

Applying California Water Rights Takings Jurisprudence To International Water Right Expropriation Cases

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I. Introduction

In 2001, attorneys for a California irrigation district won a major takings case when they successfully sued the U.S. government in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001) (*Tulare Lake*). The irrigation districts sued the federal government alleging a taking of their property after their water supply was reduced to leave water in the streams for fish pursuant to the U.S. Endangered Species Act. *Tulare Lake* threatened to change U.S. takings law as it applied to water because the irrigators successfully argued that because the amount of available water was reduced, the federal government had physically taken the irrigators' property without financial compensation as required under the U.S. Constitution. The case was decided in the U.S. Court of Claims—the court that decides compensation claims against the U.S. government.

Riding on the success in *Tulare Lake*, the same attorneys filed a claim under Chapter 11 of the North American Free Trade Agreement (NAFTA) against Mexico on behalf of a group of Texas farmers and irrigators alleging the taking or expropriation of the Texas irrigators' water by Mexico (*Bayview*).¹ The NAFTA claim unsuccessfully alleged that Mexico withheld water that originates in Mexico but that was rightfully owned by the irrigators pursuant to a 1944 Treaty between the U.S. and Mexico governing the Rio Grande and Colorado Rivers. The Texas irrigators argued that Mexico expropriated their water, thereby violating the provisions of NAFTA's Ch. 11.

Two principle issues arose from Mexico's alleged expropriation of water: (1) whether water is the type of property or investment subject to NAFTA;² and (2) even if NAFTA does apply to water, what law (Mexican, United States, Texas) would apply in determining whether an expropriation of water had occurred in this situation? The tribunal in *Bayview* dismissed the case because it lacked jurisdiction over the dispute, on the grounds that the Texas irrigators did not have an investment in Mexico. Therefore, the *Bayview* tribunal did not resolve the issue of what law applies in determining expropriation of water rights claims under NAFTA Ch. 11, and if U.S. takings applies, what the outcome would have been here.

While there is a rich jurisprudence regarding the taking of water rights, several cases have been decided recently that have provided additional details with regard to water rights. To set the context for the recent cases, this article will provide an overview of water rights in California, the U.S. Constitution's provisions regarding the taking of property, and NAFTA Ch. 11. It then sets forth the law of takings as it has been applied to California water rights. This paper then analyzes what the outcome would have been in *Bayview* if the tribunal had applied U.S. water rights takings law as set forth above. This analysis concludes that had such jurisprudence been applied to address the

substantive merits of *Bayview*, the tribunal would have determined that no appropriation has occurred and that the Texas irrigators were not entitled to compensation. This paper sets forth the water rights takings jurisprudence should another tribunal be called upon to address these issues.

II. Legal Background

A. Overview of California Water Rights Law

Water rights in the United States are based on state law and vary from state to state.³ However, in the United States there are two primary systems of water rights: (1) riparian and (2) appropriative or prior appropriation.⁴ California uses a combination of both of these systems and an overview of California water law is provided herein to provide background on the two systems. Although, as described below, the riparian and appropriate water rights are very different, all water rights in California are subject to Article X, section 2 of the California Constitution that prohibits waste, unreasonable use, and unreasonable methods of use of water. Lastly, all waters of California belong to the people of the state of California, and water right holders, although they possess a property right interest in the water, possess a usufructory right to the use of the water.⁵

i. Appropriative Water Rights

Before 1914, water rights in California could be acquired simply by posting notice of one's intent to divert water and taking water from the source, or exercising control over the water and applying it to reasonable beneficial use. This was known as a "common law appropriation." In 1872, the Legislature recognized the doctrine of prior appropriation and provided for a second method to appropriate water. Under this subsequent method, a person could record a notice of appropriation in the county where the diversion was located.⁶ This method is called a "Code appropriation." Rights acquired under either of these methods prior to 1914 may be exercised without permission from any governmental authority.

Appropriative water rights are for a specific quantity of water. The right is limited to the amount of water that can be diverted and beneficially used in a reasonable manner. With pre-1914 appropriations, the extent of actual use may be far less than the amount of the noticed appropriation, and in such cases, the historic amount and place of actual beneficial use defined the right. A pre-1914 right could also be expanded, as long as the expansion did not injure another water right holder and was put to reasonable beneficial use. In other words, even though an original pre-1914 notice of appropriation stated a certain amount of water would be diverted, the actual water right could be greater or smaller, depending on the amount of actual historic use.

With regard to the priority of appropriative water rights, the principle of "first in time, first in right" governs. This means that the person with the oldest appropriation has the most senior right to the water. In times of shortage, junior appropriators may be cut off entirely before senior appropriators lose any water at all. The priority for pre-1914 appropriations relates back to the date on which the appropriator took the first substantial act to initiate the

appropriation, assuming the miner or settler was diligent in bringing the project to completion and putting the water to use.

Under California law, appropriative water rights may be forfeited after five years of non-use.⁷ Thus, under these statutory provisions, when a pre-1914 water right holder fails to beneficially use all or any portion of that water right for a five-year period, the water right may be deemed forfeited and revert to the state, and may be regarded as unappropriated water.⁸

Today, and since 1914, appropriative water rights may be obtained only by obtaining a permit from the California State Water Resources Control Board (SWRCB), and by putting the water to beneficial use as prescribed in the permit.⁹ The same principles of priority, reasonableness, and relation-back apply to post-1914 appropriations as to pre-1914 appropriations, except that the date of priority of a modern appropriation is the same as the application date.

Licenses and permits granted by the SWRCB define quantity of the diversion or storage right, as well as the allowable type and place of use of the water. Any change in this regard requires a petition for change to be filed with the SWRCB, subject to protests of competing water rights holders and intervening environmental requirements.¹⁰

As with pre-1914 appropriative water rights, post-1914 water rights may be lost by a period of non-use. The legislature has settled on a period of five years before the right is deemed forfeited.¹¹ If the water has been unused for a period of five years, then such unused water may revert back to being unappropriated water.¹² Forfeiture, however, can only occur upon a finding by the SWRCB following notice and a public hearing.¹³

ii. Riparian Water Rights

A riparian water right is a right to use water from a natural watercourse that abuts the land to which the right attaches.¹⁴ The riparian right is a right to the flow of the water.¹⁵ It attaches only to the natural flow of the stream. The length of frontage on the watercourse is not relevant to the existence of a riparian right. If a parcel of land has any access to a stream, the entire tract is riparian to the stream and water from the watercourse may be diverted to beneficial uses on the riparian land.¹⁶ A riparian water right does not entitle the holder to divert water to non-riparian land or to another watershed. Most importantly, riparian rights are correlative, meaning that in times of shortage, each riparian water right holder must reduce their use equally. Riparian water rights are not lost through non use but remain with the land, as long as the land is riparian.

The riparian water rights are part and parcel of the riparian land.¹⁷ Title to riparian rights are acquired by the owner of land as part of the transaction by which he acquires title to the land.¹⁸ Riparian rights pass with the grant of land provided that the conveyance of land does not expressly reserve the riparian rights from the transfer.¹⁹ Where, however, a person acquires title to several parcels of land through separate

patents, even if acquired on the same day, only those individual patents contiguous to the stream are riparian. The mere contiguity of tracts of land to each other is not enough to extend riparian rights to lands that do not touch the stream.²⁰ The riparian right extends to the smallest tract held under one title in the chain of title leading to the present owner.²¹

iii. California Groundwater Law

Groundwater is not subject to statewide governmental regulation in California. Groundwater in California is still relatively unregulated except in areas where the state or the local government has adopted a groundwater management plan or where a court has adjudicated an aquifer or an underground stream. This is in stark contrast to the comprehensive regulation of groundwater in most of the Western United States, and the highly regulated surface water system in California. In addition, under California law, not all underground water is “groundwater.” The California Water Code defines water subject to surface water appropriation as “surface waters, and . . . subterranean streams flowing through known and definite channels.” (Cal. Wat. Code, § 1200.) In contrast, groundwater law applies to underground water not flowing in known and definite channels. Subject to California’s constitutional requirement that all water used be put to reasonable and beneficial use, two types of groundwater rights exist in California: overlying rights and appropriative rights. The former right is analogous to riparian rights to surface water, with the latter right similar in nature to a surface water appropriative right.

A landowner overlying a groundwater basin, an overlyer, has rights to use the percolating groundwater of the basin beneath his lands for reasonable beneficial uses on his overlying land. This right is equal and correlative with respect to other overlyers within the same groundwater basin exercising their respective rights; that is, each overlying owner is entitled to a reasonable share of the available groundwater.²² As a result, no priority is given to one overlyer’s rights as against any other overlyer, regardless of when the rights are exercised. Each overlying landowner can extract as much groundwater as is reasonably needed for use on his overlying land. However, each overlying landowner must reduce his extractions proportionately when groundwater supplies cannot provide enough water for the cumulative, reasonable, overlying uses of each overlying landowner.²³

The overlying right is analogous to the riparian right to surface waters. It is appurtenant only to land that overlies the groundwater source (the groundwater basin). Like the riparian right, the overlying right is not quantified unless adjudicated. It extends to that amount of water that can be reasonably and beneficially used on the overlying land. Like the riparian right, it is correlative.²⁴ Overlying rights, like riparian rights, are also superior to appropriative rights.²⁵

Groundwater appropriators are generally (1) strangers to the groundwater basin (i.e., not owning, or using groundwater on, overlying lands) who act to appropriate available groundwater; (2) overlyers who use all or a portion of their groundwater on lands that do not overlie the groundwater basin; or (3) an overlying municipality that extracts available groundwater for municipal purposes.²⁶ An appropriative use has a lower priority than uses made by private owners overlying the groundwater basin.²⁷ Also, the rights of appropriators

to use water from a groundwater basin is limited to surplus water in the basin.²⁸ An appropriative right to groundwater is a right to use groundwater outside of the groundwater basin or for public service in communities overlying the basin, as long as enough water is left to meet all overlying landowner needs.²⁹ Where the basin is in a condition of overdraft,³⁰ no appropriative rights can be acquired, except by prescription.³¹

B. U.S. Constitutional Takings Provisions

Takings jurisprudence is complex and extensive. A brief, admittedly oversimplified, overview will suffice here. U.S. takings jurisprudence is based on the fifth amendment of the United States Constitution, which states that “[N]or shall private property be taken for public use, without just compensation.”³² The Fifth Amendment does not prohibit the government from taking private property, but conditions the government’s power to the extent it requires the government to compensate the private owner for property taken.³³ Therefore, to establish a taking, the party must establish that a property interest is affected.³⁴ The party must also establish that the cause of the adverse affect to the property interest was a direct result of government action.³⁵

Government action and takings jurisprudence falls into two categories: physical and regulatory takings. A physical taking occurs when the government physically enters one’s private property or causes someone else to do so.³⁶ Where the government action causes a “permanent physical occupation” a per se physical taking occurs and compensation is required.³⁷ A physical invasion that is not permanent is termed a “temporary physical invasion” and is analyzed under a three-part test.³⁸ Physical takings are much more complicated when the plaintiff consents to the government activity or where the plaintiff participates in a highly regulated activity.³⁹ A physical taking of water rights can occur where the government physically diverts water from a private use for its own purposes.⁴⁰

Regulatory takings are much more nuanced. Regulatory takings came into existence in 1922 in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.⁴¹ A total regulatory taking occurs when government regulations “completely deprive an owner of all economically beneficial use of her property,”⁴² unless it was done under “background principles of the States law of property and nuisance” that existed when the plaintiff acquired the property.⁴³ Compensation is required in this instance.

Where the government regulation does not completely eliminate the value of the property at issue, the three-part test outlined in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 will apply to determine whether a partial regulatory taking has occurred.⁴⁴ This test analyzes the government action based on its “(1) economic impact on the property owner, (2) degree of interface with the owner’s reasonable investment-backed expectations, and (3) character.”⁴⁵ The factors are not conclusive or exhaustive, and the analysis is not a “set formula” but will be determined “upon the particular circumstances [in that] case.”⁴⁶ Determining whether a regulatory taking has occurred, “consists in balancing the burden placed on the individual or corporation on the one hand

against the benefit of which will accrue to the public as a whole on the other.”⁴⁷ In practice, each one of the factors, requires extensive analysis.⁴⁸

C. NAFTA Chapter 11

The provisions of NAFTA’s Chapter 11 significantly expanded the traditional investor protections against appropriation in existing bilateral investment agreements.⁴⁹ There has been great debate as to whether Chapter 11’s definitions of investment and appropriation are too broad.⁵⁰ In *Bayview*, the Texas irrigators base their claim on Mexico’s alleged violations of Articles 1102, 1105, and 1110 of NAFTA.⁵¹

i. Chapter 11’s Definition of Investment

NAFTA’s Chapter 11 protects investors from each NAFTA signatory country, and investments from the economic effects of certain government measures. Because Chapter 11’s protections only apply to investors, its definition of “investment” is pivotal. Under NAFTA, “investment” means:

(a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.⁵²

NAFTA also clarifies that the following categories of economic interest do not qualify as an investment for the purposes of Chapter 11’s protection:

(i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as

trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h);”⁵³

ii. Measures Deemed Tantamount to Expropriation Under NAFTA

Article 1110 of NAFTA prohibits a Party from directly or indirectly nationalizing or expropriating “an investment of an investor of another Party in its territory or tak[ing] a measure tantamount to nationalization or expropriation of such investment (expropriation), except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6.”⁵⁴ Where an expropriation does occur, compensation is determined by the fair market value of the investment.⁵⁵ Much of the criticism of Article 1110 has focused on the uncertainties as to the scope and meaning of the phrase “tantamount to nationalization or expropriation.”

iii. Chapter 11’s Treatment of Dispute Settlement Mechanisms

To settle disputes, Chapter 11 allows a private investor to initiate arbitration directly against a member country. The party submitting the claim to arbitration may select from three sets of rules to govern the arbitration: (a) the ICSID Convention,⁵⁶ (b) the Additional Facility Rules of the ICSID,⁵⁷ or (c) the UNCITRAL Arbitration Rules.⁵⁸ The results of Chapter 11 arbitration proceedings are binding on the parties and no procedure for appeal or review is specifically provided.⁵⁹ Additionally, Chapter 11 does not expressly provide for public access or public participation in arbitration proceedings, and the findings of the tribunal are only made public if both parties agree.⁶⁰

Panelists on NAFTA Chapter 11 arbitration panels are normally selected from a roster comprised of professionals who have expertise in international trade law; they are selected based on their “objectivity, reliability and sound judgment.”⁶¹ However, “no particular qualifications [are] specified for a tribunal member.”⁶² Each party chooses one arbitrator and a third is agreed upon by both parties.⁶³

III. California Water Rights Takings Law

As stated above, one may establish a taking claim only if a recognizable property interest is taken by government action.⁶⁴ While the U.S. Constitution determines what interests are protected under the Fifth Amendment, it “neither creates nor defines the scope of property interests compensable under the Fifth Amendment, which interests instead are defined by existing rules or understandings and background principles derived from an independent source, such as state, federal, or common law.”⁶⁵ Water rights are largely determined by state law. Therefore, in determining whether a party has a protectable interest in water rights, courts must look to state law.⁶⁶

An early California water rights takings case came in 1950 in *United States v. Gerlach Livestock Co.* (1950) 339 U.S. 725 (*Gerlach*). In *Gerlach*, Gerlach owned riparian lands along the banks of the San Joaquin River. Gerlach’s lands would flood annually and would create uncontrolled grasslands that were used for grazing. The

Federal government intended to dam up the San Joaquin River and redistribute it, taking away the seasonal flooding of Gerlach's lands without replacing the water from other sources. The project was carried out pursuant to the Reclamation Act of 1902. The United States Supreme Court determined that the Reclamation Act of 1902 required the federal government to compensate landowners for valid water rights under state law that were lost because of the federal government's reclamation projects.⁶⁷ The issue then became whether Gerlach possessed a riparian water right to the seasonal flooding of its lands under state law. The Court held that because the land at issue was riparian to the San Joaquin River, and because the use was reasonable and beneficial, that Gerlach possessed a valid riparian right that had been taken by the federal project.⁶⁸ The Court awarded Gerlach compensation for his lost use.

In another riparian rights case along the San Joaquin River, the landowners sought to enjoin the U.S. Bureau of Reclamation (BOR) from storing water behind Friant Dam and to enjoin irrigation districts from diverting water at the dam.⁶⁹ The United States Supreme Court held that the landowners could not stop the project from proceeding as it was a sovereign act performed by the Congress of the United States, but that the landowners could recover for the taking of their riparian water rights.⁷⁰ The court clarified that a physical invasion of land is not necessary to affect a taking and that "when the Government acted here with the purpose and effect of subordinating the respondents' water right to the Project's uses whenever it saw fit, with the result of depriving the owner of its profitable uses there was the imposition of such a servitude as would constitute an appropriation of property for which compensation should be made."⁷¹

In *Tulare Lake*, the United States National Marines Fisheries Service (NMFS) had issued a biological opinion concluding that the operation of California's State Water Project (SWP) and the federal Central Valley Project (CVP) would jeopardize the existence of the Delta smelt and Chinook salmon, both protected under the federal Endangered Species Act (ESA). NMFS issued reasonable and prudent alternatives (RPAs) to avoid jeopardizing the species. A 1985 agreement required the California Department of Water Resources (DWR) to coordinate its operation of the SWP with the federal operation of the CVP to ensure compliance with the ESA.⁷² Due to this agreement, DWR's operation of the SWP is subject to the consultation requirements of the ESA. Here, DWR was required to implement the RPAs adopted by NMFS, and this implementation reduced the amount of water delivered to the SWP and CVP, which in turn resulted in a reduction of water availability of approximately 0.11% and 2.92% for Tulare Lake Basin Water Storage District and Kern County Water Agency, respectively.⁷³ The plaintiffs themselves did not possess water right permits, but held delivery contracts with DWR who was the permit holder.⁷⁴

The plaintiffs in *Tulare Lake* alleged that the reduction in water deliveries amounted to a taking of property under the Fifth Amendment of the United States Constitution.⁷⁵ The United States argued, *inter alia*, that plaintiffs' water rights were subject to limitations such as the public trust and reasonable use doctrines under California law that allowed for the protection of fish and wildlife.⁷⁶ The United States also argued that the delivery reductions reflected these limitations, and that by implementing background principles of state law, compensation was unnecessary.⁷⁷

In a 2001, the *Tulare Lake* court held that the action by the federal government constituted a taking of the plaintiffs' water rights occurred by the Federal Government and thus compensation was due.⁷⁸ Specifically, the court held that a physical taking had occurred because the plaintiffs lost their right to use the water, which amounted to a "complete extinction of all value" of the water right.⁷⁹ Because it determined that a physical taking had occurred, the Court found that compensation was required regardless of the degree of intrusion on the right.⁸⁰

In *Casitas Mun. Water Dist. v. United States* (2007) 76 Fed. Cl. 100, the Court of Claims addressed a similar situation as in *Tulare Lake*. Casitas Municipal Water District (CMWD) operated a federal reclamation project on behalf of the BOR pursuant to the Reclamation Act of 1902. The project involved two dams and reservoirs and a canal and conveyance system on the Ventura River. The project was operated pursuant to operating criteria and regulations adopted by BOR. Casitas possessed a valid water right from the California State Water Resources Control Board entitling it to divert a specified amount of water. In 1997, the NMFS listed the West Coast steelhead trout as an endangered species. As a result of this listing, NMFS issued a Biological Opinion requiring CMWD to install a fish passage facility and fish screens to prevent the take of the listed species. NMFS also issued revised operating criteria for the project that included augmented instream flows for fish migration and downstream fish habitat.⁸¹

CMWD argued that the new operating criteria amount to a physical per se taking of its water rights by NMFS because they permanently reduced the amount of water CMWD could divert from the project by 3,200 acre-feet annually. CMWD argued the reduced water diversion should be analyzed as a physical per se taking because water presented a unique taking situation in that, unlike land, any restriction on the use of water entirely deprives the owner of the use of that water.⁸² The government argued that because the restrictions did not deny CMWD all economical use of its water that any taking here should be treated as a regulatory taking and analyzed under the *Penn Central* factors. The court acknowledged that the operating criteria amounted "to a transfer of value through which [CMWD's] right of use is diminished and the public right is simultaneously enlarged."⁸³ However, relying on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, the court determined that a taking did not occur because it felt that this case involved only a governmental restraint on CMWD's water right and did not amount to a government takeover of CMWD's water right.⁸⁴ The court determined that a per se physical taking had not occurred because CMWD was not deprived of all economical use of its water and water rights. Therefore, the court rejected CMWD's attempt to grant water special status in takings jurisprudence and instead evaluated as a regulatory takings case.

The Court of Federal Claims addressed very similar issues in another takings case, *Klamath Irrigation District v. United States* (2005) 67 Fed. CL. 504 (*Klamath Irrigation*). Here, the Court faced another Fifth Amendment claim where plaintiffs alleged that the federal government's actions to comply with the ESA, resulting in no water being delivered to the plaintiff irrigation district and their member landowners, was

an uncompensated taking of their interest in water.⁸⁵ This time the farmers at issue were located in Oregon.

While *Klamath Irrigation* is an Oregon case it has some significant holdings and it provides a detailed analysis of *Tulare Lake*. The Court found that the farmers had failed to state a viable constitutional Fifth Amendment takings claim, principally because “the availability of contract remedies is sufficient to vitiate a takings claim, even if ultimately it is determined that no breach occurred.”⁸⁶ The irrigation districts had service contracts with the BOR and the landowners were determined to be third party beneficiaries of the contracts. The Court held that the landowners’ and irrigation districts’ claims had a remedy in contract, which eliminated their takings claim.

Plaintiff’s also argued that they were entitled to compensation pursuant to *Tulare Lake*. Regarding *Tulare Lake*, the court held:

[W]ith all due respect, *Tulare* appears to be wrong on some counts, incomplete in others, and distinguishable, at all events.

For one thing, *Tulare* failed to consider whether the contract rights at issue were limited so as not to preclude enforcement of the ESA. Rather, the court treated the contract rights possessed by the districts essentially as absolute, without adequately considering whether they were limited in the case of water shortage, either by prior contracts, prior appropriations or some other state law principle . . . Thus, although the court noted that there were agreements between the United States and the State of California creating a coordinated pumping system, it did not examine those agreements to see whether they, like the district contracts here, limited the plaintiffs’ rights derivatively. . . . Rather, it focused on the districts’ contracts with state agencies as if they were free-standing. Nor did the court consider whether the plaintiffs’ claimed use of the water violated accepted state doctrines, including those designed to protect fish and wildlife, finding that issue to be reserved exclusively to the state courts. Because the state courts had not ruled on those issues, this court refused to rule on them as well. As a result, it awarded just compensation for the taking of interests that may well not exist under state law. . . .

On these counts, this court disagrees with the approach taken in *Tulare* and concludes that decision lends no support to the views espoused by plaintiffs here. . . .⁸⁷

[T]he court is mindful that . . . this ruling may disappoint a number of individuals who have long invested effort and expense in developing their lands based on the expectation that the waters of the Klamath Basin would continue to flow, uninterrupted, for irrigation. But, those expectations, no matter how understandable, do not give those landowners any more property rights as against the United States, and

the application of the Endangered Species Act, than they actually obtained and possess. Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property – they enjoy no elevated or more protected status.⁸⁸

The Court's analysis above seriously called into question the continuing authority of *Tulare Lake*.

California courts have also address water rights takings. For example, in *Allegretti & Co. v. County of Imperial* (206 138 Cal.App.4th 1261, the Plaintiff (Allegretti) had applied for a conditional use permit to redrill an inoperable well. The County approved the permit with the condition that Allegretti extract no more than 12,000 acre-feet annually from all the wells on its property. Allegretti sued the County alleging both a physical and a regulatory taking. Both the trial court and appellate court determined that no taking occurred.

The *Allegretti* court held that the County's action did not amount to a physical taking because the County did not physically invade Allegretti's property and it did not appropriate any of Allegretti's water.⁸⁹ Allegretti argued that a physical taking had occurred based on the *Tulare Lake* opinion and because water that he was entitled to use was gone forever because of the County's actions. The court determined that is was not bound by the Court of Federal Claims that decided *Tulare Lake* and that even if it were, it is distinguishable because *Tulare Lake* involved contract rights for water.⁹⁰ The court also found persuasive *Klamath Irrigation's* critique of *Tulare Lake*. The Court disagreed with *Tulare Lake's* conclusion that government pumping restrictions equate to a physical taking, stating that such a conclusion ignores "the hallmarks of a categorical physical taking, namely, actual physical occupation or physical invasion of a property interest."⁹¹

Allegretti argued that the County's action had denied it all economically beneficial and productive use of its land because the County denied it the full utilization of water. Allegretti also argued that it met the *Penn Central* three-part test of a regulatory taking. The *Allegretti* court determined that the County's actions did not constitute a regulatory taking under either theory.⁹² The Court concluded that Allegretti had not been denied all economically beneficial and productive use of its land because it could pump sufficient water to irrigate 400-800 of his 2,400 acres.⁹³

In analyzing Allegretti's *Penn Central* argument, the Court stated that it would consider Allegretti's entire property holdings at issue, here 2,400 acres, not the portion adversely affected.⁹⁴ The Court denied this argument stating there was no physical invasion (character prong of the *Penn Central* test). The Court also determined that there was only a diminution in the value of the land and the farm production was limited, but not eliminated (economic impact prong).⁹⁵ With regard to the distinct investment backed expectation prong of the *Penn Central* test, the Court held Allegretti did not have a distinct expectation, only an abstract expectation. Allegretti claimed a right/expectation to as much water as it need to irrigation his total acreage. The court held that Allegretti did not provide evidence that irrigation of all 2,400 acres would be reasonable within

article X, section 2 of the California Constitution requiring reasonable and beneficial use.⁹⁶ Therefore, Allegretti could not have a distinct expectation to irrigation all 2,400 acres and the court denied its argument that it met the *Penn Central* three-part test of a regulatory taking.

In California, water rights held by an irrigation district are held in trust for the landowners within the district.⁹⁷ The right held by individual landowners to the use of the water “comes about by reason of the landowner’s status as a member of the class for whose benefit the water has been appropriated.”⁹⁸ The perfected water rights of an irrigation district are therefore *not* owned by any particular landowner, but rather they are owned by the district for the benefit of all. Instead the landowners have the right to have water delivered to their property.⁹⁹ Therefore, landowners may not assert a takings claim based on individual water rights because the rights are held by district and the individual landowners do not possess an individual right.¹⁰⁰

IV. California Water Right Takings Law Applied to *Bayview*

In *Bayview*, the thrust of the Texans’ Chapter 11 claim was the allegation that they are the legal owners of 1,219,521 acre-feet of irrigation water that was wrongfully withheld from flowing into the Rio Grande by Mexico, and “the expropriation and diversion of which has severely damaged the ability of Texans and the farmers they represent to produce crops.”¹⁰¹ The Texans claim they possess an “integrated investment” under the definition of Article 1139(g) of NAFTA that allegedly includes:¹⁰²

[R]ights to water located in Mexico; facilities to store and distribute this water for irrigation and domestic consumption; irrigated fields and farms; farm buildings and machinery; and ongoing irrigated agricultural businesses. Claimants have invested millions of dollars in an integrated water delivery system, including pumps, aqueducts, canals, other facilities for the storage and conveyance of their water to the land on which it is used . . . Each Claimant’s Investment is entirely predicated on this right to receive water located in Mexican tributaries.¹⁰³

Between 1992 and 2002, the Texans allege that “nearly \$1 billion has been lost in decreased business activity and that 30,000 jobs have been precluded.”¹⁰⁴

The tribunal in *Bayview* dismissed the case because it lacked jurisdiction over the dispute, on the grounds that the Texas irrigators did not have an investment in Mexico. Therefore, the *Bayview* tribunal did not resolve the issue of what law applies in determining claims of expropriation of water rights under NAFTA Ch. 11, and if U.S. takings did apply¹⁰⁵, what the outcome would have been.

Based on the water rights framework outlined above, it is clear that had U.S. water rights takings law been applied to address the substantive merits of *Bayview*, the tribunal would have determined that no expropriation or taking has occurred and that the

Texas irrigators were not entitled to compensation. Here, no physical taking occurred because Mexico's alleged actions did not physically occupy or invade the Texas irrigators' property and Mexico did not physically appropriate any of the irrigators' water for its own use.¹⁰⁶

Moreover, no regulatory taking has occurred, because while Mexico's actions may have enlarged the public benefit in Mexico somewhat, the actions at issue involved at most a governmental restraint the Texas irrigators' water rights and did not amount to a government takeover of the Texas irrigators' water right.¹⁰⁷ Furthermore, the Texas irrigators were not denied all economically beneficial and productive use of their land because they still maintained some economic use of their land, even it was reduced.¹⁰⁸ To the extent that the Texas irrigators receive their water pursuant to water service contracts, their claims would have a remedy in contract, which would also eliminate their takings claim.¹⁰⁹

V. Conclusion

The tribunal in *Bayview* faced the possibility of having to determine the first water rights expropriation claim under NAFTA Chapter 11. The tribunal was able to avoid deciding whether an expropriation occurred based on jurisdictional grounds. However, had the tribunal been forced to apply U.S. water rights takings law, the result would have been the same. That is, the tribunal would have determined that no appropriation has occurred and that the Texas irrigators were not entitled to compensation.

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¹ See Request for Arbitration Under the Rules Governing the Additional Facility for the Administration of Proceedings by the International Center for Settlement of Investment Disputes and the North American Free Trade Agreement between Bayview Irrigation District, et al, and The United States of Mexico (Jan. 19, 2005) (*Bayview*).

² There is significant debate regarding whether, and, if so, how NAFTA applies to water. Paul Kibel, *Grasp on Water: A Natural Resource That Eludes NAFTA's Notion of Investment* (2007) 34 *Ecol. L. Q.* 655 and Howard Mann, *Who Owns "Your" Water? Reclaiming Water as A Public Good Under International Trade and Investment Law* (2003) available at http://www.iisd.org/pdf/2003/trade_who_owns_water_II.pdf.

³ For an overview of California water rights see Wells A. Hutchins, *The California Law of Water Rights* (1956).

⁴ Western states that follow only prior appropriation includes Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. Western states that follow a dual system such as California include Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. Generally, the Eastern United States follows a riparian water rights system.

⁵ *People v. Murrison* (2002) 101 Cal.App.4th 349, 358; *Klamath Irr. Dist. v. United States* (2005) 67 Fed.Cl. 504, 515.

⁶ Cal. Civ. Code, § 1410-1422.

⁷ Cal. Water Code §§1240, 1241.

⁸ See, e.g., *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582; *Wright v. Best* (1942) 19 Cal.2d 368, 380; *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398; *Smith v. Hawkins* (1898) 120 Cal. 86, 88; see also Hutchins, *supra*, note 3, at pp. 293-96.

⁹ Cal. Wat. Code, §§ 1225 *et seq.*)

¹⁰ Cal. Wat. Code, §§ 1700-1705.

¹¹ Cal. Wat. Code, § 1241.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 19.

¹⁵ *Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 726-727.

¹⁶ Hutchins, *supra*, note 3, at 198-199.

¹⁷ *Title Ins. & Trust Co. v. Miller & Lux* (1920) 183 Cal. 71, 81.

¹⁸ Hutchins, *supra*, note 3, at 179.

¹⁹ *Id.* at 189. Where a party acquired title from the United States government through formal procedures, the riparian right of the grantee “related back” to the time of the bona fide settlement of the land with the intention of acquiring complete title by patent. *Id.*, at 180-181. Riparian rights are said not to attach to lands held by the government until the lands are transmitted to private ownership. *Id.* at 180, citing *McKinley Bros. v. McCauley* (1932) 215 Cal. 229, 231

²⁰ *Boehmer v. Big Rock Irr. Dist.* (1897) 117 Cal. 19, 26-27.

²¹ *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 201, 529.

²² *Katz v. Walkinshaw* (1903) 141 Cal. 116.

²³ *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 84.

²⁴ See *Katz v. Walkinshaw, supra*, 141 Cal. at 134; *Wright v. Goleta Water District, supra*, 174 Cal.App.3d at 84.

²⁵ *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, *cert. denied sub nom. California-Michigan Land and Water Company v. City of Pasadena* (1950) 339 U.S. 937. See Hutchins, *supra*, note 3 at 441 *et seq.*

²⁶ Public or municipal use is not considered an overlying use, even though the municipality serves overlying lands. “Public use of percolating water is a non-overlying use, whether they are located outside of the groundwater area. Such public use is therefore an appropriative use of water.” Hutchins, *supra*, note 3, at 458. See *San Bernardino v. Riverside* (1921) 186 Cal.7, 10-11, 24-26.) When a city pumps water for use on lands other than city-owned lands, it is not exercising the individual water rights of its inhabitants, but is making its own appropriative use. *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, 165. This principle holds whether the wells are within the city limits or outside them.

²⁷ *City of Pasadena v. City of Alhambra, supra*, 33 Cal.2d at 926.

²⁸ *City of Pasadena v. City of Alhambra, supra*, 33 Cal.2d at 926-27; *Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.* (1949) 94 Cal.App.2d 766. See Hutchins, *supra*, note 3, at 454 *et seq.*

²⁹ *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1000 n.6, 1001.

³⁰ An overdrafted groundwater basin is one in which the safe yield has been and continues to be exceeded over a period of years. In general, the safe yield of a groundwater basin is determined by subtracting the diversion (or extractions from the aquifer) from recharge. Where the diversion exceeds the recharge to the basin, the safe yield is being exceeded.

³¹ *City of Pasadena v. City of Alhambra, supra*, 33 Cal.2d at 926-27; *City of Los Angeles v. City of San Fernando, supra*, 14 Cal.3d at 278.

³² U.S. Const. amend. V. The California Constitution also provides for compensation for government takings. Cal. Const., art. I, § 19.

³³ *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1270, *citing Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528.

³⁴ Robert Meltz, 34 Ecology Law Quarterly 307, 317 (2007) (*Meltz*).

³⁵ *Id.* at 331 (2007).

³⁶ *Id.* at 360 (2007).

³⁷ *Id.* at 360-361.

³⁸ *Id.* at 361.

³⁹ *Id.* at 363.

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- ⁴⁰ *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1273.
- ⁴¹ Meltz, 34 Ecology Law Quarterly 307, 328 (2007).
- ⁴² *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1270, citing *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 538.
- ⁴³ *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015, 1029.
- ⁴⁴ Meltz, *supra*, note 34, 329, 333.
- ⁴⁵ Meltz, *supra*, note 34, 329.
- ⁴⁶ *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978).
- ⁴⁷ *California v. Marin Mun. Water Dist.* (1941) 17 Cal.2d 699, 706.
- ⁴⁸ Meltz, *supra*, note 34, 333-346.
- ⁴⁹ Public Citizen, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005*, 1-3 (Feb. 2005) (*NAFTA's Threat*); Int'l Inst. for Sustainable Dev. and World Wildlife Fund, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights 7-8* (2001) (Private Rights)
- ⁵⁰ John D. Echeverria, *The Real Contract on America*, THE ENVIRONMENTAL FORUM, July/Aug. 2003, at 28, 31.
- ⁵¹ Article 1105(1) of NAFTA states that "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Article 1102 of NAFTA states: "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. 4. For greater certainty, no Party may: (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party."
- ⁵² North American Free Trade Agreement, U.S.-Can.-Mex, art. 1139, Dec. 17, 1992, 32 I.L.M. 289 (1993) (*NAFTA*).
- ⁵³ *Id.*
- ⁵⁴ NAFTA provides little guidance concerning the meaning of 'expropriation' or 'nationalization.' Neither term is defined in the agreement." Kevin Banks, *NAFTA's Article 1110 – Can Regulation be Expropriation*, 5 NAFTA L. & BUS. REV. AM. 499, 510 (1999); see also Francisco Orrego Vicuna, *Regulatory Expropriations in International Law: Carlos Calvo, Honorary NAFTA Citizen*, 11 N.Y.U. ENVTL. L.J. 19, 28-29 (2002) (stating that an abstract definition distinguishing between regulatory acts that are permissible from those that amount to expropriation "is probably unworkable" and that there is "no single view on the matter"); see also Ethan Shenkman, *Could Principles of Fifth Amendment Takings Jurisprudence be Helpful in Analyzing Regulatory Expropriation Claims Under International Law*, 11 N.Y.U. ENVTL. L.J. 174, 177 (2002) (stating that some tribunals have looked to customary international law to give meaning to the term "expropriation"); see also J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 Golden Gate U. L. Rev. 465, 471 (1999). (stating that NAFTA does not define "measures tantamount to . . . expropriation").
- ⁵⁵ NAFTA, *supra* note 52, art. 1110(2).
- ⁵⁶ ICSID refers to "the Convention on the Settlement of Investment Disputes between State and Nationals of Other States (1966)." The Convention is administered by the World Bank in Washington D.C.
- ⁵⁷ The Additional Facility Rules of the ICSID are available at <http://www.worldbank.org/icsid/facility/facility.htm>.
- ⁵⁸ NAFTA, *supra* note 52, art. 1120; *Roundtable Discussion*, *supra* note 112, at 226.
- ⁵⁹ NAFTA, *supra* note 52, art. 1120; *Roundtable Discussion*, *supra* note 112, at 226.

⁶⁰ *Private Rights*, *supra* note 3, at 11; Wagner, *supra* note 3, at 474, 483.

⁶¹ NAFTA, *supra* note 52, art. 2009(2). Typically, panelists are private lawyers. Martin Wagner, *Trading Human Rights for Corporate Profits: Global Trade Policy Weakens Protection for Health, the Environment, RACE, POVERTY AND THE ENVIRONMENT*, Summer 2004, at 26.

⁶² Roundtable Discussion on Domestic Challenges if Multilateral Investment Treaties are Interpreted to Expand the Compensation Requirements for Regulatory Expropriations Beyond a Signatory State's Domestic Law 11 N.Y.U. Envtl. L.J. 208, 246 (2002) (Roundtable Discussion).

⁶³ NAFTA, *supra* note 52, art. 1123; *Private Rights*, *supra* note 49, at 39; *Roundtable Discussion*, *supra* note 62, at 227; Vicki Been, *Does an International "Regulatory Takings" Doctrine Make Sense*, 11 N.Y.U. ENVTL. L.J. 49, 60 (2002).

⁶⁴ Meltz, *supra*, note 4, at 317, 331 (2007); *Sacramento Grazing Assc. Inc. v. United States* (2005) 66 Fed.Cl. 211, 217.

⁶⁵ *Klamath Irr. Dist v. United States* (2005) 67 Fed.Cl. 504, 515 (internal citations omitted.)

⁶⁶ *Sacramento Grazing Assc. Inc. v. United States* (2005) 66 Fed.Cl. 211, 215-216; *United States v. Gerlach Livestock Co.*, 339 U.S. at 741; *Klamath Irr. Dist. v. United States* (2005) 67 Fed.Cl. 504, 516-17, 519.

⁶⁷ *United States v. Gerlach Livestock Co.*, 339 U.S. at 735-40.

⁶⁸ *United States v. Gerlach Livestock Co.*, 339 U.S. at 751-754.

⁶⁹ *Dugan v. Rank* (1963) 372 U.S. 609.

⁷⁰ *Id.* at 619-626.

⁷¹ *Id.* at 625 (internal quotations omitted).

⁷² Brian Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 5 (2002); Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act and the Fifth Amendment*, 32 ENVTL. L. 551, 558-59 (2002).

⁷³ Gray, *supra* note 72, at 5-6; Benson, *supra* note 72, at 560; Brittany K.T. Kauffman, Note, *What Remains of the Endangered Species Act and Western Water Rights After Tulare Lake Basin Water Storage District v. United States?*, 74 U. Colo. L. Rev. 837, 870, 875 (2003).

⁷⁴ Benson, *supra* note 72, at 560; Kauffman, *supra* note 73, at 864.

⁷⁵ *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed. Cl. 313, 314.

⁷⁶ *Id.* at 320.

⁷⁷ *Id.* at 317, 320.

⁷⁸ *Id.* at 314, 324.

⁷⁹ *Id.* at 318-20.

⁸⁰ *Id.* at 319.

⁸¹ *Casitas Mun. Water Dist. v. United States* (2007) 76 Fed. Cl. 100, 102.

⁸² *Id.* at 105.

⁸³ *Id.*

⁸⁴ *Id.* at 106.

⁸⁵ *Klamath Irrigation*, *supra* note 8.

⁸⁶ *Klamath Irr. Dist. v. United States* (2005) 67 Fed. Cl. 504, 532.

⁸⁷ *Id.* at 538 (internal citations omitted.)

⁸⁸ *Id.* at 540.

⁸⁹ *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1273.

⁹⁰ *Id.* at 1274.

⁹¹ *Id.* at 1275.

⁹² *Id.* at 1275.

⁹³ *Id.* at 1276.

⁹⁴ *Id.* at 1277.

⁹⁵ *Id.* at 1277-79.

⁹⁶ *Id.* at 1279.

⁹⁷ *Anderson-Cottonwood Irr. Dist. v. Klukkert* (1939) 13 Cal.2d 191, 197.

⁹⁸ *Madera Irrigation District v. All Persons* (1957) 47 Cal.2d 681, 691-693, reversed on other grounds sub nom., *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275

⁹⁹ See *Empire West Side Irrigation District v. Lovelace* (1970) 5 Cal.App.3d 911, 914 (where water right rests with district, landowner only has right to receive water).

¹⁰⁰ *Anderson-Cottonwood Irr. Dist. v. Klukkert* (1939) 13 Cal.2d 191, 197.

¹⁰¹ *Texans' Notice of Intent to Submit a Claim to Arbitration Under Section B, Chapter 11 of the North American Free Trade Agreement* (2004) (NOI).

¹⁰² *Notice of Arbitration*, *supra* note 1, at 27.

¹⁰³ *Id.*

¹⁰⁴ *NOI*, *supra* note 100, at 7.

¹⁰⁵ There is significant debate regarding whether, and, if so, how NAFTA applies to water. Paul Kibel, *Grasp on Water: A Natural Resource That Eludes NAFTA's Notion of Investment* (2007) 34 *Ecol. L. Q.* 655 and Howard Mann, *Who Owns "Your" Water? Reclaiming Water as A Public Good Under International Trade and Investment Law* (2003) available at http://www.iisd.org/pdf/2003/trade_who_owns_water_II.pdf

¹⁰⁶ *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1273, 1275.

¹⁰⁷ *Casitas Mun. Water Dist. v. United States* (2007) 76 Fed. Cl. 100, 106.

¹⁰⁸ *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1276.

¹⁰⁹ *Klamath Irr. Dist. v. United States* (2005) 67 Fed. Cl. 504, 532.