. As I have explained in detail elsewhere, I believe this decision was seriously flawed and ignored significant precedent to the contrary. See John Echeverria, “Is Regulation of Water a Constitutional Taking?,” 11 Vermont Journal of Environmental Law 581 (2010). On the positive side, from my perspective, the physical takings ruling in this case is probably confined to the facts of the case, including specific concessions made by the government for sake of the appellate argument. In a subsequent decision in the Casitas case the Federal Circuit concluded that the plaintiff failed to present a ripe claim, resulting in dismissal of the entire case, suggesting that the Federal Circuit’s earlier discussion of the physical takings theory in the Casitas case can probably be dismissed as dictum. Casitas Mun. Water Dist. v. United States, 708 F.3d 1340 (Fed. Cir. 2013).

The second type of water takings case that has generated considerable ferment with respect to the “takings” issue involves government-caused inundations of private property. As discussed, in Arkansas Game & Fish the Supreme Court ruled that temporarily recurring inundations caused by government can give rise to viable takings claims. Unfortunately, the opinion for the Court is likely to create confusion about the appropriate takings test in this type of case. In the main, the Court’s opinion suggests that the analysis should follow the outline established by Penn Central. The Court refers to the severity of the impact of the government action as a relevant factor, along with the claimant’s “reasonable investment expectations.” The opinion includes a somewhat confusing reference to the need to consider “the character of the land at issue,” which is not a normal consideration in takings litigation. Perhaps what the Court has in mind is that the degree and severity of prior flooding should be factored into the analysis of the reasonableness of the owner’s investment expectations. The opinion makes no reference to the traditional third factor in the Penn Central analysis, the character of the governmental action. Perhaps the Court thought mention of this factor was redundant in a case self-evidently involving inundation. But the omission is noteworthy because the Penn Central decision says, in its discussion of the character factor, that “[a] “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” 438 U.S. at 104. Perhaps, in light of Penn Central, the Court thinks government-caused temporary inundations should be more likely to produce successful takings claims than ordinary regulations of property use. Time will tell.

Finally, the Court’s opinion highlights the importance of an established element of takings analysis that is likely to have particular salience in a takings case arising from government-caused inundation, that is, the requirement that the alleged harm to the property
interest must be the predictable consequence of a government-authorized action. See generally John Echeverria, “Takings and Errors,” supra. While this element of a successful takings claim is ordinarily not contested, it will likely be an issue with some frequency in inundation cases, where flooding may result from accidents with unpredictable outcomes by governmental officials. In addition, as several of the Court’s citations confirm, litigation in this area will raise the important but relatively obscure issue of the distinction between a takings case and a claim sounding in tort.

V. Looking to the Future – The Effects of Climate Change on Takings Litigation.

The new wild card in water regulation and management is obviously climate change. Increased global temperatures and changed weather patterns are predicted to produce significant reductions (and some increases) in precipitation in different locations around the country. As succinctly stated in the recently-released 2014 National Climate Assessment (http://nca2014.globalchange.gov): “More winter and spring precipitation is projected for the northern United States, and less for the Southwest, over this century.” What are the implications of these predicted changes for takings litigation involving water?

a. More severe water shortages and more serious flooding could both give rise to more takings cases Government restrictions on water withdrawals to reduce the adverse effects of shortages on water users and/or to mitigate the environmental effects of dwindling instream flows could be fodder for numerous takings claims. At the same, government efforts to manage larger volumes of floodwaters could also generate more takings claims, especially following the recent Arkansas Game & Fish Commission case.

b. To the extent takings awards, or the mere threat of takings liability, deters government officials from takings steps to respond to decreases in water shortages, or to higher flood flows, the environmental damages and other social harms due to climate change could be exacerbated.

c. Increased water shortages due to climate change risk making the distribution of wealth even more unequal than it is today. Climate change will increase the scarcity of water resources in significant parts of the country and, together with the demands of a growing population, tend to raise the price of water to consumers, farmers, and others. The water-haves will become more wealthy than the water-have-nots. To the extent takings doctrine helps protect asserted entitlements to water, it may interfere with more equitable sharing of water resources in an era of scarcity.

d. An important legal question is how climate change may affect “reasonable investment-backed expectations” in water rights. Some courts have ruled that investment–backed expectations should reflect the nature and severity of the challenges facing society that can reasonably be expected to prompt a regulatory response. See generally John Echeverria, “Making Sense of Penn Central,” supra. Going forward, the already apparent and predicted
future effects of climate change should arguably bar virtually any water right holder from claiming an investment-backed expectation to exploit a water right free from regulatory controls.

e. Adaptation is widely understood to be an important, inevitable response to climate change. Strong legal protections for pre-existing water interests, pursuant to the Takings Clause or otherwise, could be maladaptive in the sense that water rights holders may feel they have a constitutional entitlement not to reduce water use in the facing of increasing water shortages. (On the other hand, the use it or lose it principle of western water law has been widely discussed as a potential obstacle to voluntary water conservation efforts).

f. Finally, depending on the level of changes in water supplies due to climate change and the nature and extent of the resulting problems, climate change could create pressures to change our basic conceptions of property rights in water. As Justice Antonin Scalia famously remarked in his decision for the Court in Lucas v. South Carolina Coastal Council, 505 U.S. at 1031, “changed circumstances or new knowledge may make what was previously permissible no longer so.”