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**THE THIRD CATEGORICAL TAKING:
THE RIGHT TO USE WATER IS A PROTECTED
PROPERTY INTEREST SUBJECT TO A PER SE
TAKINGS STANDARD**

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INTRODUCTION

Water wars between government regulators and farmers and other property owners dependent on a certain supply of water are now common in the west, and especially, California. These wars are the byproduct of an increase, over the last decade and a half, in the amount and severity of water use restrictions. Water restrictions premised on the Endangered Species Act, and particularly, upon government determinations that more water is needed for fish, and less for people, have become especially common. In response, aggrieved water users are increasingly turning to the Fifth Amendment's Takings Clause for protection from, or least compensation for, regulation that deprives them of water.

The intersection between the Takings Clause and ESA-based water restrictions has produced several notable decisions in the United States Court of Federal Claims, and Federal Circuit. Although these decisions side with the takings claimants more often than not, they have not yet closed the book on the issue of whether water users are entitled to compensation when the government prevents the use of water for environmental purposes. Final resolution of this problem depends on the courts' disposition of two thorny issues arising under the Takings Clause: (1) do owners of appropriative water rights - i.e., water rights derived from capture and use- have constitutionally protected property rights?, and (2) if so, what takings standards guides the takings issue, a per analysis or a balancing, regulatory takings-type test?

This paper addresses these two important questions. Focusing on California law (because water disputes are particularly robust in that State), it contends that water use is indeed a protected property interest, and that so-called California "background principles" will limit that right in very few situations. California's principle of "reasonable" and "beneficial" water use, and its public trust doctrine, accommodates the permitted storage and use of appropriated water to serve vital human economic needs. No authority holds that reasonable private use of water, in service of a public need, becomes unreasonable or a violation of the public trust doctrine simply because it has some environmental side effects.

This paper also contends that denying valid water rights constitutes a per se taking of the property interest. While it is not easy to precisely tether water takings to modern physical occupation or invasion tests, it is also not necessary. Supreme Court water takings cases and the nature of water rights indicate that water use denials are best analyzed as a per se taking. The ad-hoc and heavily-qualified regulatory takings inquiry for land use regulations is immaterial to water takings. In effect, there is a third categorical taking (the first two arising in the land use context)- the evisceration of a water right.² See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). And because this type of per se taking is more like a physical taking than not, and the Court's older water cases demonstrate that it is applicable to partial takings of a claimant's water rights, it should apply today to a taking of any independently useable amount of water, regardless of the claimant's other

² See Josh Patashnik, draft manuscript, *Physical Takings, Regulatory Takings, and Water Rights*, available at <http://ssrn.com/abstract=1586075>.

holdings.

I. THE RIGHT TO REASONABLY USE CAPTURED RUNNING WATER IS A PRIVATE PROPERTY INTEREST UNDER CALIFORNIA LAW

Private property is not a thing, it is a right over a thing. As the following shows, California common law and statutory law plainly recognizes the right to divert, store and use captured water as protected property. *Fullerton v. State Water Res. Control Bd.*, 90 Cal. App. 3d 590, 598 (1979) (“The authorities in this state have uniformly defined the right to appropriative water as a possessory property right.”).

A. The Right to Capture and Use Water Is a Private Property Interest

California, like most western states, operates under an appropriative water rights regime, and the common law undergirding that regime frames the issues here. Under a prior appropriation system, a person acquires an individual right to use a certain amount water once it has been captured and put to a beneficial use within a reasonable time. *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (The property right in the water right is separate and distinct The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, *i.e.*, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.”). When a claim is so established, the water holder has a right of water use superior to later claims; this is what is meant by the appropriation doctrine phrase, “first in time, first in right.”

Because drops of water cannot be owned outright, water rights arising under an appropriative regime are sometimes said to be “usufructory,” *i.e.*, revolving around the use of water. But this does not mean that water rights are a flimsy, ephemeral property interest. As with other property, water rights are comprised of a bundle of distinct and valuable interests. A water right holder can impound, possess and consume water. *Fullerton v. State Water Res. Control Bd.*, 90 Cal. App. 3d at 599. Upon possession, he may exclude the rest of the world from the water. *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. 8, 26 (1929). The water holder may sell his water right. *Ickes v. Fox*, 300 U.S. 82, 89-90 (1937); Cal. Water Code § 71611 (“A [water] district may sell water under its control, without preference, to cities, other public corporations and agencies, and persons, within the district for use within the district.”).

The fact that a water rights holder exercises his rights without ownership is irrelevant. Private property rights have never depended on possession of title, but instead arise from, and exist independently in, many subsidiary interests. *See generally United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (defining property as a “group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”). In the real property context, for instance, an easement holder does not own land, but his right to use the land constitutes private property in the land. Real property leases provide another, similar, example.

Appropriative water use rights are similar to easements and leases in that they confer a level of private control over a non-owned resource sufficient to qualify as a private property interest. *Fullerton*, 90 Cal. App. 3d at 598.; *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 101 (1986) (“t is “axiomatic that once rights to use water are acquired, they become vested property rights . . .”). It is of no moment that courts sometimes differ on the exact source or nature of property rights in water. What matters is the recognition that water rights acquired under the appropriation system are entitled to legal protection as private property. *Fullerton*, 90 Cal. App. 3d at 597; *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. at 26 (“So far as the rights of the prior appropriator are concerned any use which defiles or corrupts the water so as to essentially impair its priority and usefulness for the purpose for which the water was appropriated . . . is an invasion of his private rights for which he is entitled to a remedy”); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 374 (1935) (“The preferential and paramount rights of . . . the prior appropriator are entitled to the protection of the courts of law or in equity.”).

More specific to the takings questions at hand here, usufructory water rights are property rights that cannot be taken without just compensation. *United States v. States Water Res. Control Bd.*, 182 Cal. App. 3d 82, 101 (1986) (vested water rights “cannot be . . . taken by governmental action without due process and just compensation”); see *id.* at 104 (“[W]ater rights holders are entitled to judicial protection against infringement . . . [including for] inverse condemnation.”). See also *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 143 (1967) (A compensable property interest “consists in [the] right to the *reasonable* use of the flow of the water.”).

B. California’s Regulatory System Codifies the Common Law of Appropriation and Confirms Property Rights in Water

In the early 20th century, the State of California passed laws to provide “to provide an [exclusive], orderly method for the appropriation of [unappropriated] waters.” *People v. Shirokow*, 26 Cal. 3d 301, 308 (1980) (quoting *Temescal Water Co. v. Dep’t of Pub. Works*, 44 Cal. 2d 90, 95 (1955)). Under this regulatory scheme, a would-be water appropriator must apply to the State Water Resources Control Board (Board) for a permit authorizing the taking of a quantity of water. *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d at 102. The Board must consider the public interest, especially whether a proposed appropriation is reasonable and beneficial. After the Board issues an appropriative water permit, the person may take and use the water according to the permit terms. Subsequently, and upon compliance with the permit, the appropriator is issued a license, the final step in the process. *Id.*

This regulatory and permitting process was not intended to eviscerate common law water rights. *People v. Murrison*, 101 Cal. App. 4th 349, 361 (2002) (“The only substantive difference between appropriative water rights obtained prior to 1914 and those obtained after 1914 is that post-1914 rights must go through the administrative process before the Board.”); *Fullerton*, 90 Cal. App. 3d at 602 (“[C]ourts have consistently held that the 1913 statutory scheme was only a regulation of the existing privilege to appropriate water.”). Rather, California’s Water Code codifies the

common law process for acquiring water rights, *Murrison*, 101 Cal. App. 4th at 361 (“the Legislature codified the process for appropriation of water”), so as to provide a predictable method for people to assert and control an allocation of water.

Thus, “appropriative rights become confirmed,” not diminished, by issuance of a water use license. *State Water Res. Control Bd.*, 182 Cal. App. 3d at 102. Put slightly different, a valid water license reflects the existence of property rights. While a license may not be *necessary* to establish a property interest, it is *sufficient*. See *Yuba River Power Co. v. Nevada Irrigation Dist.*, 207 Cal. 521, 525 (1929); *Miller & Lux, Inc. v. Bank of America*, 212 Cal. App. 2d 719, 726 (1963) (appropriation application confers property right).

II. THERE IS NO BACKGROUND PRINCIPAL OF CALIFORNIA LAW THAT COULD OR SHOULD DIVEST A WATER HOLDER OF THE PROPERTY RIGHT IN WATER

To neutralize California case law holding that water rights are constitutionally protected property rights, the government and its friends in the environmental community often invoke the modern background principles defense to takings liability articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029-31. That doctrine holds that a regulation that would otherwise be a taking may avoid that character if it simply implements a property restriction already inhering in the property owner’s title under state common law. *Id.* Water regulators and their apologists claim that even if there is a property right in its water, the right is so limited by certain “background principles” of California law, that it cannot implicate the just compensation obligations of the federal Takings Clause. The principles which are claimed to rise to the level of “background principles” status in the water context include: (1) the requirement that water use be for a “beneficial use,” (2) the requirement that water use be “reasonable” and (3) the public trust doctrine.

This line of argument fails in most water cases for at least two reasons. First, water restrictions typically derive from the ESA- a federal statute. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 101 (2007). ESA regulators may not hide under a state law background principle which never formed the basis for their taking of the water. Second, even when a water restriction is somehow related to the state law principles of reasonable and beneficial use and the public trust doctrine, those doctrines often accommodate, rather than eviscerate, the water holder’s property rights.

A. To Support a Background Principles Defense, the Government Must Show That it Intended to Implement A Purported State Law Background Principles; It Cannot Do So in ESA Cases

The background principles doctrine is often misunderstood. It is not a catch-all defense that allows the government to raise any conceivable rationale for its property restriction in court. Rather, the government must show that the challenged property restriction, here, a water deprivation, was actually grounded on the alleged background principle at the time of its application. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950) (rejecting a governmental attempt to escape liability for taking water rights under a navigational servitude defense, because the taking arose from a reclamation purpose, not navigation); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1385-86 (Fed. Cir. 2000).

In *Palm Beach Isles*, the Federal Circuit specifically described the nature of the government's burden under the background principles doctrine. In that case, the government caused a taking of real property by preventing the use and development of private wetlands. Although the denial was based on environmental grounds and the Clean Water Act, 208 F.3d at 1380, the government claimed it was immune from takings liability under a navigational servitude background principle. In considering this defense, the Federal Circuit held that it was the government's burden to prove that the challenged taking was predicated on the alleged background principle (the navigational servitude in *Palm Beach Isles*) rather than on some other grounds: "it is clear that in order to assert a defense under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation; absent such a showing, it will have failed to "identify background principles . . . that prohibit the uses [the landowner] now intends.'" *Id.* at 1385 (quoting *Lucas*, 505 U.S. at 1031).

Thus, in a water rights takings case, the government must show that its taking of water was related to one of the oft-alleged background principles; namely, the beneficial and reasonable use doctrine or the public trust doctrine. *Id.*; see also *Gerlach*, 339 U.S. at 737. The problem for the government is that controversial water restrictions often do not derive from these state common law rules, they arise from the ESA. *Casitas*, 76 Fed. Cl. at 102. In this situation, under *Palm Beach Isles*, the government must show that *the ESA itself* qualifies as "background principle." *Palm Beach Isles*, 208 F.3d at 1385. But this it cannot do, as there is no reported cases holding the ESA to have such an effect.

Casitas should provide a prime example of the limits of the background principles defense. There was never a hint that the water denial in that case had anything to do with California's reasonable and beneficial use and public trust doctrines until the case ended up in court. That is too late. When the government is acting to limit water deliveries to carry out the ESA or similar environmental law, it simply cannot defend its actions in court under a different state law doctrine, one alleged to be a *Lucas* "background principle."

B. The Beneficial and Reasonable Use Doctrine Is No Impediment

Even if and when water regulators may invoke California legal principles to support a federally mandated taking of water, those principles support, rather than undercut, the typical water holder's property rights.

1. A Beneficial Use Almost Always Exists

Beneficial use is a broad and flexible concept. Almost any common domestic or agricultural use of water is beneficial. Under California common law, the storage of excess water with the intent to use it for a separate beneficial use is a reasonable and beneficial use in its own right. *Miller & Lux, Inc. v. San Joaquin Light & Power Corp.*, 8 Cal. 2d 427, 436 (1937) (storage of water at times of normal river flow is a reasonable and beneficial use); *see also Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 449 (1939) (storage to control flows a reasonable and beneficial use). Consistent with this understanding, the California Water Code explicitly recognizes that Municipal Water Districts, like Casitas, may store water. Cal. Water Code § 71610 (2009) (water district may acquire, control, distribute, *store*. . . for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district.) (emphasis added). Thus, storage of water for a future beneficial use is just as permissible under California's beneficial use doctrine as the subsequent active use of it for domestic and agricultural purposes. *Id.*; *see also* Cal. Water Code § 106.5 ("It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and *future* uses.") (emphasis added).

2. An Otherwise Beneficial and Reasonable Use of Water Is Not Unreasonable Simply Because It May Have an Environmental Side Effect

Even though most regulated water uses are beneficial, California law requires that the use be "reasonable" as well. Water regulators have contended in Casitas that a use of water that potentially harms environmental resources renders the use unreasonable and thus unprotected from an uncompensated taking. In Casitas, it is specifically argued that the Water District's permitted use and storage of water unreasonable because it negatively impacts fish. This is an extreme and untenable construction.

"[W]hat is reasonable use . . . of water is a question of fact to be determined according to the circumstances in each particular case." *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750 (1976) (citing *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 139 (1967)). The inquiry may include examination of "reasonable methods of use and reasonable methods of diversion." *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1242 (2000). The quintessential unreasonable use of water is "waste." *Imperial Irrigation Dist. v. State Water Res.*

Control Bd., 186 Cal. App. 3d 1160 (1986); *Peabody*, 2 Cal. 2d 351.

In water takings cases, the government typically does not assert a “waste” claim. It contends that water use and storage is unreasonable if and when it protects fish at a less than optimum level. *See Casitas*, Federal Government’s Pre-Trial Brief at 14. Therefore, at its core, the contention is that an otherwise reasonable, beneficial and non-wasteful, use of water becomes per se unreasonable (and thus, the property rights become subject to termination) when it does not perfectly protect an environmental resource, here fish. *Id.* The essence of this position has already been rejected by the California Supreme Court:

As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructuary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may *unavoidably harm*, the trust uses at the source stream.

Nat’l Audubon Soc’y v. Superior Court, 33 Cal. 3d 419, 446 (1983) (emphasis added).

The “environmental impact equates to per se unreasonableness” view conflicts not only with *National Audubon* but with the general reasonableness rule, which considers *all* the circumstances. Cal. Water Code § 100.5. The issue of reasonableness must take into account the beneficial uses served by a water use operation, its permitted nature under federal and state law, its longevity and history, and state policy favoring delivery and use of domestic water. Cal. Water Code § 106. Given the totality of these circumstances, one is hard pressed to say that a permitted municipal or agricultural water system is an “unreasonable” one.

Finally, applying an “unreasonable use” claim to routine water delivery systems - based on alleged impacts to fish - is totally divorced from the reality of modern water delivery. Undoubtedly, almost every municipal or agricultural water system can be said to have some effect on public interests in running water, whether fish or recreation. If this were enough to make water delivery unreasonable, the entire domestic water system in California would be illegal. Yet, appropriative water delivery systems do operate legally throughout the State, including at Lake Casitas. In a very practical way, this shows that water capture, use and storage for important human needs is considered reasonable despite an environmental effect. *Nat’l Audubon*, 33 Cal. 3d at 446 (“Now that the economy and population centers of this state have developed in reliance upon appropriated water, it *would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm [environmental] public trust uses.*”) (emphasis added).

Western state agencies, people and courts have made the calculation that water “appropriation may be necessary [and thus reasonable] for efficient use of water despite unavoidable harm” to environmental concerns. *Id.* The federal government seeks to unwind this compact when it asserts a “harm to fish makes water use unreasonable” claim it [wrongly] believes will preserve it from

takings liability.

C. The Public Trust Doctrine Allows the Reasonable, Beneficial Use of Water, Even If There Is an Environmental Side Effect, Because it Serves the Overall Public Interest

The final, but perhaps most popular, purported background principles defense asserted in favor of water regulation is the public trust doctrine. In presenting this defense, water regulators and their supporters portray the public trust doctrine as a strict fish preservation rule that means affected water must be treated as a public resource. But this is not a valid description. The public trust doctrine is far more balanced and accommodating to human needs; it is not a “public property” doctrine.

The public trust doctrine derived from, and still incorporates, concerns for human navigation and commerce. *Marks v. Whitney*, 6 Cal. 3d 251, 259-61 (1971). It also includes environmental values. *Id.* In the water use context, implementation of the public trust doctrine not only requires the balancing of the various public trust values, but also that those values be weighed and balanced against other, broader public interests. In carrying out the public trust, “the state must . . . consider the effect of the taking [of water] on the public trust and . . . preserve, *so far as consistent with the public interest*, the uses protected by the trust.” *Nat’l Audubon*, 33 Cal. 3d at 446-47 (emphasis added; citation omitted); Cal. Water Code § 1253 (2009).

Accordingly, state water regulators, like California’s Water Resources Control Board, must consider the public trust doctrine in the context of the broader public interest when it regulates and permits appropriations of water. *Nat’l Audubon*, 33 Cal. 3d at 445-46; *Fullerton*, 90 Cal. App. 3d at 603-04. It is indisputable that the public has an interest in the efficient and predictable flow of water for domestic purposes. Cal. Water Code § 106; *Prather v. Hoberg*, 24 Cal. 2d 549 (1944). Consequently, when the Board issues a license confirming an appropriative water right, it has necessarily found that the public trust has been protected “consistent with the public interest.” *State Water Res. Control Bd. Cases*, 136 Cal. App. 4th 674, 778-79 (2006); Cal. Water Code § 1257 (Board must consider all potential interests in water); *Big Bear Mun. Water Dist. v. Bear Valley Mut. Water Co.*, 207 Cal. App. 3d 363, 380-81 (1989).

It is sometimes argued that the State may reconsider past decisions in light of the public trust doctrine. Perhaps so. But that does not mean that reviewing courts may ignore the elements of the public trust doctrine that protect commerce and other human needs. Moreover, in most water cases, no such state law reconsideration is at issue, just as no state law background principle forms the basis for the taking. When, as in *Casitas*, the taking of water occurs under a federal mandate, the question of whether and how a state might reorder a water permit based on “new knowledge” is simply a hypothetical.

In any event, it is doubtful that a state could invoke the “background principles” concept to support a redefinition of previously recognized and approved water rights based on some purported new public trust knowledge. Background principles limitations on water use must inhere in the

takings claimant's title at the time of acquisition; newer and unanticipated applications of the public trust are unlikely to have this character. See Joseph L. Sax, "*Rights that Inhere in the Title Itself*," *The Impact of the Lucas Case on Western Water Law*, 26 Loy. L.A. L. Rev. 943 (1993) (noting that newer definitions of the public trust may not qualify as restriction that "inheres in the title" so as to be a "background principle").

III. A PER SE TAKINGS ANALYSIS APPLIES TO THE TAKING OF APPROPRIATIVE WATER RIGHTS

A. Why the Proper Takings Test Matters

Assuming a person has a valid appropriated water right to take and use a certain amount of water, and thus a protected property interest - and this section makes such an assumption- the question faced by the courts is whether the denial of some water for an environmental purpose, such as fish preservation, is a taking. This question in turn hinges to a considerable, if not dispositive degree, on whether the water restriction is judged under a balancing, regulatory takings-type test or a per se, takings standard

If regulation of water is gauged under a modern *regulatory takings-type* standard - one which considers the impact of regulation on the economic value of property and other factors- it is less likely that a taking will be found. This is so for several reasons, but the most important is related to the concept of the "parcel as a whole." See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978). In the land use context, this concept is usually taken to mean that the entirety of a property owner's contiguous real property must be considered in determining if regulation of one part causes an economic impact rising to the level of a taking. See *Keystone Bituminous Coal v. Pennsylvania*, 480 U.S. 470, 497 (1987). The inclusion of unregulated portions of the owner's property makes any restriction have a less than total impact on the owner's ability to use or economically benefit from the land. This in turn triggers application of an ad-hoc balancing test, rather than a per se standard, *Lucas*, 505 U.S. 1019, n.8, a shift which generally makes it more difficult for the takings claimant to prevail.

If water use denials are analyzed under a regulatory takings analysis and its "parcel as a whole" concept, a denial of some water would have to be considered in light of the claimant's entire water allocation. The denial would therefore have a smaller economic impact, and be less likely to be found a taking.

Conversely, if water use denials are considered to be more like a per se, physical taking, a taking is more likely, because the "parcel as a whole" concept is inapplicable, as are the purpose of the taking, and circumstances of water use and ownership. Under a physical takings type analysis, taking any part of a person's property require compensation, period. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). It does not matter how much water is denied or how much the owner retains, or why. See, e.g. *Dugan v. Rank*, 372 U.S. 609, 613-14 (1963) (partial taking of water

holdings is still a taking).

B. A Per Se Standard Applies to Water Denials

Denials of water use should be treated as a per se physical taking for at least two reasons. First, a series of Supreme Court decisions dealing with takings of water uses already establishes such an approach. Second, a per se approach is proper given the devastating impact of water use regulation on the relevant property interest - the right to use water. Simply put, a water use prohibition destroys the entire private property interest. Land use- derived regulatory takings concepts simply do not apply to this situation.

1. The Supreme Court's Trilogy of Water Takings Cases

Although the issue of the proper water takings test is important, interesting, and generates considerable discussion, it is not nearly as open as some would suggest. This is because the Supreme Court has already employed a per se takings standard in a trilogy of decisions addressing the taking of water rights.

In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), the federal government built a dam that prevent water from flowing to downriver properties who held valid riparian rights to use the water for agriculture, *id.* at 729-30. The water confined behind the dam was "diverted . . . through a system of canals and sold to irrigate more than a million acres of land." *Id.* at 729. The claimants' lands were left without water. *Id.* at 729-30. The United States took the water to make it "available where it would be of the greatest service." *Id.* at 728. "The Supreme Court analyzed the government's action as a physical taking," *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1290 (2008), and held a taking occurred.

In *Dugan v. Rank*, 372 U.S. 609, 613-14 (1963), the Court held that the federal government had effected a taking when it extinguished the ability of private water districts to continuing collecting and using water from a river. The government had specifically denied them access to the water by building a new dam. Using what we would today describe as per se or categorical takings analysis, the Court explained that the requisitioning the water for public use was to effectively impose a servitude or easement upon it:

The right claimed here is to the continued flow of water . . . and to its use[.] A seizure of water rights need not necessarily be a physical invasion of land. . . . Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land. Therefore, when the Government acted here with the purpose and effect of subordinating the respondents' water rights to the [federal] Project's uses whenever it saw fit, with the

result of depriving the owner of its profitable use, there was *the imposition of such a servitude* as would constitute an appropriation of property for which compensation should be made.

Id. at 625 (internal citations, quotation marks, and parentheses omitted) (emphasis added).

In *International Paper Co. v. United States*, the government incurred per se takings liability from the issuance of an order that allowed a power plant to draw the whole of a river's flow, to the detriment of people using the water for private uses. 282 U.S. at 404-06. As a result of the order, a paper mill was deprived of water to which it held use rights; the government, meanwhile, gained collateral benefit from increasing the power plant's draw. *Id.* The order constituted a taking without any regulatory takings-style inquiry into the claimant's other holdings, the economic impact, or the reasonableness of the water holder's claim: "The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use." *Id.* at 407.

At the least, these water cases establish that water rights are constitutionally protected property rights for which compensation must be paid when taken. Yet, they do not end there. As the following sections show, the Court's water cases offer specific answers on the type of test to be employed in modern water disputes.

2. The Cases Establish a Distinct Category of Per Se Takings

Commentators and courts have a tendency to try and fit water disputes within modern takings jurisprudence. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 Ariz. St. L.J. 423 (1995); *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 122 (2006). They ask, for instance, whether water takings cases fit more closely within a "physical occupation" or deprivation of use framework. *Id.* This in turn often leads them to look to the Court's "older" water cases for evidence that one or the other approach is more suitable. While understandable to some degree, this method of analysis is problematic because it presumes that modern real property takings standards define the universe of available water takings tests. This is probably a mistake.

It must be remembered that modern takings tests are derived almost wholly from cases dealing with land interests. When the Court crafted "physical occupation," and "ad-hoc balancing" and "denial of all use" takings tests, it was not dealing with water denials, it did not cite to the water cases, and it gave no indication it would apply those tests to that context. Conversely, the Court's older water cases do not rely on the Court's then-existing land use precedent. The seminal 1922 regulatory takings case *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 417 (1922), is never cited in *Gerlach*, *Dugan* or *International Paper*. Nor are any of the other existing land use takings cases that apply a balancing approach. See *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

The Court's water and land use takings cases are, in short, different lines of jurisprudence. See *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008). Thus, it makes little sense to view water disputes as just a different template for application of modern land use takings test. Instead, as a different animal altogether, it is logical to conclude that water cases will be gauged under a unique test, one developed from and for that context. To find that test, we must look beyond familiar land use cases. It is likely - and logical - that the prevailing water takings test will be divined from *International Paper*, *Gerlach*, *Dugan* rather than from *Penn Central*, *Loretto* or *Lucas*.

Rather than looking at the Court's water takings cases for guidance on how land use-derived standards might *apply* to today's water disputes, we should look to those cases to *supply* the controlling test. *Casitas*, 543 F.3d at 1296. While the Court's water takings cases do not identify the test they use by a particular name or case reference (which is what we are used to from land use cases), its existence is evident and its general character identifiable. The Court's water cases describe the taking of water use as the "destruction" or "confiscation" of the property right, *Gerlach*, 339 U.S. at 753, and as a "seizure." *Dugan*, 372 U.S. at 625. There is no public/private interest balancing, there is no "if it goes too far" qualifier, no inquiry into circumstances under which the claimant acquired the water right. All of this points to a per se takings standard - one which is distinct from the other, two well-known categories of per se takings: "physical occupation" or "denial of all economically beneficial use of land" takings. Water takings are, in essence, a third class of categorical or automatic takings.

3. *Dugan*, *Gerlach* and *International Paper* Govern All Water Denials, Including "Leave In-Stream" Requirements

To dilute the applicability of the per se approach in *Gerlach*, *Dugan* and *International Paper*, some argue that the cases are limited to their facts, particularly, to the fact that water was physically diverted from the private user to a new location. As such, it is argued, the cases would not control disputes where the government commands that water be left "in-stream" for environmental benefits, rather than physically relocated. See, e.g., *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 132 (Cal. App. 2006); John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 Vermont Journal of Environmental Law, at 598; Brief of Amicus Curiae Law Professors in Support of the United States, 9-10, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (2008). John D. Leshy, *A Conversation About Takings and Water Rights*, 83 Tex. L. Rev. 1985, 2008 (2005).

This reading is not persuasive. See *Casitas*, 543 F.3d at 1993. Fairly read, the takings found in the Court's trilogy of water cases are not premised on the physical diversion of water from one physical location to another, but on its diversion from *one private purpose to a different, government-sponsored one*. *Gerlach*, 339 U.S. at 752 (taking found where claimants' "private rights are surrendered in the public interest."); *id.* at 728 (observing the government denied water flows to make it "available where it would be of the greatest service."); see also, *International Paper*, 282 U.S. at 408 ("it does not matter that by a subordinate arrangement [the government] directed the use of the [water] power to companies that would fulfill *its purposes* rather than to machinery of its

own.")(emphasis added). If the government commands water allocated to a private party for domestic purposes to stay “in-stream” for the benefit of fish or other public values, rather than to be withdrawn for private use, it is doing the same thing that occurred in *Gerlach, Dugan* and *International Paper*: it is directing the water away from a valid private purpose to a public purpose. This is enough to trigger a per se taking analysis. *Id.*

Moreover, the Court has already effectively rejected the argument that it is inappropriate to apply a per se test to a requirement that a property owner simply leave the property alone (as opposed to one transferring it to government hands). *Lucas*, 505 U.S. at 1017. In *Lucas*, the Court held that per se test was proper when the government commands a landowner to leave his property in a natural state because, from the landowners point of view, such a command was the same as if the government itself took over the property. *Id.* In the words, *Lucas* held the fact that an owner was “only” required to vacate his property, rather than turn it over to the government, was a distinction without a difference when it came to the propriety of a per se takings analysis. *Id.*

The distinction between a “leave water in-stream for a public purpose” requirement and an order that water be diverted to a government facility is also a distinction without a difference. The water holder’s property interest in water use is just as eviscerated by a government mandate that the water holder leave the water in a river and untouched, as it is by a requirement to send the water to another location. Therefore, both situations are subject to the Court’s water takings per se test.

C. A Per Se Approach is Justified by the Destructive Impact of Water Denials on the Private Property Interest

1. Regulatory Takings Balancing Tests Do Not Apply to A Restriction that Destroys An Entire Property Interest

Although the Court’s water cases do not clearly articulate the rationale behind utilization of a per se test, it is likely that the approach flows from the nature of the property interest at issue - the right of water use – and more particularly, by the impact of a use regulation on that interest. *See International Paper*, 282 U.S. at 407 (“The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition . . .it is hard to see what more the Government *could do to take the use.*”) (emphasis added) As noted before, the property right to water revolves around the ability to productively use that water. Important incidental interests, such as the ability to capture water, to possess it long enough to use it, and to sell it, hinge on the right of use. The right to use water thus comprises the entire bundle of property interests enjoyed by the holder of an appropriated water right. Without the use right, the water holder has no property.

This recognition has important implications for takings analysis, and justifies the per se approach evident in *International Paper, Dugan* and *Gerlach*. Under modern jurisprudence, balancing tests like those associated with the regulatory takings doctrine only apply when a use regulation leaves the landowner with remaining property interests. For instance, *Tahoe-Sierra*

observed that "a regulatory taking . . . does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.* at 325 n.19 Similarly, in describing the circumstances that trigger a regulatory takings test, the *Tahoe-Sierra* Court observed that "[t]he property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public." *Id.* at 326 n.22 (quoting *Mahon*, 260 U.S. at 417 (dissenting opinion)).

In the *Tahoe-Sierra* dispute itself, the Court applied regulatory takings principles to a land use restriction that left many other private property interests intact. *Id.* at 321. Thus, in practice and in theory, *Tahoe-Sierra* shows that the regulatory takings balancing analysis is reserved to a use restriction that has no impact on other private rights. It does not apply simply because a restriction can be deemed a regulation of "use."

On the other hand, the Court has identified the evisceration of a property owner's entire bundle of rights as a characteristic of a per se, physical taking. *Loretto*, 458 U.S. at 435. *Tulare Lake Basin v. United States*, 49 Fed. Cl. 313, 319 ("Case law reveals that the distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." (Citing *United States v. Causby*, 328 U.S. 256, 265,(1946)).

Because a water use restriction takes the water right owner's entire property interest, it is very difficult to justify a regulatory takings analysis. And while a traditional physical occupation analysis also seems misplaced, the destruction of the water property interest is a sign of a more direct, physical-type taking. This recognition reinforces the conclusions that (1) the water takings standard is a distinct category, and (2) *Gerlach*, *Dugan* and *International Paper* were correct in adopting a per se standard to gauge the denial of water use.³

In *Tulare Lake Basin*, 49 Fed. Cl. at 319, the Court of Federal Claims explained and applied the idea that a water use restriction leads to a *per se* taking due to the nature of the property right:

Unlike other species of property where use restrictions may limit some, but not all of

³ This per se approach to water may seem confusing if one misunderstands the scope of the property right in the use of water. The use right exists in every useable part of the water holder's overall allocation of water. Just as under common law a landowner has a use right in every part of a parcel that is otherwise, independently useable (as opposed to only a right to use the entire parcel as one unit), a water right holder has a use right in every part of a water holding. A property owner who owns one hundred acres has a right of use in every acre. A water holder who owns 100 acre feet of water has a right of use in every acre foot. Again, the big difference is that, for the water holder, the use right in the acre foot of water is the only right. The landowner, on the other hand, has other independent interests in his acres, such as the right to possess it and exclude others.

the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary . . . and totally displaced the [water] contract holder. That [is a] complete occupation of property -- an exclusive possession of plaintiffs' water-use rights for preservation of the fish

In short, “[i]n the context of water rights, a mere restriction on use -- the hallmark of a regulatory action -- *completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water.*” *Id.* (emphasis added). Ultimately, the *Tulare Lake* Court held that “by preventing plaintiffs from using the water to which they would otherwise have been entitled, [the government defendants] have rendered the usufructuary right to that water valueless, they have thus effected a *physical taking.*” *Id.* (emphasis added).

Although the per se taking that results from evisceration of a water right looks more like a physical taking than regulatory taking, it is not necessary - despite the *Tulare Lake* Court’s decision - to adopt the physical takings label. It is more appropriate to simply say that water use takings are per se takings.⁴

2. The Parcel as a Whole Concept Does Not Apply

The conclusion that water takings are their own category of per se takings does not immediately answer the important question of whether the “parcel as a whole” principle applies to takings claims based on water deprivations. In fact, it seems to leave the “whole parcel” issue more open in the water context than in any other. The central question is this: is a water denial a per se taking only when it negates all of the claimant’s water holdings (parcel as whole rules applies), or when *it denies any part* (no parcel as a whole rule)?

While there is no definitive answer on this issue yet from the Supreme Court, the most likely conclusion is that the per se test in water cases applies to any water that is taken, without respect to other (unimpeded) water rights remaining in the claimant’s hands. First, this conclusion accords with common sense. If I have two impounded ponds of water for irrigation, and the government cuts off my supply to one pond, the fact that I have another pond does not diminish the sense that I have had my property taken. Instead, a taking of my property - in the real and practical sense - seems obvious, in the same way it would if the government came in and said you can no longer have one of your two cars. That I have another car might reduce anxiety, but it would not mean my property in the car was not lost.

⁴ Mr. Patashnik has identified a number of practical and policy benefits associated with recognition of a per se rule, which are beyond the scope of this piece. See *Physical Takings, Regulatory Takings, and Water Rights*, available at <http://ssrn.com/abstract=1586075>.

Second, while water takings are distinct from traditional physical takings in certain respects, courts have concluded that, if one must choose a modern category, the physical takings class is more appropriate. *Washoe County v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003). As noted at the outset, this recognition cuts against requiring all the claimant's property -unregulated as well as regulated- to be considered when determining if the government has taken his property.

Finally, the Court's cases simply give no evidence that it views water rights as the sort of property interest that should be aggregated to create a larger "parcel as whole" before application of takings analysis. Instead, its cases suggest that the water that is taken stands alone in the analysis, meaning the destruction of any of the water holder's allocation triggers the per se takings test. *Dugan*, 372 U.S. at 625. Put differently, the water per se standard is not a denial of *all* water use rule, it is a denial of any (cognizable and valuable) water use rule. *Id.*

Perhaps one might object that, under this approach, denial of even one drop of water would be a taking. This objection is, however, more rhetorical than real. The hypothetical fear of takings of minute amounts of water is too far removed from the reality of water regulation. Governments are not regulating use of de minimis amounts of water; they are regulating thousands of acre-feet. *Casitas*, 543 F.3d at 1282, n.4. Nevertheless, to alleviate concerns that the per se approach to water denials is overbroad, it may be appropriate to require that the regulated water holdings be independently useful to the water holder/takings claimant to fall within the per se framework. One way to gauge such usefulness is by determining whether there is a market for the quantity of water that is the subject of the taking. Since neither a drop or bucketful of water is independently useful or marketable, it would not qualify for per se takings treatment. On the other hand, denial of a tanker truckload of water - while a small amount in a relative sense - might trigger per se takings liability because such an amount is useful and valuable in its own right. See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994).

CONCLUSION

Water rights are still constitutionally protected property rights. While it is true that certain principles of state law condition the use of water, it takes more to conclude that such principles have the effect of erasing property rights in water under the "background principles" concept of *Lucas*. The background principles concept is itself limited. It will generally not allow the government to invoke state law rules as a takings defense where, as in ESA cases, those rules did not form the basis for taking. Even when a water denial is premised on a state law order, that order may not be a "background principle" within the meaning of *Lucas* if it reflects a novel limitation that cannot be traced back to the landowner's title. Finally, substantive state law rules like "reasonable and beneficial use," and the public trust doctrine, are will often accommodate domestic or agricultural water use even when it has some negative impact on environmental values.

As a protected property interest, takings of water rights are subject to a per se takings test, not a balancing approach akin to the *Penn Central*, 438 U.S. at 124, regulatory takings analysis.

A per se test for water takings is proper because that is what the Supreme Court utilized in its water rights jurisprudence, and because a water use denial eviscerates the entire private property interest - the right of use - in water. This test is similar in some respects to a physical taking, but it does not fit cleanly into that category. Instead, the water takings per se test is its own category of automatic taking.

Nevertheless, water takings should be treated like physical takings when it comes to the issue of the “parcel as a whole.” As in physical takings cases, the per se water takings analysis applies to any water denial, no matter how small relative to the claimant’s total water holdings.. Thus, a taking of any water use is a per se taking - even if the claimant has other available water that is not restricted. The only qualification would be that a taking of a minute amount of water would not qualify for independent, per se takings treatment because such amounts are not independently useful.

The foregoing framework is most consistent with existing water rights precedent. It is also consistent with society’s undeniable need to have a stable, secure and protected supply of water dedicated to important human needs.