Water, Property, and the Clean Water Act

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Abstract: In PUD No. 1 of Pend Oreille County v. Department of Ecology, the Supreme Court of Washington held that Washington State has authority under the Clean Water Act to impose a minimum stream flow requirement on a hydroelectric project seeking to amend its federal license, regardless of whether the flow requirement affects an existing water right. A water right is property protected by the U.S. Constitution's prohibition on taking without just compensation. If a state's imposition of a minimum flow requirement under the Clean Water Act restrains a project from diverting the full quantity of an existing water right, the water right holder could challenge the state's action as an unconstitutional taking. This Comment argues that courts should not analyze the constitutionality of the state action under a physical invasion or exaction analysis. Instead, courts should employ a regulatory taking analysis because the state is acting in a regulatory capacity and the regulatory takings test allows for consideration of both the complex interests inherent in a water right and the high degree of control a state exercises over the right.

Water quantity affects water quality. The United States Supreme Court acknowledged this relationship in PUD No. 1 of Jefferson County v. Department of Ecology [hereinafter Elkhorn II] in 1994. In Elkhorn II, the Court held that a state has authority under the Clean Water Act to impose a minimum stream flow requirement on a hydroelectric project seeking a federal license. Eight years later, the Supreme Court of Washington examined the meaning of Elkhorn II in Department of Ecology v. PUD No. 1 of Pend Oreille County [hereinafter Sullivan Creek]. Although Elkhorn II and Sullivan Creek involve rivers on opposite sides of Washington State, the cases share similar facts. In both cases, the public utility district proposed a hydroelectric power project intended to divert water and discharge it far downstream. Both projects imperiled fish as a result of inadequate volumes of water in the bypass reach, the section of river that would be bypassed by the diversion. In both cases, Washington State, in reviewing the project under the Clean

1. PUD of Jefferson County v. Dept' of Ecology, 511 U.S. 700, 719 (1994) [hereinafter Elkhorn II]. In water law, cases concerning hydroelectric projects are traditionally named for either the body of water or the dam at issue.
2. Id.
3. Id. at 723.
4. 146 Wash. 2d 778, 51 P.3d 744 (2002) [hereinafter Sullivan Creek].
5. Elkhorn II, 511 U.S. at 708–09; Sullivan Creek, 146 Wash. 2d at 786–87, 51 P.3d at 748–49.
6. Elkhorn II, 511 U.S. at 709; Sullivan Creek, 146 Wash. 2d at 787, 51 P.3d at 749.
Water Act (CWA)\(^7\) agreed to the project on the condition that the operator limit its proposed diversion to allow enough water in the bypass reach to support fish.\(^8\) What is the difference? The public utilities district in *Elkhorn II* had not secured a right to divert water\(^9\) while the district in *Sullivan Creek* had an existing water right.\(^10\) The *Sullivan Creek* court held that the CWA does not prohibit the state from requiring the operator to maintain minimum stream flow, regardless of the effect on the applicant's existing water right.\(^11\)

If the public utility district in *Sullivan Creek* builds the power project as currently designed and meets the minimum flow requirements insisted upon by the state, the district cannot withdraw the entire year-round quantity allowed under its water right.\(^12\) Some would see this as a government attack on a valuable property right.\(^13\) Others would view it as a reasonable imposition on a user of a public resource.\(^14\) Both views raise the issue of whether Washington State can order this without invoking the Fifth Amendment requirement of government compensation for the taking of property.

This Comment argues that the determination of whether Washington State's action is constitutional must be the result of a fact-intensive regulatory taking analysis in which the holder's loss is balanced against the state's interest in promoting the general welfare. Part I describes the authority of a state to impose minimum flow requirements under the CWA and thereby affect an existing water right. Part II summarizes the relevant U.S. Supreme Court takings jurisprudence and identifies particular problems in evaluating diminution of a water right as a Fifth Amendment taking. Part III argues that if a water right holder challenges

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8. *Elkhorn II,* 511 U.S. at 709; *Sullivan Creek,* 146 Wash. 2d at 787, 51 P.3d at 749.
10. *Sullivan Creek,* 146 Wash. 2d at 784, 51 P.3d at 747.
11. Id.
12. See Petitioner's Opening Brief at 5-17, *Sullivan Creek,* 146 Wash. 2d 778, 51 P.3d 744 (2002) (No. 70272-8). The briefing for *Sullivan Creek* does not describe resulting harm to the proposed project; the author presumes the diminished diversion would reduce the hydraulic head or power generation capacity. The public utility district did not plead an unconstitutional taking at the trial court level.
this state action as an unconstitutional taking, the court should analyze it as a regulatory taking.\footnote{This Comment addresses the right to divert water from surface watercourses, but does not address groundwater diversion.}

I. STATES HAVE AUTHORITY UNDER THE CLEAN WATER ACT TO IMPOSE MINIMUM FLOW REQUIREMENTS

Congress enacted the CWA to control water pollution throughout the nation, but structured the legislation to encourage state participation.\footnote{See infra Part I.A.} A party invokes the CWA by seeking a federal permit for an activity that results in discharge to the nation's waters.\footnote{33 U.S.C. § 1341(a)(1) (2000).} The state becomes involved because the project proponent must ask the state to certify that the proposed project meets state water quality standards before a federal agency can issue the permit.\footnote{Id.} In \textit{Elkhorn II}, the U.S. Supreme Court held that a state has authority under the CWA to require minimum stream flow as a condition to certification.\footnote{Elkhorn II, 511 U.S. 700, 723 (1994).} In \textit{Sullivan Creek}, the Supreme Court of Washington held that the authority to require minimum stream flow exists even when an existing water right may be affected.\footnote{Sullivan Creek, 146 Wash. 2d 778, 784, 51 P.3d 744, 747 (Wash. 2002).}

A. \textit{The Clean Water Act Applied to Activities in States}

The CWA is a water pollution control law intended to restore and maintain the quality of national water resources.\footnote{33 U.S.C. § 1251 (2000).} The CWA's jurisdiction encompasses "the waters of the United States, including territorial seas,"\footnote{Id. § 1362(7).} otherwise known as "navigable waters."\footnote{See 33 C.F.R. § 328.3(a)(3) (2002).} Courts interpret this to include non-navigable waters, such as wetlands, when they are associated with the navigable watercourses because the water quality of navigable waters and non-navigable water are interdependent.\footnote{The U.S. Supreme Court considered the CWA's jurisdiction in \textit{Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers}, 531 U.S. 159 (2001). The Court confirmed that CWA jurisdiction over non-navigable waters associated with navigable waters is valid. See id. at 167. However, the Court held the Corps' Migratory Bird Rule (which viewed any
promotes research and planning, and provides for federal financial assistance.\textsuperscript{25}

The CWA requires the Environmental Protection Agency to establish minimum national water quality standards.\textsuperscript{26} States may establish their own standards, but only if such standards are the same or stricter than federal standards.\textsuperscript{27} In addition, the CWA requires "[a]ny applicant for a federal license or permit to conduct any activity . . . which may result in any discharge into [] navigable waters" to obtain certification from the state that the activity will meet the state's water quality standards.\textsuperscript{28} This is known as § 401 certification.\textsuperscript{29} No federal agency may issue a license without state certification or state waiver of certification authority.\textsuperscript{30}

Federal permits requiring § 401 certification cover a wide variety of projects. They include permits for point source discharges,\textsuperscript{31} discharges of dredged and fill material,\textsuperscript{32} activities affecting navigation under the Rivers and Harbors Act,\textsuperscript{33} and licenses for hydroelectric projects issued by the Federal Energy Regulatory Commission (FERC).\textsuperscript{34} A § 401 requirement to maintain minimum flow would most likely affect facilities using a water diversion such as a hydroelectric power plant or a cooling tower for an industrial facility.

A public utility district seeking to build a dam provides an example of a state's authority in the federal permitting process. First, the district must seek a license from FERC.\textsuperscript{35} FERC requires the district to obtain § 401 certification from the state because the water expelled from the watercourse used by migratory birds to be under CWA jurisdiction) impermissibly extended jurisdiction to unassociated non-navigable waters. \textit{Id.} at 174.

\textsuperscript{25} 33 U.S.C. § 1251. This Comment focuses on the CWA's function in the issuance of federal permits.
\textsuperscript{26} \textit{Id.} § 1313.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.} § 1341(a)(1).
\textsuperscript{30} 33 U.S.C. § 1341(a)(1).
\textsuperscript{31} Debra L. Donahue, \textit{The Untapped Power of Clean Water Act Section 401}, 23 ECOLOGY L.Q. 201, 219 (citing the OFFICE OF WATER, EPA, WETLANDS AND 401 CERTIFICATION—OPPORTUNITIES AND GUIDELINES FOR STATES AND ELIGIBLE INDIAN TRIBES 10 (Apr. 1989)).
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
dam is a discharge to the nation’s waters.\textsuperscript{36} Second, if dam construction results in discharge of fill into the water, the district also must seek a permit from the U.S. Army Corps of Engineers (Corps).\textsuperscript{37} Like FERC, the Corps will require the district to obtain § 401 certification from the state.\textsuperscript{38} If the state finds the project violates state water quality standards under either the FERC license or the Corps permit, then the state has the option of refusing to certify the project—in which case the federal agency would deny the permit—or certifying the project if the applicant fulfills certain conditions (such as maintaining minimum stream flow) to assure the activity meets state water quality standards.\textsuperscript{39}

B. Congressional Intent Behind the Clean Water Act

In 1994, the U.S. Supreme Court examined the authority of a state to require minimum stream flow under the CWA in \textit{Elkhorn II}. In \textit{Elkhorn II}, the Public Utility District of Jefferson County (PUD) sought to construct the Elkhorn Hydroelectric Project on the Dosewallips River\textsuperscript{40} in Washington State. As required by its application for a FERC license, the PUD sought state § 401 certification that the project met state water quality standards.\textsuperscript{41} As planned, the Elkhorn project would have diverted water from a 1.2 mile reach of the Dosewallips River and reduced water flow in the bypass reach to less than the minimum necessary to protect salmon and steelhead populations.\textsuperscript{42} The State Department of Ecology (Ecology) issued certification with the condition that the PUD maintain minimum stream flow in the bypass reach.\textsuperscript{43} When the Supreme Court of Washington upheld Ecology’s authority to apply such conditions,\textsuperscript{44} the PUD appealed to the U.S. Supreme Court.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{37} 33 U.S.C. §§ 1344(a) & 1344(d) (2000).
\item \textsuperscript{38} \textit{Id.} at § 1341(a)(1).
\item \textsuperscript{39} \textit{Id.} §§ 1341(a), 1341(d).
\item \textsuperscript{40} \textit{Elkhorn II}, 511 U.S. 700, 708–09 (1994).
\item \textsuperscript{41} \textit{Id.} at 709.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} PUD No. 1 of Jefferson County v. Dep’t of Ecology, 121 Wash. 2d 179, 189, 849 P.2d 646, 651 (1993) [hereinafter Elkhorn I].
\item \textsuperscript{45} \textit{Elkhorn II}, 511 U.S. at 710.
\end{itemize}
In Elkhorn II, the Court recognized that Congress intended states to have considerable authority under § 401 of the CWA and thus held that a state has power to require an applicant for a federal permit to maintain minimum water flow in compliance with state law as a condition of § 401 certification. The Court agreed that a minimum flow requirement is a valid water quality standard. Further, the Court held that it was reasonable for the state to find that reducing stream flow below the level necessary for sustaining fish populations would violate the state’s water quality policy.

The Elkhorn II Court rejected the notion that the CWA exempted water quantity from water quality standards. Writing for the majority, Justice O’Connor observed that the CWA “preserve[s] the authority of each State to allocate water quantity as between users; [but does] not limit the scope of water pollution control that may be imposed on users who have obtained, pursuant to state law, a water allocation.” The Court arrived at this conclusion by examining the legislative history behind the Wallop Amendment to the CWA. This provision, adopted in 1977, affirms that each state, not the federal government, has authority over water allocation. The Court determined that although Congress intended to prevent subversion of state allocation systems, it also acknowledged that effects on individual rights are permissible if such effects arise from valid concerns for water quality. Further, the Court clarified that § 401 certification does not determine the holder’s proprietary interest in the water right, it “merely determines the nature of the use to which that proprietary right may be put under the [CWA].”

46. Id. at 723.
47. Id. at 719.
48. See id. at 718–19.
49. See id. at 720.
50. Justice Stevens concurred in the result. Id. at 723. Justice Thomas wrote a dissent in which Justice Scalia joined. Id. at 724.
51. Id. at 720.
53. See Elkhorn II, 511 U.S. at 720.
55. See Elkhorn II, 511 U.S. at 721.
56. Id.
In *Elkhorn II*, the Court recognized Congress' intent that states exercise substantial authority under the CWA and thus held that a state can apply conditions to a project to protect water quality even though water allocation may be affected. After *Elkhorn II*, commentators questioned whether a state could condition a project using an existing water right because the PUD in *Elkhorn II* did not have an existing right to divert water. Further, the Court was ambiguous as to whether the fact that a new right was at issue was central to the holding. While the Court confirmed that a requirement for minimum stream flow does not correspond to a proprietary water right, the Court also stated that the PUD had yet to obtain a water right.

The Supreme Court of Washington resolved the debate for Washington State in *Sullivan Creek*. The case concerned a hydroelectric project that had been constructed in 1907, but was decommissioned in 1956. Since that time, the Public Utility District No. 1 of Pend Oreille County (the District) had operated the project under a FERC nongenerating license. This allowed the District to release water from the project's reservoir so that it could flow in the natural streambed to benefit other hydroelectric projects far downstream. In 1992, the District proposed to reestablish power generation by diverting water under the District's existing water right and sending it through a pipeline to a powerhouse approximately three miles downstream from the diversion. In the process of amending its FERC license to allow power generation, the District sought § 401 water quality certification from the state as required by the CWA. Ecology found that the project's proposed reduction of flow in the bypass reach violated the state's water quality standards because it endangered fish habitat and diminished a
significant recreation and aesthetic resource. Ecology issued the certification with the condition that the District maintain minimum stream flow in the bypass reach. Consequently, the District could not withdraw the same year-round quantity of water allowed under its existing water right. The Supreme Court of Washington granted a motion for direct review upon appeal from an administrative hearing affirming Ecology’s authority to impose the minimum flow requirement.

The Sullivan Creek court determined that federal law did not preclude Ecology from requiring the hydroelectric power project to maintain minimum stream flow, regardless of the effect on the applicant’s existing water right. Justice Madsen, writing for an eight to one majority, first declared that under Elkhorn II a state can impose a minimum stream flow requirement. The court rejected the District’s argument that Elkhorn II did not apply to the facts in Sullivan Creek because, unlike the project in Sullivan Creek, Elkhorn II concerned a project without an existing water right. The District argued that the Wallop Amendment precluded a state from imposing a condition that might affect an applicant’s existing water right. The court disproved this claim by examining the legislative history of the Wallop Amendment. The Supreme Court of Washington concluded that the Wallop amendment was a legislative compromise to limit the CWA’s jurisdictional reach, pointing to Senator Wallop’s remarks that the purpose of the amendment was to assure that the regulatory authorities used the CWA to protect water quality and not to

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68. See id.
69. Id. at 787, 51 P.3d at 748–49.
70. See Petitioner’s Opening Brief at 13, Sullivan Creek, 146 Wash. 2d 778, 51 P.3d 744 (2002) (No. 70272-8).
71. Sullivan Creek, 146 Wash. 2d at 789, 51 P.3d at 749–50. In Sullivan Creek, the Supreme Court of Washington also ruled on change in point of diversion, water right relinquishment, and water right abandonment law. Id. at 784, 51 P.3d at 747. This Comment does not address issues other than a state’s authority under the CWA.
72. Id. at 784, 51 P.3d at 747. The court also disagreed that state law prohibited Ecology from imposing minimum stream flow requirements. Id. at 818, 51 P.3d at 764.
73. Justice Sanders dissented from the majority opinion. Id. at 822, 51 P.3d at 776 (Sanders, J., dissenting).
74. Id. at 811, 51 P.3d at 761.
75. Id. at 812, 51 P.3d at 761.
76. Id.
77. Id. at 813–15, 51 P.3d at 762–63.
78. Id. at 814, 51 P.3d at 762 (citing Hobbs, Jr. & Raley, supra note 52).
assert federal control over water allocation. Based on this history, the Supreme Court of Washington reasoned that a condition imposed by the state affecting water quantity but intended to protect water quality was a legitimate state action under the CWA. Further, the court acknowledged federal court decisions reasoning that the Wallop amendment does not immunize a water right holder against legitimate water quality regulation. Thus, under Sullivan Creek, Ecology can impose minimum instream flow requirements in Washington State regardless of whether it affects an existing water right.

When Congress enacted the CWA, it intended that states be involved in the effort to control water pollution. The CWA assures state involvement by requiring that an applicant for a federal permit seek certification from the state that the proposed project meets state water quality standards. In Elkhorn II, the U.S. Supreme Court held that a state’s certification authority includes the power to require minimum stream flow. The Supreme Court of Washington held in Sullivan Creek that the state has this power regardless of whether it affects an existing water right. However, neither the U.S. Supreme Court nor the Supreme Court of Washington decided whether this is an unconstitutional taking of a property right.

II. FEDERAL TAKINGS JURISPRUDENCE AND WATER RIGHTS

When a state acting under the CWA requires an existing water right holder to maintain minimum stream flow, the state is potentially preventing the holder from withdrawing the full quantity of water allowed by the right. This gives rise to the question of whether the holder is due compensation. Most states recognize a water right as a

79. Id. (citing 123 CONG. REC. 39, 211–12 (1977) (statement of Senator Wallop)).
80. See id. at 814–16, 51 P.3d at 762–63.
81. Id. at 816–17, 51 P.3d at 763–64. The federal cases were Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) and United States v. Akers, 785 F.2d 814 (9th Cir. 1986).
82. See supra Part I.A.
85. Sullivan Creek, 146 Wash. 2d at 784, 51 P.3d at 747.
86. See id. at 787, 51 P.3d at 749.
87. See infra Part II.A.
constitutionally protected form of property.\textsuperscript{88} Federal takings jurisprudence provides guidance on how courts should analyze a water right takings challenge in the context of state action under the CWA.\textsuperscript{89} However, this guidance has limited utility because a water right is a form of property significantly different from the property considered in federal takings cases.\textsuperscript{90} Nonetheless, at least one federal court has applied federal takings law to a claim involving minimum stream flow and an existing water right.\textsuperscript{91}

\textbf{A. Federal Takings Jurisprudence}

Most states recognize a water right as a form of property deserving constitutional protection against governmental taking without just compensation.\textsuperscript{92} Sovereign governments, such as the United States and each individual state, possess the power of eminent domain,\textsuperscript{93} allowing each to take privately owned property upon payment of compensation.\textsuperscript{94} The Fifth Amendment of the U.S. Constitution guarantees just compensation when the government takes private property for public use.\textsuperscript{95} Many state constitutions have similar or more protective provisions.\textsuperscript{96} Courts construe the Fifth Amendment’s prohibition on taking to be more than just physical seizure of property.\textsuperscript{97} For example, a taking also can occur when a government’s regulatory power impairs the use or value of private property.\textsuperscript{98}

The U.S. Supreme Court recognizes three basic situations in which a governmental taking can occur. The first, known as “physical invasion”,

\begin{thebibliography}{99}
\bibitem{89} See infra Part II.A.
\bibitem{90} See infra Part II.B.
\bibitem{91} See infra Part II.C.
\bibitem{92} See supra note 88.
\bibitem{93} \textsc{John E. Nowak & Ronald D. Rotunda,} \textit{Constitutional Law,} § 11.10 at 468–71 (6th ed. 2000).
\bibitem{94} Id.
\bibitem{95} U.S. CONST. amend. V.
\bibitem{97} NOWAK \& ROTUNDA, supra note 93, § 11.12 at 472.
\bibitem{98} Id.
\end{thebibliography}
occurs when the government physically occupies private property.\textsuperscript{99} The second, known as “exaction,” occurs when the government demands private property for public use in exchange for the grant of a development permit.\textsuperscript{100} Finally, the Court has recognized “regulatory takings” in which the government neither occupies private property nor exacts it for public uses, but instead regulates the property in a way that diminishes its value.\textsuperscript{101}

A physical invasion results in a compensable taking to the extent of the government’s occupation of the property, regardless of whether the occupation serves the public interest or causes only minor economic harm to the property owner.\textsuperscript{102} Thus, a determination of physical invasion results in a per se taking, affording a very high level of protection to a property interest. The U.S. Supreme Court enunciated the rule of physical invasion in \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{103} where the government compelled property owners to allow cable television equipment to be installed on their building.\textsuperscript{104} Although the government was not physically present on the private property, the Court characterized the government action as occupation\textsuperscript{105} and held that the owners had suffered a taking of property for which compensation was due.\textsuperscript{106}

In contrast, when a government requires a property owner to dedicate private property for public use in exchange for development approvals—an exaction—the fact that the government action can be characterized as occupation does not result in an unconstitutional per se taking.\textsuperscript{107} Instead, the determination of whether the government has caused a compensable taking depends on the outcome of two tests.\textsuperscript{108} The first test asks whether there is a “nexus” or relationship between the interests a government is seeking to advance and the condition exacted by the government.\textsuperscript{109} If

\begin{itemize}
\item \textsuperscript{99} \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 435 n.12 (1982) (emphasis omitted).
\item \textsuperscript{100} \textit{See City of Monterey v. Del Monte Dunes, Ltd.}, 526 U.S. 687, 702 (1999).
\item \textsuperscript{102} \textit{Loretto}, 458 U.S. at 434–35.
\item \textsuperscript{103} 458 U.S. 419 (1982).
\item \textsuperscript{104} \textit{Id.} at 438.
\item \textsuperscript{105} \textit{See id.} at 438–39.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{See Dolan v. City of Tigard}, 512 U.S. 374, 386 (1994).
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 386 (citing \textit{Nollan v. Cal. Coastal Comm’n}, 483 U.S. 825, 837 (1987)).
\end{itemize}
there is no nexus, then the government has unconstitutionally taken property. If there is a nexus, the second, "rough proportionality", test evaluates whether the nature and extent of the exaction is proportionate to the impact created by the proposed development. If the dedication of private property appears to be roughly proportionate to the impact created by the proposed development, then the government’s action is not an unconstitutional taking.

The exaction doctrine recognizes that the government has a legitimate interest in regulating land use through its development approval process. Nonetheless, the doctrine also recognizes that a landowner should not be forced to give up property without compensation when a proposed development does not cause the impact the government is seeking to mitigate. In *Dolan v. City of Tigard*, the U.S. Supreme Court considered whether an unconstitutional taking occurred when a city exacted a portion of a business owner’s property for a bicycle trail when the owner applied for a permit to expand her business. The Court determined that a nexus existed because there was a relationship between the city’s interest in reducing traffic congestion and the proposed bicycle trail. However, the city failed to satisfy the rough proportionality test because it did not show how enlarging the business would generate additional traffic necessitating the trail. Accordingly, the Court reversed the Supreme Court of Oregon’s decision that the city’s act was valid and remanded the case for further proceedings. Subsequently, the U.S. Supreme Court suggested that the exaction doctrine’s rough proportionality test might be confined to circumstances where land use approvals are conditioned on the dedication of private land to public use.

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110. *Id.*
111. *Id.* at 391.
112. *Id.* at 395. The Court required no "precise mathematical calculation," only some level of quantification. *Id.*
113. *Id.* at 384–85.
114. *Id.* at 385.
116. *Id.* at 377.
117. *Id.* at 395.
118. *Id.*
119. *Id.* at 396.
120. City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 702–03 (1999) (refusing to extend the rough proportionality test to a circumstance where a city had repeatedly denied a permit).
The third circumstance in which a property owner may claim a compensable taking is when the taking is alleged to result from government regulation. In this circumstance, compensation may be due depending on whether the regulation deprives the owner of all economic value, and if not, on a balancing of factors such as the economic hardship and the character of the government action. The regulatory takings doctrine recognizes government authority to enforce regulations advancing legitimate state interests such as the protection of health, safety, and general welfare, and the enhancement of quality of life. A regulation may substantially diminish the value of a property without resulting in a compensable taking. However, if a regulation deprives the property owner of all economic use of the property, it is a per se taking requiring compensation.

In Lucas v. South Carolina Coastal Council, the Court considered whether a state caused a compensable taking when it imposed regulations limiting development on two seashore properties. The Court reasoned that property owners expect new regulations to restrict property uses, but eliminating all economically valuable use is inconsistent with the Fifth Amendment. The Court reasoned that a total loss of economic value is constitutional only when background principles of state law present when the owner took title to the property would have allowed it. The Court accepted the trial court’s finding that newly imposed regulations rendered the seashore properties valueless and remanded the case to determine if background principles of nuisance and property law would have reached the same result.

125. See id. at 131 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value) and Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% reduction in value)).
126. See Lucas, 505 U.S. at 1015.
127. Id. at 1003.
128. Id. at 1007.
129. See id. at 1027–28.
130. See id. at 1029 (providing the example of a lakebed owner who would be prohibited from filling if the effect is to flood the land of others).
131. Id. at 1009.
132. See id. at 1031–32.
Subsequently, in *Palazzolo v. Rhode Island*, the Court made clear that showing that a regulation existed at the time an owner acquires property does not bar the owner from bringing a takings challenge; a court must still examine the reasonableness, and thus the constitutionality, of the regulation. In *Palazzolo*, the Court held that a state prohibition on filling wetlands was not a per se taking because Palazzolo, a residential landowner, retained some economic value in an entire parcel. However, the Court remanded the case for further consideration, noting that even where a regulation does not result in a complete taking, a court must analyze government action to determine if an unconstitutional taking has nonetheless occurred.

The Court recently considered a regulatory takings challenge in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. In *Tahoe-Sierra*, the Court addressed whether a development moratorium constituted a per se taking. Before deciding that it did not, the Court summarized several aspects of its takings jurisprudence. Justice Stevens, writing for the majority, characterized a physical taking as a "rare, easily identified" circumstance in which the government seizes property for its own use. In contrast, a regulatory takings challenge results from a government program intended to benefit the "common good." The Court emphasized that the property as a whole must be considered and discouraged isolating discrete rights in property for purposes of a takings analysis; the "destruction of one strand" in a "bundle of property rights" does not constitute a taking. In addition, the Court confirmed its preference for "ad hoc, factual

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134. *Id.* at 629–30.
135. *Id.* at 630.
136. *Id.* at 632.
137. 122 S. Ct. 1465 (2002).
138. *Id.* at 1470.
139. *Id.* at 1486.
140. Six justices joined in the majority. *Id.* at 1470. Chief Justice Rehnquist wrote a dissent in which Justices Thomas and Scalia joined. *Id.* Justice Thomas also filed a dissenting opinion in which Justice Scalia joined. *Id.*
141. *Id.* at 1479–80.
142. *Id.* at 1480.
143. *Id.* at 1481.
144. *Id.* (citing Andrus v. Allard, 444 U.S. 51, 65–66 (1979) (internal quotations omitted)).
inquiries” as opposed to the adoption of per se rules where partial regulatory takings are at issue.\textsuperscript{145}

In both Tahoe-Sierra\textsuperscript{146} and Palazzolo,\textsuperscript{147} the Court indicated that when a regulation does not result in a complete taking, courts should analyze a takings challenge by balancing a number of factors first described in Penn Central Transportation Co. v. New York City.\textsuperscript{148} In Penn Central, New York City’s landmark preservation ordinance prevented developers from constructing an office tower above a train station.\textsuperscript{149} The developers claimed that the regulation deprived them of their property interest in the air space above their building.\textsuperscript{150} The Court held that New York had not effected an unconstitutional taking.\textsuperscript{151} The Court arrived at this conclusion by balancing (1) the economic impact on the property owner; (2) the extent of the regulation’s interference with “distinct investment-backed expectation,” and (3) “the character of the governmental action.”\textsuperscript{152} To clarify the last factor, Justice Brennan, writing for the majority,\textsuperscript{153} noted that an unconstitutional taking “may more readily be found when the [government’s] interference with property can be characterized as a physical invasion... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”\textsuperscript{154} The Court’s analysis stressed that the government has the authority to employ “laws or programs that adversely affect recognized economic values” in order to promote the government’s legitimate interest in the public’s welfare.\textsuperscript{155} Although the Penn Central landowner claimed a multimillion dollar loss,\textsuperscript{156} the Court reasoned that the regulation was valid because it promoted general welfare and gave the landowner reasonable use of the

\begin{footnotesize}
\begin{enumerate}
\item Id. (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)).
\item See id. at 1481, 1483–84.
\item 438 U.S. 104 (1978).
\item Id. at 115–17.
\item Id. at 130.
\item Id. at 138.
\item Id. at 124.
\item Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice Stevens joined. Id. at 106.
\item Id. at 124.
\item Id. at 124–25.
\item Id. at 147 (Rehnquist, J., dissenting).
\end{enumerate}
\end{footnotesize}
Thus, the Court held that the preservation ordinance did not effect a regulatory taking.

B. The Difficulty of Applying Federal Takings Jurisprudence to a Water Right

The primary difficulty in applying federal takings jurisprudence to a water right is that the right does not fit neatly among the other forms of property considered by courts in the taking cases. This creates a challenge because courts find more or less protection depending on the type of property, the degree of control traditionally exerted over the property, and whether the government is occupying or regulating the property. The last factor is particularly important because courts afford the greatest level of protection where the government permanently and physically occupies property. Physical invasion, no matter how little space is occupied, is per se taking requiring compensation. In contrast, if the takings challenge arises from government regulation, courts may not find an unconstitutional taking even though the government action significantly reduces the value of the property. Commentators considering takings jurisprudence in the context of water rights usually assume that courts will apply a regulatory taking analysis; but those who have suggested a physical invasion analysis admit doubt about its

157. Id. at 138.
163. Lucas, 505 U.S. at 1015 (describing how the physical invasion in Loretto occupied only 1.5 cubic feet of property). Exactions are an exception to the per se rule when the government occupies the property. See supra notes 108–19 and accompanying text.
164. See supra note 125.
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applicability. The correct analysis is unclear given the unique characteristics of a water right.

First, a water right is a usufructuary right, meaning that the holder does not own the water but possesses the right to use it. The water belongs to the public or to the state. The public’s ownership of the water may be subject to appropriation or the state may have a paramount right to use waters for a public purpose. However, an appropriation is still subject to the public interest in the water. For example, once water is withdrawn from the watercourse and flows in a private irrigation ditch, it becomes personal property in some states. Nonetheless, the right holder can use the water only once and then must return unconsumed portions to the public and other appropriators.

Second, a water right is unique because of the extent its entitlements and duties vary from state to state. The United States has two primary legal regimes for allocating water rights. The first is riparianism, in which the right to use water attaches to the land next to a watercourse.


166. 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN NINETEEN WESTERN STATES 151 (1971).


168. Anderson, supra note 167, at 12-48–12-55. As used here, appropriation is the term for the claim an individual may legitimately make to withdraw water in order to apply it to a beneficial use.


171. See 1 GEORGE Vранеш, COLORADO WATER LAW § 3.1, at 121 (1987).

172. Id.

173. Beck, supra note 170, at 4-1. Many states have adopted permit systems.

174. 78 AM. JUR. 2D Waters § 49 (2002). “Riparian rights” includes such activities as building wharves and swimming in water. Joseph W. Dellapenna, Introduction to Riparian Rights, in 1 WATERS AND WATER RIGHTS § 6.01(a), at 6-3–6-4 (Robert E. Beck ed., 2001). This Comment’s reference to riparian rights is limited to consumptive use.
The second is prior appropriation, which allows for water to be severed from the land so it can be used at a great distance from the watercourse. The “prior” in prior appropriation comes from the fact that earlier established rights are “senior” and later established rights are “junior.” In times of drought, junior rights give way to senior rights. Twenty-nine states have riparian systems and all of them are in the eastern United States. Nine states have prior appropriation systems and the remaining twelve states use hybrid systems.

A third distinctive characteristic of a water right is that it is not a precise amount of water, but a bundle of entitlements and duties. Under riparianism, a riparian landowner may divert water for some, but not all, consumptive uses. The riparian landowner’s use must be “reasonable,” meaning that it does not unreasonably interfere with another riparian landowner’s water use. In contrast, under prior appropriation, a water right holder’s essential entitlements are the priority of the right relative to others, and the right to apply water to a particular “beneficial use.” Beneficial use, rather than water quantity, is “the basis, the measure and the limit of the right to the use of water.” If an appropriator does not use the entire amount of the water right to achieve the beneficial use for which the water was appropriated, then the appropriator must make the excess water available for appropriation by

177. Id.
179. Id. at 7. (Ala., Ariz., Colo., Idaho, Mont., Nev., N.M., Utah, and Wyo.).
180. In hybrid states, state law recognizes both, or parts of both, the prior appropriation and riparian systems. Id. at 8 (Cal., Kan., Miss., Neb., N.D., Okla., Or., S.D., Tex., Wash.). Louisiana and Hawaii each have unique systems based on laws established before each state’s entry into the United States. Id.
181. See Dellapenna, supra note 174, at §§ 6-1-6-2; HUTCHINS, supra note 166, at 8-19.
182. See Dellapenna, supra note 174, at § 6.01(a)(4), at 6-49-6-50.
185. Laitos, supra note 158, at 906-07; VRANESH, supra note 171, § 3.1, at 121; HUTCHINS, supra note 166, at 9.
186. N. M. CONST. art. XVI, § 3; HUTCHINS, supra note 166, at 9; Bell & Johnson, supra note 88, at 5.
The concept of beneficial use ensures that appropriators use the public resource to its maximum potential. Thus, no one can "waste" the water.

Finally, all states exercise a high degree of control over water rights without implicating a compensable taking. For example, all states control the transfer of a water right to some extent. Some riparian states allow riparians to convey rights away from riparian lands while others do not. In contrast, prior appropriation states allow a water right to be sold separately from land, unless the transfer causes harm to another right. Further, some states expressly prohibit the transfer of a water right if it harms the public interest. Riparian rights are correlative; consequently, the amount used by one riparian may shrink or grow relative to the amounts used by other riparians. In some circumstances, a prior appropriation state may reduce the quantity of a right if it finds that a right holder has not been using the water or has "wasted" the water.

Thus, a water right is a form of property that is distinctively different from land or personal property usually considered in federal takings jurisprudence. The holder does not possess the water, only the right to use it. A water right is not a precise measure of water but a bundle of

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187. See Laitos, supra note 158, at 907-08; VRANESH, supra note 171, § 3.2 at 154; Bell & Johnson, supra note 88, at 5 (referring to the use-it-or-lose-it principle).
188. See supra note 187.
189. Lock, supra note 158, at 86 (citing A-B Cattle Co. v. United States, 589 P.2d 57, 61 (Colo. 1978)).
191. Dellapenna, supra note 184, §§ 7.04 at 7-90 & 7.04(a)(3) at 7-97–7-98.
192. Lock, supra note 158, at 82 (citing SAMUEL C. WIEL, 1 WATER RIGHTS IN WESTERN STATES § 277, at 303–04 (3d ed. 1911)).
195. Dellapenna, supra note 182, at § 6.01(a)(4)–6-50.
196. An example of such a circumstance is an adjudication, "a special form of quiet title action to determine all existing rights to the use of water from a specific body of water." Dep't of Ecology v. Grimes, 121 Wash. 2d 459, 466, 852 P.2d 1044, 1048 (1993).
197. See id. at 471–72.
198. See Thompson, supra note 158, at 48; Laitos, supra note 158, at 922; Sax, supra note 14, at 260–61; Lock, supra note 158, at 79 (2000).
199. See HUTCHINS, supra note 166.
entitlements and duties, which varies greatly from state to state. In many circumstances, the state can affect a water right without violating the Fifth Amendment prohibition on taking without compensation. The characteristics of the property interest in a water right make application of federal takings jurisprudence difficult in water rights cases.

C. Judicial Application of Takings Jurisprudence in the Context of Minimum Stream Flow and Water Rights

At least one court has found a physical taking in a matter concerning minimum stream flow and water rights. In *Tulare Lake Basin Water Storage District v. United States*, the United States Court of Federal Claims found a physical invasion when the U.S. Bureau of Reclamation (BOR) withheld a portion of water that it had contracted to supply to water service districts. The BOR had not delivered the entire amount because low instream water volumes threatened endangered fish species. Although the court did not question the State of California’s authority to alter the water rights at issue, it concluded that the federal government could not justify its refusal to deliver the entire amount because the state had not reduced the quantity allowed under the water rights. Reasoning that the BOR had displaced the contract holder, the court characterized the government’s action as a physical intrusion.

The Court of Federal Claims based its finding that a physical invasion analysis is appropriate to apply to a water right on three cases. First, the court compared the case to *United States v. Causby* where the U.S. Supreme Court found a compensable taking had occurred when low flying military planes occupied the air space above a chicken farm, depriving the private property owners of the use and enjoyment of their

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200. See supra notes 182–89 and accompanying text.
201. See supra notes 173–80 and accompanying text.
202. See supra notes 191–97 and accompanying text.
204. Id. at 318–19.
205. Id. at 316.
206. Id. at 315.
207. Id. at 324.
208. Id. The U.S. Bureau of Reclamation (BOR) was acting in response to the Endangered Species Act. Id. at 315.
209. Id. at 319.
210. Id.
211. 328 U.S. 256 (1946).
The court in *Tulare Lake Basin* found that the BOR’s act of withholding water mirrored *Causby’s* circumstances because the BOR had eliminated the water districts’ use and enjoyment of the amount of water withheld in order to preserve endangered fish.213

Further, the Court of Federal Claims analogized the facts of *Tulare Lake Basin* to *International Paper Co. v. United States*,214 a case where the government requisitioned all the power a New York power company could generate during World War I.215 To increase the power company’s capacity, the government directed the power company to use all the water from its power canal, thus cutting off water the power company leased to *International Paper*.216 The U.S. Supreme Court held that this was a governmental taking of the amount of leased water.217 The Court recognized that the property taken was *International Paper’s* “right . . . to the use of water.”218 The *Tulare Lake Basin* court viewed this as a confirmation of its characterization of a water right as property subject to a physical invasion analysis.219

The third case, *Dugan v. Rank*,220 was a complex injunction suit filed in 1947 to prevent construction of the Friant Dam.221 Prior to building the dam, the property owners refused to sell their rights to the government.222 Once built, the dam impounded water that would have been delivered to the landowners but went instead to Central Valley irrigation districts.223 The district court held that Congress had not authorized the federal government to seize water rights, but to acquire such rights exclusively through judicial proceedings.224 The U.S. Supreme Court disagreed, holding that the government had the power to “to acquire the water rights of respondents by physical seizure.”225 However, the Court emphasized

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212. *Id.* at 266.
215. *Id.* at 405.
216. *Id.* at 405–06.
217. *Id.* at 408.
218. *Id.* at 407.
221. *Id.* at 610.
222. *Id.* at 613–14.
223. *Id.* at 612–13.
224. See *id.* at 616.
225. *Id.* at 619.
that the government intended to purchase the water rights and ultimately held that the property owners were due damages resulting from the otherwise valid seizure of water rights.

The *Tulare Lake Basin* court found three factors in *Dugan* to support an application of a physical invasion takings analysis to water rights. First, in *Dugan*, the U.S. Supreme Court referred to the method the government used to acquire water rights as “physical seizure.” Second, when the Court clarified that a physical invasion of land was not necessary to claim a taking, the Court observed that a seizure of a water right can be “analogized to interference or partial taking of air space over land.” Finally, the Court held that the government effected a compensable taking when it seized water rights rather than compensating the deprived landowners. Thus, the *Tulare Lake Basin* court held that a physical invasion analysis is the appropriate test in a water rights takings challenge.

A question of unconstitutional takings arises when state action restrains a water right holder from withdrawing the entire quantity allowed under a right. Federal takings tests for physical intrusion, exaction or regulatory taking can inform a court considering a takings challenge under the CWA. Determining which test is appropriate in a water rights case is complicated by the fact that a water right is a form of property distinctly different from the exclusively owned private property usually considered in takings jurisprudence. However, one federal court has applied physical intrusion analysis to a claim resulting from the effect of a minimum stream flow requirement on existing water rights.

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226. *Id.* at 623.
227. *See id.* at 624.
229. *Id.* (citing *Dugan v. Rank*, 372 U.S. 609, 625 (1963)).
230. *Id.*
231. *See supra* note 88 and accompanying text.
232. *See supra* Part II.A.
233. *See supra* Part II B.
234. *See supra* Part II.C.
III. COURTS SHOULD ANALYZE A TAKINGS CHALLENGE TO STATE ACTION IMPOSING MINIMUM FLOW REQUIREMENTS UNDER THE CLEAN WATER ACT AS A REGULATORY TAKING

Courts recognize that a water right is property protected against unconstitutional governmental taking. A state action under the CWA that prevents a water right holder from withdrawing the full measure of a water right gives rise to a takings challenge. Courts should not analyze this state action under the physical intrusion analysis because the state is not seizing the water right and the complex nature of a water right is not suited to an inflexible, per se analysis. Further, a court should not analyze the takings challenge as an exaction because the analysis is inconsistent with the nature of the government action and, more importantly, it could yield an unfair result. Instead, a court should use the regulatory takings analysis because it is appropriate to the nature of a water right, consistent with the type of government action, and most likely to reach a fair conclusion.

A. The Physical Invasion Analysis is Inappropriate to a Water Rights Takings Challenge Under the Clean Water Act

A court should not analyze a water right taking challenge under the CWA as a physical invasion. Despite the finding of the Court of Federal Claims in Tulare Lake Basin, a water right is not a suitable subject for an analysis in which the slightest diminution results in a per se compensable taking. The physical invasion analysis is inappropriate because it is inconsistent with both the legal nature of a water right and the character of the state action. Further, the cases on which the Tulare Lake Basin court bases its conclusion do not apply when a state imposes minimum flow requirements under the CWA.

235. See supra note 88 and accompanying text.
236. See supra Part II.A.
237. See infra Part III.A.
238. See infra Part III.B.
239. See infra Part III.C.
241. See infra Part III.A.1.
1. A Physical Invasion Analysis is Contrary to the Nature of a Water Right and the Character of the State Action

The Tulare Lake Basin court’s finding that a physical invasion analysis is appropriate to a water right 243 contravenes the legal nature of a water right in three ways. First, the water right holder does not have exclusive interest in the water. 244 Water in a natural watercourse is the property of the public or the state. 245 Even after water is diverted, it is subject to the interests of others in both riparian 246 and prior appropriation 247 systems. In any system, a water right holder does not own the water; but possesses only the right to use it. 248 The quantity diverted by a riparian landowner may be reduced if the diversion unreasonably prevents fellow riparian landowners from asserting their rights. 249 In prior appropriation states, a water right holder is obligated to use water efficiently, 250 apply it only once to the beneficial use for which it was granted, and then return the unused portions to the public. 251 The shared interests inherent in a water right make it a substantially different type of property from the land in Lucas, 252 the specified amount of water agreed to by private parties in International Paper, 253 and the contracted amount of water in Tulare Lake Basin. 254

Second, unlike ownership in land, the entitlements attaching to a water right vary significantly from state to state. 255 A takings rule adopted in one state may not be correct under another state’s law. This supports the

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244. See supra Part II.B.
245. See Hutchins, supra note 166, at 5-6; Anderson, supra note 167, at 12-48-12-55.
246. See Dellapenna, supra note 174, at 6-49-6-50; Harris v. Brooks, 283 S.W.2d 129, 133-34 (Ark. 1955); 78 Am. Jur. 2nd Waters § 49 (2002); Dellapenna, supra note 184, at 7-47.
247. See Vranesh, supra note 171 § 3.1, at 121; Getches, supra note 176, at 101; Laitos, supra note 158, at 907-08; Vranesh, supra note 171 § 3.2, at 154; Bell & Johnson, supra note 88, at 5; Dep’t of Ecology v. Grimes, 121 Wash. 2d 459, 466, 852 P.2d 1044, 1048 (1993).
248. See Hutchins, supra note 166, at 151.
249. Harris v. Brooks, 283 S.W.2d 129, 133-34 (Ark. 1955); 78 Am. Jur. 2d Waters § 49 (2002); Dellapenna, supra note 184, at 7-47.
251. Vranesh, supra note 171, at 121.
255. See Beck, supra note 170, at 4-1; 78 Am. Jur. 2d Waters § 49 (2002); Bell & Johnson, supra note 88, at 6; Getches, supra note 176, at 5-8.
conclusion that an inflexible, per se taking rule is inappropriate to a water right. Further, avoiding a per se rule is consistent with the U.S. Supreme Court's opinion in *Tahoe-Sierra* which expressed a preference for "ad hoc, factual inquiries" rather than per se rules.\(^{256}\)

Third, a water right is not a right to a certain quantity of water alone; it is a collection of entitlements and duties.\(^{257}\) In riparian states, water rights are correlative; the quantity diverted by a riparian landowner can be reduced if the use unreasonably infringes on the rights of other riparian landowners to divert water.\(^{258}\) In prior appropriation states, the fundamental entitlements of a water right are (1) the right to priority of use relative to others and (2) the right to apply water to a beneficial use, which is limited by the maximum quantity of water that may be diverted under the right.\(^{259}\) If a right holder can accomplish the same beneficial use with less water than the maximum amount allowed by a right, then the excess water must be made available for other uses.\(^{260}\) In other words, in either system, a water right is not altered in its entirety by a lesser quantity of water. As the Court reiterated in *Tahoe-Sierra*, affecting one stick in a bundle of rights does not constitute a per se taking.\(^{261}\) Thus, the government does not cause a per se compensable taking when a water quality regulation prevents diversion of the full amount of a water right.\(^{262}\)

2. *The Tulare Lake Basin Court Incorrectly Applied Precedent*

Further, the three cases on which *Tulare Lake Basin* is based are distinguishable from circumstances where a government, acting in its regulatory capacity, imposes minimum flow requirements on the use of

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257. *See Dellapenna*, supra note 174, at 6-1–6-2; *Hutchins*, supra note 166, at 8–19.

258. Harris v. Brooks, 283 S.W.2d 129, 133–34 (Ark. 1955); 78 AM. JUR. 2D Waters § 49 (2002); *Dellapenna*, supra note 184, at 7-47.

259. Laitos, supra note 158, at 906–07.

260. *See id.* at 907–08; *Vranesh*, supra note 171, § 3.2 at 154; Bell & Johnson, supra note 88.


262. A state legislature could redefine a water right as a purely quantified amount without the elements of beneficial or reasonable use, but would risk increasing a state's potential liability in managing water. States could incur substantial costs if every holder could claim a per se taking whenever water is inadvertently withheld or unavailable for reasons other than those expressly stated in the law.
an existing water right. In the first case, *United States v. Causby*, the Court found a compensable taking when military planes occupied a portion of private property—the air space above the land—and by doing so deprived the owners of the use and enjoyment of their land. However, government action affecting air space is not a per se physical intrusion; courts can analyze the effect of government action on air space as a regulatory taking.

In contrast to *Causby*, the government is not occupying a portion of a water holder's property when it imposes minimum flow requirements; it is merely regulating how the holder may use the property. The full measure of the right remains available to the holder to use in a manner that does not create the condition that the government is seeking to mitigate by imposing the minimum flow requirement. For example, a holder could redesign a project to reduce the length of the bypass reach and thereby eliminate water quality concerns. Also, unlike the airplanes in *Causby* that affected a portion of the property beyond that actually occupied by the airplanes, minimum flow requirements does not deprive a right holder of the use and enjoyment of the entirety of a water right. The quantity allowed under a water right is only one stick in the bundle of entitlements inhering in the right. Therefore, a physical intrusion analysis would be inconsistent with *Tahoe-Sierra*, where the Court emphasized that the government does not create a per se taking when it affects one stick in a bundle of rights.

Further, the *Tulare Lake Basin* court's reliance on *International Paper* is misplaced. *International Paper* concerned not water rights, but a contract between private parties that created a right to a certain amount of leased water. State water law, not a contract, creates a holder's property interest in a water right. Under state law, the maximum

263. 328 U.S. 256 (1946).
264. Id. at 266.
265. See id.
267. See id.
268. See United States v. Causby, 328 U.S. 256, 266 (1946).
269. See Dellapenna, supra note 174, at 6-1-6-2; HUTCHINS, supra note 166, at 8-19.
271. Tulare Lake Basin, 49 Fed. Cl. at 319.
273. See Beck, supra note 170, at 4-1; 78 AM. JUR. 2D Waters § 49 (2002); Bell & Johnson, supra note 88, at 6; GETCHES, supra note 176, at 5-8.
amount of water that a holder may divert under the right is but one 
element in that bundle of rights and duties. Further, state law allows 
for considerable control over a water right without resulting in a 
compensable taking.

Finally, the *Tulare Lake Basin* court misunderstood the U.S. Supreme 
Court's language in *Dugan*. The *Tulare Lake Basin* court correctly 
observed that the *Dugan* Court referred to the taking of water rights as a 
physical seizure, comparing it to interference with air space. However, 
the Court used the term "physical seizure" to describe taking a right 
without consent as compared to acquiring the right through an eminent 
domain proceeding. The Court used the air space analogy to explain 
that a physical invasion of land is not necessary for a taking to have 
occurred. It did not use the air space analogy to hold that government 
action affecting a water right is a per se taking. Further, the key issue in 
*Dugan* was that the Central Valley project took water from water rights 
claimants and gave equivalent rights to others. In contrast, when a state 
exercises its § 401 certification authority to impose minimum flow 
requirements, it is not taking one right and giving it to another. The state 
is simply conditioning the way in which a holder may use the water 
right. As described in *Tahoe-Sierra*, this is not a physical taking, but 
an effect on a property right arising from a program intended to benefit 
the common good.

The court in *Tulare Lake Basin* incorrectly concluded that a water 
right takings challenge should be analyzed under the physical invasion 
analysis. An analysis in which the slightest diminution results in a per se 
compensable taking contravenes the nature of a water right and the 
government action. Further, the cases on which the *Tulare Lake Basin* 
court relied are distinguishable from a situation where a state imposes 
minimum flow requirements under the CWA.

274. See Dellapenna, *supra* note 174, at 6-1–6-2; *Hutchins*, *supra* note 166, at 8–19.
*Dugan v. Rank*, 372 U.S. 609, 625 (1950)).
278. *Id.* at 625.
279. See *id.* at 612–13.
B. An Exaction Analysis is Inappropriate to a Water Rights Takings Challenge

Imposing minimum flow requirements under § 401 resembles an exaction because it permits a water rights holder to build a project, but only if the holder agrees to divert less than the maximum amount of water allowable under an existing water right. However, an exaction analysis is inappropriate to a water rights takings challenge because it is not consistent with the regulatory character of the government action and is potentially unfair to the water right holder.

A water rights takings challenge under the CWA is not the same as a land takings challenge in *Dolan*, where the city required a business owner who wanted to build a bigger store to hand over privately-held land for a public bicycle trail. In *Dolan*, the government would have physically occupied the property. In contrast, a water right holder retains the property that is purportedly the subject of the exaction. Further, the holder may use the full measure of the right provided that the use does not result in poor water quality that the government intended the minimum flow requirement to avoid. Therefore, the government is not occupying, but merely regulating the property.

Second, the exaction analysis is potentially unfair to a water right holder because the doctrine does not allow balancing the interests of the state with the reasonable expectations of the right holder. If the exaction analysis is applicable to a water right challenge, then the state is likely to justify imposing minimum flow requirements under its § 401 authority in nearly all circumstances. There is a clear nexus between (1) the exaction (minimum water flow) and (2) the harm created by the proposed project (too little water). If the amount of water not diverted equals the amount of water necessary to meet water quality standards, then the exaction is roughly proportional to the harm. But, the court does not consider the extent of the holder’s loss unless the holder loses all economic value in use of the right. This is potentially unfair because

285. *Id.* at 378.
286. *Id.* at 380.
288. *See Dolan*, 512 U.S. at 386-96 (defining the exaction analysis tests without reference to the economic expectations of the landowner).
289. If a minimum flow requirement extinguishes all economically viable use of the right, it is a per se taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).
the holder may have reasonably expected to use the full measure of the water right granted under state law and may have invested funds in seeking to use the right. The exactions analysis is not suited to a water rights taking challenge because it considers neither the extent of the harm to the holder, the reasonableness of the holder's expectation or the legitimacy of the state action.290

C. A Water Right Takings Challenge is Best Analyzed as a Regulatory Taking

One disadvantage of the regulatory takings analysis is that, compared to exaction analysis, the outcome of judicial scrutiny is less predictable.291 Under an exaction analysis, a state's action will be valid as long as the state can demonstrate its minimum flow requirement is tailored to meet the water quality standard.292 Under the regulatory takings analysis, however, the state's action may solve a water quality problem but still be an unconstitutional taking if it has a substantial economic impact on a water right holder.293 At the same time, the court could also find that a taking has not occurred if the protection afforded to the public by the requirement outweighs the impact suffered by the holder.294 Despite the lesser degree of predictability, a regulatory takings analysis is more likely than other takings tests to reach a fair result in a water right takings challenge.

Under a regulatory takings analysis, if a government's regulatory action does not deprive a water right holder of all economic value,295 the court balances factors such as the economic hardship and the character of the government action to determine if an unconstitutional taking has occurred.296 Regulatory takings analysis is the most appropriate test for a court to use when considering a challenge to state imposed minimum flow requirements under CWA for three reasons. First, the regulatory

290. Additionally, the U.S. Supreme Court in City of Monterey v. Del Monte Dunes, Ltd., has, without explanation, intimated that the exaction doctrine's rough proportionality test is appropriate only to land use decisions. 526 U.S. 687, 702 (1999).
291. The following assumes the requirement does not destroy all economically viable use of the right. If it does, it is a per se taking. See Lucas, 505 U.S. at 1015.
292. See supra Part III.B.
294. Id.
295. If a minimum flow requirement extinguishes all economically viable use of the right, it is a per se taking. See Lucas, 505 U.S. at 1015.
takings analysis accounts for and balances the many interests that permeate a water right. Second, a regulatory takings analysis is in harmony with the legal nature of a water right. Finally, the test acknowledges that the state is acting in its regulatory capacity under state law and the CWA.

A regulatory takings analysis is more likely to be fair because it requires the court to consider all of the interests inherent in the right. The test protects the right holder by requiring the court to examine the economic impact on the water right holder and the extent to which the minimum flow regulations interferes with the holder's reasonable investment-backed expectations. The test protects the public by recognizing the government's authority to enforce laws and programs promoting the public welfare, even though the economic value of private property may be adversely affected. This balancing of interests makes the regulatory takings analysis more appropriate to a water right takings challenge than other takings analyses employed by the courts.

Second, a regulatory takings analysis accords with the legal nature of a water right. The factors that cause a water right to be unsuitable for a physical invasion analysis render it appropriate for a regulatory takings analysis. A water right is a collection of entitlements and duties, not a right to a precise quantity of water. The entitlements and duties vary greatly from state to state. There are circumstances in which a state can adjust a water right without leading to a compensable taking. The unique legal character of a water right, and the degree of control that states exercise over it, make it appropriate to a regulatory takings analysis because the test compels the court to balance several factors on a factual, case-by-case basis. This is consistent with the U.S. Supreme Court's acknowledgement in *Lucas* that the degree of control that states traditionally exercise over the property affects the outcome of a takings

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297. *Id.* at 124.
301. *Id.*
302. *See supra* Part III.A.
303. See *Dellapenna*, *supra* note 174, at 6-1–6-2; *Hutchins, supra* note 166, at 8–19.
304. See *Beck*, *supra* note 170, at 4-1; *Geiches, supra* note 176, at 5–8.
analysis.\textsuperscript{306} It also reflects the Court’s emphasis in \textit{Tahoe-Sierra} that a takings analysis must consider the property as a whole.\textsuperscript{307}

Finally, a regulatory analysis is appropriate to apply to a water rights taking challenge because the government is acting in its regulatory capacity. When a state imposes minimum flow requirements, it does not affect the water right holder’s proprietary interest in the water.\textsuperscript{308} Instead, it is regulating how the holder may use the water.\textsuperscript{309} The holder may use the full allowable quantity of the right if the use does not cause the condition that the government intended the minimum flow requirement to mitigate.\textsuperscript{310}

When a state imposes a minimum flow requirement under its \textsection 401 certification authority, a water right holder may challenge the state’s action as an unconstitutional taking of property.\textsuperscript{311} A government has effected a per se taking if the water right holder retains no economically viable use of the property.\textsuperscript{312} If the water right remains useful, the court should not analyze the challenge as either a physical intrusion\textsuperscript{313} or as an exaction,\textsuperscript{314} but as a regulatory taking because this analysis will be more likely to accurately consider the interests intrinsic to the right.\textsuperscript{315} Further, the analysis respects the legal nature of a water right, and reflects the fact that the state is acting in its regulatory capacity.\textsuperscript{316}

\section*{IV. CONCLUSION}

States have the power to impose minimum flow requirements under the CWA and thereby affect an existing water right. If a water right holder cannot withdraw the full quantity of his or her right because of the minimum flow requirements and is not compensated by the state, then the holder can challenge the state action as an unconstitutional taking. A court should not examine this challenge under the physical intrusion

\begin{itemize}
\item \textsuperscript{306} \textit{Id.} at 1027–28.
\item \textsuperscript{308} \textit{Elkhorn II}, 511 U.S. 700, 721 (1994).
\item \textsuperscript{309} \textit{Id.}
\item \textsuperscript{310} \textit{See id.}
\item \textsuperscript{311} \textit{See supra} note 88.
\item \textsuperscript{313} \textit{See supra Part III.A.}
\item \textsuperscript{314} \textit{See supra Part III.B.}
\item \textsuperscript{315} \textit{See supra Part III.C.}
\item \textsuperscript{316} \textit{See supra Part III.C.}
\end{itemize}
analysis because the state is not physically intruding on the property and an inflexible, per se test is not appropriate to the legal nature of a water right. Similarly, a court should not analyze the takings challenge as an exaction because the state is not occupying the water right but merely regulating how it can be used, and an exaction analysis could conclude in an unfair result. Thus, a court should analyze this challenge against the state as a regulatory taking because the state is acting in its regulatory capacity, the analysis respects the legal nature of a water right, and the result will accurately consider the diverse interests inherent in a water right.