Physical Takings, Regulatory Takings, and Water Rights

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Abstract

Alleged takings of property are divided into two broad categories: physical takings claims, which are categorically subject to compensation, and regulatory takings claims, which are analyzed under the multi-factor *Penn Central* test and rarely result in compensation being paid. This Article addresses the question of whether alleged takings of water rights should be treated as physical or regulatory takings. It is an increasingly salient question in the West, where growing conflict between federal environmental laws and appropriative water rights has resulted in a proliferation of takings claims over the past decade. Because whether a claim is analyzed as a physical or a regulatory taking tends to be dispositive of the question of whether compensation must be paid, the legal issue is a critical one: millions of dollars and control over the region’s most precious natural resource are at stake.

This Article is the first to comprehensively assess the merits of all the major rationales that have been offered for treating alleged takings of water rights as either physical or regulatory. Past scholarship has focused on just one or two of these rationales, usually in the context of a particular case or fact pattern. This Article takes a broader look and offers novel arguments demonstrating why there are serious conceptual problems with all of the major rationales that have been offered so far, on both sides of the debate. The thesis is a particularly timely one, since the Federal Circuit recently issued its decision in *Casitas Municipal Water District v. United States*,\(^1\) its first foray into this area and one of the most extensive judicial treatments of the issue offered to date. While the Article discusses the holding and implications of *Casitas* in detail, it also seeks to go well beyond that case and offer a broader thesis about how courts should treat alleged takings of water rights. My basic contention is that while water rights takings cannot fit straightforwardly as either physical or regulatory takings under current doctrine, treating them as physical takings—that is, applying a categorical takings rule requiring compensation when the government restricts any exercise of water rights otherwise permissible under background principles of state property law—is the most sound approach.

\(^1\) 543 F.3d 1276 (Fed. Cir. 2008).
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Introduction

In the West, few types of private property are more valuable than the right to divert and use water from lakes, rivers, and streams. Like other forms of property, this right is protected from governmental interference by the Takings Clause of the Fifth Amendment of the U.S. Constitution, which requires federal, state, and local governments to pay just compensation when they take private property for public use.

Not all claims arising under the Takings Clause are analyzed in the same manner. Courts have long distinguished between physical appropriations of property by government and regulations that merely impose economic burdens on property owners. When the government physically appropriates private property, “it has a categorical duty to
compensate the former owner.”\(^2\) When, however, the government imposes economic burdens on property owners through regulation, but does not physically appropriate property, courts will determine whether compensation is due by conducting an “essentially ad hoc, factual inquiry” that balances a number of relevant factors.\(^3\) With few exceptions,\(^4\) courts are generally reluctant to find a taking in the regulatory context.\(^5\) As a result, the question of whether to apply a categorical physical takings rule or the *Penn Central* regulatory takings balancing test often plays a central role in determining whether property owners are paid compensation.

In its landmark 2002 opinion in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Supreme Court drew a stark line between physical and regulatory takings,\(^6\) putting an end to speculation that the two lines of cases were merging into one.\(^7\) Though this sharply dichotomous approach has not met with universal acclaim,\(^8\)


\(^3\) *Penn Central*, the Court identified several factors as particularly important in determining whether a taking has occurred, including the decline in value of the property, the plaintiff’s investment-backed expectations, what remains of the plaintiff’s property right, and the physical character of the governmental action.

\(^4\) The Supreme Court has identified two categories of regulatory action that, like physical takings, are to be analyzed under a categorical rule requiring compensation. The first are regulations that require property owners to submit to a “permanent physical occupation” by the government or by a third party. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *see also* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831-32 (1987). The second are regulations that deprive of a property owner of “all economically beneficial uses” of her property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original). The potential applicability of the *Loretto* and *Lucas* rules in the water rights context is discussed in Part II infra.


\(^6\) 535 U.S. at 323 (holding that it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation that there has been a ‘regulatory taking,’ and vice versa”).

\(^7\) Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 574 (2003) (arguing that prior to *Tahoe-Sierra*, temporary development moratoria—the government action at issue in that case—seemed to be a “natural context for an extension” of the *Lucas* rationale that some regulatory takings should be subject to a per se rule requiring compensation); Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 ENVTL. L. 1, 9 (2003) (suggesting that *Lucas*’s treatment of some regulatory takings as practically equivalent to physical takings had led the *Tahoe-Sierra* plaintiffs to believe that the Court would expand further the category of regulatory takings subject to a per se rule).

the Court appears committed to the principle that all takings claims must be analyzed as either a regulatory taking, a physical taking, or a Loretto- or Lucas-type taking subject to a categorical takings rule (essentially equivalent to treating them as physical takings).9

This approach creates an obvious problem in the context of water rights: restrictions on the diversion and use of water in some respects resemble regulatory action, but in other respects bear significant physical characteristics. It is not immediately apparent which category alleged takings of water rights fall into. That problem is the subject of this paper. I conclude that though alleged takings of water rights cannot fit neatly into either category, the best approach is to treat them as subject to a categorical rule, requiring the government to pay compensation whenever it deprives owners of the ability to use their water in a manner otherwise permissible under background principles of state law.10

This paper proceeds in three main parts. Part I provides a short history of water-rights takings jurisprudence. The history reveals that, although early water-rights takings cases were decided before the Supreme Court had clearly articulated the distinction between regulatory and physical takings, alleged takings of water rights have long been treated as subject to a categorical rule requiring compensation. The past decade has witnessed a series of cases in which this conclusion has been re-examined. In the majority of these cases, though not in all of them, courts have reaffirmed the principle that, at least in certain factual settings, government-mandated reductions in the amount of water owners of water rights may use are to be treated as categorical takings. Most recently, in Casitas Municipal Water District v. United States,11 the Federal Circuit undertook perhaps the most thorough judicial examination of the question to date and applied a categorical physical takings analysis.

Yet neither the Federal Circuit in Casitas, nor the parties or amici in that case, nor courts or commentators addressing the question in other factual settings have conducted a thorough evaluation of the numerous rationales offered for treating water-rights takings as either physical or regulatory. Part II catalogues, and highlights the flaws in, these rationales, concluding that there are serious problems—rooted in logic,

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10 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-29 (1992) (holding that the government will not have to pay compensation if it merely imposes limits that "inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership").
11 543 F.3d 1276 (Fed. Cir. 2008).
practicality, and precedent—with treating all alleged water-rights takings as either regulatory or physical. It then proceeds to consider the lines some courts and commentators have proposed drawing, whereby some alleged water-rights takings would be analyzed as regulatory takings and others would be analyzed as physical takings. While this approach holds out some promise of creating a water-rights takings doctrine that closely tracks the physical/regulatory distinction in the land context, I conclude that it is unlikely to be ultimately successful. It would produce distinctions between different kinds of restrictions on water rights that would be arbitrary and meaningless in practice, and that bear no relationship to the degree of intrusiveness or harm that an owner of a water right has suffered. By drawing comparisons to the approaches taken by courts in resolving alleged takings of mineral rights, trade secrets, and interest accrued on legal judgments, I conclude that while the physical/regulatory framework can be adapted fairly well to other non-real forms of property, it is uniquely poorly suited to alleged takings of water rights.

Finally, Part III lays out the case for adopting a categorical takings rule, under which alleged water-rights takings would be treated as essentially physical, rather than regulatory. This approach would be somewhat overprotective of property rights: it is likely that the government will have to pay compensation in some cases in which it would not have been required to if finer distinctions could be drawn. But, for several reasons—most notably, the variety of background principles limiting the exercise of water rights—there will likely not be many of these cases. Moreover, the benefits of adopting a categorical rule are numerous. It refocuses judicial attention away from tantalizing but ultimately fruitless physical-or-regulatory inquiries and toward the more important, but often ignored, question of background limitations on the exercise of water rights; it provides a bright-line approach that avoids costly and fact-intensive litigation over whether to treat a taking as physical or regulatory; it furthers principles of federalism by putting state property law at the center of defining the scope of takings liability; and it will promote the development of state water law doctrines by explicitly pitting competing potential uses of water against each other. These benefits likely outweigh any drawbacks to adopting a categorical rule.

I. Evolution of Water-Rights Takings Doctrine

A. Early Cases

Modern water-rights takings jurisprudence relies heavily on a handful of twentieth century Supreme Court decisions.¹² These cases

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¹² For a more thorough discussion of past water-rights takings cases than is merited here, see James H. Davenport & Craig Bell, Governmental Interference with the Use of
introduced both of the key principles underlying recent lower-court decisions. First, the nature of a property right in water is limited by a variety of background principles that often permit the government to regulate water rights in the public interest without paying compensation. Second, however, when the government seeks to curtail water diversions in a manner that exceeds its authority under those background principles, it will usually be found to have effected a categorical taking.

One of the Court’s first major forays into the field came in 1908, in *Hudson County Water Co. v. McCarter*. In that case, the petitioner, an owner of riparian rights in New Jersey’s Passaic River, planned to divert water and sell it to users on Staten Island. Robert McCarter, the attorney general of New Jersey, sought to enjoin the petitioner from transporting the water to another state. Among other arguments, the petitioner contended that such an order would constitute a taking of its riparian right for which the Fifth Amendment required compensation. In rejecting the takings claim, Justice Holmes, writing for the Court, concluded that a riparian right is “subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.” Because the petitioner’s riparian right never encompassed the right to transfer water out of the state, New Jersey could not be said to have taken it.

It is important to understand the basis for the Court’s holding in *Hudson County*. In its brief before the Federal Circuit in *Casitas*, the government contended that the *Hudson County* Court had “declined to apply a per se physical takings analysis,” demonstrating that alleged water-rights takings are to be “evaluated by applying a regulatory takings analysis.” But this conclusion is problematic for two reasons. First, at the time *Hudson County* was decided, regulatory takings doctrine did not exist; it was not until fourteen years later, in *Pennsylvania Coal Co. v. Mahon*, that the Court held the government liable for a regulatory taking. Thus the fact that the Court entertained a

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13 209 U.S. 349 (1908).
14 *Id.* at 353.
15 *Id.*
16 *Id.* at 354.
17 *Id.* at 356.
18 *Id.* (“[I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished . . . . It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.”)
20 260 U.S. 393 (1922).
21 See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 325 (2002) (“As we noted in *Lucas*, it was Justice Holmes’ opinion in
takings claim in *Hudson County* at all suggests that it thought it was confronting a potential physical taking. Second, as discussed above, the language of the opinion makes clear that *Hudson County* was decided not on the grounds that a physical taking could not have occurred, but that there had been no taking because there were initial, background limitations on the owner’s property right. Since the government may successfully raise such a defense even in cases that would otherwise constitute categorical physical takings, there is no reason at all to believe that the *Hudson County* Court was rejecting a physical takings approach in water rights cases.

Indeed, in other cases, the Court did analyze alleged water-rights takings under a categorical rule. While it was not until decades later, in *Penn Central*, *Loretto*, and *Tahoe-Sierra*, that the Supreme Court fully articulated the distinction between regulatory and physical takings, the language used by the Court in these cases holding the government liable for takings of water rights describes physical deprivations of property, rather than the sort of overly burdensome regulation found to constitute a taking in *Mahon*. The first of these cases was *International Paper Co. v. United States*.

In *International Paper*, the government, during World War I, ordered the petitioner to forego its right to divert and use water from the Niagara River, so that a power plant could use it instead to generate electricity for industrial production. The Court held the government liable for a taking:

> “The petitioner’s right was to the use of the water; and when all the water that is 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*. . . . [T]he government intended to *take and did take the use* of all the water power in the canal.”

(emphasis added)

The Court’s emphasis on the government’s having taken the use of the water in *International Paper* indicates that, as later courts and commentators have recognized, it concluded that a physical taking had occurred.

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*Pennsylvania Coal Co. v. Mahon* that gave birth to our regulatory takings jurisprudence.” (citation omitted).

22 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992) (citing *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900), for the proposition that the government will not be held liable for alleged physical takings that simply enforce “pre-existing limitations upon the land owner’s title,” such as the federal navigational servitude).

23 282 U.S. 399 (1931).

24 *Id.* at 405.

25 *Id.* at 407.

Other important twentieth-century water-rights takings precedents arose in California from the operation of the federal government’s Central Valley Project (CVP), which, in tandem with the state’s parallel State Water Project, significantly reworked the hydroscape of California. In two of these cases, United States v. Gerlach Live Stock Co. and Dugan v. Rank, riparian landowners along the San Joaquin River brought suit against the federal government, whose construction of Friant Dam upstream of their lands deprived the landowners of seasonal overflow to which they claimed a riparian right. The Supreme Court held that the government’s plan to impound water behind Friant Dam amounted to a physical taking of their water rights, since the water to which they had a riparian right had been physically prevented from reaching their land. Justice Clark, speaking for a unanimous Court in Dugan, recognized that because “[a] seizure of water rights need not necessarily be a physical invasion of land,” the government could be said to have physically taken water rights even if it left undisturbed the land to which those rights were appurtenant.

In Ivanhoe Irrigation District v. McCracken, however, a third case stemming from the CVP, the Court declined to find a taking of water rights. The respondents contended that two provisions of federal reclamation law that prohibited CVP water from being sold for use on farms exceeding 160 acres in size constituted a taking of their contractual water rights. In holding that no taking had occurred, the Court concluded that because the water rights in question were subject to “the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges,” the acreage provision merely enforced pre-existing limitations on the respondents’ property rights. Thus just as Gerlach and Dugan confirm the Court’s holding in International Paper that restrictions on water rights, at least in certain circumstances, constitute categorical physical

31 Dugan, 372 U.S. at 625 (holding that the government’s actions “constitute[d] an appropriation of property for which compensation should be made”); Gerlach, 339 U.S. at 752-53 (“No reason appears why those who get the waters should be spared from making whole those from whom they are taken.”).
32 372 U.S. at 625; see also Scott Andrew Shepard, The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation, and Ecological Protection in the Western Water Law Context, 17 N.Y.U. ENVTL. L.J. 1063, 1112 (2009) (“[The Court] recognized that the property at issue is the water itself, not the land on which the water is going to be used. (Invasion of that land would constitute a separate physical taking.) Thus, when the government orders that the water be redirected from the right holder’s uses to the government’s uses, it has taken physical command—or physical occupancy—of the property for its own purposes.”)
34 Id. at 277-78, 294.
35 Id. at 295-96.
takings, *Ivanhoe* provides another example of the principle applied in *Hudson County* that the government will not be required to pay compensation for regulations that reflect background limitations on water rights.

**B. Tulare Lake and Subsequent Cases**

Takings jurisprudence generally, and the distinction between physical and regulatory takings specifically, developed significantly in the last few decades of the twentieth century. In addition, the proliferation of federal environmental statutes in the 1960s and ’70s created the potential for water-rights takings to be alleged in a variety of new factual contexts that seemed more susceptible to regulatory-takings treatment than earlier cases had been. It was thus not entirely clear whether courts would continue to apply a categorical rule to alleged takings of water rights. In 2001, however, Judge John Wiese of the Court of Federal Claims issued a much-discussed opinion that did just that. In *Tulare Lake Basin Water Storage District v. United States*, water users in the San Joaquin Valley who had contracts with the federal government under the CVP claimed that the Bureau of Reclamation had effected a taking when it reduced water deliveries to them in order to comply with its obligations under the Endangered Species Act (ESA) to protect endangered winter-run Chinook salmon. In holding the government liable—the first time a court had ever found that ESA-based restrictions on water rights constituted a Fifth Amendment taking—the court employed a physical takings analysis:

> “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.’”

The court equated the restrictions on water use with the impoundment of water behind a dam in *Gerlach* and *Dugan*, because “whether the government decreased the water to which plaintiffs had access by means of a dam or by means of pumping restrictions amounts to a distinction without a difference.” It also refused to accept the government’s claim

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38 *Tulare Lake*, 49 Fed. Cl. at 319 (quoting United States v. Causby, 328 U.S. 256, 265 (1946)). The court analogized the government’s action in *Tulare Lake* to the frequent flights at low altitude over a landowner’s property in *Causby*, reasoning that in both cases the government, while not taking physical possession of the plaintiff’s property, had imposed such a severe burden on the property as to leave the plaintiff in essentially the same position as if the land had been physically taken.
39 *Id.* at 320.
that background limitations on the plaintiffs’ water right under California law precluded the finding of a taking, holding that a decision by the State Water Resources Control Board (SWRCB) had already determined that state law posed no barrier to the exercise of the plaintiffs’ water rights.\textsuperscript{40}

\textit{Tulare Lake} prompted a good deal of scholarly response. A few commentators defended the court’s application of a categorical physical takings rule to the government conduct.\textsuperscript{41} Most, however, took issue with both the court’s application of a categorical rule and its cursory treatment of California water law.\textsuperscript{42} In the critics’ view, because the government “did not divert the water for its own use, but instead regulated how plaintiffs could apply it to their uses,” a physical takings analysis was inappropriate.\textsuperscript{43} And the court had seemingly ignored clear California case law holding that courts have an independent duty, apart from any SWRCB decision, to apply background state law limitations on water rights, including the requirement that all appropriated water be put to beneficial use.\textsuperscript{44}

Though the Justice Department decided to pay compensation rather than appeal \textit{Tulare Lake}, the case’s value as precedent has been somewhat eroded by subsequent opinions. In \textit{Klamath Irrigation District v. United States},\textsuperscript{45} a fellow judge on the Court of Federal Claims

\textsuperscript{40} Id. at 321-24.
\textsuperscript{41} See Jesse W. Barton, Tulare Lake Basin Water Storage District v. United States: \textit{Why It Was Correctly Decided and What This Means for Water Rights}, 25-SPG ENVRNS ENVT. L. & POL’Y J. 109, 136 (2002) (arguing that a physical takings analysis is appropriate, even in the absence of a physical invasion of property, because the “core right of the interest” in water is the right to use it, which merits the protection of a categorical rule); Grant, \textit{supra} note 26, at 1372 (“[I]mplementation of the ESA ousted the contract water users from physical possession of water molecules to which they had a right. There was a traditional physical taking.”).
\textsuperscript{43} Benson, \textit{supra} note 37, at 584.
\textsuperscript{44} Id. at 574-75 (citing EDF v. East Bay Mun. Util. Dist., 605 P.2d 1, 10 (Cal. 1980) and People \textit{ex rel. State Water Res. Control Bd. v. Forni}, 126 Cal. Rptr. 851, 871 (Cal. Ct. App. 1976)).
\textsuperscript{45} 67 Fed. Cl. 504 (2005).
criticized Judge Wiese’s ruling in *Tulare Lake* as being “wrong on some counts [and] incomplete in others.”\(^{46}\) *Klamath* took issue mainly with *Tulare Lake*’s treatment of state law,\(^ {47}\) though it did recognize in a footnote that its physical occupation holding had been the “subject of intense criticism.”\(^ {48}\) A panel of the California Court of Appeals took more direct aim, concluding that *Tulare Lake*’s categorical physical takings approach was “flawed because in that case the government’s passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation.”\(^ {49}\) Other courts, however, remained favorably inclined to the physical takings approach in *Tulare Lake*, suggesting that the government could be said to have effected a physical taking if it “physically reduced the quantity of water” available to a water right owner, even if no diversion or appropriation was involved.\(^ {50}\) Aside from the California Court of Appeals in *Allegretti*, which considered the issue in a groundwater context,\(^ {51}\) no court has clearly disavowed *Tulare Lake*’s physical takings holding, despite the torrent of academic criticism it occasioned.

### C. *Casitas*

The Federal Circuit’s 2008 opinion in *Casitas Municipal Water District v. United States* is the most thorough judicial exploration since *Tulare Lake*—indeed, in many ways it is more thorough than *Tulare Lake*—of the physical/regulatory takings distinction as applied to alleged takings of water rights. Yet, if anything, the primary effect of *Casitas* will be to add even more confusion to the mix than existed before the case. The Federal Circuit found a physical taking in *Casitas*, but based its opinion on factual circumstances so unique to the case that it remains an open question how, or whether, it will be applied as precedent in more ordinary settings.

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\(^{46}\) Id. at 538.  
\(^{47}\) Id.  
\(^{48}\) Id. n.59.  
\(^{50}\) Washoe County, Nev. v. United States, 319 F.3d 1320, 1327 (Fed. Cir. 2003) (favorably citing *Tulare Lake* but declining to find a taking, since the government had merely refused a permit application for a water pipeline project to cross federal land); *see also* Hage v. United States, 82 Fed. Cl. 202, 211 (2008) (finding a physical taking where the government “actively prevented [the plaintiffs] from accessing the water through threat of prosecution for trespassing and through the construction of . . . fences”).  
\(^{51}\) *Allegretti* concerned the validity of Imperial County’s conditional approval of the plaintiff’s application for a permit to active a well on his property. The county had approved the permit on the condition that Allegretti not extract more than 12,000 acre-feet per year from the well, which he claimed amounted to a taking. 138 Cal. App. 4th at 1267. Given the differences between groundwater and surface water allocation law in California, and the county’s discretion in approving the well permit in the first place, it is an open question whether *Allegretti* is useful precedent in cases concerning alleged takings of surface water rights.
Casitas concerned the operation of the Ventura River Project, authorized by Congress in 1956. In 2003, a biological opinion issued by the National Marine Fisheries Service (NMFS) required the plaintiff water district to construct a fish ladder, allowing endangered steelhead trout on the Ventura River to bypass a diversion dam redirecting a portion of the river’s flow into the Robles-Casitas Canal, which transports water from the river to the Casitas Reservoir. The water district filed suit against the federal government in 2005, alleging a breach of contract and a Fifth Amendment taking of its water. The case arrived at the Federal Circuit on appeal from a Court of Federal Claims opinion authored by none other than Judge Wiese, who departed from the approach he had taken in Tulare Lake, finding in Casitas that no physical taking had occurred. Though he deemed the question “not . . . an easy one to decide” and pronounced himself “tempted” to use a physical takings approach, he concluded that the stark line drawn by the Supreme Court in Tahoe-Sierra precluded him from doing so.

The Federal Circuit reversed and applied a categorical physical takings rule. It found the case analogous to International Paper, Gerlach, and Dugan, because, as in those cases, “the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water” away from the plaintiff’s canal. It thus rejected the government’s argument that the biological opinion had done nothing more than passively set pumping restrictions. The court also brushed aside the possibility that background principles of California law might have placed pre-existing limitations on Casitas’s water right. In fact, its treatment of this issue was even more superficial than the Tulare Lake court’s. In that case, the court at least cited a comprehensive SWRCB opinion as justification for declining to take up a background-limitations inquiry; in Casitas, the Federal Circuit baldly stated that the government had conceded that Casitas had a valid water right—though the government had certainly not conceded that Casitas’s proposed use of its water did not violate the beneficial use requirement, public trust doctrine, and other pre-existing limitations.

52 Pub. L. No. 432, 70 Stat. 32 (1956). All of the facilities at issue in the case, including the Casitas Dam, Casitas Reservoir, Robles Diversion Dam, and the Robles-Casitas Canal, were constructed pursuant to the Project and are located in Ventura County, California, northwest of Los Angeles.


54 Id. For reasons not relevant to the takings discussion here, both the Court of Federal Claims and the Federal Circuit rejected Casitas’s breach-of-contract theory. Id. at 1284-86.


56 Id. (“Although from the property owner’s standpoint there may be no practical difference between the two, Tahoe-Sierra admonishes that only the government’s active hand in the redirection of a property’s use may be treated as a per se taking.”)

57 Casitas, 543 F.3d at 1291.

58 Id. at 1290.

59 Id. at 1288.
under California law. In part because of this error, after the Federal Circuit denied the government’s petition for an *en banc* rehearing of the case, the SWRCB urged the federal Department of Justice to seek certiorari from the Supreme Court. The Solicitor General decided against this course of action, however, and the case was remanded to the Court of Federal Claims for trial under a physical takings analysis.

*Casitas* has not yet prompted nearly as much attention from commentators as *Tulare Lake* received, but its physical takings approach has led some to speculate that it could produce a proliferation of successful takings challenges to federal and state water regulations under the ESA and other statutes. Russ Baggerly, a Casitas board member opposed to the suit, predicted that if *Casitas* “stands as good law, there isn’t going to be enough money in the treasury to deal with all the takings claims across the country.” That conclusion is premature and likely wrong. Though its opinion is not a model of clarity, the Federal Circuit does not appear to have held that all takings of water rights are to be treated as categorical physical takings. Rather, the court’s analysis rested entirely on the premise that because the water in question had already been diverted from the Ventura River into the Robles-Casitas Canal, the government “physically caused Casitas to divert water away” from its conveyance and back into the river. Though the court never explicitly said so, the clear import of its holding is that if the government truly had “just require[d] that water be left in the river,” a regulatory

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61 556 F.3d 1329 (2009). Judge Moore, joined by two other judges, wrote an opinion concurring in the denial of rehearing *en banc*. *Id.* at 1331. Judge Gajarsa, joined by two other judges, wrote an opinion dissenting from the denial of rehearing *en banc*. *Id.* at 1333.
66 *Casitas*, 543 F.3d at 1295.
takings analysis would likely apply. The wisdom and viability of this
distinction is open to question—and is explored in Part II.C.1—but it is
clear that the factual circumstances present in the *Casitas* case will be
relatively rare. Most potential plaintiffs who will be affected by
pumping restrictions are not dam owners who operate a fish ladder, but
owners of appropriative rights to divert water directly from a river or
stream. *Casitas* says even less than *Tulare Lake* about how to analyze
these run-of-the-mill cases. Far from being a landmark water-rights
takings precedent, then, *Casitas* seems likely to be remembered as a
relatively minor case.

This leaves water-rights takings doctrine in a state of
considerable uncertainty. This is not necessarily a bad thing; as
Professor Joseph Sax has argued, “uncertainty—a fear that the
alternative could be worse—may be the incentive needed to bring all the
relevant actors to the table in search of a mutually acceptable solution.”

In at least some cases, this has been an effective alternative to
litigation. But it seems unlikely that deliberately leaving this area of
law unsettled is a viable long-term solution. If the West experiences
increasing water scarcity over the next several decades, the number of
potential takings claims can be expected to rise. Given the frequency
with which courts have been asked to adjudicate water-rights takings
claims this decade, the odds that all, or even most, of these conflicts will
be settled out of court is low. At some point, the Federal Circuit, and
possibly the Supreme Court, will likely be called upon to clarify the
doctrine.

II. The Rationales for Physical and Regulatory Takings
Treatment, and Why They Fail

Among the difficulties courts have had so far in resolving the
various justifications offered for both a categorical physical takings
approach and a regulatory takings approach is that the arguments in
favor of each are often conflated in ways that make it difficult to
understand precisely which factors are supposed to determine the
outcome of any given case. In this Part, I look independently at each of
the primary justifications offered for applying a categorical rule to all
water-rights takings, for applying a *Penn Central* regulatory takings rule

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67 Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375, 2384 (2000). It is a view shared by some in Congress. Former New Mexico Senator Pete Domenici has said, “I do not know whether we want [irrigators in New Mexico] to go to court and see if they really have water rights under the endangered species law.” *Id.*

68 See, e.g., Douglas Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 111 (2003) (detailing an agreement by the federal government to make cash payments to compensate farmers in New Mexico for water left in the Pecos River when the Pecos bluntnose shiner was listed as endangered).
to all water-rights takings, and for attempting to distinguish between different kinds of water-rights takings, such that some would be treated as physical and some would be treated as regulatory. I conclude that while some rationales are better than others, none is fully satisfactory.

A. Rationales for a Categorical Physical Takings Approach

Some commentators have argued in favor of treating essentially all water-rights takings as physical takings. Professor Scott Andrew Shepard, for instance, has argued that the physical/regulatory takings dilemma in the water rights context “is a false one: water-rights takings fit neatly into current doctrine as physical takings, and are straightforwardly subject to compensation.”69 There are three primary rationales that have been offered for using this approach.

1. The Tulare Lake rationale: deprivation of value

The weakest of the three is the rationale offered by the Tulare Lake court: water-rights takings can be analogized to the categorical taking found in United States v. Causby, because in both cases, the government’s impairment of a property right is “so immediate and direct” as to render the plaintiff unable to “use [the] land for any purpose.”70 This argument fails for several related reasons. First, in Causby, there was an actual physical invasion: military aircraft overflew the plaintiffs’ property, physically invading their airspace.71 In an otherwise identical situation lacking a physical invasion—in which aircraft noise and smoke afflicted a plaintiff’s property but the aircraft passed only over adjacent land—the Tenth Circuit declined to find a taking.72 Thus Causby cannot be said to stand for the proposition that a categorical takings rule should apply, even in the absence of a physical invasion, if the governmental action nevertheless deprives the plaintiff of all use of her land.

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69 Shepard, supra note 32, at 1111.
70 Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) (quoting United States v. Causby, 328 U.S. 256, 265 (1946)). For a similar argument, see Barton, supra note 41, at 130.
71 Causby, 328 U.S. at 259.
72 Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962). Batten explicitly distinguished Causby on the grounds that no physical invasion of the plaintiff’s land had occurred. Id. at 584. But see Martin v. Port of Seattle, 391 P.2d 540, 545 (Wash. 1964) (“We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land.”).
There is, of course, a case that does stand for that proposition: *(Lucas v. South Carolina Coastal Council)*. And, indeed, water-rights takings seem like a strong candidate for the *Lucas* rule that a categorical rule requiring compensation is appropriate for regulatory actions that deprive an owner of “all economically beneficial or productive use of land.” But there is an obvious hurdle to finding a taking of water rights under the *Lucas* rule. The *Lucas* rule applies only when a plaintiff is deprived of all economically beneficial use of her parcel of land as a whole. In most water rights cases, including both *Tulare Lake* and *Casitas*, the plaintiff is deprived of only a small portion of her water right, meaning that the “parcel as a whole”—the water right in its entirety—has not been rendered entirely valueless. If the entire water right were taken, the plaintiff would be able to make a strong *Lucas*-type claim, but otherwise such an argument will fail.

That has been the result reached in ESA-based suits concerning real property, where courts have refused to apply a physical takings analysis and have also refused to apply a Lucas-type physical invasion analysis because it was not a “taking” of the land under *Lucas*.

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73 505 U.S. 1003 (1992). Some commentators have noted that the fact that the Supreme Court developed a new category of per se takings liability in *Lucas* clearly indicates that it did not believe that deprivation of all value would suffice to create a *Loretto*-type physical invasion—because if it had believed that, it could simply have applied the *Loretto* rule rather than creating the new deprivation-of-all-use rule. Leshy, supra note 42, at 2010.

74  *Id.* at 1015.

75  *Id.* at 1016 n.7; see also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002) (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”); Carol M. Rose, *Mahon Reconsidered: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 568 (1984).

76  *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 315, 316 (2001) (noting that the water district was deprived of between zero and three percent of its allocation).

77  *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 102 & n.3 (noting that the water district was deprived of approximately three percent of its allocation).

78  Benson, supra note 37, at 586 (“Looking at the parcel as a whole in *Tulare* means looking at the whole water right.”)

79  It is possible that even if the entire water right were taken, the *Lucas* claim could still fail because the water right might be said to be part of the same “parcel” as the land to which it is appurtenant, which retains economic value. *Cf.* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 487 (1987) (not applying *Lucas*-type test to coal, even if all of the coal was taken, because it is considered part of a larger parcel of land). This rationale might be better suited to riparian rights, which are directly bound to riparian land cannot be transferred separate from it, than to appropriative rights, which can be transferred independently. *See* JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 28, 264 (4th ed. 2006). In any case, the question is mostly an academic one, since water rights—either riparian or appropriative—are rarely abrogated in their entirety, and when they are, a categorical rule has been applied on independent grounds. *See*, e.g., International Paper Co. v. United States, 282 U.S. 399, 405-06 (1931).
award compensation under *Lucas* where the plaintiff was deprived of all economically beneficial use of only part of her property.\(^80\)

2. The “last strand in the bundle” rationale

A second argument often raised in favor of applying a physical takings analysis to water rights is that because water rights are usufructuary rights only, restrictions on water use effectively deprive owners of the “last strand in the bundle” of property rights in water—as opposed to restrictions on land use, which leave owners with, among others, the rights to possess and dispose of the property.\(^81\)

The principal problem with this theory of physical takings is that the Supreme Court has never endorsed it, and in fact seems to have rejected it. In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,\(^82\) Chief Justice Rehnquist, writing in dissent, would have adopted this approach in awarding compensation to landowners forbidden by state statute from mining coal under their property. Because, in his view, the regulation “does not merely inhibit one strand in the bundle, but instead destroys completely any interest” in the coal, a categorical takings rule should have applied.\(^83\) The Court, however, came to a different conclusion. It held that absent a physical appropriation of property or *Loretto*-type permanent physical occupation of part of the property, a categorical rule would not be applied even if the regulation “destroy[ed] . . . real property interests.”\(^84\) This holding is in accord with the Court’s language in

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\(^80\) *E.g.*, Seiber v. United States, 364 F.3d 1356, 1366-69 (Fed. Cir. 2004) (rejecting plaintiffs’ theory that each individual tree, which they were prohibited from cutting down in order to protect habitat of the endangered northern spotted owl, should be counted as an independent parcel of property under *Lucas*).

\(^81\) *See, e.g.*, *International Paper*, 282 U.S. at 407; *Tulare Lake*, 49 Fed. Cl. at 319 (“In 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.”); Brief of Amicus Curiae Pacific Legal Foundation in Support of Appellant Casitas Municipal Water District at 7, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153), 2007 WL 4618651 (“[B]ecause a denial of private water use terminates the only private interest, transferring it to the public, and leaving no rights in the hands of the former owner, physical taking principles should apply under the logic of *Tahoe-Sierra*.”).

\(^82\) 480 U.S. 470 (1987).

\(^83\) *Id.* at 518 (Rehnquist, C.J., dissenting) (citation omitted). In support of his argument that a regulation that destroys the last strand in a bundle of property rights should be subject to a categorical takings rule, Chief Justice Rehnquist cited *Andrus v. Allard*, 444 U.S. 51 (1979). That case, however, held only that a categorical rule would not apply where only one strand in the bundle was destroyed and other strands remained; it was silent on the question of what analysis should be used where the only strand in the bundle was destroyed. *See Allard*, 444 U.S. at 66 (“At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”)

\(^84\) *Keystone*, 480 U.S. at 489 n.19. Other courts have also applied a regulatory takings analysis to regulations that take the right to mine coal, even though the Supreme Court has held (in *Mahon* and other cases) that the right to mine is the only strand in the
Loretto, where Justice Marshall emphasized that the reason a permanent physical occupation should be subject to a categorical rule is not that it takes the last strand in the bundle of property rights, but that it “chops through the bundle, taking a slice of every strand.”

Where, by contrast, a property owner’s rights are limited from the outset by other principles of property law, the fact that a regulation takes the only remaining strand is irrelevant to the question of whether a physical or regulatory takings analysis should apply.

Applying a categorical rule to all alleged takings that deprive an owner of the last strand in her bundle of property rights would also have strange practical consequences. First, it would totally divorce the physical/regulatory takings distinction from its grounding in physical appropriation and invasion; even purely regulatory governmental actions, with no hint of any physical intrusion, could effect categorical takings under that rule. Second, perversely, the rule would afford greater protection to more limited forms of property ownership: the fewer strands in one’s bundle of property rights to begin with, the greater the risk that a particular state action will take the last strand and thus expose the government to categorical takings liability, even if that action would amount only to a potential regulatory taking of more robust forms of property ownership.

Indeed, in one of the Court of Federal Claims’s first post-Casitas water-rights takings cases, the plaintiffs alleged a physical taking of their riparian rights. The court rejected that claim on the grounds that, unlike in Casitas, the plaintiffs retained some of their rights, such as the right to build a pier or dock into navigable water. It

bundle of property interests in coal. See, e.g., Rith Energy, Inc. v. United States, 247 F.3d 1355, 1362 (Fed. Cir. 2001); M&J Coal Co. v. United States, 47 F.3d 1148, 1150 (Fed. Cir. 1995).


A related, but slightly different, claim is that a categorical rule should apply whenever a regulation takes a right “whose importance is so central to the property interest” that without it, “the other rights have little meaning because the loss is so complete.” Barton, supra note 41, at 130. But this inquiry, too, is orthogonal to the question of whether a regulatory or physical takings approach should apply. If the government restricts a “core” right, courts are more likely to award compensation under the Penn Central regulatory takings balancing test. See, e.g., Hodel v. Irving, 481 U.S. 704, 716-18 (1987) (finding a regulatory taking under Penn Central when the government restricted the right to devise property, which it deemed a critical right). A physical invasion or appropriation is still required, however, before a categorical rule applies.

Thus some commentators have noted the strange result that, under this rule, usufructuary rights in water, which are more uncertain and less absolute than property rights in land, would be subject to a greater degree of takings protection than land ownership. See, e.g., Leshy, supra note 42, at 2011; Timothy M. Mulvaney, Instream Flows and the Public Trust, 22 TUL. ENVTL. L.J. 315, 369-70 & n.295 (2009) (collecting cases declaring property rights in land to be stronger than property rights in water).


Id.
is difficult to justify a rule that produces such divergent results for an essentially identical governmental action in the riparian setting merely because the bundle of riparian water rights includes a few more strands than the bundle of appropriative rights does.

3. The “permanently gone” rationale

A somewhat more persuasive rationale for applying a categorical rule to water-rights takings concerns the physical consequences of restrictions on water use. Whereas other types of regulation—prohibiting development on part of a parcel of land, for instance, or requiring minerals to be left in the earth unmined—do not physically deprive the property owner of any property, water molecules taken by the government or left in a stream are “permanently gone,” never to be recovered by the owner.90 The argument is aided by an analogy to wartime mining cases, where the Supreme Court found a taking only when the government physically seized and operated a mine, extracting minerals from it, rather than merely ordering it to cease operations.91

Yet there are several problems with applying this theory to water-rights takings. First, a water right does not confer ownership of particular molecules of water; it confers the right to use the water.92 The fact that water rights are usufructuary does not mean they cannot be subject to a physical taking,93 but it means that the question is not whether the water molecules have been physically taken, but whether the right to use the water has been. The distinction is a logical one because water, unlike coal or land, is a perennial resource, constantly renewing itself. A molecule of water may conceivably be used several times by the same owner of water rights, depending on patterns of evaporation and precipitation. Whereas a unit of land or coal, once taken, can never be recovered by the owner, a water right confers the ability to use a particular quantity of water each year, and the fact that a reduction in water appropriation was mandated in a particular year has no lasting

90 Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1296 (Fed. Cir. 2008); see also Grant, supra note 26, at 1371-72.
91 Compare United States v. Central Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (no taking because “the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them. All that the government sought was the cessation of the consumption of mining equipment and manpower in the gold mines and the conservation of such equipment and manpower for more essential [war] uses” (citation omitted)), with United States v. Pewee Coal Co., Inc., 341 U.S. 114, 116 (1951) (finding a taking where the government required mine workers to conduct operations as agents of the government, placed placards reading “United States Property!” outside of mines, and removed coal from the mine).
92 See, e.g., Eddy v. Simpson, 3 Cal. 249, 252 (1853) (“[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.”); SAX ET AL., supra note 79, at 27, 172; Leshy, supra note 42, at 2009.
93 See infra Part II.B.1.
effect on the quantity of water available to the owner in future years. It is thus directly analogous to the development moratorium in Tahoe-Sierra and the mining moratorium in Central Eureka: all are temporary restrictions on current economic activity that do not necessarily prevent the plaintiff from resuming that activity in the future.94

This important distinction, between actual seizure of a water right and other forms of physical interference with water rights, is often overlooked by courts. In Hage, for instance, the Court of Federal Claims found a physical taking on the grounds that, by erecting a fence around a stream so that the plaintiff’s cattle could not access the water to drink, the Bureau of Land Management had physically ousted the plaintiff from access to the water.95 Yet it is clear that the right to use the water was not physically taken, because the BLM had done nothing to use the water itself or to prevent the plaintiff from using the water by other means, such as building a diversion ditch.96

A second major problem with the “permanently gone” rationale is that courts have held that the physical/regulatory distinction hinges particularly on the “character of the governmental action,” rather than its consequences.97 And, as Professor Melinda Harm Benson has argued, “it is not uncommon for regulatory actions to have physical results.”98 In Keystone, for instance, the outcome did not hinge on the possibility that the owner of the coal would be able to extract it at some point in the future; rather, the Court emphasized that no physical taking had occurred even if, from the owner’s perspective, the ability to remove the coal had been destroyed forever.99 Nor does the fact that a regulation might cause a plaintiff’s interest in a piece of property to vanish transform a regulatory takings claim into a physical takings claim. In Forest Properties v. United States, the Army Corps of Engineers denied the plaintiff’s application for a permit under § 404 of the Clean Water Act—a classic regulatory action.100 The plaintiff alleged a physical taking, on the theory that the permit denial would have the effect of physically depriving him of his property, because his deed contained a reversionary clause returning the property to the former owner, a local water district, whatever purpose for which the land could have been used during those thirty-two months ‘is forever gone.’” (quoting Casitas, 543 F.3d at 1296)).

94 See Horchem, supra note 64, at 746-47 (“One could imagine, however, that value was lost on developments, property taxes, or rental income during the thirty-two months the developers sat idle while the moratorium was in place [in Tahoe-Sierra]. Whatever purpose for which the land could have been used during those thirty-two months ‘is forever gone.’” (quoting Casitas, 543 F.3d at 1296)).
96 Joseph M. Feller, Making It: The Legend of Wayne Hage, 11th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Governmental Regulation (Nov. 6-7, 2008), at 8.
98 Benson, supra note 37, at 584.
100 177 F.3d 1360, 1363 (Fed. Cir. 1999).
if the land were not excavated and filled within a certain period of time. The court rejected that argument, concluding that the fact that a regulation might have the effect of causing a physical deprivation of property did not make a physical takings analysis appropriate.

B. Rationales for a Regulatory Takings Approach

Others have suggested a regulatory takings approach is better suited to the water rights context. It is more difficult to argue that all water-rights takings should be subject to regulatory treatment rather than a categorical rule, since Supreme Court precedent clearly indicates that a categorical rule is appropriate for at least some water-rights takings. Yet there are at least three justifications that have been offered for subjecting all water-rights takings claims to a regulatory takings analysis.

1. The “only a usufructuary right” rationale

The most widespread of these is the claim—made by, among others, the dissenting judge on the Federal Circuit panel in Casitas—that because water rights are usufructuary, nonpossessory rights, they cannot be the object of a physical taking or physical invasion, and must thus be analyzed as a regulatory taking. There are several responses to be made. First, there is no authority for the proposition that only possessory rights can be the subject of physical takings. To the contrary, the water rights at issue in International Paper, Gerlach, and Dugan were usufructuary, which did not prevent the Supreme Court from applying a categorical, physical takings rule. And there are a variety of other types of nonpossessory property interests, including easements and leaseholds, that have been the subject of physical takings. In these cases, the takings analysis proceeded no differently than it would have if it had been a possessory right in question.

Moreover, it is inaccurate to describe water rights, as some advocates of a regulatory-takings approach do, as mere usufructuary

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101 Id. at 1362.
102 Id. at 1365.
103 See, e.g., Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1298 (Fed. Cir. 2008) (Mayer, J., dissenting in part) (“[B]ecause Casitas possesses a usufructuary interest in the water and does not actually own the water molecules at issue, it is difficult to imagine how its property interest in the water could be physically invaded or occupied.”); Horchem, supra note 64, at 748 (“Here, the water district only had a right to use the water—a nonpossessory property interest—which cannot be physically occupied by a mere restriction on use.”); Parobek, supra note 42, at 213 (“[T]he regulation could not have resulted in a physical invasion because the District did not have possession of the water, but rather the mere use of it.”).
Water rights are better viewed as usufructuary rights with significant physical components: they appertain to a specific piece of land, and are valid only on that land. In nearly all states, an appropriation is valid only for off-stream consumption—no appropriation can be made for instream use. Moreover, in order for a water right to be perfected, “some element of possession or other control [of the water] is essential.” A requirement that an owner of a water right leave some of her allotment in the stream thus does not merely regulate her use of the water; it actually eliminates these physical incidents of the water right, since the water in question is no longer being put to beneficial use on the land to which it appertains and the owner is no longer exercising any physical possession or control over the water. Put simply, the owner of the water right has no legal ability to use it in the manner the regulation requires. Treating water-rights takings as no different from run-of-the-mill restrictions on property use ignores these important physical dimensions of the water right that pumping restrictions destroy.

2. The “no right to exclude” rationale

Others have emphasized that the hallmark of a physical taking or invasion is the loss of the right to exclude others from one’s property.

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105 See, e.g., Benson, supra note 37, at 584 (contending that the regulation merely “places limits on how [the water] right can be exercised to protect the common good (in this case, species protection)”).

106 See, e.g., High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120 P.3d 710, 717 (Colo. 2005) (“Because they are perfected only by actual use, appropriations of surface water and tributary ground water . . . have a situs that includes the point of diversion and the place where the actual beneficial use occurs.”); Salt Lake City v. Silver Fork Pipeline Corp., 5 P.3d 1206, 1220 (Utah 2000) (“[W]ater rights are appurtenant to land on which the water is beneficially used.”); Dermody v. City of Reno, 931 P.2d 1354, 1358 (Nev. 1997) (“[W]ater rights are appurtenant to benefited land.”); 78 A M JUR 2D Waters § 6.


109 Indeed, though there is no case law directly on point, there is a possibility that an owner of a water right subject to pumping restrictions could be found to have forfeited a right to any water the government requires to be left instream, if the regulation endures for long enough. See Sears v. Berryman, 623 P.2d 455, 459 (Idaho 1981) (forfeiture occurs “where the appropriator fails to make beneficial use of the water for a continuous five-year period”). Some courts will refuse to find forfeiture in cases where the failure to make beneficial use occurred due to circumstances over which the appropriator had no control, Jenkins v. State, Dep’t of Water Res., 647 P.2d 1256, 1262 (Idaho 1982), but others may not.

and that because users of water rights lack the right to exclude, a
categorical takings rule is inappropriate.\textsuperscript{111} This argument is at odds
with the twentieth century Supreme Court water-rights takings
precedents, which applied a categorical rule even though the right-to-
exclude analysis would have been no different.\textsuperscript{112} It is also at odds with
more recent Supreme Court doctrine, which has applied a categorical
rule to governmental takings of other non-real property interests, where
the right to exclude is no more readily evident than it is in the water
rights context.\textsuperscript{113}

More importantly, there \textit{is} a ready analogue of the right to
exclude in the water rights context: the ability of an appropriator to
enjoin junior appropriators and non-appropriators from removing water
from a river or stream if their doing so would impede her ability to
withdraw her full allotment of water.\textsuperscript{114} It is true that a water right
owner does not, until she withdraws the water from the river, have the
right to exclude others from the use of any particular molecule of
water.\textsuperscript{115} But she does have the right to exclude everyone but
appropriators senior to her from using the waters of the stream, as a
whole, in a manner that would interfere with her appropriation. She can

\textsuperscript{111} SWRCB Amicus Brief, \textit{supra} note 60, at 19-20 (“A water right holder . . . has no
right to the exclusive use of water in the stream. . . . By definition, then, a restriction on
an appropriator’s right to take and use water from the stream, as the biological opinion
did here, lacks the essential defining feature of a permanent physical occupation or
invasion: the ouster from or intrusion on a possessory interest in property which
prevents the owner from excluding others from possession and use of that property.”)
\textsuperscript{112} If anything, the right to exclude was weaker in \textit{International Paper}, \textit{Gerlach}, and
\textit{Dugan} than in \textit{Casitas}, because those cases concerned riparian rights, and owners of
riparian rights hold only a conjunctive right to beneficial use of the water to be shared
with other riparian users—in contrast with appropriative rights, which confer the right
to sole use of a specific quantity of water.
\textsuperscript{113} See, e.g., \textit{Brown v. Legal Found. of Wash.}, 538 U.S. 216, 235 (2003); \textit{Webb’s
the Court applied a categorical rule to governmental appropriations of interest earned
on funds required to be deposited in court-supervised accounts.
\textsuperscript{114} \textit{Joerger v. Pac. Gas & Elec. Co.}, 207 Cal. 8, 26 (1929) (“So far as the rights of the
prior appropriator are concerned any use which defiles or corrupts the water so as to
especially impair its priority and usefulness for the purpose for which the water was
appropriated by the prior appropriator is an invasion of his private rights for which he is
entitled to a remedy both at law and in equity.”); \textit{Barton, supra} note 41, at 132 (“[T]he
right to use, the chief characteristic of a water right, necessarily includes the right to
exclude others from using the water, similar to a landowner’s right to exclude others
from entering his property.”).
\textsuperscript{115} \textit{Palmer v. R.R. Comm’n}, 167 Cal. 163, 168 (1914) (“One may have the right to take
water from the stream, even the exclusive right to do so, but in that case he does not
have the right to a specific particle of water until he has taken it from the stream and
reduced it to possession. It then ceases to be a part of the stream.”); \textit{Parks & Canal
Mining Co. v. Hoyt}, 57 Cal. 44, 46 (1880) (“[A]lthough [an] appropriator may be
entitled to the flow of the stream undiminished, the water in the stream \textit{above his ditch}
is not his personal property. . . . The appropriator certainly does not become the owner
of the very body of the water until he has acquired control of it in conduits or
reservoirs . . . .”).
exclude upstream users by bringing suit to enjoin their use of the water, and she can exclude downstream users by diverting the water and making beneficial use of it on her land. When the government imposes restrictions on the amount she may divert, it does not affect her right to exclude upstream users; she may still bring suit against them. It does, however, deprive her of her right to exclude downstream users, for she can no longer undertake the action that prevents junior appropriators and non-appropriators downstream from using the water to which she has a priority above them. If the language from *Loretto* and *Kaiser Aetna*, suggesting that the loss of the right to exclude is the primary characteristic of a physical invasion or occupation of property, is given full effect, the loss of the right to exclude downstream users of water surely suffices to make a categorical physical takings rule appropriate even though the right to exclude upstream users is not affected.\footnote{\textit{Cf.} Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 832 (1987) (finding a loss of the right to exclude, and thus a permanent physical occupation under *Loretto*, “even though no particular individual is permitted to station himself permanently upon the premises”).}

### 3. The “obvious and undisputed” argument

A third argument for applying a regulatory takings analysis arises from a somewhat puzzling footnote in Justice Stevens’s opinion for the Court in *Tahoe-Sierra*. In distinguishing physical from regulatory takings, Justice Stevens opined that “when the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed.”\footnote{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 n.17 (2002).} In its brief before the Federal Circuit in *Casitas*, the government cited this language several times in arguing that no such physical invasion had occurred.\footnote{Brief of Appellee the United States, supra note 19, at 44-45.}

It is difficult to know precisely what Justice Stevens meant, or how that footnote can be operationalized. There are, after all, many instances in which it is not at all obvious or undisputed whether a physical or regulatory takings analysis should apply.\footnote{See, e.g., Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (applying a categorical takings rule despite a lack of consensus that such a rule was appropriate); Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1197 (Fed. Cir. 2004) (noting that it is “not so clear” whether the government effected a physical taking by seizing and destroying potentially diseased hens); Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (recognizing the difficulty in determining when the *Loretto* permanent physical invasion categorical rule should apply); see also Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U.L. Rev. 889, 937.} There are many such cases in the water rights context alone; the *Casitas* court pointed out that even in *International Paper*, *Gerlach*, and *Dugan*, it was not clear from the outset that any taking had occurred.\footnote{Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1293 (Fed. Cir. 2008).} Moreover, it is hard to
see how such a rule could be applied. Wherever the line is drawn between physical and regulatory takings, it seems inevitable that some cases will fall close to the line, and that in those cases it will not be obvious and undisputed which test should be used. Justice Stevens may have simply been endorsing the view put forth by other jurists and commentators—that categorical takings rules are normally to be disfavored, because they are “too blunt an instrument” to determine whether compensation is required. But that general principle is simply too vague to provide much guidance as to what sort of analysis should apply in any individual situation.

C. Possible Lines Distinguishing Physical and Regulatory Takings of Water Rights

Because neither a physical nor a regulatory takings approach seems to fit in all cases, the possibility of drawing a line whereby some alleged water-rights takings would be treated as physical and others would be treated as regulatory carries intuitive appeal. There are two main distinctions that have been proposed: first, between active and passive governmental activity, and second, between regulations that require water to be kept instream for environmental uses and regulations that transfer water to consumptive use by the government or by a third party.

1. The active/passive distinction

In 1990, more than a decade before Tulare Lake opened a new era in water-rights takings jurisprudence, Professor Sax perceived that “the only new water law regulation that would prima facie raise a taking problem is a release requirement: requiring existing appropriators to make releases in order to augment instream flows for public purposes such as ecosystem protection and public recreation.” Such a requirement, Sax argued, “might well be viewed as a ‘physical invasion.’” That same rationale was the one relied upon by the Federal Circuit in Casitas: because, in the court’s view, the NMFS biological opinion required Casitas to release water it had already removed from the Ventura River, “[t]he United States actively caused

122 Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001); see also Leshy, supra note 42, at 2014.
124 Id.
water to be physically diverted away from Casitas."\(^{125}\) In fact, the government urged the court to adopt such a distinction, though it apparently did not anticipate the court would determine that Casitas’s situation fell on the “active” side of the active/passive line.\(^{126}\) It was also advocated by other commentators before Casitas was decided,\(^{127}\) and has been used by courts.\(^{128}\)

The main appeal of this distinction is that it is closely tied to notions of physical appropriation: once water has been removed from a river or stream, any requirement that it be physically returned seems more akin to a seizure than to regulatory action. But there are several problems with crafting a rule along these lines. The first is that, on its own, the rule seems to be underinclusive: it describes too many cases as regulatory takings that Supreme Court precedent suggests should be subjected to a categorical takings rule. In International Paper, for instance, the government’s restriction was passive: it required user A to leave water in the stream so that user B could divert it instead.\(^{129}\) Similarly, in Gerlach and Dugan, the government did not require the plaintiffs to put water back in the stream; it prevented them from being able to make use of water in the first place—from their perspective, a passive restriction.\(^{130}\) These cases suggest that while a requirement that a water right owner release water already diverted may be sufficient to subject an alleged taking to a categorical rule, it is not necessary, since there will be cases in which a categorical rule is applied to even passive regulation.\(^{131}\) As the Court recognized in Loretto, the question of whether a physical occupation or invasion has occurred is a separate

\(^{125}\) 543 F.3d at 1294. According to the court, the government had admitted that it “did not just require that water be left in the river, but instead physically caused Casitas to divert water away from the Robles-Casitas Canal and towards the fish ladder.” Id. at 1295.

\(^{126}\) Brief of Appellee the United States, supra note 19, at 49 (arguing that in International Paper, Gerlach, and Dugan, unlike in Casitas, “the government caused water to be physically diverted away from the user.”)

\(^{127}\) See, e.g., Kauffman, supra note 42, at 870-71 (“Unlike the government’s active use of the water in International Paper, in Tulare the government passively required the water users to leave the water in the stream.”).

\(^{128}\) See, e.g., Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th 1261, 1275 (2006) (distinguishing a “passive restriction, which require[s] . . . water users to leave water in the stream” from active diversion or appropriation).

\(^{129}\) 282 U.S. 399, 405-06 (1931).


\(^{131}\) This result should not be surprising. More than forty years ago, Professor Frank Michelman noted in his seminal article on takings that “[a] physical invasion test . . . can never be more than a convenience for identifying clearly compensable occasions. It cannot justify dismissal of any occasion as clearly noncompensable.” Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165, 1228 (1967) (emphasis in original).
inquiry from the question of whether a regulation imposes affirmative duties on a property owner.\footnote{132} A second problem with the active/passive distinction is that, in practice, it is not an easy rule to administer. First, the line between active and passive restrictions will be blurry in many cases, and will require expensive and fact-intensive litigation about the nature of an appropriator’s diversion system. In \textit{Casitas}, for instance, it was not clear from the outset whether the requirement that water sent down a fish ladder should qualify as active, since the water had already been removed from the Ventura River, or passive, because of the physical proximity of the fish ladder to the river and the fact that the water ultimately returned to the river after passing through the fish ladder.\footnote{133} It will also often be difficult to determine what the appropriate temporal reference point is for characterizing a taking as active or passive; a creative government attorney will no doubt attempt to describe a release requirement as simply a retroactive pumping restriction designed to restore the passive status quo before a diversion occurred.\footnote{134} A more serious difficulty with the active/passive distinction is that the distinction is likely to prove arbitrary and meaningless in practice, and create perverse incentives for water rights owners.\footnote{135} Most owners of water rights will view pumping restrictions and release requirements as essentially equivalent: they have the same impact on economic activity, and the owner is left in the same place after each.\footnote{136}

\footnote{132} 458 U.S. 419, 436 (1982) (“[A]n occupation is qualitatively more severe than a regulation on the use of property, even a regulation that imposes affirmative duties on the owner . . . .”) (emphasis in original).


\footnote{134} The \textit{Casitas} court rejected this argument under the facts of that case, but the outcome might have been different had the Ventura River Project not been operational for so many years before the need for a fish ladder arose. \textit{Id.} at 1292 n.13 (opinion of the court) (“Contrary to the government’s assertions, the appropriate reference point in time to determine whether the United States caused a physical diversion is not before the construction of the Project but instead the status quo before the fish ladder was operational.”).

\footnote{135} See Tara L. Mueller, \textit{Background Principles of California Water Law: The Threshold of a Water-rights takings Claim}, 11th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Governmental Regulation (Nov. 6-7, 2008), at 30 (arguing that the distinction between pumping restrictions and a release requirement is “artificial” and “makes no sense and is unworkable in practice”); Brief of Amicus Curiae Natural Resources Defense Council in Support of the United States at 23 [hereinafter NRDC Amicus Brief], Casitas Mun. Water Dist. v. United States. 543 F.3d 1276 (Fed. Cir. Sept. 25, 2008) (No. 2007-5153), 2007 WL 4984848 (“It is questionable whether there is any meaningful distinction between a requirement that water be left in the river and a requirement that water be passed through a fish ladder on its way down the river.”).

\footnote{136} The same is not true in the land context; in this sense, water rights are qualitatively different. For real property interests, permanent physical occupation, but not regulation, “forever denies the owner any power to control the use of the property.” \textit{Loretto}, 458
Deciding whether to apply a categorical or regulatory takings rule based on a distinction so divorced from the substantive values underlying the special treatment of physical invasions of real property is formalism at its worst: it will result in disparate treatment of landowners in essentially the same position. It will also presumably spur property owners to develop diversion and wildlife protection systems that take water out of the river as soon as possible, in order to gain takings protection against a potential future release requirement—an incentive that is neither economically nor environmentally beneficial. Thus although drawing a line between active and passive restrictions on water use does, at first blush, seem to mirror the physical invasion rule for real property, it is not well suited to achieving the same end.

2. The consumptive use/instream flow distinction

The other primary distinction that has been proposed would apply a categorical takings rule when the government restricts water rights in order to permit itself or a third party to make consumptive use of the water, and apply a regulatory takings approach to restrictions on water rights designed to preserve water for instream use. This distinction has been widely endorsed by judges, advocates, and commentators, and is the most promising and realistic approach for treating some water-rights takings as physical and others as regulatory. Importantly, it is compatible with Supreme Court water-rights takings precedent: International Paper, Gerlach, and Dugan all were examples of the government restricting the water right of one user to transfer the water to another user. Nevertheless, the doctrinal and practical difficulties this approach would entail weigh heavily against it.

U.S. at 436. It is only in the water rights context that a physical invasion burdens the property owner no more than a use regulation.

137 See Casitas, 543 F.3d at 1300 (Mayer, J., dissenting) (“To differentiate between [active and passive governmental actions] on a deceptively simple theory of “diversion” creates a perverse system of incentives, whereby form is elevated over substance, because self-selected methods of regulatory compliance can be manipulated and negotiated to arrive at preferred Fifth Amendment results.”)

138 See, e.g., id. (“Here, the government did not invade, seize, convey or convert Casitas’ property to consumptive or proprietary use.”); Washoe County, Nev. v. United States, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (“In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use . . . .”).


140 Kauffman, supra note 42, at 871 (“In Tulare, the government did not take the water and use it for another purpose . . . .”); Leshy, supra note 42, at 208; Parobek, supra note 42, at 213.
First, the Supreme Court has made clear, outside the water context, that a regulation does not become a physical taking simply because it causes a transfer of property from one party to another. In *Yee v. City of Escondido*, the plaintiffs argued that a rent-control ordinance amounted to a physical invasion of their property by transferring wealth to renters. The Court rejected that argument, noting that many regulations, including traditional zoning practices, have the effect of transferring wealth. The rent-control setting made the transfer in the case at hand “more visible than in the ordinary case,” but the Court nonetheless insisted that “the existence of the transfer in itself does not convert regulation into physical invasion.” There is nothing to suggest that this principle is limited to rent-control ordinances, and no reason to believe that an A-to-B transfer should convert a regulatory action into a physical taking only in the water context.

There are also a variety of conceptual oddities about the consumptive use/instream flow distinction. Most obviously, the question of whether a particular governmental action would be treated as a regulatory or a physical taking would hinge on factors both temporally and spatially separated from the interaction between the government and the owner of a water right. From the owner’s perspective, that interaction is complete once the government has forced her to forego an appropriation from a river or stream; she presumably does not care, and may not even know, whether the water is used for instream purposes or for consumptive use. If, as the Supreme Court has suggested, a categorical physical takings rule is justified on the grounds that physical invasions and appropriations are more burdensome on property owners than mere regulation, then the distinction between consumptive use and instream flow would seem to make little sense. The focus in a takings inquiry is to be on the loss suffered by the property owner, and that loss is no greater when the government or a third party makes consumptive use of water taken.

Nor is it clear that the distinction can actually be administered. A single molecule of water is used numerous times, for many different purposes, during its journey in a river or stream. Water left instream to protect endangered species is likely to be consumptively used further downstream by junior appropriators; similarly, water left instream in order to permit a downstream user to make consumptive use of the water—the *International Paper* scenario—may well further instream...

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142 *Id.* at 529.
143 *Id.*
144 *Id.* at 529-30.
environmental purposes en route. If governmental restrictions on water rights serve both to augment instream flows and to facilitate consumptive use that would not otherwise have been possible, as they often will, the distinction between the two is of no use in determining what sort of takings analysis should apply.

Moreover, even in theory, the distinction between consumptive use and instream flow is rather hazy, and the trend toward permitting appropriation and acquisition of water rights for instream purposes is making the distinction hazier. Some courts have held that keeping water for instream environmental purposes qualifies as consumptive use.\textsuperscript{147} As the Federal Circuit wrote in \textit{Casitas}, in response to the government’s attempt to distinguish consumptive-use cases from instream-flow cases, “[i]f this water was not diverted for a public use, namely protection of the endangered fish, what use was it diverted for?”\textsuperscript{148} In the land context, no such distinction is drawn between consumptive and environmental purposes: if the government takes property to establish a wildlife refuge, it must pay the same compensation as if it had taken the land to erect a post office.

This is particularly true in light of the increasing use of state appropriation law to set aside water for instream flow purposes.\textsuperscript{149} California is unique in its continuing refusal to allow the government or private organizations to acquire water rights for instream purposes.\textsuperscript{150} In \textit{Casitas}, the government and its amici emphasized this point in order to argue that the government could not have taken the water in question for instream use.\textsuperscript{151} There is some irony, of course, in the government’s tactical decision to rely on an antiquated, environmentally unfriendly provision of California law in order to defend its actions on behalf of endangered trout. More to the point, though, it is a defense that can succeed only in California, and perhaps not for much longer, if the state legislature decides to adopt the approach to instream flows taken by other western states. In jurisdictions that permit the acquisition of water

\textsuperscript{147} \textit{E.g.} Rio Grande Silvery Minnow v. Keys, 469 F. Supp. 2d 973, 996 (D.N.M. 2002) (concluding that water used to benefit endangered species was being put to “beneficial consumptive use” as required by the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948).

\textsuperscript{148} \textit{Casitas Mun. Water Dist. v. United States}, 543 F.3d 1276, 1293 (Fed. Cir. 2008). Note that in \textit{Casitas}, the outcome likely did not hinge on the court’s rejection of the consumptive use/instream flow distinction: the court seemed to rely primarily on the active/passive distinction in applying a physical takings analysis. Under its rationale, even if the government had actively required Casitas to release water down the fish ladder for a non-consumptive-use purpose, a physical takings analysis would have applied anyway.

\textsuperscript{149} See Boyd, \textit{supra} note 107, at 1152.

\textsuperscript{150} SAX ET AL., \textit{supra} note 79, at 141.

\textsuperscript{151} SWRCB Amicus Brief, \textit{supra} note 60, at 22-23 (“Under state law, only Casitas legally is entitled to appropriate and take physical control of the water . . . . [T]he United States currently has no legal right to appropriate, divert, use or exercise any physical control of Ventura River water for any purpose.”).
rights to be dedicated to instream flow, the distinction between
regulatory action and physical seizure of water rights is very narrow
indeed, if perceptible at all. Why would a state governmental agency
ever pay to acquire water rights to be used to augment instream flow, if
the same result could be achieved at no cost by enacting a regulatory
statute that requires water to be left instream?

3. What makes water rights different

It is worth taking a closer look at what separates alleged takings
of water rights from takings of other forms of property—is the
physical/regulatory takings framework flawed generally, or is the water
context uniquely poorly suited to it? There is good reason to believe the
latter is true. As Professor John D. Echeverria and Julie Lurman have
noted, aside from water-rights cases, the argument that wildlife-
protection regulations should be treated as physical takings “has met
with almost complete failure in the federal and state courts.”

Yet in water cases, on the whole, the argument has been quite successful.
Intuitively, in adjudicating takings claims, judges seem to feel there is
something about water that distinguishes it from other forms of property.

A comparison of the facts underlying these cases shows
demonstrates why. Typical of the non-water wildlife regulation cases is
Boise Cascade Corp. v. United States. In Boise Cascade, the plaintiff
claimed that the federal government had effected a categorical taking of
its property by obtaining an injunction prohibiting it from logging trees
that were home to endangered northern spotted owls. It claimed that
the government had taken its right to exclude the owls and surveyors
from the Fish and Wildlife Service, which amounted to a physical
occupation subject to the Loretto rule. In rejecting this argument, the
court noted that, notwithstanding the plaintiff’s claim to the contrary, it
was easy to distinguish between the regulation at issue and a Loretto
physical occupation: the government had clearly not authorized a
physical invasion of the property, aside from sending surveyors to
monitor the owls, which the court regarded as an essentially de minimis
harm. It was impossible to mistake the government’s regulation for
seizure of the land to establish a wildlife refuge for the spotted owls,
which would unquestionably be a categorical physical taking.

152 Echeverria & Lurman, supra note 42, at 377 & n.243 (collecting non-water-rights
cases in which courts have refused to treat restrictions on development designed to
protect wildlife as physical takings).
153 296 F.3d 1339 (Fed. Cir. 2002).
154 Id. at 1341-42.
155 Id. at 1352.
156 Id. at 1354 (“Boise claims that application of Loretto is appropriate here because it
views occupation by wild spotted owls as indistinguishable from a forced government
invasion upon its land. These two situations are, however, very different.”)
157 Id.
The government has argued that water rights cases are no different. But they are, for what was clearly distinguishable in *Boise Cascade* is no longer distinguishable: the government’s action may be simultaneously *both* a regulatory restriction on use *and* a physical seizure. Modern takings jurisprudence is based upon the usually sensible idea that any particular governmental action must be either regulatory or physical, and cannot be both. In water cases, however, a landowner is unlikely to be able to tell any difference between the two, and characterizing a particular governmental action as one or the other, even if sometimes possible in theory, is likely to be impossible in a large number of cases. This also separates water rights from the mining cases cited by the government: in the mining context, there can be no mistaking a regulatory restriction for a physical seizure, and courts can easily distinguish between the two.

Even in cases concerning alleged takings of other forms of intangible property, the physical/regulatory framework makes far more sense than it does in water cases. In *Brown v. Legal Foundation of Washington*, for example, the Court applied a categorical takings rule to the practice, common to all fifty states, of requiring lawyers holding clients’ funds to place the money in interest-bearing accounts, the proceeds from which were used to fund legal services for low-income residents. Because the money in question was actually transferred to a separate account, the Court had no trouble concluding that the transfer was more akin to a physical taking than to a regulation. Likewise, when confronting alleged takings of trade secrets or intellectual property, courts can apply a categorical rule in a situation where the government makes use of the privileged information or disseminates it to a third party, while employing a *Penn Central* regulatory balancing test when it does not. Like in the land and mining cases, but unlike in water cases, it will be fairly easy to determine which analysis should be applied, because the property owner is made demonstrably worse off.

### III. Advantages of a Categorical Rule

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158 Brief of Appellee the United States, supra note 19, at 44 (citing *Boise Cascade*).
159 See supra notes 146-151 and accompanying text.
161 *E.g.* United States v. Central Eureka Mining Co., 357 U.S. 155, 165-66 (“[I]t is clear from the record that the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them.”)
163 *Id.* at 220-21.
164 *Id.* at 235.
165 See Philip Morris, Inc. v. Reilly, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring) (proposing such a distinction).
If neither a regulatory nor physical takings analysis is particularly well suited to resolving alleged water-rights takings, and if the main distinctions that might be drawn between the two present significant conceptual and practical difficulties, the fact remains that some approach—imperfect though it be—must be used in determining whether the government is to be required to pay compensation in these cases. In this Part, I offer a variety of rationales for adopting a categorical rule, requiring the government to compensate owners of water rights whenever it requires them to forego an appropriation or diversion of water that is otherwise permissible under background principles of state property law. This rule will almost certainly result in the government being held liable for more takings than it would be if finer distinctions between physical and regulatory takings of water rights could realistically be drawn. There is good reason to believe that the number of such overcompensatory cases will be limited, however, and will only arise where the government has acted outside the scope of its traditional power to protect wildlife. By contrast, the main alternative—applying a *Penn Central* regulatory takings rule in all or most cases, despite the poor doctrinal fit—is likely to be dramatically undercompensatory. The benefits of applying a categorical rule, moreover, are many.

### A. Refocusing the Inquiry on Background Principles of Property Law

Perhaps the greatest advantage of adopting a categorical takings rule in water rights cases is that the outcome of such cases would then hinge on whether the plaintiff had a property right in the first place in the

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166 The Supreme Court has been somewhat opaque in articulating what sorts of legal doctrines qualify as background principles that can defeat takings claims. Justice Scalia, it seems, would limit the category to nuisance-like common law principles. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Justice Kennedy, by contrast, would consider a wider array of law, including some statutes. *Id.* at 1035 (Kennedy, J., concurring) (“The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”). For discussion, see Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1016 (1997). More recently, in the wake of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which held that a state statute does not become such a background principle immediately upon its adoption, courts have found newly developed state law to constitute a background principle if it is “consistent with the historical role played by the sovereign” in regulating. American Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1379 (Fed. Cir. 2004); see also Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 355-58 (2005). Because all of the principles likely to be at issue in water rights cases—the beneficial use requirement, public trust doctrine, public nuisance law, and wildlife protection laws—are deeply rooted in the historical role of governments, there should be little doubt that they qualify as background principles.

167 See supra note 5 and accompanying text.
use of the water in question. 168 The inquiry into the nature of the property right is “logically antecedent” to the takings analysis, because if the use of water proposed by the plaintiff is already barred by water law principles such as the beneficial use requirement or the public trust doctrine, the government cannot be liable for taking a nonexistent property right. 169 Even if the government physically appropriates property, if the result is an outcome that could have been achieved through regulation, courts will refuse to find a taking. 170

Yet discussion of background principles of state water law has been extremely limited in the major water-rights takings cases of the past decade. The Tulare Lake court relied solely on a decision of the California State Water Resources Control Board, refusing to conduct an independent analysis; 171 the Casitas court dodged the question entirely by claiming, bizarrely, that the government had conceded the issue. 172 It seems rather odd that so central a question seems to have been almost entirely ignored by courts, but one likely explanation is that, as Professor Brian Gray has argued, federal judges are “[r]eluctant to delve into the nuances” of state water law doctrines with which they are unfamiliar. 173 When given the chance, they are apt to prefer focusing their analysis on the familiar and interesting question of whether a physical or regulatory takings test should apply. If, on the other hand, they apply a categorical rule from the outset, rendering the physical/regulatory distinction moot, they will be more likely to perform a complete and thoughtful examination of background state property law principles, since only those principles will remain at issue.

There is ample reason to believe, moreover, that those principles should determine the outcome of water-rights takings cases. First, they more accurately track the impact of a regulation on a water right owner than the physical/regulatory distinction does: the clearer it is that a regulation has deprived the owner of a right she previously held, the stronger her claim for compensation. By contrast, whether the owner of a water right is fortuitous enough to have built a diversion system resembling Casitas’s, or to have been excluded by a fence as rancher Hage was, is totally unrelated to the economic and equitable factors that should determine whether compensation is appropriate. Second, background principles provide a sort-of built-in balancing test: because

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168 Brian E. Gray, The Property Right in Water, 9 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 1, 28 (2002) (“[I]f other courts . . . apply a categorical takings standard, the determination vel non of the property right in water will be conclusive in water-rights takings cases.”).
169 Lucas, 505 U.S. at 1027.
173 Gray, supra note 168, at 9.
the beneficial use requirement and public trust doctrine, among others, already take into account a variety of relevant factors in determining the extent of water rights, a *Penn Central* regulatory takings analysis would be largely duplicative.

Third, and most significantly, the principles themselves account for the unique features of water rights. In arguing against a categorical physical takings rule, some commentators have pointed out that the qualified, uncertain nature of water rights makes them ill-suited to categorical takings treatment. Others have compared appropriators to industrial polluters, contending that they should be no more entitled to takings protection than polluters were when the Clean Water Act and other environmental statutes removed their (quite lucrative) right to pollute waterways. Still others have argued that the long history of fish protection statutes should preclude the finding of a taking in the ESA setting. At root, however, these are claims about the nature of the property right in water, and are best addressed at the background principles stage of the takings inquiry. If, in any particular case, a water right truly is limited—by nuisance law, the public trust doctrine, the beneficial use requirement, or the historical reach of fish protection statutes—in ways that permit the government regulation at issue, then the government will not be liable, categorical rule or no. If, by contrast, the particular regulation in question is not contemplated by background property law principles, and the water right thus not limited by them, then there is no reason for treating water rights as less susceptible to a categorical rule than other forms of property. In short, a focus on the nature of the property right in water will direct judicial attention to the factors that should be at the center of the inquiry, but for which the physical/regulatory distinction serves as a poor proxy in the water rights context.

**B. A Bright-Line Rule That Reduces Uncertainty**

Among the greatest shortcomings of the current doctrine is that it is all but certain to result in a good deal of costly, unpredictable, fact-intensive litigation. Whether an alleged taking is analyzed under a categorical rule or not depends on a variety of factors unique to particular cases, such as the presence of a fence around the river or the design of the diversion system. In future cases, courts may be asked to determine what rule should apply if water is used first for instream use and then consumptively, or if the government restricts water rights in one case and not the other. The lack of a clear and consistent rule leaves courts with no choice but to rely on ad hoc reasoning, which is likely to result in a good deal of litigation.

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174 See, e.g., SWRCB Amicus Brief, supra note 60, at 18 (“The qualified nature of a water right under California law make it impossible to characterize a restriction on water use as a physical taking.”); Leshy, *supra* note 42, at 2011 (applying a categorical rule to water-rights takings “would be most anomalous, because water rights are . . . much weaker and more fragile than rights in land”).

175 Sax, *supra* note 123, at 272.

176 Law Professors’ Amicus Brief, *supra* note 139, at 6-7.
river to move water to a different river for instream use. The endless variety of fact patterns that may arise in such cases is a recipe for confusion. The need to avoid this situation and adhere to a bright-line rule was one of the Court’s primary rationales for adopting the categorical rule for permanent physical occupations in *Loretto*.

Just as the *Loretto* categorical rule “avoids otherwise difficult line-drawing problems” in determining how large an occupation need be before compensation is required, so too would a categorical rule in the water context avoid the difficult problems courts have encountered in determining what sorts of regulations should qualify as physical appropriations.

This bright-line rule will further the important goal of promoting well-functioning water markets. Water markets will not operate well if water rights are uncertain, with their reliability hinging on whether a physical or regulatory takings analysis is applied—which, under the current doctrine, itself hinges on case-specific facts and circumstances that may not be predictably or consistently interpreted by courts. It is far easier for prospective buyers and sellers of water rights to understand how courts will apply background principles of state property law, which are likely to be better defined and less fact-specific than the physical/regulatory distinction has been. The critical factor is not simply whether compensation is paid in every case to owners of water rights; functioning markets exist in forms of property, like permits to graze livestock on federal land, that are not afforded takings protection. Rather, what is needed is clarity. Buyers and sellers of water rights must be able to rely on their assessment, in any given situation, as to whether compensation will or will not be paid for a given use of water, and can they adjust their valuation of the water accordingly, as with grazing permits. But they will presumably be far more reluctant to engage in water market transactions if the doctrine effectively precludes them from knowing in the first place whether compensation is likely to be paid.

**C. Promoting Principles of Federalism**

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178 *Id.*
179 See, e.g., Thompson, *supra* note 104, at 44 (“[T]he market paradigm only works with secure and definite water rights. Markets will not form if there is uncertainty about whether the government will honor the traded rights.”).
180 It is true that in some circumstances, the determination of whether a particular water use is reasonable under state law—and thus whether the owner had a vested right in that use of water—will itself be fact-dependent and uncertain. See Gray, *supra* note 168, at 13. But even in these cases, applying a categorical rule will at least remove the second layer of uncertainty, concerning which takings analysis should apply.  
181 Leshy, *supra* note 42, at 2023-24 (“Markets can and do function all over the place without property rights being stringently protected. There is an active market in permits to graze livestock on federal land, for example, even though federal law is absolutely clear that such permits carry with them no property right.”).
Another important effect of applying a categorical rule would be to promote principles of federalism by placing state property law at the center of takings jurisprudence. It would thus allow states to have a substantial say in determining how frequently compensable takings of water rights occur within their jurisdiction. In states like California that have adopted legal doctrines limiting the ability of appropriators to divert water in a manner harmful to fish, compensable takings will be relatively rare. By contrast, in states like Colorado that afford strong protection to appropriative rights even in situations where the exercise of those rights threatens to harm wildlife, more takings will occur.

Such a role for state law is in keeping with federal mandates, most notably in the Endangered Species Act and Clean Water Act, to afford deference to state law in enforcing environmental statutes. Courts have rightly refused to read these mandates as suggesting that state property law can trump federal environmental statutes. But they have cited it as evidence that the ESA was not intended to wholly displace state law or preclude deference to state administrative proceedings, and as the basis for granting standing to irrigation districts organized under state law to challenge ESA enforcement. Placing state water law at the center of water-rights takings jurisprudence would be in line with this vision of state law as playing a circumscribed but still significant role in mediating between federal environmental statutes and individual citizens. The federal government would not be precluded from enforcing the ESA, even in circumstances where doing so would interfere with state water rights. But it would mean that the federal government would have to pay compensation when it enforces the act in a manner incompatible with state water rights, thus providing

183 SWRCB Amicus Brief, supra note 60, at 4-13.
184 Hobbs, supra note 182, at 75 (collecting and discussing Colorado cases); Sandra B. Zellmer & Jessica Harder, Unbundling Property in Water, 59 ALA. L. REV. 679, 733-34 (2008) (describing Colorado as “an anomaly among Western states” in the strength of property rights it recognizes in water).
187 United States v. Glenn-Colusa Irr. Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992); see also Parobek, supra note 42, at 192 & n.118 (noting that § 1531(c)(2) of the ESA was adopted instead of a stronger provision, advocated by western water users, that would have mirrored § 101(g) of the Clean Water Act and prevented the ESA from interfering with the exercise of state water rights); A. Dan Tarlock, The Endangered Species Act and Western Water Rights, 20 LAND & WATER L. REV. 1, 19 (1985).
188 Sierra Club v. City of San Antonio, 112 F.3d 789, 797-98 (5th Cir. 1997).
states with a limited degree of influence over the frequency and ramifications of ESA enforcement within their borders.

A categorical takings rule would also promote federalism by refocusing attention on state political and administrative processes, which bear responsibility in the first instance for setting water rights. Reliance on these processes would serve both to reduce the frequency of water-rights takings litigation and to place democratically accountable state officials, who are more likely than federal judges to have expertise in water allocation, at the center of reconciling conflicts between appropriative and instream uses. For instance, one of the oddities about the Casitas case is that the SWRCB, the California agency tasked with approving and modifying applications for water rights, went to great lengths arguing, in both the Federal Circuit and Court of Federal Claims, that a regulatory takings analysis should apply and that background principles of state law barred Casitas’s takings claim. Yet the SWRCB itself could have rendered the entire case moot simply by modifying Casitas’s appropriative water permit, as it retains the legal authority to do. The SWRCB may have been reluctant, for political or administrative reasons, to take the more direct step of modifying Casitas’s permit itself, hoping federal courts would employ a regulatory takings analysis, side with the United States, and make such action unnecessary. Had it known that a categorical rule would be applied, however, the SWRCB may have sought to modify Casitas’s permit before the litigation ever commenced. In future cases, such a course of action would both steer conflicts between water users and the government toward a more appropriate forum for resolution, and, by forcing potential plaintiffs to engage with state administrative processes, provide them with an incentive to seek compensation through the political process rather than through litigation, as some commentators have advocated. If this succeeds in reconciling landowners to the goals of the ESA, it might also reduce political barriers to the listing of species and enforcement of the act.

D.  Strengthening and Developing State Water Law Doctrines

190 SWRCB Amicus Brief, supra note 60.
194 See Thompson, supra note 5, at 349-50 (noting the tendency of minimal compensation rules to foster “socially inefficient investment in political opposition” to the ESA).
Finally, by placing background principles of state law at the center of takings cases, a categorical rule would contribute to the development of that body of law. There are a wide variety of state law principles that might be relevant to water-rights takings cases. Indeed, in surveying the field of such principles in the wake of the Supreme Court’s decision in *Lucas*, Professor Sax noted that while the *Lucas* majority seemed to believe its background-principles holding would lead to more findings of compensable takings, the strength of pre-existing restrictions on water rights would likely produce the opposite result in the water context.\(^{195}\) Between the requirement of beneficial use, the public trust doctrine, state wildlife protection laws, and the Endangered Species Act itself, the government would retain a number of viable defenses to alleged takings of water rights even if a categorical rule is applied. The breadth of these doctrines provides a major explanation for the often-overlooked reality that, despite widespread predictions to the contrary,\(^ {196}\) *Tulare Lake* has given rise to only a barely noticeable trickle of successful water-rights takings claims.

A number of these doctrines, though, would benefit from further judicial development—particularly in cases where competing consumptive and environmental uses of water are explicitly considered in tandem. Commentators have long urged courts, for instance, to update and police more carefully the beneficial use requirement.\(^ {197}\) One of the main factors inhibiting doctrinal development, however, is that courts have relatively few occasions to consider the continuing reasonableness of past water allocation decisions in light of competing uses to which the water in question may be put; in a vacuum, it is difficult to pronounce any but the most blatantly wasteful uses as non-beneficial.\(^ {198}\) Courts are far more likely to vigorously police the beneficial use requirement in a factual setting in which a different use of the water is readily evident.\(^ {199}\) A water-rights takings case stemming from enforcement of the ESA is precisely such a setting. It seems largely self-evident that an agency’s determination that water is necessary to avoid placing a listed species in

\(^{195}\) 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, 945 (“Paradoxically, the majority’s rejection of evolution, change and contemporary expectations is calculated to work against the owners of water rights.”).

\(^{196}\) E.g., Kauffman, *supra* note 42, at 883.

\(^{197}\) See, e.g., Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 EnvTL. L. 27, 42 (1996) (“[W]e need to get serious about the long-standing yet ineffectual requirement that all water uses be beneficial.”).

\(^{198}\) E.g., Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 45 P.2d 972, 1007 (Cal. 1935) (holding that drowning gophers is not a beneficial use).

jeopardy should factor into courts’ determination of whether a competing use, which would threaten the species, conforms with the beneficial use requirement. Forcing courts to confront such a tradeoff directly would provide a ready avenue for this question to receive appropriate judicial treatment. Similarly, while courts have recognized that the public trust doctrine can serve as a governmental defense to takings liability, few have considered its applicability specifically as a defense to an alleged taking of appropriative water rights. Were they to do so, the result could be an invigorated public trust doctrine in states that have yet to fully embrace it. Because most courts are generally disposed to side with the government in water-rights takings cases, confronting these questions in such cases seems likely to yield more robust versions of the beneficial use and public trust doctrines.

A renewed focus on background principles is equally apt to further the development of other common law wildlife protection tools. Nuisance law might operate as a takings defense, since some states have cases holding that killing fish constitutes a public nuisance. Most of these cases concerned water pollution rather than appropriation, however, and there is little case law on the specific question of whether the noncallous exercise of a water right is a nuisance if harmful to fish. Similarly, many states, including California, have statutory and common law requirements obligating dam operators and other property owners to protect fish in the course of their activities. These laws have roots dating all the way back to the Framers. And yet these laws have been almost entirely ignored in mediating contemporary conflicts. California’s version, which provides a rather clear mandate to dam

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201 Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 985-86 (9th Cir. 2002).
203 SAX ET AL., supra note 79, at 383 (noting that courts “have been very deferential to governmental water regulation” when confronting takings claims).
205 Grant, supra note 26, at 1376. Some state courts have held that appropriators may completely dewater a stream without committing a public nuisance, which would seem likely to harm fish, but those courts did not explicitly consider the impact of appropriations on fish. See, e.g., Mettler v. Ames Realty Co., 201 P. 702, 704 (Mont. 1921); Avery v. Johnson, 109 P. 1028, 1030 (Wash. 1910).
206 Law Professors’ Amicus Brief, supra note 139, at 4.
owners to protect fish, has been the subject of virtually no litigation. If takings cases can help breathe new life into these overlooked provisions of state law, and force courts to consider their applicability to modern conditions, that would be a substantial benefit regardless of whether the government is required eventually to pay compensation or not.

Conclusion

The distinction between physical and regulatory takings is hardly a model of a clear and logical legal rule. It is, rather, a rough shortcut that generally does a decent job of determining when a compensable taking has presumptively occurred. The distinction itself carries little significance; its utility lies in its ability to track underlying factors—the nature of the governmental action in question, the burden placed upon property owners—that are significant. Water rights appear to be one form of property, however, for which the distinction is uniquely poorly suited to performing its ordinary function. Attempting to apply the distinction in the water rights context will be impossible in some cases, and in other cases will produce a doctrine that is largely incoherent, in tension with longstanding precedent, and apt to produce outcomes that hinge on ultimately irrelevant considerations.

The only practical alternatives, it seems, are second-best solutions. Courts could shoehorn all or most water-rights takings claims, even those that seem not to fit, into the regulatory takings bin, applying a Penn Central balancing test. This rule would likely be quite undercompensatory, producing very few takings, even in cases that intuitively feel analogous to compensable takings in other factual settings. Alternatively, courts could apply a categorical takings rule, as I suggest. This would be slightly overcompensatory, but more in keeping with precedent, and more logical, than applying a blanket regulatory takings rule. But perhaps more importantly, this approach would be likely to produce a sounder water-rights takings jurisprudence overall. Instead of the long list of factors to be considered in a Penn Central analysis, a water-rights takings claim should hinge above all on one overarching question: is the use of the water the plaintiff seeks to engage in already restricted by pre-existing, background limitations inherent in

208 CAL. FISH & GAME CODE § 5937 (West 2009) (“The owner of any dam shall allow sufficient water at all times to pass through a fishway . . . to keep in good condition any fish that may be planted or exist below the dam.”)

her water right? In many—likely most—cases, the answer will be yes, and the court will find no taking; in some the answer will be no, and compensation will be ordered. But more important than the outcome in any given case would be the clear message this approach would send: state water law is to be at the heart of defining when property has been taken under the Fifth Amendment, and state water law doctrines must explicitly consider the tradeoffs between competing uses of water in determining what limitations exist on the private exercise of water rights. To the extent a categorical takings rule would push Western water law down that road, it would be a healthy change indeed.