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THE ESA, WATER RIGHTS, AND REGULATORY TAKINGS

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**BIODIVERSITY PROTECTION:
IMPLEMENTATION AND REFORM OF THE
ENDANGERED SPECIES ACT**

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I. INTRODUCTION

It is only a matter of time before a court hears a claim that the federal government has taken a water right through application of the Endangered Species Act (ESA). On an increasingly frequent basis, the federal government is using the ESA to require water users to reduce the amount of water that they have been withdrawing from surface streams or groundwater aquifers. The ESA has also blocked a number of proposed new water projects. At some point, affected water users will bring a takings claim and litigate the case to a final judgment..

At the moment, however, there are no published opinions addressing the constitutionality of ESA regulation of private water rights. To try to determine how a court might resolve such a case, one must therefore look to see how the courts have resolved similar challenges. Because takings jurisprudence is highly fact specific, an examination of general takings principles does not get one very far. One instead must look both at cases involving wildlife protection and at cases involving water rights. Courts historically have been highly deferential to governmental regulations in both of these categories of takings cases -- suggesting that water users will have a steep road to climb in challenging ESA actions that impact their water rights.

The United States Supreme Court, however, has breathed new life into the Fifth Amendment over the last decade or so, giving new hope to water users affected by the ESA. Any takings challenge to the ESA, moreover, will almost certainly be heard by the United States Court of Federal Claims, which has been exceptionally receptive to takings claims.

Part II of this outline briefly summarizes today's general takings jurisprudence. Part III looks at the sparse takings jurisprudence under the ESA and related wildlife-protection laws. Part IV examines how courts have resolved takings challenges involving water rights -- including a

recent case in the Court of Federal Claims in which the court forcefully held that water rights are constitutionally protected property. Part V quickly sets out some of the issues that might be involved in an ESA water case. Finally, Part VI briefly looks at current Congressional takings legislation.

II. GENERAL TAKINGS JURISPRUDENCE

A. Only property rights are protected.

- The first question in any takings case is whether the plaintiff holds a property right that has been destroyed or restricted by the government.

- According to the Supreme Court, property rights stem not from the Constitution but from state or federal law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

- A property owner thus cannot complain if a government regulation merely proscribes a particular use or activity that was not part of the property owner's "title to begin with" (e.g., because state nuisance law or other common law doctrines already prohibited the use or activity). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

- Courts, however, cannot uphold uncompensated takings simply by asserting without precedential support that the property owner did not have a particular right to begin with: a "State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.*; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

- See also *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332 (1994) (Stevens, J., dissenting from the denial of certiorari): "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under

the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law."

B. Uncompensated physical takings are unconstitutional.

- The next question in any case is whether the government has physically taken the property or merely regulated use of the property.

- Where the government has physically taken the property, compensation is automatically owing: this is the quintessential taking to which the Fifth Amendment is directed.

C. Regulatory takings present a more difficult issue.

1. Ad hoc balancing is the approach in most cases.

- In the 1970s, the United States Supreme Court rejected the view that there was or could be "any 'set formula' for determining when 'justice and fairness' require" compensation for governmental regulations that injure property values. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

- The Court held that takings cases must instead be handled as "ad hoc, factual inquiries" in which a number of different factors are weighed and balanced, including

- the "economic impact" of the governmental regulation on the property owner,
- the extent to which the regulation "has interfered with distinct investment-backed expectations" of the owner, and

- the "character" of the regulation (e.g., does it result in a "physical invasion" of the property).

2. Some regulations, however, are "categorical takings."

● Although federal courts continue to use this ad hoc, balancing approach to resolve most regulatory takings cases, the United States Supreme Court now holds that some types of regulations constitute "categorical" takings and automatically entitle property owners to compensation.

● **Permanent physical occupations:** Actions that result in "permanent physical occupations" of a piece of property are essentially the same as governmental condemnations and thus are categorical takings. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

● Federal courts, for example, have held that virtually all governmental regulations that deprive landowners of their right to exclude others from their property constitute *per se* takings. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (EPA order authorizing access to plaintiffs' property to install and maintain a monitoring well constituted a categorical taking).

● **Interference with "core" property interests:** According to the Supreme Court, physical occupations constitute categorical takings in part because a property owner's right to exclude others from her property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," raising the question whether there are other "essential sticks" in a property owner's bundle of rights that are also categorically protected against governmental regulation.

● This could be a critical question in water cases because the "right to exclude" seems less meaningful when discussing water rights than in discussing real property.

●For suggestions that there are other categorically protected "core" interests, see *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987) (strongly suggesting that the "right to pass on property" at one's death is a core property interest); *Sintra, Inc. v. Seattle*, 829 P.2d 765, 771 (Wash. 1992) (courts must determine whether a challenged regulation "destroys one or more of the fundamental attributes of property ownership--right to possess, to exclude others, and to dispose of property").

●**Deprivation of all economic use:** Regulations that deny a property owner all "economically viable use of his land" also constitute categorical takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

●Although the "economically viable use" test is quite narrow on the surface, two questions left open in *Lucas* could lead to broader ramifications.

●First, what is the relevant parcel of property in determining whether the owner has been deprived of "all economically beneficial use"? Where a regulation reduces the amount of water that a farmer can use, for example, should a court look at the economic impact on the farmer's property as a whole (including the farmer's land)? at the impact just on the farmer's water? at the impact just on the water that cannot be used?

●The Supreme Court recognized in a footnote to its *Lucas* opinion that this is a difficult question, but concluded that it did not have to resolve the question because the facts of *Lucas* did not raise it.

●The Supreme Court, however, suggested that the "answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- i.e., whether and to what degree the State's law has

accorded legal recognition to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."

• Second, what happens if a regulation deprives a property owner of most, but not all, of the economically viable use of his property?

• The Court of Federal Claims has held that regulations that deprive a property of substantially all its economic value require exceptionally strong governmental justifications. See, e.g., *1902 Atlantic, Ltd. v. United States*, 26 Cl. Ct. 575, 578-79 (1992); *Formanek v. United States*, 26 Cl. Ct. 332, 334-35 (1992).

C. Property owner also might be able to challenge a regulation on the ground of insufficient governmental justification.

• The Court also has expressed an increasing interest in scrutinizing the purposes behind governmental regulations that injure property values.

• Regulations are unconstitutional under the takings protections if they do not "substantially advance legitimate state interests" -- a higher standard than the "rational basis" test which is normally applied to economic regulations. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

• Lower federal and state courts, however, have shown considerable reticence about applying heightened scrutiny to property regulations.

III. TAKINGS CHALLENGES TO SPECIES PROTECTION LAWS

- There has been no reported takings case to date involving a landowner or water user whose use of land or water is restricted or prohibited entirely because of either section 7 or section 9 of the ESA.

- One possible reason for the dearth of cases is the difficulty of reaching a stage where a property owner has a ripe claim.

- Until the federal Fish and Wildlife Service makes it clear that the property owner cannot develop a satisfactory "habitat conservation plan" that will permit use of the property under section 10 of the ESA, the property owner arguably has not exhausted administrative avenues for relief and thus does not have a ripe claim.

- Another possible reason for the absence of cases is the money and time required to litigate a takings challenge to its conclusion.

- A final possible reason is the efforts of the Fish and Wildlife Service to accommodate the interests of private property owners to the degree possible under the dictates of the ESA.

- As discussed below, takings challenges to other ESA provisions and to similar wildlife protection laws have all failed to date.

- Given the fact-specific nature of takings challenges, this should not necessarily deter a property owner from challenging other actions under the ESA.

●The opinions, however, suggest that some state and lower federal courts believe that wildlife regulations are entitled to greater constitutional deference than other property regulations (although the courts fail to clearly explain why).

A. Species trading cases.

● Two courts have held that the ESA can constitutionally prohibit the interstate sale of endangered species or their body parts without providing compensation. See *United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976); *United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995).

● The courts rejected takings challenges on the ground that the prohibition on interstate sales does not preclude all use of a species: an individual can still hold and exhibit a species and can also apply for a permit to use or transfer the species for scientific purposes.

B. Predatory species cases

●The Ninth Circuit has held that the ESA can constitutionally prohibit a property owner from protecting his property from a predatory or marauding species by shooting or otherwise harassing the species. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988) (involving a sheep rancher who lost 84 sheep to endangered grizzly bears).

● According to the Ninth Circuit in *Christy*, the bears, and not the federal government, had taken the rancher's sheep.

●The *Christy* case is consistent with numerous state cases upholding state laws that protect predatory or marauding species, even where the species destroy private property. For lists of the state precedents, see *Christy*, 857 F.2d at 1334-35; *Moerman v. State of California*, 17 Cal. App.

4th 452, 21 Cal. Rptr. 329 (1st Civ. 1993).

C. State land use cases.

- Two courts have upheld state provisions restricting land use in order to protect endangered or threatened species.

- In *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (1st Cir. 1992), the First Circuit upheld the decision of a Vermont regional environmental board to deny a developer's application to construct a vacation home project in the middle of the sole remaining deeryard in a 10.7 square mile watershed.

- The First Circuit rejected the developer's claim that the board's action constituted a "permanent physical occupation" of his property by the deer. According to the court, there was at most a "minor" and "seasonal" "invasion."

- In a footnote, the court also emphasized that the deer were not "strangers" to the deeryard and thus their "invasion" of the developer's property was not "especially offensive."

- The court held that the developer's claim that the denial deprived it of all the economically viable use of its land was not ripe for review because the developer was free to submit new plans to the environmental board.

- In *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Ct. App. 1994), a state court rejected the takings claim of a development company that was forced to delay completing part of a residential subdivision because two pairs of bald eagles had nested on the developer's property.

- The court rejected the developer's "permanent physical occupation" claim on the ground that the government "neither owns nor controls the migration of the wildlife species it protects."

- The court rejected the developer's more general takings claim on the ground that the state restrictions affected only a small portion of the developer's property and did not make even that portion worthless.

D. Are species cases different?

- Running through virtually all of these opinions is the suggestion that wildlife regulations are entitled to higher deference than most governmental regulations.

- Several of the opinions suggest that wildlife cases are different because the government is protecting the natural *status quo* rather than mediating between competing human demands.

- Although never reaching the takings issue, a California appellate court has also suggested that wildlife regulations are less susceptible to takings challenges because of the longstanding role of government in preserving and protecting wildlife. See *Sierra Club v. Dept. of Forestry & Fire Protection*, 21 Cal. App. 4th 603, 26 Cal. Rptr. 2d 338 (1st Dist. 1993).

IV. WATER RIGHTS TAKINGS LAW

A. Are water rights subject to as much constitutional protection as rights to land?

- Water users have brought dozens of takings challenges to governmental efforts to regulate the diversion and use of water, although no claim has yet been lodged involving the ESA.

- Virtually every court that has heard a takings challenge to a water regulation has

recognized that water rights are property and thus entitled to at least some degree of constitutional protection. See, e.g., *Public Service Comm'n v. FERC*, 754 F.2d 1555, 1564 (10th Cir. 1985), cert. denied, 474 U.S. 1681 (1986); *Fallini v. Hodel*, 725 F. Supp. 1113, 1123 (D. Nev. 1989), aff'd on other grounds, 963 F.2d 275 (9th Cir. 1992); *Town of Eureka v. Office of State Engineer*, 108 Nev. 163, 826 P.2d 948, 951 (1992); *Hale v. Colorado River Muni. Water Dist.*, 818 S.W.2d 537 (Tex. Ct. App. 1991); *Department of Ecology v. Adsit*, 103 Wash. 2d 698, 694 P.2d 1065, 1069-70 (1985).

- Indeed, most courts have viewed water rights much like real property for takings purposes, and have used the same general standards and terminology in takings challenges to both types of rights.

- Some courts and commentators, however, have suggested that *unexercised* riparian or groundwater rights are entitled to virtually no constitutional protection. See, e.g., *State v. Knapp*, 167 Kan. 546, 207 P.2d 440, 447 (1949); *Baeth v. Hoisveen*, 157 N.W.2d 728, 732 (N.D. 1968); *In re Hood River*, 114 Or. 112, 227 P. 1065, 1094 (1924); *Bell Fourche Irr. Dist. v. Smiley*, 204 N.W.2d 105, 107 (S.D. 1973).

- This suggestion is not totally unique to water law: a similar distinction is found in zoning cases where courts readily award compensation if a zoning ordinance forces an existing use to stop immediately, but seldom award compensation if the ordinance simply forecloses a future use.

- Some courts have also suggested that there is something intrinsically different about water rights that entitle them to less protection than real property even when the water is actively being used.

●One justification often given for providing less protection is that there is a greater public interest in water than in other property. See, e.g., *Baumann v. Smrha*, 145 F. Supp. 617, 625 (D. Kan. 1956), aff'd, 352 U.S. 863 (1956); *Baeth v. Hoisveen*, 157 N.W.2d 728, 733 (N.D. 1968); *In re Hood River*, 114 Or. 112, 227 P. 1065, 1092-93 (1924).

● Perhaps the justification given most frequently by courts for according water rights weaker constitutional protection is that water users have only usufructuary rather than possessory rights to the water. See, e.g., *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324, 1328, appeal dismissed, 457 U.S. 1101 (1982); *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767, 772 (Minn. 1981); *Bamford v. Upper Republican Natural Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642, 652, cert. denied, 115 S. Ct. 201 (1994).

●Courts wishing to distinguish water from real property also sometimes emphasize state constitutional or statutory provisions reciting that water is the property of the public. See, e.g., *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 630 P.2d 1164 (1981); *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767, 771 (Minn. 1981); *Bamford v. Upper Republican Natural Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642, 652, cert. denied, 115 S. Ct. 201 (1994).

●Similarly, some courts have argued that states have considerable room to regulate appropriative water rights without paying compensation because such rights are subject *ab initio* to a variety of broad restrictions (e.g., the reasonable and beneficial use requirement). Cf. *Broughton Lumber Co. v. United States*, 30 Fed. Cl. 239 (1994) (denying

compensation because of doubts whether water right holder could use water for hydroelectric purposes).

- The United States Supreme Court has never addressed the question whether water rights are subject to the same protections as real property.

- The Supreme Court, however, has suggested that it might differentiate among different types of property rights and accord some forms of property less protection than others.

- In *Lucas*, for example, the Court noted that its takings jurisprudence had traditionally been guided by people's understandings "regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," and indicated that personal property might be entitled to less protection than land.

B. As in real property cases, the first issue is whether the plaintiff has a water right that has been injured.

- As in real property cases, the first question is whether the plaintiff has a water right that has been injured by the challenged governmental regulation.

- In *Broughton Lumber Co. v. United States*, 30 Fed. Ct. 239 (1994), the Court of Federal Claims rejected a takings challenge to a federal law that allegedly prevented the plaintiff from building a hydroelectric project, because the plaintiff had never received state approval to use its water right for hydroelectric purposes.

- Although plaintiff presented expert testimony that state approval was "highly probable," the court held that "a mere unilateral expectation ... is not a property interest

entitled to protection" (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

- The court, however, suggested that it might recognize a takings claim if a plaintiff had a "reasonable expectancy" of state approval based on "hard facts -- for example, statistical data confirming favorable approval rates."

C. Do the takings "principles" developed for real property apply to water cases?

- Accepting that water rights are entitled to some degree of takings protection, an additional question is whether current takings jurisprudence should be applied, or even sensibly can be applied, to the water context.

- Takings jurisprudence was developed to address land cases, not the quite different resource of water. Attempts to apply current takings jurisprudence to water cases, therefore, can raise new and difficult issues.

- *Central Colorado Water Conservancy Dist. v. Simpson*, 877 P.2d 335 (Colo. 1994), shows the difficulties involved.

- In *Simpson*, the Central Colorado Water Conservancy District challenged a Colorado law that permitted sand and gravel companies to expose tributary groundwater to evaporation without replacing evaporative losses. The trial court found that the law would "somewhat ... decrease" surface water.

- Although this could be viewed as a physical taking of the rights of surface appropriators, the Colorado Supreme Court analyzed the case as an alleged regulatory taking.

● Because the district could not show that the law would substantially diminish the value "of any specific water rights," the Colorado Supreme Court rejected the takings claim.

D. Historically, most takings claims involving water rights have been unsuccessful.

● Looking at the specific cases challenging water regulations, most takings challenges historically have been unsuccessful. The same can be said, however, of takings challenges to land regulations. In several recent water cases, plaintiffs have enjoyed greater success.

1. State efforts to abolish or limit unexercised riparian rights have generally been upheld.

● A major category of takings challenges have involved state legislation that abolishes or restricts unexercised riparian rights.

● In every state to enact such legislation except Oklahoma, state courts have rejected takings challenges to the legislation. See *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142 (1935); *Baumann v. Smrha*, 145 F. Supp. 617 (D. Kan. 1956), aff'd, 352 U.S. 863 (1956); *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962); cert. denied, 375 U.S. 7 (1963); *State ex rel. State v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949); *In re Hood River*, 114 Or. 112, 227 P. 1065 (1924), appeal dismissed, 273 U.S. 647 (1926); *Belle Fourche Irr. Dist. v. Smiley*, 84 S.D. 701, 176 N.W.2d 239 (1970); *In re Water Rights of Guadalupe River Basin*, 642 S.W.2d 438 (Tex. 1982); *Department of Ecology v. Abbott*, 103 Wash. 2d 686, 694 P.2d 1071, 1077 (1985).

● In 1990, however, the Oklahoma Supreme Court held that such legislation constitutes a taking. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568 (Okla. 1990).

●The court's logic was straight forward: Riparian rights are private property and thus protected from takings. Legislation restricting riparian rights to existing diversions "takes" the unexercised rights by permitting appropriators to divert the water.

2. State and local groundwater regulations have generally been upheld.

●State courts also have almost always rejected takings challenges to legislative or administrative actions limiting the amount of groundwater that can be extracted from an aquifer. See, e.g., *Aikins v. Arizona Dept. of Water Resources*, 154 Ariz. App. 437, 743 P.2d 946 (1987); *Town of Chino v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982); *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D. 1968); *Bamford v. Upper Republican Natural Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994); *Kline v. State*, 759 P.2d 210 (Okla. 1988); *Knight v. Grimes*, 127 N.W.2d 708 (S.D. 1964); *Peterson v. Department of Ecology*, 92 Wash. 2d 306, 596 P.2d 285 (1979).

●In *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991), however, the federal Court of Appeals held that the plaintiffs could prove that a local county ban on groundwater pumping was unconstitutional if they could show either (1) that the public interest did not outweigh the severity of the private deprivation, or (2) that the county acted out of an illegitimate purpose (i.e., to halt groundwater sales to Mexico).

3. **Other governmental regulations or actions have also typically been upheld.**

- State courts have also rejected takings challenges to a variety of other water regulations.
- State courts, for example, have rejected challenges to state legislation requiring water right holders to register their water rights (at the cost of otherwise forfeiting the rights). See, e.g., *Matter of Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992); *Department of Ecology v. Adsit*, 103 Wash. 2d 698, 694 P.2d 1065, 1069-70 (1985).

- The Nevada Supreme Court has held that it is not unconstitutional for a state to retroactively apply a forfeiture statute. *Town of Eureka v. Office of State Engineer*, 108 Nev. 163, 826 P.2d 948, 950-52 (1992).

- The Nebraska Supreme Court has held that the government does not have to pay compensation for the use of aquifer storage space underlying private land. *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290, 298-99 (1987).

4. **Current views of the Court of Federal Claims**

- If a takings challenge is brought to the ESA, the claim almost certainly will go initially to the Court of Federal Claims which, under the leadership of Chief Judge Loren A. Smith, has been exceptionally sympathetic in recent years to takings claims in general.

- The Court of Federal Claims currently has before it a takings case involving water (although not involving the ESA) and, in a March 8, 1996 opinion written by its Chief Judge, denied the United States' motion for summary judgment on the water cause of action. *Hage v. United States*, 35 Fed. Cl. 147 (1996).

- Two ranch owners in Nye County, Nevada, brought the case alleging that the

federal government had taken their water, grazing, and other property rights through various regulatory and other actions. In particular, they alleged that the federal Forest Service (1) diverted water from an allotment the plaintiffs used for grazing purposes to another stream that the Forest Service used as a domestic water supply for a guard station, (2) permitted non-indigenous elk to drink the plaintiffs' water, and (3) prevented plaintiffs from accessing their water.

- The court rejected the argument of several environmental groups as *amici* that water rights are entitled to less constitutional protection because they are "limited, usufructuary rights" to "put a certain quantity of water to beneficial use." After holding that appropriative rights can be property rights, the court went on to say:

Amici provides [sic] no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection [than land rights]. This is particularly true in the West where water means the difference between farm and desert, ranch and wilderness, and even life and death. This court holds that water rights are not "lesser or diminished" property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.

- The court also rejected the United States' arguments that (1) the plaintiffs could not own water on federal lands, and (2) the plaintiffs could not claim a vested right to all the water in any given area of a national forest.

E. Plaintiffs face additional hurdles where their water rights are based on contractual entitlements.

- Those water users who receive their water under a contractual entitlement from the federal government or from a public or private water distributor face a more difficult time

establishing a taking.

- Federal courts have recognized that contractual entitlements can constitute property, and that federal abrogation of contractual entitlements can violate the Fifth Amendment. See, e.g., *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Peterson v. Dept. of Interior*, 899 F.2d 799 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

- In cases involving revisions to federal reclamation contracts, however, courts have held that the government must be given substantial leeway.

- In two cases, federal courts have permitted the federal government to increase the rates that it charges for reclamation water over objections that existing contracts prohibited such increases. *Peterson v. Dept. of Interior*, 899 F.2d 799 (9th Cir.), cert. denied, 498 U.S. 1003 (1990); *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397 (9th Cir.), cert. denied, 114 S. Ct. 59 (1993).

- According to the courts, three principles make it very unlikely that reclamation reforms will constitute takings:

First, "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Thus, "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." Second, governmental contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Third, governmental contracts should be interpreted against the backdrop of the legislative scheme that authorized them

Peterson v. Dept. of Interior, 899 F.2d 799 (9th Cir.), cert denied, 498 U.S. 1003 (1990), quoting *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986).

E. A final question in water cases can be the amount of compensation due if there is a taking.

- If a court concludes that a water right has been taken, the amount of compensation that the government must pay can be a difficult question.

- Although no court has yet addressed the issue, quantification of "just compensation" for federal reclamation water raises particularly interesting issues. Should just compensation equal the value of the water to the farmer or on an open market? Should just compensation be adjusted to reflect the governmental subsidy of federal reclamation water?

- In measuring just compensation, how should a court deal with the government's unrelated regulatory discretion over the water right at issue?

- In *United States v. 42.13 Acres of Land*, 73 F.3d 953 (9th Cir. 1996), for example, the government's New Melones dam project cut off the water supply for a private hydroelectric project whose federal license was originally scheduled to expire in 1977. The United States was willing to pay for the value of the hydroelectric project on the assumption that its license would not have been renewed in 1977, but the power company wanted almost 100 times as much based on the assumption that the license would have been renewed.

- Quoting from *United States v. Fuller*, 409 U.S. 488 (1973) (holding that just compensation for a ranch did not include the value of related federal grazing permits), the Ninth Circuit concluded that the power company was not entitled to the larger amount:

The principle [is] that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain."

V. POTENTIAL ISSUES IN AN ESA WATER CASE

To give a brief idea of some of the many open issues that would arise in an ESA water case, consider several relatively realistic hypotheticals.

Hypothetical 1: A Reduction in Private Surface Water Use

- Assume first that the federal government under section 9 of the ESA orders the private holder of an appropriative right to reduce the amount of water that the water right holder historically has diverted from a stream. Is the water right holder entitled to compensation under the Fifth Amendment?

- The first question is whether the water right is a constitutionally protected property right. The case law holds that it clearly is (although the issue is still likely to be litigated).

- The next question is whether state law would permit the water right holder to divert the water to the injury of the endangered species even absent the ESA. Although many appropriators might believe the answer to this question is an easy "yes," the United States (and *amici* environmental groups) will almost certainly argue that the "reasonable and beneficial use" requirement, the public trust doctrine, or other state water law doctrines preclude diversions that injure endangered species.

- The next question is whether this is a physical or regulatory taking. Although most

people have assumed that an ESA case would involve a regulatory taking, the water right holder has been completely deprived of the water that it must now leave in the stream. Is that a physical taking?

- If this is merely a regulatory taking, does it fall within any of the "categorical" taking boxes?

- It would not seem to involve a "permanent physical occupation."

- Could the water right holder, however, argue that the government's action deprived him of the very "core" of his appropriative right -- the right to divert and use the water? In the case of a water right, where the right is entirely a usufructuary right, is there anything else to the right?

- Whether the water right holder can argue a complete diminution in economic value depends on whether the court will permit the farmer to separate the water right into two parts -- probably unlikely.

- If there is no categorical taking, how would a court resolve the balancing test mandated by *Penn Central*?

Hypothetical 2: A Reduction in Groundwater Withdrawals

- Should it make any difference if the first hypothetical involved groundwater withdrawals rather than surface water diversions? As noted above, courts have rejected takings claims to state regulations reducing groundwater withdrawals. But those cases have involved attempts to avoid depletion of the aquifer and therefore involve a "reciprocity of advantage" that an ESA case arguably would not.

Hypothetical 3: A Reduction in Federal Reclamation Water

- Should it make any difference if the first hypothetical involved a reduction in available federal reclamation water?

- As noted above, although courts have recognized that federal reclamation contracts can create constitutionally protected property rights, courts have been quite deferential to federal modifications of those contracts. An important question will be what amount of water the contract promises (and exactly how the contract is worded).

- If there is a taking, a very difficult question, as discussed earlier, will be what is "just compensation."

Hypothetical 4: Prohibition of a New Water Project

- Assume finally that, under section 7 of the ESA, the Army Corps of Engineers refuses to permit a rancher to build a diversion system necessary to bring new water to her lands. Assume further that the farmer has received a permit to divert the new water, but given the problem with the Army Corps of Engineers, cannot perfect her water right.

- The difficult issue here, of course, is whether the courts will recognize the unperfected right as a compensable property right.

VI. CURRENT CONGRESSIONAL TAKINGS BILLS

- Although it looked early in 1995 like the 104th Congress would pass takings legislation, chances for passage now are quite dim. Even if Congress passed such legislation, President Clinton is sure to veto it.

● In early 1995, the House of Representatives passed a bill that would provide compensation to property owners, explicitly including water right holders, if the Endangered Species Act or a short list of other regulatory programs diminishes the fair market value of their property by 20 percent or more. H.R. 925, 104th Cong., 1st Sess. (1995).

● The Senate Judiciary Committee has approved, but the full Senate has not, a bill that would require compensation whenever any federal regulatory action diminishes the fair market value of a "portion" of the property by 33 percent or more. S. 605, 104th Cong., 1st Sess. (1995).

● These bills suffer from a number of flaws.

● First, these bills, if enacted into law, would present many of the same difficult questions that current judicial takings law presents. For example, does one have a right as a matter of state law to divert water if the diversion would injure endangered species? For example, what is a "portion" of a water right for purposes of using the percentage diminution formula? What is the appropriate compensation?

● The use of a percentage diminution cutoff, moreover, would provide a field day for appraisers and lawyers, while not addressing the complex fairness concerns that underlie the Fifth Amendment.

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