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**2006 Water Law Symposium:
Keynote Address**

*By Roderick E. Walston**

I. Introduction

I really appreciate the opportunity to speak at this wonderful conference. I think this conference will be very successful in the future as a result of the timeliness of the issue of water law. You are all beginning to learn by your attendance at this conference what it took me an entire career to learn: Water law is truly a very exciting and challenging field of law to practice.

Water law is especially important in California and the West because our natural water supply is insufficient for our population. As a result of the scarcity of water, water law is linked with public policy considerations in a way that other areas of law are not. How and where we distribute our water determines in large part which areas and industries will grow and which will not. It also determines the balance between our environmental quality and our domestic and agricultural growth. Former California Governor Pat Brown, who was responsible for developing much of California's water infrastructure, once told me that water issues were by far the most interesting problems he ever encountered. He also said that water issues are most important because they

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are going to have the biggest effect on California's future.

In California today, we see the importance of water law issues everywhere around us. We are "submerged" in water issues. How much water should flow from northern California to southern California? How should we balance environmental preservation against economic growth? How should we plan for future water supplies for the growing population of California? These questions are at the centerpiece of water law today and will remain the centerpiece for generations to come.

During my career, I have been fortunate enough to see water law from many different perspectives. I have spent most of my career in government service, and now I am in the private sector. While in government, I spent most of my career in the California Attorney General's office, and then eventually with the U.S. Department of the Interior in Washington, D.C. I have worked on both sides of the federal/state fence and the public/private fence. In fact, I have been on both sides of many fences. This gives me a unique perspective. Actually, I found that I was able to take many of the briefs that I wrote when I was in the Attorney General's office and simply use them when I moved on to do work with the federal government. I just had to insert the word "not" in a lot of sections.

In many ways, water law reminds me of an egg because what it means depends on the eye of the beholder. When a mother hen looks at an egg, she sees a chick, whereas a rooster sees his virility, and a

farmer sees his breakfast. In the same way, water law means different things to different people.

To environmentalists, water law is the way to preserve our natural resources—to preserve fish in the Delta, salmon in the ocean, and maybe even a way to drain Hetch Hetchy. To cities, farmers, and developers, water law is a way to develop and grow our economy and industry, to build the "shining city on the hill," to produce foods that will be marketed in California and throughout the world, and to sustain growing populations.

Bill Mulholland, who was the architect of the Los Angeles Aqueduct, which brings water from Owens Valley to Los Angeles, summarized this point at the Aqueduct's opening ceremonies.¹ When the first water poured out of the Aqueduct, he said to the people of Los Angeles: "There it is. Take it."² That was his view; the water was there for the taking.

These different perspectives all have some validity (perhaps some more than others) because water serves many purposes in our society. My own perspective of water law has been shaped by my long career in government service. Based on my government career, I am more inclined to see water law through the prism of federalism, as a way to determine the balance between federal and state power and how they regulate water, a way to define the role of the federal government and the states in our constitutional system. From this perspective, the issue is not so much who wins (as between environmentalists and water users) but rather who decides.

1. The Aqueduct opened on November 5, 1913. William Mulholland, Los Angeles Department of Water and Power Biography, <http://www.ladwp.com/ladwp/cms/ladwp001562.jsp>.

2. *Id.*

While I am not agnostic on how water is used, I respect the institutions that have been created to make these decisions. As a government lawyer, my job was to make sure that the right institution made the decisions, that it followed the right process, and that it applied the right laws.

During my presentation today, I will discuss issues of federalism in the field of water law, particularly in terms of how they arise before the United States Supreme Court and are decided by the Court. This is a very timely topic because the nature of our federalism is being much debated across the land today. The Supreme Court itself is engaged in this debate. The Court has issued recent decisions that have defined the relationship between the federal government and the states in our constitutional system, and these decisions have enormous ramifications for water law. To be sure, the Court's jurisprudence in this area has been unsteady and uneven. Some people say that the Court is in the midst of a federalism revolution that is going to continue; others say that the revolution is over, and still others say it never occurred.

The Court has a case on its docket right now that raises federalism issues in water law, and its decision may clarify the federal and state roles in regulating water.³ Additionally, there are other cases lurking out there that may work their way to the Supreme Court. This is an exciting time to be practicing in the field of water law.

I. Background: Federalism in Water Law

To understand federalism in water law, you need to have basic understanding

of how our water laws came about. Indeed, our water laws are the product of our own history, much more so than in many other areas of law. In the beginning, the states controlled all navigable and non-navigable waters. After the American Revolution, the King of England's sovereign powers went to the states, and the states had all the power. When new states, like California, came into the Union, they were on equal footing with other states, receiving sovereign control of their waters.

The Constitution delegates a substantial amount of power to the federal government. One of the powers is the power to regulate interstate commerce. It is this power that provides basis for laws like the Endangered Species Act,⁴ the Clean Water Act,⁵ and other acts that regulate our environment at the national level. But the states have otherwise retained control of the right to regulate the actual use of the water within their borders. For their part, the states have adopted two kinds of water rights laws—riparian laws and appropriation laws.

Most eastern states recognize riparian rights. The riparian right is an incident of land ownership—the right belongs to the land. If you own Blackacre, you have the right to use water that flows across your land. The right attaches to the land.

In the West, the experience was different and a different system developed. The early miners developed a custom of diverting water from land they did not own to mining claims. The federal government owned the lands across which the water was running, and the miners felt free to divert the water. This simple cus-

3. *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004), cert. granted, 126 S. Ct. 414 (argued, Feb. 21, 2006).

4. 16 U.S.C. §§ 1531-1544 (2006).

5. 33 U.S.C. §§ 1251-1387 (2006).

tom, which developed in the gold mining camps in eastern California, ripened into the doctrine of appropriation. This is the prevalent water law of the West today. Under this doctrine, the right to use water depends on the right to put it to beneficial use. The priority of the right depends on the simple principle of "first in time, first in right." Remember this as the same principle that controlled the line for the high school drinking fountain.

Today, the appropriation doctrine is the basic water law that allows water to be transported from rivers in eastern California to coastal cities like Los Angeles and San Diego. This is an example of how water law follows public policy: Where water is plentiful (as in the East), water rights attach to the land; where water is scarce (as in California), rights depend on how the water is used. As a result, America has a water law system unlike any other in the world. It is the product of our unique history. The federal government has the right to regulate interstate commerce, which allows it to regulate water for some purposes (e.g., protecting endangered species), but the states regulate the right to use water itself.

These different federal and state systems sometimes come into conflict. One major conflict arose in California several years ago over whether state water laws applied to federal reclamation products.

In 1902, Congress passed the Reclamation Act,⁶ which authorizes the federal government to build federal water projects all over the West. These projects, like the Central Valley Project in California,⁷ have developed much of the West's water supply. The Reclamation Act contains a provision which requires the federal government to comply with state water laws.⁸ Under this provision, California's State Water Resources Control Board imposed some rather Draconian conditions on the New Melones Dam, a federal project.⁹ These conditions, among other things, require that water be released from this project to protect downstream water quality.¹⁰ The federal government was very unhappy with the conditions, so they challenged them in court, claiming that states do not have the right to control abuse of water over reclamation dams.¹¹ Indeed, the Supreme Court issued several decisions during the 1950s upholding the argument that states cannot control federal water uses.¹²

In 1978, the Court returned to those prior decisions and, while not explicitly reversing them, moved in the opposite direction. In *California v. United States*, the Court held that the federal government has to acquire its water rights under state law.¹³ Moreover, the Court held that the federal government must comply with conditions that the states attach to water rights.¹⁴ In retrospect, the Court's deci-

6. 43 U.S.C. §§ 372-586 (2006).

7. See generally *California v. United States*, 438 U.S. 645 (1978) (discussing the endeavors of the Central Valley Project).

8. 43 U.S.C. § 383 (2006).

9. *California v. United States*, 438 U.S. at 647.

10. *Id.*

11. *Id.*

12. See, e.g., *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958) (reversing a state court decision that refused to recognize contracts entered into pursuant to the Reclamation Act); *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950) (finding that congressional control of water use superceded state authority).

13. *California v. United States*, 783 U.S. at 678-79.

14. *Id.*

sion in 1978 was one of the earliest articulations of the fundamental reshaping of the balance of power between the federal government and the states to regulate water in the West. Under this restructuring of the law, the Court began to pay more deference to state water laws than it had in the past. Then-Justice Rehnquist noted that the "consistent thread of purposeful and continued deference to water law by Congress" is one of the hallmarks of Congress' reclamation policy.¹⁵ This does not mean that the states always win, in fact, they often do not. However, it does mean that state interests are considered and given more weight than they were prior to that decision.

II. Environmental Statutes and Federalism

In the late 1960s and early 1970s, Congress enacted several laws that provided for environmental protection at the national level. These laws include the Clean Water Act,¹⁶ the Clean Air Act,¹⁷ the National Environmental Policy Act (NEPA),¹⁸ the Endangered Species Act,¹⁹ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,²⁰ Superfund,²¹ and many others. These laws are responsible for flooding our legal lexicon with acronyms. For example, a recent Ninth Circuit opinion included the sentence "The CEQA requires an EIR rather than an EIS, which is required under NEPA."²² This moved the court to comment that "acronyms are

not required by any federal statute but seem to be the preferred lexicon of environmental law."²³ So if environmental law is a field you intend to enter, you need to know your acronyms. In any event, some of these environmental laws raise very important federalism issues. This is especially true of the Clean Water Act and the Endangered Species Act. I would like to discuss some of the issues arising under these two acts in just a little more detail.

A. The Clean Water Act

The Clean Water Act (CWA) establishes permit programs that regulate the discharge of pollutants into navigable waters.²⁴ One permit program regulates pollutant discharges from point sources and another authorizes the Army Corps of Engineers to exercise permit authority over all discharges from dredge and fill operations in navigable waters.²⁵ Congress did limit the intrusion of this federal act into the states' traditional areas of responsibility. Most importantly, the CWA does allow the states to take over their own National Pollutant Discharge Elimination System (NPDES) programs.²⁶ California was the first state to do this. In fact, to date almost every state has taken over its own NPDES program.

Congress also limited their intrusion upon state sovereignty by providing that the permit programs apply only to navigable waters.²⁷ Why did Congress do that?

15. *Id.* at 653.

16. 33 U.S.C. §§ 1251-1387 (2006).

17. 42 U.S.C. §§ 7401-7671 (2006).

18. *Id.* §§ 4321-4370 (2006).

19. 16 U.S.C. §§ 1531-1544 (2006).

20. 42 U.S.C. §§ 9601-9675 (2006).

21. The Superfund Amendment and Reauthorization Act of 1986, 100 Stat. 1613 (1986).

22. *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1083 (2003).

23. *Id.*

24. 33 U.S.C. § 1251(a) (2006).

25. *Id.* § 1252 (2006).

26. *Id.* § 1252(c).

27. *Id.* § 1252(c)(3).

The answer is that the Constitution gave Congress the power to regulate interstate commerce, and with that power came the power to regulate navigable waters. This leaves to the states the power to regulate everything else, which is to say, non-navigable waters. However, Congress muddied these waters by defining the term "navigable waters" as "waters of the United States."²⁸ The term "navigable waters" is very limited and discreet, whereas the term "waters of the United States" could potentially include every body of water in the United States. This is one example of a situation where Congress provided a definition that is less clear than the term it defines.

The major question is whether the broad, amorphous term "waters of the United States" includes wetlands. Wetlands are swamps, bogs, and marshes around the nation that support various types of water fowl and migratory birds. The question is whether the federal government has the power to regulate these wetlands under the CWA. It raises an even broader question: Whether the federal government has the right to regulate non-navigable waters under the CWA. Remember, non-navigable waters have been traditionally regulated by the states. The Supreme Court has issued two decisions that touch on this question and partially resolve the issue. In a 1985 case, *United States v. Riverside Bayview Homes, Inc.*, the Court held that the federal government

can regulate wetlands that are adjacent to navigable waters.²⁹ The Court went the other way about five years ago in the *Solid Waste Agency* case, holding that the federal government cannot regulate isolated waters.³⁰ Isolated waters are wholly separated from navigable waters, having no connection to them at all. What about the vast bulk of wetlands that fall between these extremes? These wetlands are isolated in that they are not adjacent to navigable waters; however, they are connected to navigable waters remotely, and therefore not completely isolated.

That is the question in a pair of consolidated cases currently pending before the Court: *Rapanos v. United States*³¹ and *Carabell v. United States*.³² In *Rapanos*, the Army Corps of Engineers undertook to regulate wetlands that are connected very remotely to navigable waters.³³ The wetlands were located about twenty miles from a navigable lake.³⁴ In *Carabell*, the Army Corps of Engineers undertook to regulate wetlands that were separated from navigable waters by a spoil berm and thus not connected to navigable waters at all.³⁵ No water from the wetlands in the *Carabell* case ever reached the nearest body of "navigable waters," which was a lake about one mile away.³⁶ In both cases, the wetlands have no apparent effects on the navigable waters or on interstate commerce, which is, of course, the lynchpin in Congress' power to regulate. The Court's decisions in these two

28. *Id.* § 1362(7) (2006).

29. 474 U.S. 121 (1985).

30. *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

31. 376 F.3d 629 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (*argued*, Feb. 21, 2006).

32. *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (*argued*, Feb. 21, 2006).

33. *Rapanos*, 376 F.3d at 632-33.

34. *Id.* at 642.

35. *Carabell*, 391 F.3d at 705.

36. *Id.* at 705-06.

cases will tell us a great deal about how far the federal government can go in regulating non-navigable waters (like wetlands) that have been traditionally regulated by the states.

The *Rapanos* and *Carabell* cases were argued before the Court on February 21, 2006. These cases were the first environmental and water cases heard by the Court since Chief Justice Roberts and Justice Alito took their positions on the Court. Not only will these cases provide insight on how the Court views these broad issues of federalism, but they will also help us learn how the two new members of the Court view these issues.

B. The Endangered Species Act

The Endangered Species Act (ESA) appears to be having a larger impact on state water laws and private rights than any other piece of federal legislation. Unlike the CWA, the ESA makes no accommodations for state sovereignty. Congress' goal was to protect endangered species regardless of the effect on state and local laws. In *Tennessee Valley Authority v. Hill*, the Supreme Court held that Congress' goal was to protect endangered species "whatever the cost."³⁷ The ESA requires federal agencies to consult with federal service agencies before they take any action that may impair endangered species.³⁸ After the consultation, the federal service agency then makes recommendations with the intent of avoiding jeopardy to the species. The federal agency must comply with these recommendations or risk criminal sanctions.⁴⁰

37. 437 U.S. 153, 183 (1978).

38. 16 U.S.C. § 1536 (2006).

39. *Id.*

40. *Id.*

The ESA also prohibits any individual, any state, or even the federal government itself, from killing, endangering, impairing, or injuring, an endangered species without a special permit issued by the Secretary of the Interior.⁴¹

The ESA has a major impact on state water laws and private rights because the ESA often requires that federal action agencies re-allocate water in order to protect endangered fish, even though state laws may have already allocated that same water for private use. This is where the conflict arises. The ESA also has major impact on local land use regulation because it prevents local governments from approving local residential or commercial development in areas where endangered species live. I am not going to address whether these effects are good or bad, or what should be done about them; I simply note that they do exist.

The ESA has a major impact in California because most of the endangered species listed by Secretary of the Interior are found in two states—Hawaii and California.⁴² The ESA is probably one of nation's most popular environmental laws passed by Congress, and, as a result, it will likely prove one of the most difficult for Congress to amend. It is also one of the most controversial laws passed by Congress because of the major impact it has on private land use and states rights. Today Congress is considering amending the ESA to resolve some of these concerns.

The ESA does raise one interesting legal question that cannot be summarized

41. *Id.* § 1533 (2006). These permits are very difficult to obtain.

42. The Endangered Species Listing Program, <http://www.fws.gov/endangered/listing/index.html#species>.

more simply than this: Is the ESA constitutional? To be sure, the Court would never invalidate the whole ESA under any circumstances. However, the question of whether the ESA is constitutional as applied to a specific species is another matter. The ESA was enacted pursuant to Congress' commerce powers, but was not enacted for the purpose of regulating commerce. It was enacted to regulate and protect species. The constitutional issue is whether Congress' regulation of endangered species can be squared with Congress' power to regulate interstate commerce.

To date, four federal circuit courts of appeal have considered whether the ESA is constitutional in light of recent Supreme Court decisions. All four decisions ruled in favor of the constitutionality of the ESA as applied to the species in those cases. These four decisions involve: (1) an endangered fly in southern California called the "Delhi Sands Flower-Loving Fly;"⁴³ (2) endangered red wolves that the Secretary of the Interior reintroduced in North Carolina and Tennessee;⁴⁴ (3) endangered cave bugs and spiders in Texas;⁴⁵ and (4) the endangered Arroyo Toad in southern California (San Diego County).⁴⁶

Although these four decisions upheld the constitutionality of ESA, the reasoning of the decisions varied greatly. Every one of these decisions had vigorous dissenting opinions—some written by judges who are on the short list for the next appointment to the Supreme Court.

43. *NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)

44. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

45. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

46. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

Indeed, Chief Justice Roberts (while sitting on the D.C. Circuit Court of Appeals) wrote one of the dissenting opinions. Justice Roberts noted that it was difficult to see how a "hapless toad that, for reasons of its own, lives entirely in southern California" can be said to affect interstate commerce.⁴⁷

The Court has followed a very uneven path in deciding these constitutional issues. Since the 1930s, the Court has broadly construed Congress' commerce powers. In fact, the Court never struck down a congressional enactment on the grounds that it went too far. The Court always deferred to Congress' judgment that it was regulating interstate commerce. In two recent cases, however, the Court went the other way and held that Congress' constitutional powers to regulate commerce are limited and courts do not have to automatically defer to Congress. The Court found that there had to be a separate determination as to whether the regulated activity actually has an effect on interstate commerce. The two seminal cases that established this rule are *United States v. Lopez*⁴⁸ (which involved regulation of guns near schools), and *United States v. Morrison*⁴⁹ (which involved the Violence Against Women Act). In both cases, the Court determined that Congress went too far.⁵⁰

More recently, however, the Court went the opposite direction in a marijuana case that came out of California.⁵¹ In *Raich*, the Court held that Congress can

47. *Id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc).

48. 514 U.S. 549 (1995).

49. 529 U.S. 598 (2000).

50. *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 561.

51. *Gonzales v. Raich*, 545 U.S. 1 (2005).

regulate local marijuana use and deferred to Congress' judgment that regulation of local marijuana use is related to interstate commerce.⁵² There is no question that the Court will have to resolve this constitutional issue in the context of whether the ESA is constitutional as applied to an individual species. This is a looming question that the Court will probably take up in the near future, especially considering that at least one of the members of the Court is now on record raising the issue.

Let me give you an idea of how courts are looking at this constitutional issue in different ways. Essentially, courts have come up with three different models for determining whether endangered species affect interstate commerce:

(1) Whether the endangered species, *by itself*, significantly affects interstate commerce. Under this model, a purely local species may have no effect on interstate commerce, and therefore may not be subject to federal regulation under the ESA.

(2) Whether the endangered species—*in combination* with all other endangered species found anywhere—significantly affects interstate commerce. Under this approach, all species (endangered or not) are part of nature's biodiversity, and if you remove one part, you threaten the entire system. Biodiversity does affect interstate commerce. This approach allows courts to find that even purely local species may affect interstate commerce.

(3) Whether the actor—the person whose activities threaten the endangered species—is engaged in interstate commerce. Here, the focus is on the actor

(who is the subject of regulation), rather than the species (which is the object of regulation). Under this approach, a regulation will almost always be valid, because the actor is usually a developer and development always has an effect on interstate commerce. However, not all actors are engaged in commercial activity. For example, a lone hiker in the woods or a homeowner landscaping his property may chance upon the last member of an endangered species. The actor is presumably not engaged in any commercial activity and, as a result, would have the right to destroy the last member of the species with impunity.

This is a difficult constitutional issue. On one hand, there are important reasons for protecting endangered species. On the other, Congress' protection of such species cannot be easily reconciled with its power to regulate interstate commerce. As a result, these cases raise questions concerning extent of Congress' power to regulate water, and to regulate the environment generally. To date, the Court has not reviewed any case involving the constitutionality of the ESA, but the Court will likely have to address this issue in the future.

III. Inter-Basin Transfers

Another major federalism issue is whether federal permit programs of CWA apply to western water projects. Generally, permit programs apply to anyone who "adds" pollutants to "waters of United States."⁵³ The question then arises: When a water project transfers water between different water basins, and that transfer includes pollutants that reach the second basin, has the project "added" pollutants

52. 125 S. Ct. at 2211.

53. 33 U.S.C. § 1362 (2006).

to "waters of the United States"? This issue is of paramount importance in the West. Western water projects, such as the Central Valley Project in California,⁵⁴ typically transfer water between basins in providing water supplies. Often the transfers contain some pollutants that are added to the second basin. These projects generally acquire water rights—including right to transfer water between basins—under state law. However, if the CWA applies to inter-basin transfers, projects may have to get permits under the CWA, and the conditions attached to the permits may trump conditions imposed under state water rights laws.

Superficially, it would seem that projects must get CWA permits in order to transfer water containing pollutants to other basins. When water is transferred, the pollutants are introduced into the second basin—and thus "added" to that basin. The CWA contains another provision, section 101(g), which limits the Act's intrusion into state water laws. Section 101(g)⁵⁵ provides that the Act shall not supersede a state's authority to "allocate" quantities of water within its jurisdiction.⁵⁶ Thus, section 101(g) appears to create an exemption from permit requirements for western water projects, because they "allocate" water.

The Supreme Court considered this issue two years ago, in a case arising out of the Florida Everglades.⁵⁷ This case was not a good vehicle to decide the meaning of section 101(g) because the Florida project transferred water for conservation and

flood control purposes, not for the purpose of allocating water among different users (as is the case in most western projects). Nevertheless, the Court was fully aware of importance of the section 101(g) issue. During oral argument, Justice Breyer speculated aloud (without asking a question) that if the Court rules one way, it may allow degradation of "pristine" bodies of water; but if it rules the other way, it may interfere with Congress' policy of exempting western water projects.⁵⁸ The Court did not decide the issue, and instead remanded the case to the district court, indicating that further development of the record was necessary.⁵⁹ A Second Circuit case involving the same issues is also poised for Supreme Court review.⁶⁰ Therefore, this issue may come before the Court in the near future, giving the Court another opportunity to decide whether it is pursuing a federalism revolution.

IV. Takings

I would like to briefly mention another area of law that does not strictly involve issues of federalism, but does apply to all government regulation of water and the environment. The central question is whether the government has the right to reduce water rights for public purposes (e.g., protecting endangered species or protecting public trust uses) without paying compensation to the water user whose right is reduced. This involves potential conflicts, not between governments, but between government and individuals.

Under the Takings Clause of the

54. See *Central Valley Project Improvement Act of 1992*, Pub. L. No. 102-575, 106 Stat. 4706 (1992).

55. 33 U.S.C. § 1251(g) (2006).

56. *Id.*

57. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

58. Transcript of Oral Argument at 5, *S. Fla. Water Mgmt. Dist.*, 541 U.S. 95 (No. 02-626).

59. *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 112.

60. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

Constitution, the government must pay compensation to property owners when it "takes" their property for public use.⁶¹ In recent years, the Supreme Court has held that in some instances the government must pay property owners when it *regulates* a property right.⁶² This is called the "regulatory takings doctrine." This issue is distinct from the one recently receiving media attention, which involves governmental power to take private property for economic development. That was the issue decided in *Kelo v. City of New London*. There, the issues were whether economic development is a public use and whether government can take the property if it provides compensation.⁶⁴ The question that arises in regulatory takings cases, and especially in the water context, is not whether there is a public use (such takings are almost invariably for public benefit, e.g., protecting endangered species), but whether the property can be taken *without* payment of compensation.

The first question that arises in water regulatory takings cases is whether the public or the private water user owns the water. If the public owns the water, the public has the property right, and the public can do whatever it wants with its property right. If that is the case, the private user does not have a constitutionally protected property interest. If the private user owns the water, then he does have the property right, and it follows that he has the same rights as any other property

owner and is justified in asserting a takings claim. This question arose many years ago in a case I handled before the California Supreme Court, which involved the question of whether the public trust doctrine applies to water rights.⁶⁵ The case arose out of the State's attempt to reduce the City of Los Angeles' right to divert water from Mono Lake Basin and to send it down to southern California.⁶⁶

The California Supreme Court upheld the state's position. The court held that the public trust doctrine does apply to water rights, and therefore the State can reduce the amount of water that Los Angeles is taking out of the Mono Lake Basin. Los Angeles filed a petition for a writ of certiorari with the United States Supreme Court arguing that its water rights had been unconstitutionally taken and it was entitled to compensation. The Court denied the petition, likely not on the merits, but because the California Supreme Court had remanded the matter to a lower court and therefore there was no final state court decision. This is still very much a live issue in California.

This issue has also recently arisen in two cases before the Court of Federal Claims in Washington, D.C. In these cases, federal or state water projects have reduced water deliveries to their customers in order to provide more water for endangered species. The customers then argued that their water was unconstitutionally taken and that they were entitled

61. "Nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.

62. See, e.g., *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Penn. Cent. Transp. Co. v. New*

York City, 438 U.S. 104 (1978).

63. 125 S. Ct. 2655 (2005).

64. *Id.* at 2655-56.

65. *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 502 P.2d 1049 (Cal. 1972).

66. *Id.* at 1051-52.

to compensation. Each case was heard by a different judge and the judges came to exactly opposite conclusions.

One case arose out of California and involved farmers in the Central Valley who had contracted for water from the State Water Project.⁶⁷ The other case arose out of Oregon and involved farmers in Klamath who have contract rights to water from the federal project in the Klamath River Basin in Oregon.⁶⁸

The factual outlines of the cases were essentially the same. In both cases, the customers were farmers and had contracts that allowed them to obtain water under the terms of the contract. In both cases, the federal service agencies issued biological opinions under the ESA that required the projects to reduce the amount of water deliveries to the customers in order to provide more water for endangered fish. The biological opinions required the reallocation of water from the farmers to the endangered fish.

In the California case, Judge John Paul Wiese held that the federal government does have the right to reallocate the water, but that it has to pay compensation to the farmers for the loss of their rights. In his view, the farmers had a contract, which created a property right. Therefore, when the federal government requires that right to be reduced for some public purpose (in this case, protecting endangered species), the farmers have lost something of value. As a result, they have lost a property right and are entitled to just compensation under the Takings Clause.⁶⁹

67. *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed Cl. 246 (2003).

68. *Klamath Irrigation Dist. v. United States*, 67

In the Oregon case, Judge Francis Allegra also held that the federal government has the right to reallocate the water. However, he held that the government does not have to pay compensation to the farmers for the loss of their rights. In his view, the contracts created no property rights. A contract is no more than a contract; it gives rights and expectations but does not create property. Therefore, a contract does not automatically create a property right or the ability to assert a takings claim.⁷⁰

These two judges fundamentally disagree on the question of whether the government has to pay compensation to people like the farmers, who have contracts for the delivery of water that are interfered with in order to provide more water for endangered fish. This question is critically important in water law today because it may determine whether government can effectively regulate water. If the government has to pay a water user every time it regulates and/or reduces rights, then the government is will be very cautious before promulgating any regulation. Protecting endangered species is an admirable cause, but governments may think differently if their budgets are exposed to multi-million dollar takings claims. On the other hand, water users argue that, as a matter of simple fairness, the burdens of these regulations should be placed on the entire public because the public benefits from the protection of endangered fish.

This a very fundamental question. I do not know what the outcome will be, but I predict that the Supreme Court will be compelled to address this water law issue in the years ahead.

Fed. Cl. 504 (2005).

69. *Tulare*, 59 Fed. Cl. at 246.

70. *Klamath*, 67 Fed. Cl. at 515.

Conclusion

What does all this mean? First, I think that we are on verge of some major developments in water law, both in terms of the balance between federal and state power to regulate water and whether government has to pay for regulating water. These issues are very important and affect the entire nation. Therefore, I think the Supreme Court will have to address them. Of course, the Court is already planning to address one of these questions in the wetlands case that I mentioned.⁷¹

Second, the longer I work in water law the more I become aware of how water laws change as our public needs change. Therefore, I warn those of you who are about to enter this area of law, that it is not one in which the rules are fixed for all eternity. These rules are dynamic and flexible and change as our water needs change. When I started in this field many years ago, I naïvely thought that there was a discrete set of issues that I could put in a box and that, once I got the answers to these questions, the rules would be set for future generations. Then all I would have to do is take these well-settled principles and apply them to the facts of individual cases. Now, I see that it is not that way at all and that the rules and laws will continue to change as our needs continue to change in the future. I pass on to the students in attendance this very hard-earned lesson that has taken me a career to learn: No matter how hard you try, you will not be able to solve all legal problems in your lifetime.

Third, to all the students in the audience, I do have an ulterior purpose in providing the perspective of a former govern-

ment lawyer. It is to encourage you to at least think about pursuing a career in government and public law. If you do, I can promise you that you will not find yourself in the distant future wallowing in riches and thinking about which vacation home you are going to visit next summer, but you will have the satisfaction of knowing that you represent the people, in the broadest sense, on matters of great importance to you. Government is the one institution in our society that is charged with the function of representing everybody. Government is often criticized about how it performs that function—perhaps justly so, but nonetheless that is its function. I do not for a moment discount the importance of lawyers who represent more specific interests, whether environmental, property, or otherwise. The legal profession is certainly a big tent that can accommodate many different points of view. A government career does, however, give you a perspective about public law that may be different from that of other lawyers. As a result you may have the opportunity to share that unique perspective with your peers, perhaps at future conferences, as I have done today.

Thank you very much.

Questions from the Audience

Audience Member: What is your sense of the future intersection of groundwater law and the lack of regulation in California?

Walston: Groundwater regulation lies in California's future, at least at some point. A lot of states, Arizona for example, which is also an extremely arid state, have extensive groundwater programs. Our

71. *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004), cert. granted, 126 S. Ct. 414 (argued, Feb. 21, 2006).

population continues to grow in California and our water supplies remain somewhat finite. If we do effect more storage projects to restore more water, then I think the regulation of groundwater is almost unavoidable. When that will happen, I do not know. It seems to me that it will have to happen sometime in the future because of the importance of the issue.

Peter Douglas: I have been in public service for thirty-five years, and this is the first time that I have had the opportunity to thank you for the work that you have done. My name is Peter Douglas and I am the Executive Director of the Coastal Commission. We have worked together over the years and we have changed, but I still recognize you. I want to publicly thank you for your dedication to public service and the excellent representation you have provided all of us by protecting the public's interest throughout your career. You have made a heck of a difference. You are a very humble, modest person, but your morality, your ethics, and your dedication to public ethics is something that I am honored to publicly recognize.

Walston: For those who don't know, that is Peter Douglas, and his position is Executive Director of the California Coastal Commission. He has held that position for many years. If memory serves, I think that Peter is the third person to serve in that capacity. This does bring back some wonderful memories that have nothing to do with water law, but do have to do with coastal regulation. I had the privilege of being appointed by the Attorney General to represent the Coastal Commission during its formative years. A gentleman who has long since retired, named Carl Bronchi, who is one of the greatest members I have ever served under, and is a great public servant, served with me in that capacity. We basically molded the law for California in the formative

years of the Coastal Commission. It was really a very exciting time, and Peter was there, as they say, "present at the Creation," and a great participant in that as well.

Audience Member: You discussed a very interesting area of the law, the intersection of state-based water allocation, the Endangered Species Act and the Fifth Amendment. Do you have any opinion on the appropriateness of the narrow Court of Claims being the first part of the judiciary to tackle those issues?

Walston: I am not quite sure that I understand the question. What I think you might be suggesting is that the Court of Claims has a very limited function and jurisdiction. It has jurisdiction over claims for damages against the United States. Theoretically, if you want to go into court and enjoin the Endangered Species Act or the Clean Water Act or anything else as it applies to you, the claim would have to be brought in a federal district court. If you have no problem with the regulation itself and wants to allow the federal government to regulate but simply wants to be compensated for damages created by the regulation then you go to the Court of Federal Claims. It is very interesting that some property rights advocates have been making a choice in recent years about which way they want to go. In other words, do they want to go to the federal district courts, perhaps a federal district court in California, which would then be appealed to the Ninth Circuit, which is very hostile to property owner claims? Alternatively, the plaintiff may want to bring the action in the Court of Federal Claims in the form of a claim for damages. The decisions of the Court of Claims are appealed to the Federal Circuit in Washington, D.C., allowing the parties to bypass the Ninth Circuit. It is simply a choice, if you are a property owner and you want to develop your property, and the gov-

ernment will not let you because you are building over an endangered species habitat, you must make this choice.

This is the calculation that the individual property owner has to make: (1) whether he wants the use of his property or he wants damages; and (2) will he be better off by going through the appellate process back in Washington, D.C. than he would in the Ninth Circuit? That is a calculated decision that property advocates are making. I should hasten to add that I have had some conversations with some well known attorneys practicing in this field of law, and they have told me that this is a choice between the devil and the deep blue sea. The Ninth Circuit is adverse to their claims in most cases, but the Federal Circuit is also somewhat hostile to their claims. Attorneys are having slightly better luck with the Court of Federal Claims, as witnessed by the decision I mentioned by Judge Wiese.⁷² These are all calculations that you have to take into account when you represent clients. Your clients may come to you and say, "I heard Mr. Walston speak at this conference, and he told me I have two choices. Tell me, which one will win?" That is a risky determination given that you might lose either way, but that is the calculation that property attorneys are undertaking.

Audience Member: Is there a possibility that trade agreements like NAFTA or GAP may limit the ability of the state to regulate water?

Walston: Absolutely, but in ways that we cannot yet anticipate. That is an issue

that has been lurking for a long time. Congress has not come up with an answer yet. I am not sure what the answer is. I know that the Supreme Court faces these questions every time that the United States enters into a treaty with a foreign country. They did that, for example, with the Migratory Bird Treaty Act. The executive branch entered into a treaty with Canada to protect endangered birds that flew between Canada and the United States and back again. This created treaty rights. The question was whether the treaty overrides state laws. That question went to the Supreme Court, which held that the Treaty did in fact override state law. I assume that the same would hold true today.

The treaty power rests up in the ether with the Congressional power, and both of these powers override state law. The question which then arises is more a political question than a legal one. Congress is concerned about the impact on state laws, and as a result writes language into the treaties that will protect state laws to some degree. To the extent that there are conflicts, however, we all know that the Supremacy Clause will govern. Under the Supremacy Clause, the treaty power of the federal government overrides state laws without question. Additionally, there is no question that the Commerce Clause clearly overrides state laws. The question that is raised in the cases I mentioned is whether congressional enactments are within the scope of the Commerce Clause. That is the question that was before the Supreme Court on February 21 in the *Rapanos* matter.

72. *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed Cl. 246 (2003).

73. 16 U.S.C. 703-712 (2006).

74. *Id.*

75. *Carey v. South Dakota*, 250 U.S. 118 (1919).

76. *Rapanos*, 126 S. Ct. 414 (*argued*, Feb. 21, 2006).

