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# Drought by Fifth Amendment: Debunking Water Rights as Real Property Comments

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# Drought By Fifth Amendment: Debunking Water Rights as "Real" Property

*"The wars of the twenty-first century will be fought over water."*

*–Ismail Sergaldein*[1]

## I. INTRODUCTION

The West is experiencing a water crisis.[2] Extreme and severe drought has taken hold in California, Nevada, Utah, Washington, and Oregon,[3] brought on by dry weather and rising population.[4] California reported record levels of drought with "water supplies . . . severely depleted . . . record low snowpack in the Sierra Nevada mountains, decreased water levels in most of California's reservoirs, reduced flows in the state's rivers and shrinking supplies in underground water basins."[5] California, in its sixth year of drought, responded with substantial water restrictions aimed at reducing con-

1. Ismail Sergldein is the former Chairman of the Global Water Partnership. *See* ALEX PRUD'HOMME, THE RIPPLE EFFECT: THE FATE OF FRESHWATER IN THE TWENTY-FIRST CENTURY 12 (2012).

2. U.S.D.A., UNITED STATES DROUGHT MONITOR, http://droughtmonitor.unl.edu (last updated Apr. 4, 2017).

3. NOAA NAT'L CTRS. ENV'T INFO., STATE OF THE CLIMATE: NAT'L OVERVIEW FOR AUG. 2015 (Sept. 2015), http://www.ncdc.noaa.gov/sotc/national/201508. The problem is also prominent in Arizona, Colorado, New Mexico, Texas, and Montana, which have also reported lower than normal water levels. *Id.* Almost sixty percent of the West is suffering from moderate to severe drought. *Id.*

4. Benjamin I. Cook, et al., *Unprecedented 21st Century Drought Risk in the American Southwest and Central Plains*, SCI. ADVANCES, (Feb. 12, 2015), http://advances.sciencemag.org/content/1/1/e1400082.

5. Cal. Exec. Order No. B-29-15 (Apr. 1, 2015), https://www.gov.ca.gov/docs/4.1.15_Executive_ Order.pdf. Although California experienced higher levels of precipitation in 2016, drought persists in California and other Western states as a result of above-normal temperatures. The National Oceanic and Atmospheric Administration holds the above-normal temperatures result in "very wet episodes during some months in some regions. These wet events mask some of the dry episodes on the statewide-scale and seasonal-scale analyses." NOAA NAT'L CTRS. ENV'T INFO, DROUGHT – ANNUAL 2016, (Jan. 2017), https://www.ncdc.noaa.gov/sotc/drought/201613#west-sect; *see also* Darryl Fears, *Has this year's record rain finally ended California's epic drought? Not really.*, WASH. POST (Feb. 13, 2017, 3:55 PM), https://www.washingtonpost.com/news/energy-environment/wp/2017/02/13/has-this-years-record-rain-finally-ended-californias-epic-drought-not-really/?utm_term=.495e1daa4140.

sumption.[6] These restrictions have yet to be enforced. Rather, disputes have escalated regarding the extent to which the state can restrict water usage, specifically in the Central Valley region, which is predominately agricultural and the dominant user of California's water.[7]In 2015, water rights holders, whose rights to draw from rivers and streams were curtailed,[8] filed lawsuits against the State Water Board on claims of constitutional violations.[9] The response in California to its water crisis is a sign of what is to come in other western states as they struggle to address the need for water conservation. In fact, most states have commenced conservation efforts. Utah commissioned a fifty-year water plan and urged water conservation after a decline in its snowpack;[10] Nevada is moving towards changes in water law to incentivize conservation as Lake Mead, which services ninety percent of Las Vegas' water needs, experiences lower-than-average water levels;[11]and Arizona issued a state water plan to address how dwindling supply will meet its ever growing population.[12] Yet, as states move to assert more control over water resources, there may be

6. Cal. Exec. Order No. B-29-15 (Apr. 1, 2015); *see also* Darryl Fears, *California Officials Say a New Plan Will Make Water Conservation 'A Way of Life*,*'* WASH. POST (Dec. 31, 2016), https://www.washingtonpost.com/national/health-science/california-officials-say-a-new-plan-will-make-water-conservation-a-way-of-life/2016/12/31/0afb79a2-c869-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.51dc1e1c6f00 (discussing California's efforts to curb water use).

7. Bettina Boxall, *Lawsuits Over California Water Rights Are a Fight a Century in the Making*, L.A. TIMES (Jun. 29, 2015, 4:00 AM), http://www.latimes.com/local/california/la-me-water-rights-legal-20150629-story.html.

8. Thirty-six thousand water right holders were told in April 2015 to stop diverting water from most major river systems. Press Release, Cal. Water Bds., State Water Bd. Warns that Water Right Curtailments Are Coming Soon (Apr. 3, 2015), http://www.swrcb.ca.gov/press_room/press_releases/2015/pr040315_ drought_ curtailments.pdf.

9. Dale Kasler & Phillip Reese, *Lawsuits Challenge California's Drought Plan*, THE SACRAMENTO BEE (June 19, 2015, 3:48 PM), http://www.sacbee.com/news/business/article 25022413.html#!. Water restrictions have been particularly been an issue with senior water right holders who have held their right for over a century. *Id.*

10. *See* Press Release, Utah Governor Gary Herbert, Gov. Herbert Encourages Water Conservation, Plans for Long-Term Solutions (Apr. 9, 2015), http://www.utah.gov/governor/news_media/article.html ?article =20150409-2.

11. Jeff DeLong, *Summit Brings Call for Nevada Water Law Changes*, RENO-GAZETTE J. (Sept. 25, 2015, 1:13 PM), http://www.rgj.com/story/news/2015/09/25/summit-brings-call-nevada-water-law-changes/72817234/.

12. Arizona is expecting a fifty percent increase in population in the next two decades, which would require nineteen percent more water than is currently being consumed. *See* Abraham Lustgarten, *Less Than Zero: Despite Decades of Accepted Science, California and Arizona Are Still Miscounting Their Water Supplies*, PROPUBLICA (July 17, 2015), https://projects.propublica.org/killing-the-colorado/story/groundwater-drought-california-arizona-miscounting-water.

significant limitations and costs.

Emerging litigation in California highlights the conflict between the implementation of water restrictions and the exercise of water rights, primarily in the face of exacerbated drought conditions.[13] A key concern is whether states should compensate water right holders for restricting usage. Under the Fifth Amendment, states cannot take private property "for public use, without just compensation."[14] Every state constitution likewise requires a taking of property be justly compensated. This limits the state's power and helps ensure a property owner is made whole after the taking occurs.[15]Action by states to curtail the usage of water raises the question of whether restrictions will be considered a taking that compels "just compensation." This paper argues that state and federal courts' designation of water regulations as takings with the assumption that water rights are traditional property perpetuates an outdated system of water regulation that fosters waste and non-conservation in the West. Therefore, to ensure states have the power to protect water sources in the long-term, courts must revisit the assumption that water rights garner the same protection as traditional property. Additionally, the public trust doctrine must be raised by courts to allow states to act in the best interest of the public when regulating water usage.

The purpose of this paper is to evaluate water regulation considering the Fifth Amendment and assess federal and state courts' interpretations of takings jurisprudence to determine the limitations of state water conservation efforts. Part II of this Comment discusses the history of water rights in the West and the persistence of waste and non-conservation by the prior appropriation doctrine. Part III surveys federal and state court decisions on the Fifth Amendment regarding water takings. Finally, Part IV considers the power of states to regulate water use without being subject to the Fifth Amendment's

13. Mark Fischetti, *U.S. Droughts Will Be the Worst in 1,000 Years,* SCI. AMERICAN (Feb. 12, 2015), http://www.scientificamerican.com/article/u-s-droughts-will-be-the-worst-in-1-000-years1/. Studies have predicted that advancing climate change will result in "less rain and greater soil evaporation," potentially creating the worst droughts since the twelth and thirteenth centuries. *Id.*

14. *See* Chicago, B. & Q.R. Co. v. City of Chicago*,* 166 U.S. 226, 239 (1897).

15. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). State constitutions provide clauses for eminent domain that require just compensation. *See, e.g.,* ALASKA CONST., art. I, § 18; ARIZ. CONST., art. II, § 17; CAL. CONST., art. I, § 19(a); COLO. CONST., art. I, § 15; IDAHO CONST., art. I, § 14; MONT. CONST., art. II, § 29; NEV. CONST., art. I, § 22; N.M. CONST., art. II, § 20; OR. CONST., art. I, § 18; UTAH CONST., art. I, § 22; WYO. CONST., art. I, § 33.

just compensation requirement.

## II. THE EVOLUTION OF WESTERN WATER RIGHTS

Roscoe Pound aptly stated that "the courts of America of the twentieth century [would] struggl[e] to administer justice to the crowded, urban, industrial, heterogeneous population . . . on the basis of the judicial organization devised after the revolution for the homogeneous, rural, pioneer agricultural community of the time."[16] This is particularly true for the West, as water rights were and continue to be shaped around agricultural usage.[17] Prior to population growth in the West, courts developed water rights using the doctrine of riparian rights, adopted from England.[18] Based on this doctrine, the government granted property owners a right to water based on the property's proximity,[19] as "[e]very proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands."[20] Riparian rights are only granted to property owners whose property borders the body of water, and each property owner has a right to an equal share of the water source. Western states continued to use the doctrine during settlement of the West, but climate conditions proved to be a challenge to the riparian doctrine.

### *A. The Rise of Prior Appropriation*

Settlements in the West quickly discovered that riparian rights were unworkable with an arid climate and "would have prevented the irrigation of the extensive nonriparian lands in the . . . West."[21] Mining heavily influenced the development of new water rights in the West, as "[t]he solution was to apply the same doctrine used to settle mining claims,"[22] which was "the person who is first in time to ap-

16. F. Joyce Cox, *The Texas Board of Water Engineers*, 7 TEX. L. REV. 86, 87 (1928).

17. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RES. J. 769, 770–71 (2001) [hereinafter Tarlock, *Future*].

18. ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 59 (1983).

19. 1 WATERS AND WATER RIGHTS § 6.01 (Amy K. Kelley, ed., 3d ed. LexisNexis/Matthew Bender 2015).

20. DUNBAR, *supra* note 18, at 59 (quotation and citation omitted).

21. *Id.* at 60.

22. *See* JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 46 (2009).

propriate water is the first in right."[23] Prior appropriation, under the two basic principles of priority and beneficial usage, allocates a water right to the first person to put a certain quantity of water to beneficial use.[24] Nineteen states have adopted the doctrine of prior appropriation or a hybrid system,[25] consisting of both riparian and prior appropriation rights.[26]

*1. Priority of water rights*

Prior appropriation helped settle water disputes over who first had claim to a water source by creating a system of priority. The rule of priority establishes that water needs of earlier claims (senior rights) are to be served paramount to any other claim (junior rights). Under this rule, "[w]hen water is not sufficient to supply all appropriators, senior appropriators make a call and junior users must shut down their diversions to enable senior rights holders to fill their needs."[27] Priority does not give a water right owner the right to possess, but rather the right to use—this is a "special type of property right"[28] and when water flow is insufficient, even senior water rights owners are not permitted to draw water.

Regulation of water rights proved difficult and "[b]y the early twentieth century, prior appropriation had evolved into an administrative system to allocate unused waters on entire stream systems."[29]All states adopted a permit system, requiring that for a water right to be granted, a user must show intent to divert the water, put the water to beneficial use, and demonstrate their intent in an "open physical manner."[30] California's permit system was enacted in 1914,

23. 1 WATERS AND WATER RIGHTS, *supra* note 19, § 12.01.

24. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, Or Rhetoric?*, 76 N.D. L. REV. 881, 882 (2000).

25. The riparian doctrine was initially used in the West, however, the West eventually adopted the prior appropriation doctrine, but rights granted under the riparian doctrine were preserved. Thus, a hybrid system was established to respect rights established under the earlier doctrine. *See* JOHNSON, *supra* note 22, at 57.

26. Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming have adopted the prior appropriation doctrine; whereas California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington have adopted a hybrid system. *See id.* at 303.

27. *Id.* at 52.

28. *In re* McKenna, 346 P.3d 35, 40 (Colo. 2015).

29. Tarlock, *Future*, *supra* note 17, at 770.

30. COLO. DIV. WATER RES., OBTAINING A WATER RIGHT (Dec. 2000), http://water.state.co.us/SurfaceWater/ SWRights/Pages/HowGetWaterRights.aspx.

after many water rights had already been established, presenting a complex system of priority in which riparian rights receive higher priority than prior appropriative rights, pre-1914 rights receive priority over post-1914 rights, and post-1914 rights are last in the line of priority.[31]

Permit systems allow states to monitor and warn individuals of over appropriation of a water source;[32] over time states have given authority to administrative agencies to issue permits.[33] Administrative agencies, specifically state water boards, play a significant role in establishing the priority of water rights, regulating beneficial use, and determining whether the appropriation of water will interfere with public interests.[34] California's State Water Board "has two primary duties: 1) to determine if surplus water is available and 2) to protect the public interest."[35] Other Western states have granted similar administrative duties, principally authorizing water boards and departments to retain substantial control over water usage in light of public interests.[36]

31. STATE WATER RES. CONTROL BD., THE WATER RIGHTS PROCESS, http://www.waterboards.ca.gov/waterrights/ board_info/water_rights_process.shtml (last visited Oct. 15, 2015).

32. Permits perform the significant role of a recording instrument to establish priority, and when a permit application is complete, the water date is recognized as the date the right was established. 1 WATERS AND WATER RIGHTS, *supra* note 19, §15.03. Colorado is the only state without a permit system, as the Colorado Constitution prohibits it, but has given authority to a water board to oversee the management of water rights. Water rights are instead established through litigation once a dispute has arisen. *See* JOHNSON, *supra* note 22, at 56.

33. Permit systems vary on the type of water they regulate, but most states regulate diffuse surface waters—varying on the exact definition—but typically covering streams, rivers, and lakes. *See* 1 WATERS AND WATER RIGHTS, *supra* note 19, §15.02.

34. *See* CAL. WATER CODE, § 174–89 (2016), http://www.leginfo.ca.gov/cgibin/displaycode?section=wat&group= 00001-01000&file=174-189.; *Ssee also* 1 WATERS AND WATER RIGHTS, *supra* note 19, §15.03.

35. United States v. State Water Res. Control Bd., 227277 Cal. Rptr. 161, 169 (Cal. Ct. App. 1986).

36. SWRCB has power to halt water diversion by water right holders if dry weather conditions continue. State Water Res. Control Bd., *State Water Board Drought Year Water Actions,* CAL. ENVTL. PROT. AGENCY (Nov. 2, 2016), http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/water_availability.shtml; *see also* ARIZ. REV. STAT. § 45-105 (2015) (director of the Department of Water Resources given power to regulate water rights); NEV. REV. STAT. § 533.090 (2015) (State Engineer granted significant power of the allocation of water rights); UTAH ADMIN. CODE R655-14-3 (2015) (state engineer and Utah Division of Water Rights are granted power to protect Utah's water and public welfare).

*2. Beneficial use of water*

Water usage is the key to prior appropriation, unlike land ownership under riparian rights, and for a right to be granted "a person must 1) comply with all statutory requirements, and 2) put the water to a beneficial purpose. The right remains valid so long as the use lasts."[37] Beneficial use conserves water resources by not allowing claims for an amount, but instead, only for water that would actually be put to use. States typically have a list of uses they recognize as beneficial, including domestic use, irrigation, municipal use, stock watering, mining, water power, and storage and capture of flood waters.[38]

Nonetheless, beneficial use is not as rigidly enforced as the rule of priority. Even though the purpose of beneficial use has been to prevent waste of scarce water resources, courts are hesitant to revoke allocations of water as "[w]ater rights became more of a general water entitlement to use water rather than the right to a specific quantity used in a non-wasteful manner as specified by the formal doctrine."[39] The practice of prior appropriation remains substantially different from the formal doctrine developed in the early settlement of the West, and has instead evolved from allocating water based on need to "a mature mixed administrative-property regime."[40] Rather than successfully managing water systems in the West, the prior appropriation doctrine has led to an over allocation of water rights and a decline in water conservation.

*B. The Decline of Beneficial Use and Lack of Water Conservation*

Conservation efforts and enforcement of beneficial usage are undermined by the lack of enforcement by state agencies to punish violators of water rights—violations including illegal diversion or waste of water resources—and instead waste and inefficient incentives pervade western water rights. One farmer in Colorado reported, "When we have it, we'll use it . . . . You'll open your head gate all the way

37. *See* JOHNSON, *supra* note 22, at 45.

38. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, § 5:60 (Westlaw, July 2015) [hereinafter TARLOCK, LAW]. In some cases, uses of water have moved from being deemed beneficial to wasteful, such as the case in Nevada where the legislature prohibited cities and counties from using water for artificial lakes and streams. *Id.*

39. Tarlock, *Future*, *supra* note 17, at 771.

40. *Id.*

and take as much as you can—whether you need it or not."[41] Water right holders worry their rights will be lost if they are not used to their maximum benefit, even as drought and growth continue to bear down on the availability of water.

Although the doctrine requires the water to be put to a beneficial use, prior appropriation has become more of a "shadow doctrine" with the creation of dams and earlier history promoting the irrigation of land.[42] "The principal criticisms are that perpetual 'use it or lose it rights' lock too much water into marginal agriculture and generally encourage inefficient off-stream consumptive uses to the detriment of aquatic ecosystem values and the needs of growing urban areas."[43] The concept of waste in water rights does not necessarily entail the excessive use of water, but rather the choice to not conserve it for future sustainability.[44] For example, older water rights do not need to share water with developing water needs and instead "flood deep canyons and literally dry up streams, as has happened with some regularity."[45] Also, states are hesitant to punish violators of restrictions on water rights, and in reality "beneficial use" is a loose concept encouraging waste and inefficiency.[46] Even if waste were to occur, states have not clearly defined waste—essentially because it is difficult to police water usage for waste; further, state monitoring of water to ensure beneficial use is non-existent.[47] Even state courts rarely enforce beneficial usage, and rather continue to embrace customs of irrigation. For example, to determine the definition of waste, courts look to irrigation customs as the standard of whether the water is being put to beneficial use.[48] This makes it very difficult to break the cycle of water waste and locks in to place the old system of water rights without any flexibility in changes to supply and demand.

41. Abraham Lustgarten, *Use It or Lose It: Across the West, Exercising One's Right to Waste Water*, PROPUBLICA (June 9, 2015), https://projects.propublica.org/killing-the-colorado/story/wasting-water-out-west-use-it-or-lose-it.

42. Tarlock, *Future*, *supra* note 17, at 775.

43. *Id.* at 772.

44. MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 12 (Penguin Books 2d ed., 1993) (1986).

45. Ray Huffaker, et al., *The Role of Prior Appropriation in Allocating Water Resources into the 21st Century*, 16 INT'L J. WATER RES. DEV. 265, 267 (2000).

46. Janet C. Neuman, Beneficial Use, Waste, And Forfeiture: The Inefficient Search for Efficiency In Western Water Use, 28 Envtl. L. 919, 955 (1998).

47. Karen A. Russell, *Wasting Water in the Northwest: Eliminating Waste as a Way of Restoring Streamflows*, 27 ENVTL. L. 151, 155 (1997).

48. Neuman, *supra* note 46, at 955.

The structure of the prior appropriation rights has led to criticism of the incentives of water right holders to maximize use, rather than conserve.[49] The foremost criticism of the prior appropriation doctrine is the lack of flexibility in addressing new demands for water.[50] Prior appropriation grants a vested property right in a water source, and in turn, states are unable to exercise any control over that right and "[t]he notion seems to be that to declare an existing use wasteful, or non-beneficial, is a sort of prohibited *ex post facto* law that impairs a vested right."[51]

## III. THE TAKING OF WATER

In the face of drought, states have struggled to regulate water usage since water rights have been reinforced as a vested property interest. In May and June of 2015, California's State Water Board issued curtailment notices to senior water rights holders in the Western Central Valley region of California, with priority dates of 1903 or later. The State Water Board ordered water right holders to stop the diversion of water due to drought.[52] News sources reported that many in the region have never had their water curtailed before, and in response, farmers and ranchers brought suit.[53] In July 2015, the Superior Court in Sacramento found the curtailment of water in the West Side Irrigation District resulted in a taking of property,[54] and other districts have since brought suits against the State Water Board for demanding that senior and junior water rights holders cease diversion of water in the Central Valley.[55] The State Water Board already tried to limit the impact of the court's ruling to only the curtailment notices and not the ability to regulate water resources

49. Huffaker, *supra* note 45, at 267.

50. *Id.* at 272–73.

51. Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 258 (1990).

52. Press Release, State Water Res. Control Bd., 2015 Summary of Water Shortage Notices (Sept. 18, 2015), http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/curtail_summary_2015.pdf 2.

53. Jim Carlton & Ilan Brat, *California Drought Leaves Few Farmers Unscathed*, WALL STREET J. (July 13, 2015), http://www.wsj.com/articles/california-drought-leaves-few-farmers-unscathed-1436809802.

54. W. Side Irrigation Dist. v. Cal. State Water Res. Control Bd., No. 34-2015-80002121, 5 (Cal. Sup. Ct. July 10, 2015), http://www.waterboards.ca.gov/press_room/press_releases /2015/west_side_irr%20_v_cswrcb.pdf.

55. Carlton & Brat, *supra* note 53.

in general.[56] Yet, California provides a clear example of the struggle states will face in regulating water without inviting Fifth Amendment claims.

### *A. The Takings Clause*

The U.S. Constitution limits government, both state and federal, from taking private property without just compensation,[57] and a form of the "Takings Clause" has also been adopted by every Western state in their own constitutions.[58] Takings can either occur directly or indirectly. A direct taking occurs under the power of eminent domain, when the government condemns a property to be used for a public purpose and pays compensation for that property.[59] An indirect taking arises from an inverse condemnation—physical invasion of the property ("physical taking") or government restrictions placed upon the property ("regulatory taking") to which compensation has not been paid.[60]

The history of takings has focused on its application to real property. The U.S. Supreme Court in recent years has been expanding the scope of what constitutes a taking from the original definition, where the government physically takes property, to a definition including regulatory measures issued by the government limiting what property owners can do with their property. The earliest case of expansion was *Pennsylvania Coal v. Mahon*,[61] in which the Court held that if regulation goes "too far" it is considered a taking and the state must compensate the property owner.[62] Takings jurisprudence further evolved in *Penn Central Transportation Co. v. New York City*,[63] where the Court identified three factors to determine whether a taking has occurred: 1) the economic impact of the regulation, 2) the owner's reasonable expectations when he invested in the property, and 3) the character of the government action, in particular, whether

56. *Id.*

57. U.S. CONST. amend. V, XIV.

58. *See supra* note 15.

59. Raymond Dake, *Trout of Bounds: The Effects of the Federal Circuit Court of Appeals' Misguided Fifth Amendment Takings Analysis in* Casitas Municipal Water District v. United States, 36 COLUM. J. ENVTL. L. 59, 74 (2011).

60. *Id.*

61. 260 U.S. 393 (1922).

62. *Id.* at 415.

63. 438 U.S. 104 (1978).

the government action could be characterized as a physical invasion of the property.[64]

Following *Penn Central*, the Court continued to develop the definition of regulatory takings, including recognizing that a permanent physical occupation, however minor, destroys all of the owner's basic property rights and is therefore a taking.[65] Regulatory measures that deny the property owner all economically beneficial or productive use of his land also constitute a taking.[66] Nevertheless, the body of law surrounding takings has been "described as a 'mess.'"[67] Takings jurisprudence has become incoherent due to the number of tests introduced in *Mahon*, *Penn Central*, *Loretto v. Teleprompter Manhattan CATV Corp.*,[68] and *Lucas v. South Carolina Coastal Council*.[69]

The question now is how takings jurisprudence applies to water rights. California's regulation of junior and senior water rights holders in light of drought conditions displays the predicament of water conservation efforts. Further, it raises the question of whether water rights should be designated as a vested property interest. And if so, what impact does the Fifth Amendment have on water rights?

### *B. State Courts and Water Takings*

The introductory inquiry in takings jurisprudence is whether there is a property interest to be taken.[70] Contemplating water rights, many states recognize a vested property interest when the steps to appropriation are completed and the state administrative agency awards a final decree.[71] Early state courts declared water rights as "real property," essentially giving them the same designation as tradi-

64. *Id.* at 123.

65. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437–38, 441 (1982).

66. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

67. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (quoting Damel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 279 (1992); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L.REV. 285, 287 (1990)).

68. 458 U.S. at 441.

69. 505 U.S. at 1016.

70. *See* Bingham v. Roosevelt City Corp., 235 P.3d 730, 736 (Utah 2010). The Utah Supreme Court has refused "to find a taking in situations where the plaintiffs failed to prove a 'vested legally enforceable interest.'" *Id.*

71. James N. Corbridge, Jr., *Historical Water Use And The Protection Of Vested Rights: A Challenge For Colorado Water Law*, 69 U. COLO. L. REV. 503, 505 (1998).

tional property rights.[72] Idaho[73] and New Mexico[74] are the only courts that continue to acknowledge this, and many states have moved away from this concept as several state legislatures deem water as belonging to the "public"[75] and the appropriation of water only gives the water right holder the 'right to use.' Vested water rights do receive a certain level of protection, and now the question remains whether water rights have the same constitutional protections under the Fifth Amendment as traditional property rights. State courts have made it clear that riparian and appropriative water rights are usufructuary,[76] granting only the right to use and not conferring any private ownership in a body of water. The unique nature of water rights granting only the right to use presents a difficult determination of whether the Fifth Amendment applies when states curtail water rights.

Riparian water rights have long been subject to the takings clause under state and federal constitutions. In *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, the Oklahoma Supreme Court determined that the Oklahoma Legislature could not abrogate riparian water rights without compensation, after it had passed a statute asserting that riparian water rights were to be limited to domestic use.[77] It held the statute abolished riparian water rights that were vested interests and the abrogation of this right was a constitutional taking.[78] Similarly, the Ohio Supreme Court recognized that "[r]iparian rights are private property within the meaning of the Constitution. Where the state makes an improvement for a purpose

72. *See* Olson v. Idaho Dept. of Water Res., 666 P.2d 188, 191 (Idaho 1983); Goodwin v. Hidalgo Cty. Water Control & Improvement Dist. No. 1, 58 S.W.2d 1092, 1094 (Tex. App. 1933); First Nat. Bank v. Hastings, 42 P. 691, 692 (Colo. App. 1895) ("Water rights for irrigation are regarded as real property.").

73. *See* Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 78 (Idaho 2010).

74. *See* Mannick v. Wakeland, 117 P.3d 919, 926 (N.M. 2004) (limiting the concept of real property to water rights "generally tied to specific land."); *see also* Cooper v. Chevron U.S.A., Inc., 49 P.3d 61, 69 (N.M. 2002).

75. *See* ARIZ. REV. STAT., § 45-141; CAL. WATER CODE, § 102; NEV. ADMIN. CODE, § 445A.67563(2) ("The purchase of water rights, unless the water rights are owned by a public water system that is being purchased in an effort to consolidate as part of a program to develop the capability of a water system."); UTAH CODE, § 73–1–1(1).

76. *See* People v. Shirokow, 605 P.2d 859, 864 (Cal. 1980) (both riparian and prior appropriation water rights are usufructuary); Franco-American Charolaise, Ltd., 855 P.2d at 575 (riparian water rights are usufructuary); Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 842 (Tex. 2012) (riparian water rights are usufructuary).

77. 855 P.2d 568, 572 (Okla. 1990).

78. *Id.*

other than the improvement of navigation, which destroys riparian rights, the owners of such rights are entitled to compensation for the loss they have suffered."[79] There are recognized limitations to riparian water rights, as they may be restricted to reasonable use;[80] however, they are vested water rights attached to the land and cannot be eliminated without compensation.[81]

Curtailments of vested water rights under the prior appropriation doctrine have also been deemed takings by western state courts.[82] This is a rare occurrence, as limitations to water rights have occurred primarily in the concepts of beneficial use and priority. Limitations under the beneficial usage doctrine, reducing an appropriated water right based on wastefulness, do not constitute a taking.[83] Yet, state courts rarely enforce the concept of water being put to beneficial use, as irrigation customs determine the standard for waste, making it difficult for state administrative agencies to adapt to changing conditions to ensure water is not wasted.[84]

Litigation over water rights arises mainly from disputes over the administration of priority between junior and senior water right holders, rather than conservation issues. States have the capability of regulating water rights, without having to pay compensation, to ensure water usage does not harm appropriated water rights with higher priority. In *Kobobel v. State, Dep't of Natural Resources*,[85] the Colorado Supreme Court allowed the state water engineer to curtail junior water rights in favor of senior water rights. This was a result of an over-appropriation of water that brought an inherent risk to other

79. McNamara v. Rittman, 838 N.E.2d 640, 645 (Ohio 2005) (citing State *ex. rel.* The Andersons v. Masheter, 203 N.E.2d 325, 327 (1964)). *See also* Wernberg v. State, 516 P.2d 1191, 1194–95 (Alaska 1973) (finding riparian water rights are subject to the Fifth Amendment and "[t]hese rights are valuable property, and ordinarily cannot be taken for public use by the federal or state governments without payment of just compensation to the landowner.").

80. Scranton v. Wheeler, 179 U.S. 141 (1900) (finding destruction of riparian water rights did not have to be compensated because purpose was not abrogation, but rather, the improvement of public waters granted by the Commerce Clause).

81. Brusco Towboat Co. v. State, By and Through Straub, 567 P.2d 1037, 1046 (Ore. Ct. App. 1977).

82. Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 79 (Idaho 2011) ("When there is insufficient water to satisfy both the senior appropriator's and the junior appropriator's water rights, giving the junior appropriator a preference to the use of the water constitutes a taking for which compensation must be paid.").

83. State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1055 (Wash. 1993) (holding that beneficial use operates as a limitation to a vested property right).

84. *See supra* text accompanying note 48.

85. 249 P.2d 1127 (Colo. 2011).

water rights.[86] The threat to water rights arose over the administrative goal to "maximize the beneficial use of all of the waters of [Colorado]" and the court allowed the state to regulate water within the limitations of the prior appropriation doctrine.[87] The Colorado Supreme Court in *Kobobel* suggested that anything outside of those limitations could qualify as a constitutional taking and that the state engineer was "merely enforc[ing] Colorado's long-standing doctrine in order to address the injurious effects . . . pumping out of priority."[88] Regulation of water rights is permitted as it gives "its holder the right to use and enjoy the property of another without impairing its substance. Thus, one does not 'own' water but owns the right to use water within the limitations of the prior appropriation doctrine."[89]

The current view of state courts is that there are inherent limitations of the prior appropriation doctrine—beneficial usage and priority—which allow states to regulate that water within those limitations. Yet, courts have been unable to adapt to the changing conditions of water supply and demand in light of drought conditions and growing populations. Disputes only arise as to issues of priority, and in rare occurrences as to issues of beneficial usage. But they do not address the need of the state to regulate a scarce resource in the face of changing circumstances. State courts have played a minor role in water takings jurisprudence. Instead, federal courts have shaped the future of water rights litigation with regards to regulation outside the inherent limitations of priority and beneficial usage.

### *C. Federal Courts and Water Takings*

The landmark precedent for water takings in the West is *Casitas Municipal Water District v. United States* ("*Casitas Municipal Water*"),[90] which held regulation of a water right constituted a physical taking.[91] In 1956, the Casitas Municipal Water District ("Casitas") and the U.S. Bureau of Reclamation ("BOR") entered into a contract regarding the Ventura River Project.[92] The contract stipulated that

86. *Id.* at 1135.

87. *Id.*

88. *Id.* at 1134.

89. *Id.* (citing Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377 (Colo. 1982)) (internal quotations omitted).

90. 543 F.3d 1276 (Fed. Cir. 2008).

91. *Id.* at 1282.

92. *Id.* at 1281.

Casitas would have the "perpetual right to use all water that becomes available through the construction and operation of the Project."[93] Casitas applied to the State Water Board for the appropriation of those water rights.[94] In 1997, forty years after the project was completed, West Coast steelhead trout were placed on the endangered list of the Endangered Species Act ("ESA").[95]

Section 9 of the ESA makes it illegal to "take" a species that was listed as endangered, and under this law, BOR directed Casitas to "(1) construct a fish ladder facility . . . and (2) divert water from the Project to the fish ladder, resulting in a permanent loss to Casitas of a certain amount of water per year."[96] In 2008, Casitas sued the U.S. Government for an unconstitutional taking of the water they lost in the diversion. The Federal Circuit made it clear that the Fifth Amendment was "designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[97] Yet, two aspects of the decision in *Casitas Municipal Water* pose significant problems to future regulation of water: 1) assuming a usufructuary right is a vested property interest and 2) holding water regulation as a physical taking.

First, the decision in *Casitas Municipal Water* never directly addresses whether a water right should be subject to a taking. Similar to state courts, the Federal Circuit assumes a water right is a "vested property interest."[98] Yet, a water right is much more limited than the right associated with traditional property. A water right cannot be possessed nor is a water right holder given title. Rather, a water right is limited to the allocation of water given based on the usage. Judge Mayer, dissenting in *Casitas Municipal Water*, disagreed with whether Casitas had a property interest in the water. He argued that a usufructuary interest does not give actual ownership over water, as under California law the public owns all water within California territory,

93. *Id.* at 1282.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1288 (emphasis in the original) (quoting First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 315 (1987)).

98. *Id.* at 1297 (Mayer, J., dissenting) (Judge Mayer highlights in his dissent that this threshold issue of whether a water right even constitutes a property interest was never addressed by the court).

and cannot be "physically invaded or occupied,"[99] nor did the government take the water right outright from Casitas and give it to someone else.[100] He focuses on an important concept that has yet to be fully answered by state and federal courts: whether a usufructuary right can and should be subject to the takings clause. As already discussed, many states' constitutions and water codes hold water as a public right rather than a private right. This is too important of a threshold question to be based on assumptions when considering whether property has been taken.

Second, the most significant holding the Federal Circuit made in *Casitas Municipal Water* was that the curtailment of Casitas' water right was a "physical taking."[101] Drawing upon prior Supreme Court decisions in *International Paper Co. v. United States*[102]and *United States v. Gerlach Live Stock Co.*,[103] where the government had directly appropriated water the parties had a right to use, the diversion was deemed a "physical taking" by the Court. The issue in *Casitas Municipal Water* differed from this precedent, as the right was "only partially impaired."[104] Even though Casitas' water supply was partially reduced from having to divert the water to the fish ladder, the court regarded the partial reduction amounted to a taking requiring the injured parties be compensated.[105]

Prior to *Casitas Municipal Water*, in 2001, the U.S. Federal Court of Claims decided a similar case, *Tulare Lake Basin Water Storage Dist. v. United States* ("*Tulare Lake*").[106] An influential factor in the decision of the Court of Claims in *Tulare Lake* and for the Federal Circuit in *Casitas Municipal Water* was the Supreme Court's taking analysis in *United States v. Causby.*[107] The case involved low-flying planes of the Army and Navy over Causby's property resulting in the death of his chickens, minor property damage, and devaluation in the land.[108] The Court held it was a physical taking because the "frequency and altitude of the flights" made it impossible for the

99. *Id.* at 1298 (Mayer, J., dissenting).
100. *Id.* at 1297.
101. *Id.* at 1295.
102. 282 U.S. 399 (1931).
103. 339 U.S. 725 (1950).
104. *Casitas Mun. Water Dist.*, 543 F.3d at 1292.
105. *Id.*
106. 49 Fed. Cl. 313 (2001).
107. 328 U.S. 256, 265 (1946).
108. *Id.* at 258.

landowners to use the land for any purpose, and it was a complete loss as if the government had taken exclusive possession.[109] Both *Tulare Lake* and *Casitas Municipal Water* analogize water rights to *Causby* by declaring that the government had prevented the plaintiffs from using the water, and thus, the water right became valueless.[110] In using the *Causby* analysis, both *Tulare Lake* and *Casitas Municipal Water* disregard previous Supreme Court caution against treating all interference as *per se* takings, as they could "transform government regulation into a luxury few governments could afford."[111] The Court thought that "[b]y contrast, physical appropriations are relatively rare, [and] easily identified . . . ."[112]

Designation of the reduction in water as a "physical taking" has been substantially criticized for the impact it will have on water law.[113] The Federal Circuit concluded that the diversion was a physical taking based on the idea that the government commandeered the water "for a public use"—the preservation of an endangered species. When the government commandeered the water by diverting it to the fish ladder, it took Casitas' water.[114] "The water, and Casitas' right to use that water, [was] forever gone."[115] Shortly after *Casitas Municipal Water*, concern arose that the Federal Circuit's decision "could potentially convert every regulation of water use into an unconstitutional taking and basically freeze the government in its tracks."[116]

The Federal Circuit and Court of Claims analysis of water rights as a physical taking is flawed because it is inconsistent with the nature of water rights. Water rights lack the physical occupation aspect that is used in real property takings. Professor John D. Echeverria states,

109. *Id.* at 261.

110. *Tulare Lake Basin Water Storage Dist.*, 49 Fed. Cl. at 319; *Casitas Mun. Water Dist.*, 543 F.3d at 1294.

111. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002).

112. *Id.*

113. *See* Dake, *supra* note 59, at 111–21 (discussing the impact the designation "physical taking" will have on states with depleting sources in trying to regulate groundwater consumption); A. Dan Tarlock, *Takings, Water Rights, And Climate Change*, 36 VT. L. REV. 731, 754 (2011–2012) ("The curtailment of a seasonable delivery obligation does not disturb the underlying property or contract right, and thus the proper analysis is the Court's temporary takings doctrine.").

114. *See Casitas Mun. Water Dist.*, 543 F.3d at 1294.

115. *Id.*

116. Dake, *supra* note 59, at 111.

"the physical occupation theory cannot logically be applied to a water right" because there is no physical property to occupy; rather water is merely a right to use.[117] Professor Echeverria states that the analysis by the Court of Claims has given "property rights in water greater protection than any other type of property known to the law" and this protection "is inconsistent with the traditionally limited and contingent nature of private rights in water."[118] The contingency of private water rights rests on the fact that "private rights in water are subject to greater demands on behalf of the public welfare, and therefore are less appropriate for treatment using a per se takings rule than other types of property rights."[119]

The concern with *Casitas Municipal Water* is that any regulation of water that results in a diminution of a water right could cause a significant amount of compensation. For a physical taking, the government is required to fully compensate the property for the full value of the property taken.[120] Regulatory takings require the government to compensate only when the regulation "deprives land of all economically beneficial use."[121] The *Casitas Municipal Water* decision could result in compensation as much as $1,349,000,[122] and the *Tulare Lake* decision resulted in the government settling for $16.7 million with the water district.[123] Compensation of this magnitude may deter states from taking any action that would result in any slight diminution of water rights, and further, it could frustrate the ability of state legislatures to enact regulation towards water conservation.

117. John D. Echeverria, *Why* Tulare Lake *Was Incorrectly Decided*, GEO. ENVTL. L. & POL'Y INST.14 (Aug. 2005), http://www.gelpi.org/gelpi/current_research/documents/RT_Pubs_Law_TulareLakeIncorrect.pdf.

118. *Id.*

119. *Id.*

120. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987)).

121. *Lucas*, 505 U.S at 1027*; see also* Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99 (Mar. 1, 2012), http://www.stanfordlawreview.org/online/physical-regulatory-takings#footnote_5 (explaining that the structure of physical and regulatory is already criticized for the unfair outcomes it can lead to, as "a physical occupation with trivial economic consequences gets full compensation. In contrast, major regulatory initiatives rarely require a penny in compensation for millions of dollars in economic losses.").

122. Dake, *supra* note 59, at 111–12. This estimation is based on $100–$1000 per acre-foot from data gathered for *Tulare* case. *Id.* However, on remand the trial court found the takings claim was not yet ripe for *Casitas* because it had not yet impacted beneficial use. Casitas Municipal Water Dist. v. United States, 102 Fed. Cl. 443, 478 (Fed. Cir. 2008) (holding that the claim was not yet ripe for adjudication), *aff'd* 708 F.3d 1340 (Fed. Cir. 2013).

123. Echeverria, *supra* note 117, at 1.

California has already witnessed that courts will hold any restriction on water in an effort to curb usage as a constitutional taking, causing the State Water Board to retreat from any effort to curtail water rights.[124]

## IV. BALANCING THE WATER RIGHT WITH STATE POWER

The question now remains how courts can create flexibility for state legislatures with regard to water regulation without running afoul of the Fifth Amendment. The state and federal courts have created two obstacles that must be addressed in future takings litigation: 1) the treatment of water as a private vested property interest; and 2) the designation of water regulation as a physical taking. Precedent requires "just compensation" to water right holders in the event of water regulation, so how can courts address the need for water conservation without triggering the Fifth Amendment protections? Courts will have to recognize, first, that water rights are not subject to the same treatment as traditional private property interests and state regulation of water is permitted under the police power; and second, that the public trust doctrine gives public interests priority over private water rights.

### *A. Water Systems Belong to the Public*

Treatment of water rights as private property by federal and state courts is in direct conflict with state statutes and constitutions that treat water systems as belonging to the public. The designation of permanent public ownership in state constitutions entrusts the state with managing and protecting water sources for the benefit of the public, and is typically referred to as the public trust doctrine. This doctrine has long existed in water rights as they are "subject to a sort of easement for public navigation and fishing"[125] from which courts acknowledge that state administrative agencies are authorized "to reconsider past water rights decisions in light of modern public

124. *See* Press Release, Cal. Water Bds., State Water Board Issues Statement On West Side Irrigation District Court Challenge (July 10, 2015), http://www.waterboards.ca.gov/press_room/press_releases/2015/pr071015_westside_statement.pdf.

125. James L. Huffman, *Avoiding The Takings Clause Through The Myth Of Public Rights: The Public Trust And Reserved Rights Doctrines At Work*, 3 J. LAND USE & ENVTL. L. 171, 180 (1987).

needs"[126] without Fifth Amendment implications.[127] Placing public interests paramount has broad implications for prior appropriation, particularly as the West continues to experience growth. California deems "[a]ll water within the State . . . the property of the people of the State."[128] States are entrusted to protect their water systems and, therefore, any exercise of water rights "is subject to state administration and enforcement."[129]

In some instances, states have already taken measures to sustain water sources by instituting "minimum instream flow" requirements.[130] Colorado is one of these states and has given its water board the authority to determine what "may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree."[131] Yet, states' intent to protect water sources conflicts with the appropriation structure and the court's view of water as a "vested property interest."[132] The California Constitution recognizes water as belonging to the public, subject to state regulation and control, and limits water to reasonable use allowing for the legislature to "enact laws in the furtherance of [this] policy."[133] Unlike riparian water rights, prior appropriation has continually been subject to regulation; a property owner has no guarantee they will receive water. In particular, water rights have never been exclusively private or possessory by one property owner.[134]

Nonetheless, courts have not recognized the priority of public needs in water rights, and rather, private property rights continually protect water rights. The view is that water is entitled to the same protection as land under takings jurisprudence. But, the Court's decision in *Lucas v. South Carolina Coastal Council* suggests that government regulation or taking of vested property rights are not always to be perceived by courts as *per se* takings; rather, there is room for

126. Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context*, 29 NAT. RES. J. 585, 589 (1989).

127. *Id.* at 590–91.

128. CAL. WATER CODE, § 102 (West 2016).

129. Reed D. Benson, *Maintain the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENV'T. L. 881, 886 (1998).

130. *See* WASH. REV. CODE. §§ 90.92.080, 90.22.010 (2016); NEB. REV. STAT. § 46-2,115 (2014).

131. COLO. REV. STAT. § 37-92-102(3) (2015).

132. WATERS AND WATER RIGHTS, *supra* note 19, at § 15.03.

133. *See* CAL. CONST. art. 10, §§ 2, 5.

134. *See* discussion *supra* Part II.A.1.

flexibility in takings jurisprudence in light of states' power over those rights.[135] There are two principles of takings jurisprudence to be drawn from *Lucas*: first, the background principles of property rights include an understood limitation; and second, the restrictions placed on that right are a legitimate exercise of the state's police power.

Justice Scalia, writing for the majority, proposed that when a state implements regulation that deprives an owner of all beneficial use, the preliminary inquiry should be whether the property interest was even "part of [the] title to begin with."[136] Further, Justice Scalia recognized that property rights are not without their limitations as the police power acts as a constraint on property rights and a property owner "ought to be aware of the possibility that new regulation might even render his property economically worthless.[137]

First, background principles of property rights provide limitations of what a property owner can do with a vested property interest. Originating in either state or federal law,[138] background principles provide an affirmative defense to takings claims to which the government has the burden of proof in proving that background principles allow them to regulate the property right without triggering the Fifth Amendment.[139] Riparian water rights have already evoked the background principles of property rights in establishing preexisting easements of navigation and fishing. In water takings, courts have not raised the perspective of *Lucas*' background principles of property rights in regards to appropriative water rights. In *Tulare Lake*, "[t]he court recognized that various California legal rules potentially represented 'background principles' under *Lucas* . . . ."[140] Yet, the state failed to raise those principles regarding water use—particularly beneficial use and public trust doctrine —"but determined that since the state of California failed to invoke available state rules imposing limits on water use . . . the federal government could not rely on them to defend its species regulation."[141]

135. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

136. *Id.*

137. *Id.* at 1027–28.

138. Michael C. Blumm & Lucas Ritchie, Lucas's *Unlikely Legacy: The Rise Of Background Principles As Categorical Takings Defense*s, 29 HARV. ENVTL. L. REV. 321, 328 (2005).

139. *Lucas*, 505 U.S. at 1030.

140. Blumm & Ritchie, *supra* note 138, at 329.

141. *Id.*

Second, even as takings jurisprudence remains a "mess,"[142] *Lucas* highlighted the role of the police power, as recognized by Justice Holmes in *Hudson County Water Co. v. McCarter*.[143] Justice Holmes acknowledged that "[a]ll rights tend to declare themselves to the absolute extreme" when they are in fact subject to the limitation by "the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[144] Background principles of water rights have always been subject to the police power of a state, even in the early establishment of prior appropriation, as was recognized in *Tulare Lake*. Prior appropriation in its early establishment never guaranteed an absolute right to the water, just the use of a particular amount that over time could be modified.

However, courts have been unwilling to recognize those limitations in the face of changing circumstances that require regulation of water. One of the strongest limitations in all of property is when a property right is exercised in a manner that is 'harmful or noxious '[145] Inherent in the background principles of water rights are that public needs have priority over private water rights. That is not to say the harm justifies a regulatory taking, but rather, it gives rise to the use of the police power to regulate without compensation because the harmful use was never recognized as part of the property right to begin with.[146] In both regulatory and physical takings, the government can avoid compensation if "the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[147] This concept is the crux of the ability of states to regulate water rights without compensation, as water rights were never intended to be absolute. Within the background principle of prior appropriation, water rights could not be exercised to harm earlier established rights, including public interests. Thus, water has never been a "vested property interest" in the traditional sense, and

142. Commentary on takings jurisprudence has recognized the messiness of the doctrine. *See* Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 285 (1996); J. Peter Bryne, *Ten Arguments for the Abolition of the Takings Doctrine*, 22 ECO. L. Q. 89, 90 (1995).

143. 209 U.S. 349, 355 (1908).

144. *Id.*

145. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992).

146. *Id.*

147. *Id.* at 1027.

instead, remains a right limited to the extent it harms public rights. Further, as will be discussed in the next section, the priority of public interest also remains a background principle of property with respect to the public trust doctrine, a property principle adopted from English common law.

### *B. Applying the Public Trust Doctrine*

One important background principle of property that places a limitation upon a property owner is the public trust doctrine. U.S. courts first raised the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*,[148] in which the Supreme Court held that the sovereign (state or federal) owns all of the navigable waterways and lands lying beneath them as a trustee for the benefit of the public.[149] "[P]eople of the state [own and] . . . may enjoy navigation of the waters, carry on commerce over them, and have liberty of fishing therein."[150] Created for navigable waterways, courts have contemplated the public trust doctrine as a remedy to expand beyond navigable waters and tidelands; *Tulare Lake Basin* even emphasized that the government had failed to raise the "public trust doctrine."[151] Courts in California and North Dakota recognize the doctrine; the North Dakota Supreme Court recognizes that the public trust doctrine plays an expanding role in environment law and suggests the doctrine requires "as a minimum, evidence of some planning by appropriate state agencies and officers in the allocation of public water resources."[152] California has expanded their use of the doctrine—evident in their landmark decision in *National Audubon Society v. Superior Court*.[153]

The California Supreme Court in *National Audubon Society* held that the principle of public trust prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.[154] The case involved the City of

148. 146 U.S. 387 (1892).

149. *Id.* at 120–22.

150. *Id.* at 118.

151. Tulare Lake Water Basin Water Storage Dist. V. United States, 49 Fed. Cl. 313, 332 (2001) ("Thus, while we accept the proposition that plaintiffs have no right to use or divert water in an unreasonable manner, nor in a way that violates the public trust, the issue now before us is whether such a determination has in fact been made.").

152. United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

153. 658 P.2d 709 (1983) (en banc).

154. *Id.* at 712.

Los Angeles's diversion of four of the five tributaries into Mono Lake, a large saline lake located near the Sierra Nevada mountain range, to which they had been granted appropriative rights. The diversion caused the level of the lake to drop, and "surface area has diminished by one-third; one of the two principal islands in the lake has become a peninsula, exposing the gull rookery there to coyotes and other predators and causing the gulls to abandon the former island."[155] National Audubon Society, a non-profit organization focused on wildlife conservation, brought suit against the City of Los Angeles claiming the lake was protected by the public trust.[156] National Audubon Society claimed Mono Lake would continue to diminish and harm not only wildlife but also the public, as the exposed lakebed would result in airborne dust "irritat[ing] the mucous membranes and respiratory systems of humans and other animals."[157] The California Supreme Court addressed in *National Audubon Society* the interaction between the public trust doctrine and the water rights system.[158]

To determine how the public trust doctrine applied to California's water system, the court examined the 1) purpose, 2) scope, and 3) duties and power of the trustee.[159] First, the purpose of the trust was to protect public rights of navigation and fishing, yet it has since expanded to tidelands (i.e. *Illinois Central Railroad Co.*), and in some cases, the protection of ecosystems.[160] Second, the scope of the trust historically applied to navigable waterways; however, the court expanded the scope of the trust to "beds, shores and waters" of lakes that "are without question protected."[161] The court's justification for expanding the doctrine was based on earlier California Supreme Court cases that used the doctrine to prevent mining companies from dumping fill into rivers that prevented navigation, caused water pol-

155. *Id.*

156. *Id.*

157. *Id.* at 716. The threat to the public was not exactly determined, but a similar occurrence happened in Owens Valley, California. The City of Los Angeles diverted water from Owens Lake and the lakebed became exposed resulting in air quality issues. Los Angeles later reached a settlement for the air quality issues in Owens Valley. *See* Times Editorial Board, Editorial, *100 Years Later, The Dust Settles In The Owens Valley*, L.A. TIMES, Nov. 16, 2014, http://www.latimes.com/opinion/editorials/la-ed-owens-valley-settlement-20141116-story.html.

158. *Id.* at 717.

159. *Id.* at 719.

160. *Id.*

161. *Id.* at 720.

lution, and potentially "creat[ed] the danger that in time of flood the rivers would turn from their channels and inundate nearby lands."[162] The expansion of the public trust doctrine by the California Supreme Court suggests that the doctrine could reach as far as non-navigable waters, so long as they intersect, as "it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests."[163] Third and finally, the duties and powers of the trustee are to supervise and ensure that no vested right holder "use[s] those rights" to harm the trust.[164] Further, the court recognized that as a usufructuary right, water could not be owned and the right was limited to use. California, in 1926, passed a constitutional amendment, Article 10, altering water rights by subjecting them to reasonable use. After the legislature passed the amendment, it granted the State Water Board incremental power to supervise and oversee the water rights system.[165]

Part of this power was to administer the public trust, as California's alteration of water rights included making public needs superior to any subsequent rights. Addressing concerns about water rights that existed prior to the constitutional change, the court stated:

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.
>
> The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses.[166]

This does not guarantee that the public trust will prevail over appropriative rights in every instance that the State Water Board curtails water, rather the public trust will only be invoked when they "consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any

162. *Id.* at 720.
163. *Id.* at 721.
164. *Id.* at 720.
165. *Id.* at 725.
166. *Id.* at 728.

harm to those interests."[167] Nonetheless, the California Supreme Court granted substantial power to the state to regulate water to ensure the public interests are not harmed by appropriated water rights.

*National Audubon Society* has been acknowledged by states as a way to assert control over water allocation.[168] Alaska,[169] Arizona,[170] Idaho,[171] Hawaii,[172] Montana,[173] Nevada,[174] North Dakota,[175] South Dakota,[176]and Washington[177] recognize "the connection between water rights and the public trust law."[178] However, the rise of the public trust doctrine over appropriative rights does not give the state unlimited power to regulate water, but gives the state power as a trustee to preserve water sources, as a trust, "so far as consistent with the public interest."[179] The power granted to the State to regulate water allocation does not conflict with the Supreme Court's view of takings in *Lucas*; rather, the majority created flexibility within takings jurisprudence for states to regulate property interests so long as the background property principles have recognized restrictions on the property right. *Casitas Municipal Water* did not take into account the restrictions on water rights with regard to the public trust doctrine;

167. *Id.* at 712.

168. *See* Michelle Bryan Mudd, *Hitching Our Wagon To A Dim Star: Why Outmoded Water Codes And "Public Interest" Review Cannot Protect The Public Trust In Western Water Law*, 32 STAN. ENVTL. L.J. 283, 297–98 (2013) (explaining that many states after *National Audubon Society* have tried to adopt the public trust doctrine in their water codes).

169. ALASKA CONST. art. VIII, §§ 3, 13; *see also* Pullen v. Ulmer, 923 P.2d 54, 60–61 (Alaska 1996) (recognizing the public trust doctrine as established in the Alaskan Constitution).

170. San Carlos Apache Tribe v. Super. Ct. *ex rel.* Cty of Maricopa, 972 P.2d 179, 199 (Ariz. 1999) (rejecting the legislature's intent to abolish the public trust doctrine).

171. *See* Kootenai Envtl. All. v. Panhandle Yacht Club, 671 P.2d 1085, 1094 (Idaho 1983) (citing the reasoning of *Nat'l Audubon Soc'y* in recognition of the public trust doctrine).

172. HAW. CONST. art. XI, §§ 1, 7 (1978); *see also In re* Water Use Permit Applications, 9 P.3d 409, 445, 453 (Haw. 2000) (citing the reasoning of *Nat'l Audubon Soc'y* in recognizing the public trust doctrine, which is also established in the Hawaiian Constitution).

173. *See* Montana Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 185–86 (Mont. 2011) (recognizing the existence of the public trust doctrine for recreational use of Montana's waters).

174. *See* Lawrence v. Clark Cty., 254 P.3d 606, 612–13 (Nev. 2011) (acknowledging that water within Nevada belongs to the public and provides grounding for the public trust doctrine).

175. *See* United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976).

176. *See* Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004) (citing that history and precedent have led to the public trust doctrine).

177. *See* Rettkowski v. Dep't of Ecology, 858 P.2d 232, 234 (Wash. 1993) (finding that the public trust doctrine comes from the state water code).

178. Mudd, *supra* note 168, at 304.

179. *Nat'l Audubon Soc'y*, 658 P.2d at 728.

therefore, the physical takings analysis remains flawed and should not be adopted by future courts.[180] Yet, takings jurisprudence is recognized as incoherent[181] and one cannot blame lower courts for struggling to make sense of the Supreme Court's evolving view of takings.

Within takings jurisprudence, California remains an outlier in regards to water takings, as many states have yet to afford their water boards the same power that California has. So what does this mean for western states? Western state legislatures and courts will have to recognize the need for change to their water rights systems—not just pertaining to the lack of oversight and regulation, but also the power administrative agencies have in asserting their rights of regulation.

## V. CONCLUSION

The water crisis in the West has highlighted a need for change in western water systems. Yet, state and federal courts continue to preserve an outdated system that puts the supply of water in the West in jeopardy. Even as history led to the creation of regulatory systems to monitor and oversee water rights, significant obstacles remain for states in their ability to exercise that power. Courts should reconsider the designation of water regulations as takings by recognizing the background principles of property rights.

First, water should not be considered a "vested property interest" to be possessed or owned, but rather, should be subject to state police power to regulate and restrict water based on priority and beneficial use. Second, water rights are subject to the public trust doctrine that protects the public interest in water resources. Therefore, public interests should be prioritized over private rights in the face of significant threats to water sources. A compelling government interest needs to be recognized that in order to protect water sources for future sustainability, the public interest outweighs private rights to water. The difficulty for courts will be finding a balance between private water rights and public needs to ensure that neither put the other at risk of significant harm.

It is apparent that water rights can no longer remain entrenched in past customs of irrigation and usage. Water rights should instead

180. Judge Mayer raised this issue in his dissent that California subjects appropriated waters to reasonable use and the public trust doctrine. Casitas Municipal Water Dist. v. United States, 543 F.3d 1276, 1297 (Fed. Cir. 2008) (Mayer, J., dissenting).

181. *See* Treanor, *supra* note 67, at 812.

embrace change that seeks to ensure long-term water preservation. To address the need for change, courts must first recognize the limitations of water rights inherent in the history of prior appropriation, namely, that water rights holders are limited to a right to use. Second, courts must recognize that the public trust doctrine grants states the ability to regulate water systems with concern to public needs. The connection between water rights and the public trust doctrine allows public interests to be prioritized before all other water right holders. These considerations are necessary to make certain that states do not trigger the compensation requirement of the Fifth Amendment and create an onslaught of compensation with the slightest reduction in water usage. These considerations will give states the power to safeguard the future of water in the West.

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