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John D. Leshy*

Dramatis Personae (in order of appearance):

Faith is a farmer in California who receives water from a project operated by the Bureau of Reclamation (BOR), an agency of the U.S. government. Her 320-acre farm was established by her parents 40 years ago, on arid land they bought in anticipation of the federal government’s building that water project to capture, store, and deliver water to irrigate the farm and others like it. For most of the last four decades, in years of normal and wet precipitation, Faith has received 1600 acre-feet of water to irrigate cotton. In drought years, she has received less, and in a couple of extremely dry years she has received no water. Over the most recent several years, however, the government has taken steps, mandated by a suite of federal and state laws (most prominently, the federal Endangered Species Act), to restore some semblance of aquatic health to the river system that supplies water to Faith and other farmers. These steps have led the BOR to interrupt delivery of water to Faith more often than previously in years of less-than-normal precipitation. Faith has filed a claim for compensation. This conversation assumes that Faith can claim a legal interest in a surface water right under the California state law of prior appropriation for the water used to irrigate her farmland.2

* Harry D. Sunderland Distinguished Professor of Law, U.C. Hastings College of the Law. I appreciate the very helpful suggestions of Molly McUsic, John Echeverria, Mary Doyle, and Brian Gray, and the excellent research assistance of Doug Obegi, a second year student at Hastings College of the Law.

2. Assuming that Faith can claim a legal interest in her surface water right provides a necessary jumping-off point for this discussion, but is actually an oversimplification of a very murky legal situation. The BOR supplies water to a large proportion of irrigated acres in the West. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 644–45 (3d ed. 2000) [hereinafter SAX, LEGAL CONTROL]. Public water districts (special governmental units created under state law) are involved in most water deliveries to individual farmers like Faith. Id. at 628–30. Many of these districts have contracts with the BOR, which contain the terms and limits of the BOR’s contractual obligation regarding storage and delivery. Id. at 648. The BOR typically holds water rights perfected under California state law for its project water. Id. at 644. These arrangements introduce a number of layers of complexity into determining what kind of compensable legal interest, if any, Faith has in the water she uses on her farm, and what remedies she may have. Amy Kelley, Federal Reclamation Law, in 4 WATERS AND WATER RIGHTS 41-1-41-98 (Robert Beek ed., 2004) (addressing excess land laws, section 8 of the Reclamation Act and its impact on federal-state relations, uses of reclamation water, and transfers of reclamation water). One layer involves questions of contract law—the extent to which the contract itself limits the government’s obligation to deliver water to the district. O’Neill v. United States, 50 F.3d 677, 689
Frank is a government lawyer representing the project that delivers water to Faith.

Rodger is Faith's lawyer.

I. The Nature of Private Property Rights in Water

A. Conflicts Between Appropriative and Riparian Water Rights

Faith: I believe in a healthy environment, and I'm all for protecting fish. But when the government takes my water to do that, I want to be paid.

The Constitution protects property like my water right from governmental confiscation. I'm not asking for special treatment here.

Frank: Let me start by saying, Faith, that I agree—water rights are a form of property. But not all property is the same. Property rights can attach to things as intangible as stocks and patents and to things as tangible as furniture and land. The degree to which the Constitution protects property rights against governmental action varies a great deal, depending on, among other things, the nature of the property right involved.

Faith: Are you suggesting my water right is not genuine property?

Frank: Your water right is property, but it's a very peculiar kind of property. Your water right does not give you an absolute entitlement to a fixed amount of water every year. It is much more limited than that. The most obvious limit is, of course, that Mother Nature must make the water available. As you well know, in dry years you may get nothing because no water may be available.

But besides nature's limits, the law qualifies the very character of your property right in some important ways. It is not an absolute right by any means. In fact, the law affords your water right little or no protection from

(9th Cir. 1995) (releasing the government from any liability for failing to furnish a landowner the full contractual amount of water when the water could not be delivered consistently under requirements of other federal law); Ickes v. Fox, 300 U.S. 82, 94-95 (1937) (holding that although water had been appropriated by the United States Bureau of Reclamation, water rights were still vested in the landowner, not the federal government). Another layer involves ownership of the legal interest in the water right as among the United States, the irrigation district, and individual farmers like Faith. State water law and federal reclamation law may both influence the answer. Barton H. Thompson, Jr., Institutional Perspectives on Water Policies and Markets, 81 CAL. L. REV. 673, 726–28 (1993) (discussing the patchwork of various state and federal law and its chilling effect on external transfers by water districts). Still another layer involves the irrigation district's obligation to deliver water to Faith, which may turn on state laws governing the irrigation district, the district's articles of incorporation, and its regulations and policies. Nevada v. United States, 463 U.S. 110 (1983) (analyzing the interaction between federal law and Nevada law and holding that the United States, as constructor, owner, and operator of project works, and the water users of the project water are both bound by state law applicable to the appropriation, use, and administration of project water). Faith's ability to seek the aid of the federal courts to require the district, the United States, or both to deliver water to her may also be uncertain. Orff v. United States, 358 F.3d 1137, 1149 (9th Cir. 2004) (holding that sovereign immunity prohibited landowners from suing the federal government for breach of contract for diverting water from a federal water management project that the landowners contracted with).
certain kinds of actions by the government or by private parties. For example, in California, as in most states, there are actually several different types of water rights. Looking first at rights in surface water, California recognizes two kinds of water rights—prior appropriation (the right you have) and riparian rights.3

Riparian rights are much different from prior appropriation rights. They are not based on actual use of water, but arise merely from owning land that borders a watercourse. On the stream from which the water you use is taken, there are probably riparian landowners who have such water rights. Integrating their riparian water rights with your appropriative rights can be difficult. Indeed, the U.S. Supreme Court once observed that the task of meshing the two very different kinds of rights has “vexed [the California] judiciary for a century.”4

Sometimes the rights fundamentally conflict with each other; that is, both cannot be satisfied at the same time. As the California Supreme Court put it several decades ago, “[i]t was inevitable that the claims of [prior] appropriators and riparian owners [asserting water rights] would collide and that the legal principles upon which they were asserted would appear to be in conflict.”5 In such cases, the government is forced to choose which claim to satisfy. When it makes this choice, the government does not have to compensate the loser, because this possibility of conflict and loss is built into the very nature of surface water rights in California.

In fact, California law often prefers the holder of the riparian water right over a conflicting prior appropriation right such as you have.6 Let me put this in concrete terms. If Friends of the Fish bought riparian land along the


6. See In re Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 660 (Cal. 1979) (noting a substantial body of California caselaw concerning riparians’ prospective rights); Lux v. Haggin, 10 P. 674, 753 (Cal. 1886) (“But the right to a water-course begins ex jure naturae, and, having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below.”); United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 185 n.20 (Cal. Ct. App. 1986) (approving of the State Water Resources Control Board plan that recognizes riparians’ right to protection against harmful diversions or pollution by upstream users as well as the conditions that subject projects to prior vested rights); SAX, LEGAL CONTROL, supra note 2, at 333–34 (discussing the mixed appropriation-riparian doctrine of California, and the protection of riparian rights in this system). Sometimes the courts have allowed later arriving appropriators to take the water, but required them to compensate riparian landowners. See, e.g., Gerlach Live Stock Co., 339 U.S. at 754–55 (holding that California law requires the compensation of the plaintiff for the taking of waters to which the plaintiff has a riparian claim). On the other hand, sometimes the courts have denied compensation to riparian rights holders, even when they have long been using water. See, e.g., Joslin, 429 P.2d at 898 (rejecting the plaintiff’s claim for damages resulting from the defendant’s upstream appropriation of water because the plaintiff’s claim was based on an unreasonable use of riparian rights).
stream where water is diverted for your fields, Friends might be able to assert a riparian right under California law to make reasonable use of the water for fish, and California courts might hold that Friends’ right trumps your appropriative right, with no obligation to compensate you. The same could be true if a government agency like the State Department of Fish and Game or the U.S. Fish & Wildlife Service owned the riparian land.7

I’m not defending California’s simultaneous recognition of prior appropriation and riparian surface water rights as good policy. Most other states following the prior appropriation doctrine for surface water simply extinguish unexercised riparian surface water rights in favor of prior appropriation rights, and, with very few exceptions, the courts have said states may do this without compensating the holders of riparian water rights.8 But California has not taken that step. Thus, in California, owners of prior appropriation water rights (like you) have a potential sword of Damocles hanging over their property—the possibility that their right will be nullified without compensation by the exercise of a conflicting riparian water right.

B. Conflicts Between Surface and Ground Water Rights

Faith: Well, if the government can assert this riparian right to the surface water I’ve been using, maybe I should just start pumping groundwater from underneath my land instead. That, at least, surely belongs to me.

Frank: You bring up an interesting point, Faith, but it hurts rather than helps your case. Yes, California gives you a right to pump groundwater from underneath your land. But this right is also fragile and limited, because you cannot stop others from pumping groundwater out from underneath your land, so long as they withdraw it from wells on their own land and use it on that land.9

Even more troublesome for you is the fact that California, like many other states, has long drawn an artificial distinction between surface water

7. The government has riparian rights when it owns riparian land. See In re Water of Hallett Creek Stream Sys., 749 P.2d 324, 334 (Cal. 1988) (concluding that under California law the federal government has riparian water rights on land that it owns within the State of California).
8. See Dellapenna, Dual Systems, supra note 3, § 8.03(b)(1) (discussing state courts’ approval of statutes abolishing unused riparian rights without compensation).
9. See, e.g., SAX, LEGAL CONTROL, supra note 2, at 377–78 (elucidating how the correlative rights system requires “sharing of the available water on an equitable basis among the overlying owners for use on the overlying tract”). Under California’s doctrine of correlative rights to groundwater, landowners who withdraw groundwater for use on the overlying land have superior rights to those who withdraw groundwater for use somewhere else, even if the latter predate the former. Thus, for example, if Faith owns two noncontiguous parcels of land and has long been pumping water from a well on parcel A and transporting the water across the land of others to her separate parcel B, a landowner who later begins withdrawing water for use on his own land may be able to shut her well down if its continued operation is deemed to injure him. Id.
and much groundwater, and applied different legal doctrines to each. The result is that California law may not protect your surface water right against interference by someone who sinks a well and indirectly withdraws stream water from it. This means, for example, that Friends of the Fish could be within its legal rights if it bought land near the stream your water comes from, drilled a well on it, withdrew groundwater, and piped it downstream for the fish to use, even if its pumping dried up the stream and prevented you from exercising your water right.

Faith: Do you really mean I couldn’t stop Friends from pumping, and I couldn’t be compensated for my loss?

Frank: That’s a distinct possibility. Under California water law, Friends may not be interfering with your property right, if the water pumped by Friends is considered to be percolating groundwater. This is another illustration of the fragility of your water right. You could lose the use of your surface water right, without compensation, if Friends were to limit that flow by pumping percolating groundwater to provide water for the fish. To the extent that California law allows this result, it undercuts your argument for compensation if the government limits your diversion for the same purpose. Your surface water right may not, in other words, give you a right to exclude or stop others from using a well to intercept and remove the water you would otherwise use in exercise of your water right. This is a serious issue. The interference with surface water uses from groundwater pumping is a subject of a growing debate across the country.

10. Groundwater in a subterranean stream is subject to a prior appropriation system like surface water. Prior appropriators of surface water may be protected from later initiated pumping from what is deemed such a subterranean stream. See CAL. WATER CODE § 1200 (West 2005) (applying the prior appropriation system to subterranean streams flowing through known and definite channels). But groundwater deemed not in a subterranean stream—so-called percolating groundwater—is subject to a separate legal system. The distinction between a subterranean stream and percolating groundwater is a legal construct that may not conform to hydrogeologic reality. Thus, percolating groundwater may include water that is hydrologically connected to surface water, and pumpers of percolating groundwater need not limit their pumping to protect prior appropriation surface water rights. See generally Joseph L. Sax, We Don’t Do Groundwater: A Morsel of California Legal History, 6 U. DENV. WATER L. REV. 269, 272–73 (2003) (discussing Section 1200 of the California Water Code and its separation of water into three categories: (1) regulated surface streams; (2) unregulated groundwater or “percolating groundwater”; and (3) “subterranean streams,” treated the same as surface streams); see also John D. Leshy & James Belanger, Arizona Law: Where Ground and Surface Water Meet, 20 ARIZ. ST. L.J. 657 (1988) (discussing the bifurcated system regarding surface water and groundwater in Arizona law).

11. See SAX, LEGAL CONTROL, supra note 2, at 270–75 (discussing the legal disputes that arise because of the differing treatment of groundwater rights and surface water rights).

12. See supra note 10 and accompanying text.

I am not, by the way, defending the soundness of such legal distinctions between surface water and groundwater. The law should conform to hydrological reality, and ways should be devised to protect established surface water uses from groundwater pumpers, to the extent feasible. But the fact that the law doesn’t always do so underscores my central point here—that your water right may not, as Sam Goldwyn once reputedly said about an oral agreement, be worth the paper it’s written on.

There’s more bad news along this line, Faith. Most states give landowners the right to capture water that falls on their land as precipitation, so long as they capture it before it reaches a stream or other water body (the legal label for this is diffuse surface water). And the law protects such landowners even if their capture effectively takes water from the holder of a water right in that stream. So if Friends of the Fish captured (by such means as ponds, cisterns, rain barrels, or contour plowing) water falling on their land that otherwise would feed the stream where you get your water, and shipped that water to the fish, Friends would not have to compensate you even if your supply were interrupted. This distinction regarding diffuse surface water—like the distinctions between surface and groundwater rights and appropriative and riparian rights—is another example of an inherent limit on your water right. All these inherent limits tend to cut against compensating you for similar government limitations of that right.

Another inherent limit on your right stems from the fact that many water bodies are interstate or international (or both) in character. For example, the Colorado River, a key source of water supply for much of the southwestern United States, flows through seven different states and two countries (Mexico as well as the United States). Each of those jurisdictions recognizes private property rights in that water, but each such property right depends upon whether the jurisdiction conferring the right itself has some entitlement to that water. If California gives you a water right to use Colorado river water, your right is only good to the extent that California itself has a right to that water—it can’t give you what it does not have. Thus, all state law water rights in an interstate or international water body are somewhat fragile, being dependent upon the state’s ability to establish a sufficient entitlement in the water body to satisfy the right.

Rodger: Even if we were to concede that Faith’s water right is limited because others may have superior rights to the same water under the various

14. See CAL. WATER CODE ANN. § 1201 (West 1971) (confining the reach of the prior appropriation system to water flowing in any natural channel).

15. Joseph W. Dellapenna, Related Systems of Waters, in 2 WATERS AND WATER RIGHTS, supra note 2, § 10.83 (noting that “[f]armers and ranchers... have found that they can have the benefit of the water falling on the land with no more effort than that necessary to excavate a small pond or to bulldoze a small earthen dam or gully plug”).

16. See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (noting that disagreements over the apportionment of interstate water rights is a matter “upon which neither the statutes nor the decisions of either State can be conclusive”).
legal doctrines you describe, that is not the same thing as the government having the power to interrupt her water to protect fish without compensating her. That is, perhaps she does in some sense share a property interest in that water with others, but that does not mean she has to share a similar interest with the government. When it takes her water for the fish, the government is not exercising that type of built-in, competing right to the same resource.

C. The Fundamentally Public Character of Water

Frank: I can’t agree, Rodger. In fact, the government has similar built-in authority to limit Faith’s exercise of her water right. Like other western states, California state law has provided for nearly a century that “[a]ll water within the State is the property of the people of the State.”17 A right to the use of water may be acquired by appropriation in the manner provided by law,18 and this is what has allowed Faith to obtain some kind of private property right to use water. But the state’s assertion of popular ownership of all water within the state’s borders reflects Californians’ perception of water as a communal resource with an overriding public value. This informs whether the government has a duty to compensate Faith when it restricts her use of water to serve some public purpose like protecting aquatic health. The U.S. Supreme Court has recognized that a state’s claim of ownership is “not without significance” in testing state authority to manage water within its borders consistent with the U.S. Constitution.19

Faith: Oh, that just strikes me as slippery lawyers’ reasoning. Even if the people of California owned the water once upon a time, the state gave me a water right. That’s the most important thing. My water right is just like my ownership of land.

17. CAL. WATER CODE § 102 (West 2005) (dating back to CAL. CIVIL CODE § 1410 as amended by 1911 CAL. STAT. 821 on April 8, 1911). This idea of water as being held in common by the government, subject to limited usage rights, dates back at least to the Romans. See JUSTINIAN INSTITUTES 35 (J. Moyle trans., Oxford Press, 5th ed. 1955) (pronouncing that things such as “the air, running water, the sea, and consequently the sea-shore” are “by natural law common to all”); see also SAMUEL C. WEIL, WATER RIGHTS IN THE WESTERN STATES 4–7 (3d ed. 1911) (discussing public ownership of water in the common law); Harrison Dunning, Sources of the Public Right, in 4 WATERS AND WATER RIGHTS, supra note 2, §§ 30.01–02 (discussing the public trust doctrine and state sovereign ownership of water); David H. Getches, The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?, 20 STAN. ENVTL. L.J. 3, 7–8 (2001) (noting that state ownership claims reflect the importance of protecting the public’s interest in achieving maximum benefit from the use of a public resource).

18. CAL. WATER CODE § 103 (West 2005).

19. Sporhase v. Nebraska, 458 U.S. 941, 953 (1982) (“These factors [including the claim of public ownership] inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable.”).
Frank: Your analogy warrants scrutiny. In fact, California, like other states, makes no similar claim to own all the land in the state.\textsuperscript{20} Relatively arid Western states have always regarded property rights in water as somewhat different from property rights in land. Here are some explanations:

All life needs water to sustain itself; not everyone needs to own land for there to be adequate food supplies. In the United States, especially in the West, water is often in much scarcer supply than land. Water, surface water at least, is as mobile and difficult to apportion as land is stationary and easy to carve into parcels. It is thus not surprising that we have historically treated water in a communal manner and land as an individual matter.\textsuperscript{21}

In pointing out such differences between land and water, I don’t mean to suggest that the government must compensate landowners whenever it regulates their use of land. For example, we’ve long accepted the idea that local zoning boards may constitutionally limit some uses of private land by prohibiting factories in residential neighborhoods\textsuperscript{22} or requiring landowners to set buildings back from the street line of their lots.\textsuperscript{23} Even if your right to water were comparable to a right in land, reasonable restrictions on the use of property for the general public good are not takings requiring compensation.\textsuperscript{24} To reiterate my main point here, however, water rights differ from rights in real property because state law emphasizes, among other things, the fundamentally public character of water.

Faith: But the state government gave me a right to use its water. Why doesn’t that obligate it to compensate me if it takes the right back, or prevents me from exercising it?

Frank: It’s true that California, like other Western states, has freely handed out private rights to water that it owns. But California also provided in its original 1913 Water Code that, if the state decides to take back the water right it has given you in order to devote it to some other public purpose, it need pay you only “the actual amount [you] paid to the State” for it.\textsuperscript{25} That

\textsuperscript{20} California does assert ownership of some lands, including lands submerged below tidewater, where a strong communal interest is also present. See CAL. CIVIL CODE ANN. § 670 (West 1982) (“The state is the owner of all land below tide water . . . ”).

\textsuperscript{21} Myrl L. Duncan, Reconceiving the Bundle of Sticks: Land as a Community-Based Resource, 32 ENVTL. L. 773, 798 (2002).

\textsuperscript{22} See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 413 (1915) (upholding an ordinance prohibiting the manufacture of bricks within a municipality).

\textsuperscript{23} See, e.g., Gorieb v. Fox, 274 U.S. 603, 610 (1927) (upholding a setback ordinance based on a valid exercise of the police power).

\textsuperscript{24} See, e.g., Penn Cent. Transp. v. United States, 438 U.S. 104, 138 (1978) (ruling that the designation of property as an historic landmark is not a taking because the “restrictions imposed are substantially related to the promotion of the general welfare”).

\textsuperscript{25} CAL. WATER CODE ANN. § 1629 (West 1971) (“no value whatsoever in excess of the actual amount paid to the State therefore shall . . . be assigned to or claimed for any license granted . . . under the provisions of this division, in respect to any valuation for purposes of
actual amount has usually been zero, because the state has generally given water rights away for free. This statute, still on the books, enables the state to manage water in the public interest without being encumbered by a generic duty to compensate holders of water rights.26

**Faith:** But what about the fact that we’re in the arid West? Rodger told me that a judge on the U.S. Claims Court has written that “within our constitutional tradition... water rights, which are as vital as land rights, should receive [no] less protection... particularly... in the West where water means the difference between farm and desert, ranch and wilderness, and even life and death.”27 That makes perfect sense to me.

**Frank:** No one can deny that water is important in the arid West. And that may underscore the importance of protecting property rights in water against interference by other private parties. But that is not the same thing as saying that the government has no power to restrict the exercise of water rights for the common good of all, present and future. Indeed, the region’s aridity helps explain why the laws of western states have been particularly careful to limit the scope of private rights to use water, and to magnify the public’s interest in water management. Water’s relative scarcity in the region is, in other words, exactly what has led the western states to imbue it with a strongly communal, public character. More humid eastern states generally don’t assert that the public owns the water found within their borders.28

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26. Although the water management statutes have yet to be interpreted in a takings case, they seem to fit neatly within the doctrine of *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). *Brown* reiterated the concept that “just compensation is measured by the owner’s pecuniary loss” and established that, when that loss is zero, no compensation is due. *Id.* at 240.


28. See Joseph W. Dellapenna, *The Right to Consume Water Under “Pure” Riparian Rights*, in 1 WATERS AND WATER RIGHTS, supra note 2, § 7.01(b) (“[I]n many eastern states the common law of riparian rights continues as the basic means to resolve disputes... between direct private users of water... [. W]hat public regulation as there is serves to protect the public interest in the waters, playing little...”).
II. Limitations on the Transfer of Property Rights in Water

**Faith:** I have to tell you that my frustration over this endangered species situation sometimes just makes me want to sell my water right and go do something else.

**Frank:** You may not find it so easy to do. Water rights can be notoriously hard to market, because they can be very hard to transfer if the new owner contemplates some different purpose or type of use from yours. This is still another example of how limited your water right actually is.

**Faith:** Are you saying I can't just sell my water right to, say, a city for delivery to its residents?

**Frank:** The fact is, neither you nor anyone who purchases your water right has an unfettered right to change its use from the one you have been making. You need government permission to do so, and that permission may not be easily obtained, especially if others object. This is yet another built-in limitation on a prior appropriation water right, one which can drastically limit its marketability. Your water right is actually no more than a right to use a maximum amount of water in a particular place for a particular use at a particular time or season. Water laws in all Western states prohibit surface water right holders from changing the type or place of their use of water unless the government gives its okay.  

As Professor Dan Tarlock has put it:

[B]y the early twentieth century, prior appropriation had evolved into an administrative system to allocate unused waters on entire stream systems, to protect the rights of third parties potentially injured by new appropriations or transfers, and to assert a public interest in how increasingly scarce waters were allocated.

Therefore, the exercise of water rights has long been subject to much tighter regulation than the exercise of rights in land. A landowner's right to make new uses of land is generally presumed unless the government affirmatively restricts it. If land were comparable to water, this would be the result: Your property right in your land might be no more than a right to grow cotton or another crop; it would not include a right to switch to an

29. These restrictions on water rights go back a long way in the American West. Indeed, the administration of water rights provided some of the earliest examples in American government of regulatory agencies controlling the use of private property for the common good. A pioneering figure of western water law, Elwood Mead (after whom Lake Mead was named), drafted the 1889 provision of the Wyoming Constitution which made the perfection and use of water rights subject to close state regulatory control in the public interest. WYO. CONST. art. 1, § 31; see also id. art. VIII, § 2 (mandating that a board of control shall have supervision over the state's waters and their appropriation, distribution, and diversion). Within three decades almost all other western states, including California, had followed suit.

30. A. Dan Tarlock, The Future of Prior Appropriation in the New West, 41 NAT. RESOURCES J. 769, 770 (2001); see also Moses Lasky, From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration, Part I, 1 ROCKY MT. L. REV. 161, 162 (1929) (explaining that all states are in a transition from individualistic property rights in water to a “distribution of state-owned water by a state administrative machinery”).
industrial use of land without government permission. If you stopped growing cotton and didn’t get government permission to use the land in some other endeavor, your property right could be extinguished, and no compensation would be owed you.

The reason water is treated so differently from land is because it is mobile, fungible, and reusable. Water law has always tried to take advantage of those characteristics by recognizing water rights that in effect overlap with each other. That is, water rights are typically allocated on the assumption that the owner will not consume one hundred percent of the water in making use of it, and some water subject to a water right will eventually become available for reuse by others. Measuring water rights by the amount diverted rather than the amount consumed means that in many watersheds there are more rights to use water than there is water. To encourage reuse, and to protect those who have perfected legal rights to water first diverted but not consumed by another, the universal rule of surface water law in the West is that the owner of a water right may not make any change in the use of the right if it results in injury to any other water right holder—including those who start using water later and who are junior in priority. So if you have a water right to 1000 acre-feet, but your cotton typically consumes only 200 acre-feet, and the rest returns to the stream where somebody later obtains a water right in that 800 acre-feet you don’t use, you can’t sell more than 200 acre-feet of your water right to somebody for use outside that watershed. That can make it very difficult for a prospective purchaser of your water right to secure state permission to change the place or type of water use, dramatically affecting the marketability of your water right.

III. More Background Principles Applicable to Water Rights

**Faith:** Well, I wasn’t serious about wanting to sell my water right. I want to farm. It’s what I’ve always done, and what my parents did before me. And now the government is saying that my water right doesn’t allow me to continue to do that. I was brought up to believe a property right is sacred, and that it’s un-American for the government to take it from me without paying me.

**Frank:** It’s just not that simple, Faith. No property right is absolute. In the 1992 *Lucas* case, Antonin Scalia (perhaps the most aggressive protector

31. See Owen L. Anderson et al., *Reallocations, Transfers and Changes*, in *2 Waters and Water Rights*, supra note 2, § 14.04(c) (explaining that the basic allocation rule in the West is that a change or transfer of water rights is allowed only on the condition that the rights of another appropriator, including a junior appropriator, are not injured). Moreover, some states require approval from any irrigation or other special governmental water district that may be affected by the proposed change. See, e.g., *ARIZ. REV. STAT.* § 45-172 (1956) (prohibiting the severance or transfer of water rights without first obtaining written consent and approval from the governing body of an irrigation district, agricultural improvement district, or water users’ association that would be affected by such a change).
of property rights currently on the Supreme Court) wrote that the government
does not have to compensate a landowner, even if it denies all economic use
of land, if “the government’s action inhere[s] in the title [to the property]
itself, in the restrictions that background principles of the State’s law of
property and nuisance already place upon land ownership.”\textsuperscript{32} This idea has
been the law for more than a century, and although Scalia was talking about
land, not water, this is one area of the law in which land and water rights are
treated similarly. In fact, water law is considerably richer in background
principles than land law. Besides the ones I’ve already mentioned, many
other sacred principles of water law effectively limit the government’s obli-
gation to compensate the owner when it restricts use.

\textbf{Faith:} Do you mean the law can just define away my property right?

\textbf{Frank:} As the great English philosopher Jeremy Bentham once
explained, “property is entirely the work of law” because “[b]efore laws were
made there was no property.”\textsuperscript{33} In other words, property is not a fixed,
immutable concept, and not all property rights are the same. How the law
defines a particular property right determines both its character and its
compensability if the exercise of the right is restricted by the government.
The Supreme Court put it this way more than half a century ago: “[N]ot all
economic interests are ‘property rights’; only those economic advantages are
‘rights’ which have the law back of them, and only when they are so recog-
nized may courts compel others . . . to compensate for their invasion.”\textsuperscript{34}

\textit{A. The Beneficial Use Doctrine}

\textbf{Frank:} Still another important background principle in water law may
be applicable here, Faith. California law, like the law of other states, holds
that a prior appropriation right in surface water like yours is bottomed on
your putting the water to a beneficial use. This means your property right is
measured by both the amount and the nature of the use to which the water
may be put.\textsuperscript{35}

\textbf{Faith:} But of course I have been using water beneficially all these
years—how do you think I grow my cotton?

\textbf{Frank:} Again, it’s not that simple. The law has never regarded benefi-
cial use as simply the amount the holder of a water right has used in the past
or wants to use in the future. The government, not the water user, retains

\textsuperscript{33} Jeremy Bentham, \textit{The Theory of Legislation} 111, 113 (C.K. Ogden ed., Kegan Paul,
Trench, Trubner & Co. 1931) (1759).
\textsuperscript{34} United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).
\textsuperscript{35} The same concept is found in the surface water law of all other western states. In some
states and under some water law doctrines it is called reasonable use, or reasonable and beneficial
use. See Robert E. Beck et al., \textit{Elements of Prior Appropriation, in 2 Waters and Water
Rights}, supra note 2, § 12.02(1)(A).
Faith: But I get the water, I irrigate my fields, and the crops grow. How could anyone deny that I’m making beneficial use of the water?

Frank: Beneficial use is not just a matter of using water to grow things, even if you (or the marketplace) consider that a valuable use. Determining beneficial use typically involves examining many things—the purpose of the use, the quantity of water devoted to that use, the availability of technologies that would require less water for that use, and the impacts on the environment (including fisheries) of that use. Notions of beneficial use can and do change over time in response to changing values, economics, and technology. The general idea that the law accommodates change is, of course, found in many other areas. Twenty-five years ago you probably wouldn’t have been considered legally negligent if you didn’t wear a seat belt or put your infant in a special car seat; today you likely would be.

But water law is different from negligence law in one key respect. Because of the very nature of the water right—the background principle of property law that applies—when notions of beneficial use or reasonableness change, the property right itself changes. This was made clear as long ago as 1928, when California voters approved an amendment to the state constitution stating that unreasonable uses of water are not protected property rights.36 No one used to question the practice of irrigating one’s fields with old-fashioned, crude flood irrigation, even though it required lots of water. Now, laser-guided leveling of farm fields can significantly reduce irrigation water requirements. If you fail to use laser leveling today, you might violate the beneficial use doctrine. Your water right could be limited, and the government would not have to compensate you for your loss.37

Contrast this, once again, with land. Generally speaking, all landowners have more or less the same legal title to land, regardless of how efficiently or sensibly they use it (except for the background principle of the law of nuisance or comparable statutory restrictions like zoning codes, which I want to discuss in a moment). If land rights were comparable to water rights, when you acquired a parcel of land to farm, you would not get ownership of the soil, but merely the right to use that parcel for farming, and only so long

36. CAL. CONST. art. X, § 2 ("A water right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.").

37. See generally Janet C. Neuman, Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use, 28 ENVTL. L. 919 (1998) (critiquing the effectiveness of the beneficial use doctrine over the past 100 years and concluding that its inadequacy calls for significant judicial, legislative, and administrative action to reform the doctrine in order to better and more systematically reduce waste and encourage efficiency); Steven J. Shupe, Waste in Western Water Law: A Blueprint for Change, 61 OR. L. REV. 483 (1982) (criticizing the prior appropriation doctrine and judicial sanction of it for encouraging waste and proposing a legal blueprint from which courts can rescind the privilege to use customary yet wasteful irrigation techniques and declare excess water forfeited without running afoul of the Takings Clause).
as you conformed to evolving standards of farming, as determined by the
government.

**Faith:** But the government has delivered water to me for many decades
without once questioning the beneficial or reasonable character of my use
until it started this fish protection business. Doesn’t that protect me?

**Frank:** Not necessarily. Your question was put to the California
Supreme Court seven decades ago, and its answer has been quoted often by
courts around the country:

What is a beneficial use, of course, depends upon the facts and
circumstances of each case. What may be a reasonable beneficial use,
where water is present in excess of all needs, would not be a
reasonable beneficial use in an area of great scarcity and great need.
What is a beneficial use at one time may, because of changed
conditions, become a waste of water at a later time.\(^{38}\)

The California courts have applied this idea to overturn longstanding
practices involving the use of water, without requiring compensation of the
water right holder. As a leading modern California court decision succinctly
put it: “Unlike real property rights, usufructory water rights are more limited
and uncertain.”\(^ {39}\) Professor Brian Gray has described property rights in water
in California as “fragile and dependent on contemporary economic condi-
tions and societal values.”\(^ {40}\) With better understanding of the importance of
aquatic ecosystems and the impact of water diversions on them, we are
coming to appreciate that uses dependent upon such diversions may not
qualify as legally beneficial uses in drought conditions.

**B. More Background Principles: The Public Trust Doctrine and the
Navigation Servitude**

**Faith:** It still seems to me that the government, having made the water
available to me and encouraged me to farm with it, is breaching some sort of
trust responsibility to me by taking the water away.

**Frank:** It is interesting that you mention the idea of a trust
responsibility. California and a number of other states apply a very old
doctrine, dating back to Roman law, that any use of certain important natural
resources is subject to a public trust.\(^ {41}\) This trust puts the government under
a continuing obligation to weigh the long-term effect of using those re-
sources. The California Supreme Court has made clear that the public trust

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\(^{38}\) Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal.
1935).


(1994).

\(^{41}\) See Hope M. Babcock, *Has the Supreme Court Finally Drained the Swamp of Takings
Jurisprudence?: The Impact of Lucas v. Coastal Council on Wetlands and Coastal Barrier Beaches,*
doctrine applies not only to certain kinds of lands that have high public value, like beaches, but also to the exercise of many surface water rights.\(^4\)

In the landmark modern court decision on the subject, the court enforced the public trust doctrine to require a reassessment of Los Angeles' diversion of water from the Owens Valley, despite the fact that, several decades earlier, the state had granted the City of the Angels seemingly unrestricted water rights to make that diversion.\(^5\) To the extent the reassessment reduced the amount of water Los Angeles could take, no compensation was owed.\(^4\) This is one more example of how property rights in water incorporate, on an ongoing basis, changing values about what kinds of uses of water are appropriate.

**Faith:** It seems ridiculous for my farm to suffer from some legal doctrine that dates back to Roman times.

**Frank:** Some attitudes, such as a strong public interest in water, have great staying power, as Los Angeles discovered. There's much talk about water rights, but the public trust doctrine stands for the idea that there are some water responsibilities as well. And there's more. There's the navigation servitude, another very old doctrine. It allows the national government to take certain kinds of actions to protect its interest in navigable waters without compensating property owners, even if they completely lose the benefit of their property rights. This doctrine has been vigorously enforced by the Supreme Court. In one modern case the Court ruled that the government's navigation servitude denied the Cherokee Indian Nation compensation when an Army Corps of Engineers navigation improvement project injured tribally-owned sand and gravel deposits in a riverbed, because the Tribe's injury resulted from "the lawful exercise of a power to which the interests of [the Tribe as property owner] have always been subject."


\(^4\) Id. at 721–23. The decision applied the public trust doctrine to water rights authorizing diversions from surface waters considered navigable, or from tributaries of such waters, even if the tributaries were not considered navigable. This covers the vast bulk of water rights in the state.

\(^4\) United States v. Cherokee Indian Nation, 480 U.S. 700, 703–04 (1987) (quoting United States v. Rands, 389 U.S. 121, 123 (1967)). See also United States v. Willow River Power Co., 324 U.S. 499, 509–10 (1945) (denying compensation to power company when government action decreased efficiency of its hydroelectric plant by raising the high water line of the Willow River); SAX, LEGAL CONTROL, supra note 2, at 525–40 (explaining the navigation servitude as the federal government's power to override private rights in navigable waters without compensating the holders of those rights); Martha Goodloe Haber, Note, The Navigation Servitude and the Fifth Amendment, 26 WAYNE L. REV. 1505, 1505–20 (1980) (describing the origins of the navigation servitude doctrine). However, note that the Supreme Court has distinguished control of navigation from pure reclamation projects. In 1950, the Court held that landowners damaged by changes in water levels due to California's Central Valley Project were entitled to compensation because the project was not a navigation improvement, but reclamation of the surface water in the area. United States v. Gerlach Live Stock Co., 339 U.S. 725, 739 (1950).
C. Another Background Principle: Public Nuisance Law

Faith: It still seems to me that, despite all the legal mumbo-jumbo you're throwing at me, what's going on here is simple: The government, having once preferred farming over fish, gave me a water right to launch my farming enterprise, which I have successfully done. The government has now simply reversed course and decided to prefer fish over farms, yet it won't pay me for the loss of my water right. That seems unfair—if a mistake was made in managing water so as to devastate the aquatic environment, it was the government's mistake, and the government should pay for it.

Frank: You're right that water management choices have been contributing to the destruction of the fishery resource. One survey showed, for example, that high concentrations of fish species listed by the Endangered Species Act correspond with areas of extensive surface water irrigation throughout the West. This is because intensive development of western water resources, primarily for agricultural irrigation, has converted many free-flowing western rivers into a series of reservoirs, dramatically altering the aquatic environment—often with dire effects on native fish populations. Development has also altered the riparian environment on which many nonaquatic species depend, and many of these species have also made it onto the endangered species list.

These problems bring up another background principle that Justice Scalia specifically identified in his Lucas opinion—another very old doctrine of property law called nuisance. It is grounded on the sensible idea that, as the U.S. Supreme Court said in a landmark decision well over a century ago, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." This principle applies to land and water rights in the same way. It is what prevents your neighbor from building a feedlot on his land if the resulting odors, flies, and other effects seriously interfere with your use of your property. You (or the government on behalf of you and the public) can ask the courts to enjoin the feedlot as a nuisance. If the court agrees, you ordinarily do not have to compensate your neighbor for his loss. This is because your neighbor's property right does not include, and has never included, the right to use her land in a way that causes a nuisance. California court decisions dating back more than a century stand for the proposition that using water in such a way as to impair fisheries may be a nuisance, and if so, this use can be stopped without compensating the water rights holder.

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47. Id. at 320–21.
49. See People v. Glenn-Colusa Irrigation Dist., 15 P.2d 549, 552–53 (Cal. Dist. Ct. App. 1932) (holding that the diversion of irrigation water into a canal without the use of a screen or other measures to prevent destruction of fish is properly deemed a nuisance); see also People v. Truckee
Indeed, well over a century ago, farmers asked the courts in California to use the nuisance principle to effectively shut down an entire major industry—hydraulic mining—because, despite the vast riches it unearthed, it wreaked havoc on the environment and on farmers and others downstream. The farmers and their allies won, and the industry was shut down, without compensating the mineral owners.\textsuperscript{50} The leading history of this episode is called \textit{Gold vs. Grain}.\textsuperscript{51} The modern version, which might be called \textit{Grain vs. Fish}, is not such a zero-sum game. Restoring some measure of aquatic health does not require shutting down the entire agricultural industry; agriculture need only relinquish some water in some years. That hardly seems an outlandish request. After all, this is not the first time society has made new demands on property owners to do a better job of protecting the general public interest in the environment without paying them—that’s what the Clean Air and Clean Water Acts were about. Professor Sax put it this way:

By tradition the industrialist was permitted to use the water body as a waste sink, and the harm to the natural system was a ‘natural and inevitable’ cost of its use. The modern ... pollution laws effectively ‘took’ that right away from industrial users, often at great cost to them. The agricultural diverter’s situation is no different. Traditional agricultural uses required preempting the natural functions of the river (by dewatering rather than by contaminating); that result was a necessary cost of use. But now, just as we no longer permit rivers to be denatured by being used as waste sinks, we no longer want to permit them to be denatured by being dewatered. Are the different traditional users (industrial and agricultural irrigator) in different constitutional positions as to these new public goals?

\textsuperscript{50} See People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1159 (Cal. 1884) (holding that “[t]he state holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general government”); JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 184–86 (1987) (pointing out that the California Supreme Court effectively halted the hydraulic mining process of “monitoring,” which involved hosing down whole mountainsides to locate gold deposits and sending vast quantities of debris to downstream areas, on the grounds that such environmental nuisances were authorized neither by state nor national legislation).

\textsuperscript{51} ROBERT L. KELLEY, GOLD VS. GRAIN: THE HYDRAULIC MINING CONTROVERSY IN CALIFORNIA’S SACRAMENTO VALLEY (1959); see also Marilyn Ziebarth, California’s First Environmental Battle, CAL. LAWYER, Aug. 1984, at 56–59 (outlining historical and legal developments giving rise to the Gold vs. Grain era).
If there is a difference, it is too subtle for me to discern.\textsuperscript{52}

\textbf{Rodger:} But here the restrictions on delivery of water to Faith have come not from the courts applying nuisance doctrines but from the Congress and the executive branch in the Endangered Species Act and directives to implement it.

\textbf{Frank:} The most important modern constraints against the specific nuisance of pollution, like the Clean Water Act,\textsuperscript{53} also came from the legislature, not the courts. The evolution of nuisance principles, like the beneficial use doctrine, may come from court decisions in individual cases, from executive agencies, or from the legislature. As early as 1887, the U.S. Supreme Court rejected a brewery owner’s claim for compensation after the state of Kansas adopted a statute that prohibited the manufacturing and sale of alcoholic beverages, even though the change reduced the value of his brewery and equipment to something between zero and twenty-five percent of its former worth.\textsuperscript{54} Production and sale of alcohol in Kansas was not a nuisance before the legislature acted, yet no compensation was owed once the legislature decided to outlaw the industry to protect the common good. As the Supreme Court once said, “the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”\textsuperscript{55}

Legislatures have just as much power as courts to define the scope and permissible limits of property rights. Indeed, being more directly accountable to the people through elections, they are presumably better at gauging contemporary values. Any suggestion that the noxious use exception is confined to nuisances that courts rather than legislatures have defined is, according to leading scholars on the subject, “difficult to square with the historical run of the cases.”\textsuperscript{56} Besides the national government, all states have statutes and regulatory programs that limit what you can do with your water rights in order to protect the environment; indeed, many states have their own endangered species acts.

\textbf{Rodger:} Well, then, what about California’s Right to Farm Act, where the legislature said that no commercial farming activity “shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began”?\textsuperscript{57}

\textbf{Frank:} An interesting point, although now you want to take refuge behind a statute rather than the common law. This statute is a thin reed to

\textsuperscript{54} Mugler v. Kansas, 123 U.S. 623, 657, 664 (1887).
\textsuperscript{55} Munn v. Illinois, 94 U.S. 113, 134 (1877).
\textsuperscript{56} DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 149-50 (2003).
\textsuperscript{57} CAL. CIVIL CODE ANN. § 3482.5 (West 1997).
rly on because, among other things, it is designed merely to prevent courts from using the common law doctrine of nuisance to shut down farms that are encroached upon by creeping urbanization—hence its reference to changed conditions.\(^5\) It was not aimed at immunizing farmers from liability for destroying aquatic health, which has been declining since large scale agricultural diversions began. Indeed, the statute contains an exception for anything that violates any provision of the Fish and Game Code, Health and Safety Code, or other laws.\(^5\)

IV. State Versus Federal Law

**Faith:** One thing I don’t understand about your argument is this. You’ve been talking mostly about California law and its wrinkles and quirks. But my claim for compensation is based, Rodger tells me, on the United States Constitution, and particularly its Fifth and Fourteenth Amendments.

**Frank:** State law is the source and foundation of most property rights in this country. Although the U.S. Constitution provides some protection to property rights, state law usually defines what those property rights are. Generally speaking, the more limitations state law puts on water rights, the less the U.S. Constitution will protect them. That is what Justice Scalia meant when he argued that the background principles of state law operate to restrict the government’s duty to compensate for restricting the use of a property right.\(^6\) Water rights are rich in background principles of state prop-

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58. In essence, the statute, which has counterparts in several dozen other states, revives the common law “coming to the nuisance” defense which had been weakened although not entirely abandoned by more modern courts. See Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706-07 (Ariz. 1972) (limiting the influence of the “coming to the nuisance” defense by requiring the relocation of a feedlot, the existence of which predated the arrival of the complaining property owner’s development). By curtailing neighbors’ rights to complain about nuisances maintained on farmers’ property, the statute allows farmers in some circumstances effectively to restrict how neighbors use their property. For that reason, and somewhat ironically, it has been held to be an unconstitutional interference with the property rights of others. See Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004) (holding an Illinois statute’s grant of nuisance immunity to animal feeding operations unconstitutional in a case involving a nuisance action against an operator of a hog confinement facility); Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998) (holding a nuisance immunity provision in an agriculture land preservation statute, which was used in an “agriculture area” designation by a county board of supervisors, unconstitutional); John E. Cribett, Concepts in Transition: The Search for a New Definition of Property, 1986 U. ILL. L. REV. 1, 19-20 (explaining how courts have fashioned unique remedies to solve the dilemma created by the “coming to the nuisance” defense, enabling them to abate such nuisances).

59. CAL. CIV. CODE § 3482.5(c) (West 1997) (“Paragraph (1) of subdivision (a) shall not invalidate any provision contained in the Health and Safety Code, Fish and Game Code, Food and Agricultural Code, or Division 7 (commencing with Section 13000) of the Water Code, if the agricultural activity, operation, or facility, or appurtenances thereof constitute a nuisance, public or private, as specifically or described in any of those provisions.”).

60. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (pointing out the Court’s “traditional resort to ‘existing rules or understandings that stem from an independent source such as state law’ to define the range of interests that qualify for protection as ‘property’ under the Fifth and Fourteenth Amendments”) (citations omitted).
alty law (e.g., the beneficial use and the public trust doctrines) and in state nuisance law (e.g., limiting diversions that harm fish). So even where the government totally thwarts the exercise of a water right, state law restrictions inherent in the title can immunize the government from a duty to provide compensation.

V. The Gap Between the Law and The Public Perception of Water Rights

Faith: I must say that what you have been saying is shocking to me. I'm a simple farmer. Assuming you have been accurate, I had no idea that my water right had all these limitations built into it. I suppose you're going to tell me that's no excuse.

Frank: Your lack of information or understanding doesn't change the character of your water right. This is true in almost any area of the law. Legal systems would be impossible to administer otherwise. As English jurist John Selden put it nearly four centuries ago: "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him."

Faith: But all my life I've been told that water rights in the West are the paramount form of property—absolute and impregnable.

Frank: It's a myth. Water rights are limited, contingent, and fragile. Of course, our culture glorifies a lot of things that are more myth than reality. Consider the life of the American cowboy—often celebrated as romantic, it was usually hard and lonely. The conventional wisdom is often wrong. Unfortunately, the common rhetoric misleads water right holders into thinking they actually have something approaching an absolute right.

The best example I know of is in the Lone Star State. In most of Texas, groundwater is legally a commons—anyone has the right to drill a well and withdraw groundwater in any amount for any use anywhere. No one has a right to exclude anyone else from the resource. Yet the Texas Supreme Court, in adopting this legal principle and then repeatedly reaffirming it, has spoken of it in terms of the right of the owner of the soil, and "as the property of the owner of the surface," which "has become an established rule of property law in this State, under which many citizens own... water rights." It is, frankly, ludicrous for a court to speak of one having an

61. See supra subparts II(A-B).
62. See supra subparts II(A-B).
64. As Professor Sax, a prominent scholar of takings law and water law, put it: "Nowhere in the decisions of the Supreme Court is there any hint that water rights are a constitutionally favored form of property." Sax, The Constitution, supra note 52, at 261.
66. City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 800 (Tex. 1955).
67. Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 29 (Tex. 1978). See also Sipriano v. Great Spring Waters, 1 S.W.3d 75, 76 (Tex. 1999) (describing the rule of capture: "[A]bsent malice or willful waste, landowners have the right to take all the water they can capture..."
ownership interest or a property right in groundwater when one has no right to prevent anyone else from withdrawing, using, and exhausting it. Yet when proposals have been made to regulate withdrawals of groundwater in Texas to provide some sustainable future for its residents, they have tended to be “shunted aside by the smokescreen of claimed invincibility of landowner property in groundwater.” Although Texas is an extreme case, it shows how the rhetoric of property rights in water employed throughout the West has far outstripped the reality of how limited or evanescent those property rights actually are.

**Faith:** But I thought that water management out here in the West is tightly controlled, with every drop of water accounted for, subject to water rights defined with crystal clarity, functioning with the precision of a Swiss watch.

**Frank:** Unfortunately, another myth. The sad if not well-understood truth is that many states have little idea about who has rights to which water or what actual uses are. Unexercised, “paper” rights abound. Many Western management systems operate as much on assumptions and guesses as hard data, and only rarely are those assumptions and guesses entirely correct. Moreover, a good deal of water gets used in ways that would be, shall we say, of questionable legality if water rights were strictly enforced. This is not a Swiss watch. This is more like a sundial on a partly cloudy day. I think this may be what Mark Twain meant when he said, “Whisky is for drinking, water is for fighting over.”

In California, for example, a Governor’s Commission chaired by the state’s former Chief Justice concluded that “relative uncertainty” is “the distinctive attribute of water rights” in the state. The sources of uncertainty include the fact that a large number of nonstatutory water rights (including


68. Johnson, *supra* note 67, at 1295. Groundwater in Texas provides more than 40% of the state’s municipal water, almost 70% of the agricultural water, and about 60% of the total water supply. *See Sipriano*, 1 S.W.3d at 81 (Hecht, J., concurring) (“Twenty-nine aquifers underlie eighty-one percent of the State. . . . In 1992, groundwater sources supplied fifty-six percent of all water used in the State, including sixty-nine percent of agricultural needs and forty-one percent of municipal needs.”).

69. *See generally* SAX, LEGAL CONTROL, *supra* note 2, at 266–76 (describing practical problems various western states face caused by differences between water rights records and actual water use patterns).


71. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 16 (1978).
riparian rights, prescriptive rights, and pre-1914 appropriative rights) are not quantified and recorded. Even where water rights are recorded, the quantities of water claimed are often wildly exaggerated; the Commission dryly noted that rivers with average flows of a few thousand cubic feet per second (cfs) had recorded notices of appropriation totaling nearly one million cfs. The Commission identified many adverse consequences of this uncertainty, including inefficient allocations, inadequate administration, and much costly litigation. Studies in other states have shown similar results. This is, of course, in sharp contrast to land, where elaborate title recording systems make it fairly easy to ascertain who owns what. In an attempt to get a better handle on the situation and make their records conform to reality, many of the western states are going through elaborate and expensive adjudications of water rights.

This chronic uncertainty about the validity and measure of many water rights has some important implications for takings law. It could mean that the Court of Federal Claims, if it is to resolve takings issues fairly, will have to undertake the Herculean task of bringing order out of the chaos that characterizes water claims on many stream systems today. This task has proved daunting for many state courts trying to conduct general stream adjudications. It is not clear the Court of Federal Claims will do any better. To the extent that the court is not up to the task, it might be tempted to assume that the plaintiff's water rights are valid despite the uncertainty, in which case the government could end up compensating many holders of defective water rights, bestowing a windfall on them.

VI. When Should a Less-Than-Total Governmental Restriction on Water Use Require Compensation?

Faith: But I'm not like those with mere paper claims. I've been using water. The government is restricting me from full exercise of my right in dry years, and for that I should be compensated.

Frank: Your claim would have to be tested against the Supreme Court's modern regulatory takings doctrine, announced in the Penn Central decision. It says that compensation claims based on governmental

72. Id. at 17.
73. Id. at 18.
74. Id. at 21–25.
75. See, e.g., Michael McIntyre, The Disparity Between State Water Rights Records and Actual Water Use Patterns: "I Wonder Where the Water Went?", 5 LAND & WATER L. REV. 23, 23–24 (1970) (describing inaccuracies in records received by the Wyoming Board of Control regarding the nature and extent of water use, dates when the first use commenced, places of diversion, places of use, and types of use).
restrictions of property rights must usually be resolved through essentially ad hoc, factual inquiries. The Court identified three factors as being of particular importance: (1) "the character of the governmental action"; (2) "the extent to which the governmental regulation interferes with the owner's distinct, investment-backed expectations"; and (3) the amount the property is devalued because of the challenged government regulation. How do these principles apply in your case? First, the government here is limiting your water use from time to time in order to protect aquatic health, which is an important public interest, given the vital character of water to life on earth. Second, your investment-backed expectations are limited in various ways—not just by the risk of weather, drought, and other forces of nature involved in any farming enterprise, but more importantly by the numerous limitations I've already discussed on the very character of your property right to use water.

The third factor deserves a bit more comment. The Supreme Court said in Penn Central, and recently reaffirmed in its Tahoe-Sierra decision, that the relevant inquiry is the effect of the challenged governmental action on the parcel of property as a whole. Earlier I mentioned the requirement of many zoning ordinances that property owners set back from the property line any buildings they build on their property. While that may prohibit you from building anything on that strip of land, the relevant inquiry is the impact of that requirement on your entire property right, and not just your property right in that strip. In its recent Tahoe-Sierra decision, the Court confirmed that this idea has a temporal dimension when it upheld a sweeping though time-limited moratorium on private building around Lake Tahoe designed to give the government time to craft a land-use plan that would protect the Lake's fragile environment.

How is this relevant to you? Well, as you recognize, the government's measures to protect fish do not completely and permanently prohibit you from exercising your water right. You continue to get your full allotment of water in some, perhaps many, years. While in some years you may receive only a fraction of that allotment, and in a few years you may get no water at all, takings law looks at the impact of the governmental restriction on the totality of your water right measured over time, and not just its impact on any

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78. Id.
79. Id.
80. Id. at 130–31.
82. See id. at 327 (explaining that the focus in regulatory takings cases must be on "the parcel as a whole").
83. See supra text accompanying note 23.
particular year or season. It's not really different from a zoning setback requirement.

All this means that, under a straightforward application of the Supreme Court's standard takings test, the government does not owe you compensation.

VII. Protecting the Public Interest Versus Favoring One Private Interest Over Another

**Faith:** Then why has the government paid compensation to owners of water rights like me in the past after taking water for other uses? That would seem to have been unnecessary.

**Frank:** It is true that the government has sometimes paid to settle claims of water right takings in the past. The government compensated farmers along the San Joaquin River when it diverted practically the entire flow of the river to build Friant Dam.\(^{85}\) But in these situations, the government was taking water from one group of farmers and giving it to another group of farmers.\(^{86}\) Here, by contrast, the fundamental purpose of the government's limitation on your diversion is to protect the health of the aquatic environment as a whole. In the Endangered Species Act, Congress found that biodiversity is of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,"\(^{87}\) and it adopted the Act in order to "provide a means whereby the ecosystems upon which endangered ... and threatened species depend may be conserved."\(^{88}\) Congress's purpose was not, in other words, to favor one private commercial interest over another, but to benefit the public at large, including our children, grandchildren, and those who follow them. That's a key difference. The case for compensating the loser is stronger under prevailing legal standards when the government's purpose is to transfer something of value from one private interest to another.

**Faith:** But it doesn't really ease my pain to say the government is using my water for the environment rather than giving it to other farmers. My loss is the same. And anyway, it's not taking water from me to give to the environment. It's taking water from me to give it to fishermen.

**Frank:** No, it's not. First, in normal and wet years there is enough water for both you and the fish; it is only in dry years that the government may be forced to choose between fish and farms. Moreover, while the government's effort to restore a healthy fishery may ultimately have some

\(^{85}\) United States v. Gerlach Live Stock Co., 339 U.S. 725, 752 (1950) ("The waters of which claimants are deprived are taken [by the federal government] for resale largely to other private landowners .... Thereby private lands will be made more fruitful, more valuable, and their operation more profitable.").

\(^{86}\) Id.


benefits for commercial industries, that’s not the primary reason for the restrictions. As Congress made clear in the Endangered Species Act, its regulatory program is designed to protect all endangered species, whether they have commercial value or not.

**Faith:** Rodger, you need to jump in here. What am I paying you the big bucks for? Can’t you come up with some clever legal arguments to rebut this communist propaganda?

VIII. Is a Governmental Restriction on the Exercise of a Water Right a Permanent Physical Occupation Governed by a Per Se Rule of Takings Liability?

**Rodger:** Well, Frank, what about the per se rule the Supreme Court has applied in the modern era, almost automatically requiring compensation where the government engages in a permanent physical occupation of private property? In the leading case in this area, *Loretto*, the city government came into a privately owned apartment building and ran a small communications cable down a wall. The Court did not apply *Penn Central*'s parcel-as-a-whole principle, but instead held that the government had to pay for the comparatively tiny space it occupied. This is not different from Faith’s situation. The government should pay for that portion of Faith’s water right it is physically occupying to give to the fish.

**Frank:** I’ve been waiting for you to bring that up, Rodger. Every lawyer in the country representing holders of private water rights is trying to shoehorn governmental limitations on the exercise of water rights into this judge-made category of permanent physical occupation as a per se taking. It’s a kind of nuclear weapon in takings doctrine. But there are several defects in your argument. For one thing, it ignores the basic character of the water right. Faith’s water right doesn’t give her ownership of molecules of water. What she has instead is a right to use some amount of water. This limited interest—what lawyers call a *usufruct*, or a right to enjoy something owned by someone else—has interesting implications. It means, for example, that if Faith is not exercising her right—if she is not using water—she cannot complain if others make use of it. Her right to exclude others, which the Supreme Court has described as a fundamental element of property rights, is limited. This is, by the way, not true for land. Landowners own the molecules of the soil, and ordinarily have a right to prevent the


90. See, e.g., *Loretto*, 458 U.S. at 435 (acknowledging that “[t]he power to exclude has traditionally been considered one of the most treasured strands in the owner’s bundle of property rights”); *Kaiser Aetna* v. United States, 444 U.S. 164, 176, 179-80 (1979) (characterizing the right to exclude as “one of the most essential sticks in the bundle of [property] rights,” and declaring that it is “universally held to be a fundamental element of the property right”).
government (or anyone else) from trespassing on their land, regardless of whether the landowner is actually using the land in any way.

**Rodger:** You keep saying that a property right in water isn’t comparable to a property right in land. But the way I see it, the difference cuts in favor of Faith’s claim for compensation, not against it. If Faith owned land subject to the zoning ordinance setback requirement in your example, she would still have some control over the use of that portion of her property affected by the government restriction. She could walk on it, picnic on it, and enjoy birds nesting on it. As you just pointed out, she could keep other people from trespassing on it.

But don’t make too much of the right to exclude others; that’s not really the issue here. Faith would have no problem letting others use her water if she voluntarily chose not to exercise her water right. However, in this case, she wants to use her water, but the government says she can’t, at least at certain times. Faith’s water right consists only of a right to use a particular amount of water. So when the government prohibits Faith from exercising her water right, she has nothing left to enjoy—it’s all been taken from her. That makes her case for compensation stronger and more compelling than the landowner’s. After all, the U.S. Court of Federal Claims has found that the government must compensate a water rights owner for limiting the exercise of her water right, reasoning that “[i]n the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water.”

**Frank:** With all respect, I believe you and the Claims Court vastly oversimplify the matter. The character of the government’s act here is simply a restriction on Faith’s exercise of her water right, and not a physical occupation of it. The Supreme Court made that clear in its *Lucas* decision. There, the Court created a new and distinct per se rule for takings liability, one that applies where the government permanently restricts the use of a parcel of land so much as to destroy all its economic value. If the Court had regarded such a severe restriction on use as tantamount to a physical occupation of property, it wouldn’t have needed to create a new category of per se liability. It would have simply applied the one it had already created for physical occupation in *Loretto*.

If the physical occupation doctrine were applied to land in the way you suggest it ought to be applied to water, every setback requirement, every height limitation, every minimum lot size, or other use restriction would require compensation. The practical effect would be to end zoning law and most forms of environmental regulation of land. Almost no one has ever se-

93. Id. at 1029.
riously suggested that the doctrine ought to apply that way to land.\textsuperscript{94} Under your physical occupation argument, the government would have a per se duty to compensate you if it reduced your 200 acre-foot water right by 40 acre-feet in order to protect an endangered species of salmon. But in a straightforward application of takings doctrine, the Court of Appeals for the Federal Circuit recently denied Boise Cascade Corporation compensation when the government restricted logging on 40 acres of a 200 acre tract of timberland owned by Boise, in order to protect the endangered northern spotted owl.\textsuperscript{95} It's difficult to see why the result should be different in these two cases. Yet that's what would happen if the governmental restriction were considered a permanent physical occupation of the water right. Any governmentally mandated reduction in private water use, even a teaspoonful, would be regarded as a physical occupation and require compensation. More importantly, it would mean that much more protection would be given to a property interest in \textit{water} than one in \textit{land}. This would be most anomalous, because water rights are, for the many reasons I've already given, much weaker and more fragile than rights in land.

\textbf{Rodger:} But the Court's major physical occupation case made something of the special kind of injury caused by this government interference: Permanent physical occupations are an especially demoralizing form of government interference because "an owner suffers a special kind of injury when a \textit{stranger} directly invades and occupies the owner's property."\textsuperscript{96} The Court puts physical occupations of property into a per se category requiring compensation because the right to exclude is one of the most essential sticks in the bundle of rights that are commonly characterized as property.\textsuperscript{97} With respect to water rights, the right to use is an even more essential stick than the right to exclude, and this makes it appropriate to apply the physical occupation doctrine to governmental limitations on their exercise.

\textbf{Frank:} You're arguing for a very significant extension of the doctrine. In the landmark \textit{Loretto} case, the Court underscored that the physical occupation must be permanent: "[W]hen the physical intrusion reaches the extreme form of a \textit{permanent} physical occupation, a taking has occurred."\textsuperscript{98} It also said that a mere temporary physical invasion, even a governmental

\textsuperscript{94} On the few occasions when this argument has been presented, the Court has given it short shrift. \textit{See} Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002) (stating that treating land-use regulations as per se takings would put a virtual end to government regulation because of the prohibitively high cost of compensating every affected landowner); Palazzolo v. Rhode Island, 533 U.S. 606, 630–31 (2001) (rejecting a landowner's argument for a per se taking of his eighteen acres of coastal property when the state prohibited him from filling wetlands because he retained modest use of the property (a single family house)).

\textsuperscript{95} Boise Cascade Corp. v. United States, 296 F.3d 1339, 1349–50 (Fed. Cir. 2002).

\textsuperscript{96} \textit{Loretto}, 458 U.S. at 436.

\textsuperscript{97} \textit{Id.} at 433 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

\textsuperscript{98} \textit{Id.} at 426 (emphasis added).
intrusion of an "unusually serious character," was not in the per se category because "[n]ot every physical invasion is a taking." Instead, it is the "permanence and absolute exclusivity of a physical occupation [which] distinguish[es] it from temporary limitations on the right to exclude." In its recent *Tahoe-Sierra* decision, the Court reaffirmed that temporary prohibitions on the exercise of property rights, even if they amount to a complete prohibition, do not fall within a rule of per se liability, and may not require compensation at all.

As I've pointed out, governmental interruptions in Faith's exercise of her water right are temporary, being necessary only in drier years. Put another way, natural variations in precipitation make it possible to fully satisfy both water rights and fishery needs much, perhaps most, of the time. It is also possible that a fishery may recover (or, alas, be extirpated), erasing the need for limits on diversions to protect it.

**Rodger:** What about the fact that, in its *Nollan* decision, the Court held that repeated—albeit noncontinuous—use of private property by the public is equivalent to a permanent physical occupation? That's really what the government is doing here with Faith's water right: repeatedly, if noncontinuously, occupying it.

**Frank:** That's not exactly what the Court said in *Nollan*. It held that a permanent physical occupation had occurred "where individuals are given a permanent and continuous right to pass to and fro, so that real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." That's not what the government is doing here.

**Rodger:** What about the cases saying that the government must compensate a landowner if the government periodically floods her property? That is what the government is doing here—periodically occupying Faith's water right for its own purposes.

**Frank:** But the government is not occupying Faith's property like it is occupying land in the flowage easement cases. It is merely preventing her from exercising her water right by not delivering water to her. The government here is, at certain times in certain years, letting nature take its course, and not switching on the pump to lift water from the stream and divert it into project works and eventually deliver it to Faith's fields. This just doesn't fit

99. *Id.* at 433, 435 n.2.

100. *Id.* at 435 n.12. Even suffering a permanent physical occupation may not entitle a property owner to compensation. See *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–85 (1980) (determining that appellants' right to solicit signatures in a shopping mall does not infringe on the mall owners' property rights).


103. *Id.* at 832.

the physical occupation doctrine. Suppose, for example, that Faith herself had control of the pumps to get access to her water. If the government simply issued her an order not to turn on the pumps, in order to protect the fish (or simply threatened her with prosecution under fish protection statutes if she did), would the government be physically occupying her water right? That's all it typically does in the classic regulatory takings cases like *Boise Cascade*, and the courts don't regard that as a physical occupation. ¹⁰⁵

There's still another reason why that doctrine doesn't work here. The Court has made clear that background principles limit it. In *Lucas*, Justice Scalia said that the Court "assuredly would permit the government to assert" a right to occupy someone's private property if it "was a preexisting limitation on the landowner's title," as part of the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. ¹⁰⁶ Scalia cited a century-old case where the government exercised its navigation servitude and occupied someone's (submerged) land without compensating the owner. ¹⁰⁷ Even if the government's restriction on Faith's exercise of her water right were deemed a physical occupation of it, in other words, no compensation would be owed if the government was seeking to forestall the nuisance of fishery destruction, or exercising its duty to protect the public trust, or invoking one of the other background principles of water law I've already discussed.

In fact, it is not entirely clear that the per se rule of liability for permanent physical occupations of property by government applies to anything but land. Justice Scalia has emphasized that property rights in land have always been given a special kind of status in "the historical compact recorded in the Takings Clause that has become part of our constitutional culture." ¹¹⁰⁸ He contrasted land with personal property, regarding the latter as having, generally speaking, much less constitutional protection against governmental regulation. ¹⁰⁹ The peculiarly limited character of property rights in water more closely resembles personal property rights than real property rights.

It is worth keeping in mind that your argument for applying the permanent physical occupation doctrine is not whether the government may, in some circumstances, have a duty to compensate Faith for limiting the exercise of her water right. Instead, it is whether the government's action is subject to a categorical rule that nearly automatically requires compensation. The Supreme Court has always, and rightly so, been very skeptical of per se

¹⁰⁵. *See Boise Cascade*, 296 F.3d at 1352–56 (holding that an injunction obtained by the government that prohibited logging on private land without a permit did not constitute physical occupation giving rise to a per se takings claim).
¹⁰⁹. *Id.* at 1028.
rules in the takings area. It has narrowly confined permanent physical occupations to very distinctive, qualitatively more severe regulations that mandate actual governmental occupation of the property.\textsuperscript{110} In its recent Tahoe-Sierra decision, the Court cautioned that physical occupations should be relatively rare, confined to situations where the physical occupation can be easily identified, such as where the government occupies the property with cable TV wires, or flies its planes through private airspace, as contrasted with situations where the government merely restricts the use of private property.\textsuperscript{111} Even when some sort of physical seizure by the government is involved, the courts generally have displayed a strong reluctance to, as the Claims Court once put it, “squeeze[e] the government’s action into . . . the grasp of the magic words of [Loretto’s] per se rule.”\textsuperscript{112} Accordingly, the Court has generally rejected invitations to expand that category. It has said, for example, that the government may tightly control rents landowners charge for their use of property without being subject to that doctrine, even when the government is effectively dictating what a landowner can do with her property.\textsuperscript{113}

In Tahoe-Sierra, the Court noted that the temptation to adopt what amount to per se rules should be resisted, to avoid “transform[ing] governmental regulation into a luxury few governments could afford.”\textsuperscript{114} In the Palazzolo decision of a year earlier, Justice Kennedy, writing for the majority, expressed skepticism about “blanket rule[s]” in this area, because they are “too blunt an instrument to accord with the duty to compensate for what is taken.”\textsuperscript{115} Concurring in the same case, Justice O’Connor wisely observed that, because “[t]he concepts of ‘fairness and justice’ that underlie the Takings Clause . . . are less than fully determinate,” the Court has generally refrained from “any ‘set formula’ for determining” liability.\textsuperscript{116} These comments, by the two Justices who control the political center of the Court on these issues, strongly suggest that the Court is likely to continue resisting the expansion of the permanent physical occupation category of liability. The peculiar nature of water rights makes it a most inappropriate place for such an expansion. In short, applying the permanent physical occupation doctrine to governmental regulation of water rights would be completely at odds with how water rights have been regarded in jurisdictions throughout

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  \item \textsuperscript{110} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).
  \item \textsuperscript{112} Am. Cont’l Corp. v. United States, 22 Cl. Ct. 692, 700 (1991).
  \item \textsuperscript{113} Yee v. City of Escondido, 503 U.S. 519, 527–28 (1992); Pennell v. City of San Jose, 485 U.S. 1, 12 n.6 (1988).
  \item \textsuperscript{114} Tahoe-Sierra, 535 U.S. at 324.
  \item \textsuperscript{115} Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001).
  \item \textsuperscript{116} Id. at 633.
\end{itemize}
the country, and would work a genuine revolution in the relationship between the government and water use.

IX. Background Principles and Fairness Issues

Rodger: But there are plenty of irrigators and other water users out there who don't suffer cutbacks from government regulation. As Justice Scalia put it in Lucas, if "other landowners, similarly situated, are permitted to continue the use denied to [one landowner]," this will ordinarily indicate that the government's restriction is not really an expression of a background principle immunizing government from any obligation to provide compensation for a total "denial[al] of all economically beneficial or productive use of land."117

Frank: In fact, however, many water users in the Central Valley are being affected by the ongoing reorientation of water management. The effort to protect water quality and endangered species in this vast area has engaged the attention and efforts of local, state, and federal agencies; water users; and nongovernmental groups for a quarter of a century. Indeed, one of the landmark modern cases in California water law held that the entire burden of this effort could not be placed just on those who were served by state and federal water projects; instead, other water users' diversions must also be appropriately regulated.118

Faith: But I get no benefit at all from this governmental action; I only bear the burden.

Frank: We all, including you and your offspring, benefit from a healthy environment. The Supreme Court has generally been willing to defer to the other branches of government to produce a fair and equitable distribution of the benefits and burdens of limiting property uses. In the landmark Penn Central case, the Supreme Court rejected the argument that the government must compensate a building owner when New York City's historic landmark law required that the building, along with a relatively small number of other buildings in the City, be preserved for its historic value.119 The Court said, "the preservation [scheme] benefits all New York citizens . . . by improving the quality of life in the city as a whole."120 The same is true here.

120. Id.
X. Can the Application of Background Principles Change Over Time?

**Faith:** I still don’t understand why the government’s delivery of water to me all these years without regard for the impact on fish doesn’t give me some protection.

**Frank:** The content and application of background principles built into property rights can change over time. As Justice Scalia wrote for the Court in the *Lucas* decision, “changed circumstances or new knowledge may make what was previously permissible no longer so.”

In fact, the courts of all western states are continually readjusting water rights, sometimes even fundamentally, to conform to emerging societal demands. As our leading contemporary water law scholar, Joseph Sax, has put it, “[t]he story of water law is a record of continual change,” which is “far from being a modern invention of goal-oriented judges.” Sax further states:

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

Another leading water law guru, Dan Tarlock, put it this way: “[T] he law of western water rights, in contrast to land law, has always been a risk allocation scheme rather than a system of relatively absolute property rights,” because “[w]ater rights holders have long been on notice that rights can be curtailed to meet competing demands.” This means that, as a matter of law, you have always been on notice of the government’s ongoing interest in how this important resource is used. Thus, your expectation of

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121. *Lucas*, 505 U.S. at 1031.
122. For example, in central Arizona farmers held recognized water rights—adjudicated and embodied in court decrees dating back to 1917—in a stream fed by Phoenix’s discharge of its sewage effluent. They sued to stop Phoenix from recapturing that effluent and selling it to a local utility. (The effluent had been cleaned up and made marketable by environmental laws like the Clean Water Act). Despite the fact that the farmers seemed to have a powerful case, the Arizona Supreme Court held for Phoenix, finding effluent not to be water subject to water law. Ariz. Pub. Serv. Co. v. Long, 773 P.2d 988, 996 (Ariz. 1989). In another case, the same court rewrote basic Arizona groundwater law in upholding the power of the legislature to closely regulate groundwater pumping. Chino Valley v. Prescott, 638 P.2d 1324, 1326–28 (Ariz. 1982) (holding that there is no ownership right in Arizona groundwater prior to its capture and withdrawal from a common supply, departing from a longstanding judicial rule that an owner of land also owned the water beneath it).
123. *Id.* at 267.
124. *Id.* at 268.
125. *Id.* at 269.
127. *Id.*
continued water delivery by the government is, relatively speaking, less strong than any reliance interest you may have in using land you own.

**Rodger**: I just can’t believe the courts will approve manipulating the beneficial use doctrine to confiscate Faith’s property right in water—a right she has been exercising a long time. Even if I agreed that the government had no obligation to compensate a property owner where state law has—in longstanding, well-understood, and clearly articulated ways—restricted how property can be used, the hard truth is that, despite water law’s rhetorical devotion to the idea of beneficial use, this doctrine has rarely been invoked to restrict water use in any meaningful way.\(^{128}\) For courts to abruptly begin to put some teeth into it in order to avoid compensation would not be a fair implementation of the background principle in the way Scalia spoke of it. He thought the application of legal doctrines like beneficial use had to be settled enough to provide property owners with some stability. That’s clear from dissenting opinions in that case, which protested loudly that the majority was “[a]rresting the development of the common law.”\(^{129}\) After all, the Court has said that “a state, by ipse dixit, may not transform private property into public property.”\(^{130}\)

**Frank**: That’s not the right way to look at this situation. The government is not transforming private property into public property; it is simply exercising governmental authority that it built into Faith’s water right from the very beginning to protect the public interest in how water is used. The state does not lose that authority by failing to exercise it. The fact that speeders often go unprosecuted doesn’t give you a good defense if a law enforcement officer tickets you for speeding.

Moreover, the Supreme Court has said that the most important factor in determining whether the expectations of the property owner are reasonable is how property is formally defined by the state. In 1988, the Court found that

\(^{128}\) See, e.g., Janet C. Newman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 38 ENVTL. L. 919, 928 n.51 (1998) (“There seems to be almost an unstated presumption that if a use went unchallenged until it was later replaced by another use, the earlier use will be found beneficial [by a court].”).

\(^{129}\) See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1068–69 (1992) (Stevens, J. dissenting) (criticizing the majority for “effectively freez[ing] the State’s common law,” because under the majority’s rule any new state regulation or prohibition of a previously unregulated and lawful use of property would constitute a per se compensable taking). Scholars have debated the extent to which Justice Scalia meant to freeze the development of the law. See Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1002 n.33 (1997) (arguing that *Lucas* is consistent with the notion that “as applied to land-use issues, state laws are bound by the sic utere principle of common law nuisance, though they also may be subject to statutory modifications that refine or sharpen nuisance-like considerations”); Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215, 225 (1995) (positing that “Justice Scalia’s admission that a landowner should expect newly enacted regulations to restrict the use of his property” suggests that “a newly enacted land-use regulation . . . is not a per se taking if it was in effect when the landowner purchased her land, even though the regulation denies all economically viable use”).

lands beneath non-navigable tidal waters in Mississippi had passed into state ownership when the state was admitted to the Union. In upholding the state’s claim to these lands, the Court overturned strong private claims. These private claims were based on property holders’ longstanding assertion of title, their paying of taxes as if they owned the property, and the state’s long noninterference in their claims. Nonetheless, the Court found that the private claims were unreasonable because Mississippi law had, as Professor Sax put it, “consistently said that the state held a public trust title in all lands under the tidewater.”

Here, California has long said that it owns all water in the state, that water rights are subject to the beneficial use and public trust doctrines, and that the content of the doctrines can change over time. Professor Sax explains:

[The Supreme Court seems to be saying that] an expectation however real, functionally speaking, cannot be considered reasonable if it is at odds with a definition of property. . . . Definitions of property are of primary, if not determinative, importance, notwithstanding their non-enforcement for many years, and notwithstanding government behavior to suggest that the law is different from its formal statement. The implications of such a rule for western water law in states which now stand ready to implement long-moribund precepts of waste and beneficial use, or the public trust, are obvious. . . . Property rights in water are not only restrictively defined, but the definitions openly anticipate changes that may diminish or abolish uses that were once permitted.

Rodger: I think that reads too much into this obscure Supreme Court decision. Furthermore, I don’t think the courts should manipulate the nuisance doctrine to deny compensation to Faith. When Justice Scalia acknowledged that state nuisance law was a background principle qualifying certain kinds of property rights, he was careful to limit that proposition: “The fact that a particular use had long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.” For many decades, farmers have been diverting water in California’s Central Valley without nuisance law imposing any serious limits on their use. To start limiting diversions now on nuisance grounds is to impose limits on Faith’s property right that simply didn’t exist before. I might agree that a novel use of property which proves injurious to the community could be prohibited without compensation to the property owner. But Faith has been making what everyone has long regarded as a normal or conventional use—irrigating cotton. It would be a radical departure from common

133. Id. at 950–51 (citations omitted).
understanding to say that irrigated agriculture in California’s Central Valley is a nuisance.

Frank: First, your implication that no efforts have been made over the years to protect fish from agricultural water diversions is not true. The state has long been concerned with protecting its fishery resource. It’s true that, in general, the measures it has taken have not worked sufficiently well, partly because they have been inadequately enforced or implemented. Furthermore, California law had already established that harming fish habitat could be a nuisance when Faith perfected her water right. Also, we know a lot more than we used to know about the cumulative impact of all these water diversions (and their concomitant adverse effect on water quality, including temperature) on the aquatic environment. Consider that, not long ago, many farmers were using chemical pesticides to improve their crop yields because they were thought then to be safe as well as effective. Scientific research has now shown some of them to be dangerous to the environment and human health—a nuisance. As a result their use has been prohibited, yet neither the owners of the pesticides nor the farmers benefiting from their use has any claim for compensation. In the same way, if your water delivery is curtailed to protect aquatic health, the government should have no legal obligation to compensate you. In this respect, the nuisance limitation operates on your water right to the same extent that it operates on an ownership interest in land.

Faith: But we’re out here in the West, where the darling of environmentalists, Wallace Stegner, once wrote that “[w]ater is the true wealth in a dry land.” You just haven’t persuaded me that the government can confiscate my true wealth to satisfy some newfangled environmental fashion.

Frank: The fashion of protecting the environment is not newfangled. Almost a century ago the great Justice Oliver Wendell Holmes said for the Supreme Court:

[F]ew 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

135. See, e.g., CAL. FISH & GAME CODE § 5937 (West 1997) (requiring dam owners to pass sufficient water “to keep in good condition any fish that ... exist below the dam”). Note that this provision is similar to one contained in section 525 of the Fish and Game Code of 1933.

136. See Joel Baoicchi, Comment, Use It or Lose It: California Fish and Game Code Section 5937 and Instream Fishery Resources, 14 U.C. DAVIS L. REV. 431, 445 (1980) (stating that the California Fish and Game Department “rarely if ever invokes section 5937 to punish a dam owner for noncompliance or to secure compliance through injunctive relief”).

perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors [the case he was addressing came from New Jersey, which recognizes only riparian water rights] cannot be supposed to have deeper roots. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.138

Anyway, here the government is not acting to prohibit irrigated agriculture permanently, across the board. It is merely cutting back on water deliveries to Faith on some occasions in a comparatively modest effort to protect fish. In many years she continues to get all the water she needs; only in drought years are her diversions curtailed. Furthermore, the government is acting here prospectively, to redress the problem going forward. It is not imposing retroactive liability on water diversers like Faith for fish destruction from past diversions. Thus, the government’s approach is sensitive to fairness concerns; it is not seeking reparations for harm caused by past water diversions.139

XI. Water Rights, Land Rights, and Other Forms of Property

Faith: Well, it still seems to me that every owner of private property in the country is at the mercy of the government if I can’t get compensated here.

Frank: You raise an interesting question, because your observation highlights how skewed the constitutional protection of private property has become since the U.S. Constitution was adopted in the late 18th century. The nature of our society’s wealth has undergone a massive shift since the industrial revolution began. Formerly concentrated in real property, it is now mostly in intangibles—stocks, bonds, intellectual property, and the like.140


139. See Sax, The Constitution, supra note 52, at 267 (noting that “[i]n the water situation, imposition of waste laws would only change the uses that can be made in the future”).

140. In 2003, for example, the net private stock of fixed tangible wealth was estimated at $19.8 trillion, while intangible financial assets were estimated at $34.3 trillion. U.S. TREASURY DEP’T, STATISTICAL ABSTRACT OF THE UNITED STATES 2004 tbl.695, available at http://www.census.gov/prod/2004pubs/04statab/income.pdf. See generally Molly S. McUsic, Looking Inside Out: Institutional Analysis and the Problem of Takings, 92 NW. U. L. REV. 591, 608–10 (1998) [hereinafter McUsic, Looking Inside Out] (discussing and criticizing traditional explanations of concern for the land as the origin of Takings Clause jurisprudence); see also Molly S. McUsic, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. REV. 605, 653–58 (1996) [hereinafter McUsic, The Ghost of Lochner] (discussing the Court’s protection of dominion rights in land over economic interests in land). Most of the tangible wealth is in owner-occupied housing, which is rarely the subject of takings litigation. See STATISTICAL ABSTRACT OF THE UNITED STATES, supra, tbl.696. Of those who own land, the top 0.5% of the largest landowners, including corporations, have title to 40% of the Nation’s
The government is constantly taking action that affects the value of such intangible property. Taxation is only the most obvious example. When the Federal Reserve changes the prime discount rate, the value of privately held property (tangible as well as intangible) may go up or down by many billions of dollars.\textsuperscript{141} When Congress raises the minimum wage, it effectively devalues property held in the form of McDonald’s common stock.\textsuperscript{142}

Almost no one ever tries to argue that these kinds of governmental actions are unconstitutional takings of private property requiring compensation. Instead, our takings law has been largely focused on real property in general, and to some extent on a subset of real property—namely, undeveloped land.\textsuperscript{143} The Supreme Court’s recent, more energetic efforts to protect private property rights have, for the most part, been aimed at protecting only a comparatively tiny class of property owners: landowners seeking to put buildings on raw land.\textsuperscript{144} The practical effect of this narrow focus is to make it harder for government to protect the natural environment, and thus functionally somewhat stacks the deck against environmental protection.\textsuperscript{145} This seems anomalous to me. The anomaly would be compounded if the Court were to expand this focus to include water as well, especially once the ecological importance of water for planetary health is balanced against the relative fragility of property rights in water.

XII. Of Subsidies and Equities

\textbf{Faith:} But look at it from my perspective. I am a hardworking, honest farmer who has been using water and playing by what I thought were the rules. Now I find my livelihood is being threatened by my own government, and you say I’m to get nothing for it.

\textbf{Frank:} I grew up in a rural area and know that farm life can be hard and involve sacrifice. But look at matters for a moment from a different acreage, and the top 5% own three-quarters; the bottom 78% of landowners own a mere 3% of private land. Charles C. Geisler, \textit{Land and Poverty in the United States: Insights and Oversights}, 71 LAND ECON. 16, 19 (1995).

\textsuperscript{141} See Roger N. Waud, \textit{Public Interpretation of Federal Reserve Discount Rate Changes: Evidence on the “Announcement Effect”}, 38 ECONOMETRICA 231, 231 (1970) (stating that “[i]t is rather common opinion that discount rate changes have a ‘psychological’ impact on the public’s expectations about the future of the economy . . . [which in turn] affect[s] economic activity by influencing the expectations of business and financial institutions”).

\textsuperscript{142} See McUsic, \textit{The Ghost of Lochner}, \textit{supra} note 140, at 664 (explaining that “minimum wage regulations . . . limit the conditions under which goods may be produced and exchanged, and therefore limit profits to owners for the purpose of expanding benefits to workers”).

\textsuperscript{143} See id. at 608 (stating that the Court’s takings jurisprudence has “protected what [the Court] considers ‘fundamental’ or ‘core’ property interests: interests centered around the right to control land,” including the rights to exclude and develop).

\textsuperscript{144} “The property rights [the modern] Court is protecting appear to be interests independent of economic value and closely connected to land.” \textit{id.} at 647.

\textsuperscript{145} See id. at 660 (positing that the “regulations most at constitutional risk from the Court’s takings jurisprudence [include] environmental laws that prohibit development”).
perspective: Farming is one of the most subsidized industries in the country. Price supports and various other programs transfer large amounts of taxpayer money to private farmers.\textsuperscript{146} Moreover, farming uses the vast majority of the developed water in the country—upwards of eighty or even ninety percent in most western states, and sixty-five percent across the country.\textsuperscript{147} Even in California, which has experienced massive population growth in urban areas over most of the last century, and which is now home to more than 35 million people, farmers still use eighty percent of freshwater withdrawals.\textsuperscript{148} And governmental water projects—most of which were built to make water available for farmers—involves further massive subsidies.\textsuperscript{149} Overall, in fact, the federal government has invested billions of dollars in such water projects, on top of the billions of taxpayer dollars it spends every year subsidizing agriculture through generic farm programs.

**Faith:** Wait right there. I get federal project water, and I know the federal investment is really in the form of a loan, and people like me who benefit from those projects repay this loan.

**Frank:** Sorry, Faith, the terms of this loan are so generous that it cannot realistically be described as anything but a subsidy. Irrigators repay only a small portion of the total cost of these projects—a few million total of the billions of federal dollars invested.\textsuperscript{150} These subsidies result from the facts that only a small portion of the project cost is allocated to agriculture for repayment, repayment obligations for farmers are calculated according to their ability to pay, the repayment term stretches over many decades, and the government charges no interest on this loan. No respectable economist doubts that the reclamation program is anything but a massive subsidy for...
What this means is that the nation's taxpayers have been bestowing gifts on farmers for decades. Your argument for compensation fundamentally rests on the notion that the taxpayers cannot end the gift-giving without compensating you.

Faith: I must say it is demoralizing for the government in effect to invite my family to farm on a government irrigation project, and we accept the challenge, and make a success of it in just the way the government contemplated, and then that same government comes back and takes it all away.

Frank: Just a minute. First of all, the government is not taking it all away. You still get your full allocation of water in most years. The restrictions to protect the fish are really marginal, especially when measured against the risks you normally bear from drought, pestilence, changing public tastes, the export market, and the like. More important, try to look at this from the perspective of ecologists, who are demoralized by seeing their government take tax money to support a venture—agriculture, and especially irrigated agriculture—in situations where a free market would likely not support it. And they are doubly demoralized when they see tax money used in a way which destroys healthy aquatic ecosystems and productive fisheries. And they are triply demoralized at the prospect that the government cannot take steps to restore the fisheries and health to the environment without being required to compensate the farmer-beneficiaries for the loss of something they call a property right in water.

Rodger: Let me take a step back here, to look at the big picture from a different angle. More and more people are seeing that the big-picture solution to our water resource problems is to allow the marketplace to work better. Let it, rather than government, shift water from lower value to higher value uses. But the market requires defined and protected water rights, and that's another reason to protect Faith here.

Frank: I agree that many water uses are inefficient, and that market mechanisms can play an important role in improving efficiency, at least so long as aquatic health is not destroyed in the process. But I'm not convinced the market works to protect aquatic health; the government is still needed for that. Even more important, there is ample room for a marketplace to work in water (indeed, there has been one working for a long time) without imposing takings liability. Markets can and do function all over the place without property rights being stringently protected. There is an active market in per-

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151. For the opinions of respectable economists, see, e.g., SAX, LEGAL CONTROL, supra note 2, at 652–56; and Environmental Working Group, California Water Subsidies, Executive Summary, at http://www.ewg.org/reports/watersubsidies/.
mits to graze livestock on federal land, for example, even though federal law is absolutely clear that such permits carry with them no property right.\textsuperscript{152}

Government subsidies have long distorted market allocations of water. Many of the massive projects that store and distribute water throughout the country, and especially in the West, are heavily subsidized by the government. So there is some irony when beneficiaries of those subsidies use the free market to justify their claim for government compensation for takings, when the government has been so generous with its free-market-distorting givings.

If, as you argue, limitations on the exercise of water rights required compensation, we would all be left more impoverished. I fear what would happen is that the government would usually not pay; instead, it would regulate less.\textsuperscript{153} The government simply cannot raise the money that would be required to compensate water right holders for limiting the exercise of their water rights—especially in this era when many people, including many of the country’s political leaders, seem to regard taxation for public programs as a form of theft. The result will be that aquatic dependent species, which already comprise a large majority of species on the endangered species list, will be extirpated and our stream systems will continue to be unhealthy. That’s not a proud legacy to leave to our children and grandchildren.

Rodger: That bleak result doesn’t necessarily follow. When government agencies lose takings claims, their budget doesn’t suffer. The money comes from the bottomless pit (otherwise known as a no-year appropriation) called the Claims and Judgments Fund in the Department of Justice.\textsuperscript{154} If protecting fish and wildlife is popular, people will pay to do it.

Frank: Not necessarily. As we have re-entered an era of large federal budget deficits,\textsuperscript{155} Congress will have a strong temptation to cut back on regulation rather than add to the deficit.

\textsuperscript{152}See Taylor Grazing Act, 43 U.S.C. § 315b (1986) (authorizing the Secretary of the Department of the Interior to issue permits to graze livestock on public lands and stating that such permits create no “right, title, or estate in or to the lands” for which the permits are issued); United States v. Fuller, 409 U.S. 488, 489 (1973) (applying the Taylor Grazing Act).

\textsuperscript{153}See generally McCusic, The Ghost of Lochner, supra note 140, at 644–45 (explaining that “the practical impact of requiring compensation is the same as finding the law unenforceable” because states’ tax revenues cannot support the compensation).


\textsuperscript{155}See Tom Abate, News Analysis: The Effect of Politics on Federal Budget Deficit; Can Tax Cuts Give Americans Incentive to Boost the Economy?, S.F. CHRONICLE, Sept. 9, 2004, at C1 (analyzing the increased federal deficit created by President Bush’s tax cuts).
XIII. Looking to the Legislature

Faith: I must say I'm crushed by all this. You're making me feel like a plunderer, a robber of future generations. But you're asking me to bear the burden of avoiding that result. That's what strikes me as downright un-American about your position.

Frank: Faith, let me emphasize that what I am most strongly objecting to is your position that any limitation on the exercise of your water right must be compensated through the courts, applying principles of constitutional law. If that were the law, it would mean every limitation on every water right, no matter how slight, would require compensation.

Faith: I'm so upset that I'm going to call my old friend, who happens to represent this area in the U.S. Congress. Surely he can do something about this wrong.

Frank: Your suggestion that you might have some sort of remedy through the political process is noteworthy. I think you might well find a sympathetic ear in Congress. Indeed, the historical record suggests you may have little trouble receiving, through political channels, compensation for whatever loss you may suffer from governmental regulation here. The long existence of many government programs to subsidize the nation's farmers stands as strong testament to the political power of the agriculture lobby.¹⁵⁶ Practically everywhere in the country, the agricultural industry exercises vastly more political power than employment or other economic numbers would suggest.¹⁵⁷ Today, approximately half of total farm income in the United States comes directly from the federal treasury.¹⁵⁸

A good recent illustration of how the political system responds when a direct conflict between endangered fish and farmers results in water cutbacks to agriculture can be found in the Klamath Basin in 2001. Congress responded by appropriating more than $20 million in emergency aid to the farmers¹⁵⁹ and refunding to the agricultural water districts routine charges for federal project operations and maintenance.¹⁶⁰ For its part, the

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¹⁵⁶. For a chronicle of the creation of several such programs in the Tulare Basin of California's Central Valley, see Mark Arax & Rick Wartzman, The King of California: J.G. Boswell and the Making of a Secret American Empire (2003).

¹⁵⁷. As Fast Food Nation pointed out, there are more people incarcerated in this country than there are full-time farmers. Eric Schlosser, Fast Food Nation 8 (2001).

¹⁵⁸. Ben Sutherly, Subsidy Cuts Stun Farmers, Dayton Daily News, Feb. 20, 2005, at D1 (noting that in 2000, farm subsidies accounted for $22.9 billion of $47.9 billion in U.S. net farm income), available at 2005 WLNR 2766417; see also Environmental Working Group, Farm Subsidy Database, at www.ewg.org (stating that federal taxpayers have spent more than $131 billion on federal farmer programs from 1995 through 2003, including $16.4 billion in 2003 alone).


Administration set up a water bank that is now engaged in buying or leasing water from the farmers for the fish.\(^1\)\(^{161}\) According to the Bureau of Reclamation, about $4.5 million was spent in 2003 and about $5.1 million in 2004.\(^1\)\(^{162}\) These compensation programs have not deterred the farmers from instituting litigation seeking compensation for the government’s alleged taking of their water rights.\(^1\)\(^{163}\) It can be demoralizing to taxpayers who value aquatic health to add another federal payment to the many subsidies these farmers already receive.

**Faith:** Come on, Rodger. It’s clear we’re not going to get anywhere here, and maybe not in court either. Let’s go visit our friends in the Executive Branch and in the Congress; I’ve already set up some appointments.\(^1\)\(^{164}\)


\(^{162}\) Documents on file with author, obtained by the Klamath Coalition under the Freedom of Information Act.
