

# ARTICLES

## **Instream Flows in California and Spain: The Thorny Issue of Compensation**

LUIS INARAJA VERA\*

### ABSTRACT

*Limiting existing water rights to preserve environmental values, for instance, by requiring that a minimum flow be left in a watercourse, can be a controversial measure in and of itself. The relevant question that arises in these situations, however, is the extent to which water users should be compensated for the curtailment of their right. Two geographical areas with a similar climate, Spain and California, have been dealing with this problem for some time, and their approaches show remarkable parallels.*

*Both in California and Spain, the latest court decisions suggest that the government may have to compensate water users for the reduction of their rights. The courts dealing with cases of this nature in California have adopted the physical taking standard, which is more favorable for water users than the regulatory takings rubric. In Spain, while the Supreme Court has left this issue as an open question, the legislative framework in place strongly suggests that water users should have to be compensated if their rights are curtailed to ensure that rivers maintain a minimum flow. Nevertheless, there is some uncertainty in both jurisdictions as to whether certain defenses—the public trust doctrine in California and the general restriction defense in Spain—could successfully exempt the government from the duty to pay compensation, at least in cases where the reduction of the right is relatively small.*

### TABLE OF CONTENTS

I. Introduction . . . . .	200
II. Water Law in California and Spain. . . . .	201
A. Water Law Systems in the United States: Riparianism and Prior Appropriation . . . . .	201

---

\* Attorney admitted to the Barcelona Bar (Spain). During his time at the firm Cuatrecasas, Gonçalves Pereira, he represented clients in the practice areas of administrative, environmental and natural resources law. B.S. University of Girona. LLB University of Barcelona. LLM. University of the Basque Country. LL.M. Vermont Law School. J.D. Candidate 2016, New York University School of Law. The author would like to thank Professors John Echeverria and Katrina Wyman for their comments and guidance. © 2015, Luis Inaraja Vera.

B.	The Mixed System in California . . . . .	203
C.	Water Law in Spain . . . . .	205
III.	Takings in California and Spain . . . . .	208
A.	Takings in the United States . . . . .	208
B.	Takings in California . . . . .	210
C.	Takings in Spain . . . . .	210
IV.	Property Rights in Water . . . . .	212
V.	Water and Takings . . . . .	215
A.	Takings of Water Rights in California . . . . .	215
B.	A Comparison with the Spanish System . . . . .	218
VI.	Defenses to Takings Claims . . . . .	220
A.	United States: The Public Trust Doctrine . . . . .	221
1.	The Public Trust Doctrine in California . . . . .	221
2.	The Public Trust Doctrine as a Defense in Takings Cases . . . . .	221
B.	Spain: Defenses Based on the Consideration of Water as Part of the Public Domain . . . . .	223
1.	Parallels with Public Trust Doctrine: The General-Restriction Defense . . . . .	223
2.	Drought Periods: The Temporary-Restriction Defense . . . . .	225
VII.	Conclusion . . . . .	226

## I. INTRODUCTION

Michael has recently obtained a right to take water from a creek and starts running his small hydropower plant. Everything is going well until, two years later, a drought strikes, leaving the creek with just enough water to run the plant. The government realizes that while this situation is not very frequent, the water level at times is too low to adequately sustain the riparian ecosystem. The water agency then decides to impose a minimum flow requirement to limit the amount of water that Michael can use, reducing the profitability of his plant. Does Michael have the right to be compensated for his economic loss? Should the answer change depending on whether the forgone water represents 5% or 60% of his right?

These questions are being asked in different parts of the world, especially in regions where water is a scarce resource. Spain and California are two good examples of areas where these issues are becoming increasingly important, with recent court rulings<sup>1</sup> addressing some of the permutations of this problem. Although they are located thousands of miles away, Spain and California have one important thing in common—the challenge of having to manage water resources in a territory with a rainy north and a thirsty south.<sup>2</sup>

1. *E.g.*, *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013); S.T.S., Dec. 5, 2014 (R.J., No. 4997) (Spain).

2. Data from the California Department of Water Resources shows that, in 2000—a year that was not extremely wet or dry—the total precipitation in some areas of Northern California exceeded 86 inches. In that

The situation described above may arise more frequently in light of projected changes in precipitation and water supply in both California and Spain. According to the latest report of the Intergovernmental Panel on Climate Change (IPPC), water availability in the arid areas of western United States will decline and droughts will increase.<sup>3</sup> The IPPC also expects a rise in the duration and intensity of droughts in Southern Europe.<sup>4</sup>

Parts II and III of this article provide an overview of the main principles and legal doctrines of water and takings law in Spain and California. Part IV examines whether water rights, given their peculiar legal nature, are subject to protections against uncompensated takings in these two jurisdictions. In Part V, the article discusses the different takings frameworks that may apply to the restriction of water rights in the two legal systems and explains which of these approaches has prevailed. Part VI analyzes some of the most relevant defenses invoked in water-related takings cases and claims that the ultimate success of these doctrines remains uncertain in both jurisdictions.

## II. WATER LAW IN CALIFORNIA AND SPAIN

### A. WATER LAW SYSTEMS IN THE UNITED STATES: RIPARIANISM AND PRIOR APPROPRIATION

Riparianism is a doctrine that states east of Kansas City adopted from the English common law,<sup>5</sup> where water rights were connected to the ownership of land.<sup>6</sup> The amount of water that riparians have been able to use has changed significantly over time. In the earlier stages or riparianism, the “natural flow”

---

same year, however, the southern hydrographic regions (Colorado River, South Lahontan and South Coast) had precipitation levels below 24 inches, and the rainfall in the majority of this area did not reach 12 inches. See CAL. DEP'T OF WATER RES., *2000 Precipitation*, [http://www.waterplan.water.ca.gov/docs/portfolio/faf\\_data/precip/precip\\_2000\\_w-percent.jpg](http://www.waterplan.water.ca.gov/docs/portfolio/faf_data/precip/precip_2000_w-percent.jpg) (last visited Mar. 9, 2015). Precipitation in Spain is also significantly more abundant in the north than in the south. The north has an annual precipitation over 39 inches, with some areas that exceed 71 and even 87 inches. In contrast, in Southern Spain, the rainfall is generally below 28 inches per year, with large areas in the southeast usually receiving annual precipitation below 16 inches. See *Iberian Climate Atlas*, DEPARTAMENTO DE PRODUCCIÓN DE LA AGENCIA ESTATAL DE METEOROLOGÍA DE ESPAÑA [PROD. DEP'T OF THE STATE METEOROLOGICAL AGENCY OF SPAIN] 67, available at <http://www.aemet.es/documentos/es/conocerlas/publicaciones/Atlas-climatologico/Atlas.pdf> (last visited Mar. 9, 2015).

3. VICENTE R. BARROS ET AL., *CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, PART B: REGIONAL ASPECTS, CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1456-57* (2014), available at <http://www.ipcc.ch/report/ar5/wg2/>. For an analysis of the effects of climate change on trout populations in the West, see Jack R. Tuholske, *Hot Water, Dry Streams: A Tale of Two Trout*, 34 VT. L. REV. 927 (2010).

4. VICENTE R. BARROS ET AL., *supra* note 3, at 1279.

5. See ROBERT W. ADLER, ROBIN K. CRAIG, & NOAH D. HALL, *MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS* 23 (2013) [hereinafter ADLER, CRAIG, & HALL, *MODERN WATER LAW*]. Certain western states like California have mixed systems that incorporate features of prior appropriation and riparianism. *Id.* at 102.

6. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 27 (4th ed. 2006).

doctrine imposed very strict limitations on the volume of water that landowners could withdraw such that no user would diminish in quality or quantity the right of the other riparians.<sup>7</sup>

These limitations proved overly restrictive as water use increased. Some states responded by progressively adopting the so-called “reasonable use riparianism.”<sup>8</sup> Under this doctrine, riparians may diminish the quantity and quality of the water that will be available to downstream users as long as their use, and the injury caused to other users, is reasonable.<sup>9</sup> As the Supreme Court stated, “[t]he ‘fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use.’”<sup>10</sup>

States located west of Kansas City have predominantly adopted the system of prior appropriation. The settlers in the West were faced with certain challenges that made riparianism ill-suited to their needs. First, the vast majority of the West is arid.<sup>11</sup> Second, activities such as mining required the diversion of large volumes of water ultimately used in nonriparian lands.<sup>12</sup> Finally, water users made significant investments and demanded certainty that their right would be protected.<sup>13</sup>

As a result, most western states adopted the prior appropriation system, where water rights are acquired by (i) diverting unappropriated water (ii) from a source subject to appropriation and (iii) applying it to a beneficial use.<sup>14</sup> One of the distinct features of this doctrine is consideration of priorities or relative seniority based on the “first in time, first in right” principle.<sup>15</sup> The practical effect of this principle is that, when there is not enough water to satisfy the needs of all users, those who have an earlier priority date—i.e., senior appropriators—have preference over those with a later priority date—i.e., junior appropriators. Further, under this system, water rights are not dependent upon the ownership of land abutting the watercourse.<sup>16</sup>

---

7. *See id.* at 38.

8. *See id.* at 37; Santiago Álvarez Carreño, *Property Rights in Water in Common Law Countries: Reflections on Their Evolution and Adaptation to Changing Needs*, 25 REVISTA GENERAL DE DERECHO ADMINISTRATIVO 1, 19 (2010) (explaining the evolution of the natural flow doctrine).

9. *See* SNOW v. PARSONS, 28 Vt. 459, 462 (1856). For an analysis of this case, see SAX ET AL., *supra* note 6, at 44.

10. *United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945) (quoting L. Ward Bannister, *Interstate Rights in Interstate Streams in the Arid West*, 36 HARV. L. REV. 960 (1923)).

11. Robert W. Adler, *Climate Change and the Hegemony of State Water Law*, 29 STAN. ENVTL. L.J. 1, 21 (2010) [hereinafter Adler, *Climate Change*].

12. *Id.*

13. *Id.*

14. ADLER, CRAIG, & HALL, *MODERN WATER LAW*, *supra* note 5, at 87.

15. *Id.* at 139.

16. *Id.* at 87.

The requirement that water be applied to a beneficial use serves to avoid waste and also to prevent users from holding water for purely speculative purposes.<sup>17</sup> This does not mean, however, that water storage is necessarily forbidden; some states have recognized it as a separate right as long as the water is later put to a beneficial use.<sup>18</sup> In addition to the beneficial-use requirement, there are other legal mechanisms aimed at ensuring that the resource is used efficiently, such as the loss of the right by non-use.<sup>19</sup> This category includes several doctrines, two of the more noteworthy being forfeiture and abandonment. Forfeiture is a “statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water.”<sup>20</sup> Abandonment, on the other hand, is a common law doctrine that requires a relinquishment of the right and the intent to abandon it.<sup>21</sup> Unfortunately, agencies do not always enforce these “use-it-or-lose-it” provisions.<sup>22</sup>

Although prior appropriation was the system chosen by settlers in the Southwest, a region where water resources remain scarce, one commentator has questioned the doctrine’s suitability to handle some of the problems that are yet to come, noting that “the harsh implications of prior appropriation have yet to be tested in a significant way.”<sup>23</sup> When the vast majority of appropriators are able to have their water needs fulfilled, disputes between water users can be expected to remain within reasonable bounds. However, this system of predominant winners could become one of predominant losers if water scarcity continues to increase.<sup>24</sup>

## B. THE MIXED SYSTEM IN CALIFORNIA

California was one of the few states to adopt mixed or dual systems that incorporate features of both prior appropriation and riparianism.<sup>25</sup> This circumstance sets California apart from pure prior appropriation states such as Idaho, Montana, Wyoming, Nevada, Utah, Colorado, Arizona, and New Mexico.<sup>26</sup> Today, Section 102 of the California Water Code provides that “water may be acquired by appropriation.”<sup>27</sup> Statements confirming the existence of appropria-

---

17. Adler, *Climate Change*, *supra* note 11, at 22.

18. *See, e.g.*, *City of Westminster v. Church*, 445 P.2d 52 (Colo. 1968). For an analysis of this case, see ADLER, CRAIG, & HALL, *MODERN WATER LAW*, *supra* note 5, at 126.

19. SAX ET AL., *supra* note 6, at 247.

20. *Sears v. Berryman*, 623 P.2d 455, 459 (Idaho 1981).

21. *Id.*

22. Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 928-29 (1998).

23. Adler, *Climate Change*, *supra* note 11, at 24.

24. *Id.*

25. ADLER, CRAIG, & HALL, *MODERN WATER LAW*, *supra* note 5, at 102. Another example is the State of Oregon. *See id.*

26. Carreño, *supra* note 8, at 39.

27. Cal. Water Code § 102 (West 2015).

tive water rights in California, however, can be found in early decisions dating back to the Nineteenth century. In *Irwin v. Phillips*, the Supreme Court of California noted that:

The lands being open to this appropriation, the rule of time is the rule of right; and the first taker is to be protected in his entry and possession . . . [t]hat there is no difference between an appropriation of land and an appropriation of water; this being a mere accessory, as sand, gravel, gold dust, or anything else, the Courts must give effect to this rule and right, as to the water as to the land.<sup>28</sup>

As for riparian rights, article 2, section 2 of the California Constitution, which was enacted in 1928 as article XIV, section 3, indicates that “nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner’s land is riparian.”<sup>29</sup> The Supreme Court of California, however, had already recognized these kinds of water rights before the enactment of art. XIV of the California Constitution. The court in *Pope v. Kinman* stated that:

As being owners of the land, the plaintiffs have an interest in the living stream of water flowing over the land: their interest is that called the riparian right . . . it is enough to say that under settled principles, both of the civil and common law, the riparian proprietor has a usufruct in the stream as it passes over his land.<sup>30</sup>

As one may expect, the coexistence of riparian users and appropriators has been problematic. The Supreme Court of California originally held that riparian rights took priority over appropriative rights and that riparian rights were not limited by the doctrine of reasonable use.<sup>31</sup> This situation triggered a constitutional amendment which established that “[r]iparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are . . . *in view of such reasonable and beneficial uses*”<sup>32</sup> The Supreme Court of California interpreted this language to mean that the rule of reasonableness, which originally applied only to appropriators, had finally been extended to include riparian users.<sup>33</sup>

The legal nature of water rights has also necessitated clarification by the courts. Section 102 of the California Water Code provides that “[a]ll water within

---

28. *Irwin v. Phillips*, 5 Cal. 140, 141 (1855). For an analysis of this case, see ARTHUR L. LITTLEWORTH & ERIC L. GARNER, CALIFORNIA WATER II 46, 50 (2d ed. 2007).

29. CAL. CONST. art. X, § 2.

30. *Pope v. Kinman*, 54 Cal. 3, 5 (1879). For an analysis of this case, see LITTLEWORTH & GARNER, *supra* note 28, at 39.

31. *See* *Herminghaus v. S. Cal. Edison Co.*, 252 P. 607, 615 (Cal. 1926); *see also* *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 725 (Cal. 1983).

32. CAL. CONST. art. X, § 2 (emphasis added).

33. *See* *Peabody v. City of Vallejo*, 40 P.2d 486, 491 (Cal. 1935).

the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”<sup>34</sup> This formulation stresses that the right that can be held by an individual is limited to the mere use of the water and is subject to certain conditions. The courts have supported the view that the right “consists not so much of the fluid itself as the advantage of its use,” describing it as “usufructuary.”<sup>35</sup>

Last, appropriative rights in California, unlike riparian rights,<sup>36</sup> can be lost by nonuse. In California, similarly to what occurs in other states, an appropriator may lose his right by abandonment<sup>37</sup> if he does not use the water within a certain period of time and has no intent to repossess the right. The Supreme Court of California highlighted the importance of the intent element by noting that non-use alone will not, “without an intention to abandon, be held to amount to abandonment.”<sup>38</sup> Forfeiture is also a mechanism by which a water right can be lost as a result of non-use.<sup>39</sup> Section 1241 of the California Water Code provides that, if the appropriator fails to beneficially use all or any part of his right for a period of five years, the unused water may revert to the public.<sup>40</sup>

### C. WATER LAW IN SPAIN

The nature of water rights in Spain cannot be addressed without first explaining the concept of “public domain.” Pursuant to the Spanish Constitution, “[p]ublic domain property shall be established by law and shall, in any case, include the foreshore beaches, territorial waters and the natural resources of the exclusive economic zone and the continental shelf.”<sup>41</sup> Property that has been declared part of the public domain<sup>42</sup> is under the ownership of the government,<sup>43</sup> subject to a public use or service,<sup>44</sup> and may not be transferred, seized, or lost to adverse possession.<sup>45</sup> With some exceptions provided in statutes governing specific public domain goods,<sup>46</sup> the private use of public domain property—i.e., to the exclusion of others<sup>47</sup>—requires an administrative concession.<sup>48</sup> If the

---

34. Cal. Water Code § 102 (West 2015).

35. *Eddy v. Simpson*, 3 Cal. 249, 252 (Cal. 1853) (emphasis omitted).

36. LITTLEWORTH & GARNER, *supra* note 28, at 46.

37. *N. Kern Water Storage Dist. v. Kern Delta Water Dist.*, 54 Cal. Rptr. 3d 578, 581 (Cal. Ct. App. 2007).

38. *Utt v. Frey*, 39 P. 807, 809 (Cal. 1895).

39. *Kern*, 54 Cal. Rptr. 3d at 581.

40. Cal. Water Code § 1241 (West 2015).

41. CONSTITUCIÓN ESPAÑOLA [CONSTITUTION], B.O.E. n. 311, Dec. 29, 1978, art. 132.2 (Spain).

42. Or that, being otherwise owned by a government, is subject to a public use or service. Public Administrations Patrimony Act art. 5.1 (B.O.E. 2003, 33) (Spain).

43. Whether it is the central, regional, or municipal government.

44. *See* Public Administrations Patrimony Act art. 5.1.

45. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 132.1.

46. *See, e.g.*, Water Act art. 59.1 (B.O.E. 2001, 176) (Spain) (providing that uses in article 54 of the act do not require a concession).

47. Public Administrations Patrimony Act art. 85.3.

individual, however, is merely performing a so called “common use”—i.e., the kind of use that does not deprive or limit the ability of others to enjoy that same good or property<sup>49</sup>—the general rule is that no concession or authorization is required.<sup>50</sup>

Although the Spanish Constitution did not declare water resources to be a public domain good, the Spanish Water Act<sup>51</sup> provides that continental water—including surface and renewable groundwater that is integrated in the hydrologic cycle—is part of the so called hydrologic public domain, and thus, subject to the public interest.<sup>52</sup> This statute also provides that river and lakebeds are included within the hydrologic public domain.<sup>53</sup> Some exclusions include ephemeral streams, which are not considered part of the hydrologic public domain if they exclusively flow through privately owned lands from beginning to end,<sup>54</sup> and ponds located, and exclusively used, on private lands.<sup>55</sup>

The legislature has subjected the right to use water resources to a regime consistent with that of public domain goods, differentiating between common and private uses. The Spanish Water Act incorporates a list of common uses of surface water that includes drinking, bathing, other domestic uses, and livestock watering.<sup>56</sup> Any person may use surface waters for a common use without obtaining an authorization or concession. However, similarly to what occurred in earlier versions of riparianism,<sup>57</sup> the common use must not impair the quantity or quality of the water available to other users, and diversions are forbidden.<sup>58</sup>

Conversely, private uses of water—i.e., those that exclude use by others<sup>59</sup>—can only be granted by statute or through an administrative concession issued by the relevant water agency.<sup>60</sup> Statutory water rights include those conferred to landowners who use groundwater or water from springs that originate in their property in an amount that does not exceed 7,000 cubic meters per year.<sup>61</sup> Any other private use not specifically authorized by a statutory provision requires an administrative concession,<sup>62</sup> which will have a maximum duration of seventy-

---

48. *Id.* art. 86. In some cases, if the public domain good is not used for more than four years, an authorization—as opposed to a concession—may suffice. *Id.*

49. *Id.* art. 85.1.

50. *Id.* art. 86.1.

51. This declaration was already made by previous water acts. *See, e.g.*, Water Act art. 1.2.

52. Water Act art. 1.3.

53. *Id.* art. 2.

54. *Id.* art. 5.1.

55. *Id.* art. 10.

56. *Id.* art. 50.

57. *See* SAX ET AL., *supra* note 6, at 38.

58. Water Act art. 50.2.

59. *Id.* art. 51.1(c).

60. *Id.* art. 52.

61. *Id.* art. 54.2.

62. *Id.* art. 59.1.

five years<sup>63</sup> and does not guarantee the availability of any amount of water.<sup>64</sup> Water agencies have discretion to grant or deny a water concession application, but their decision must be justified by the public interest and the principle of rational use of water resources.<sup>65</sup>

Accordingly, water agencies are bound, when issuing water concessions, by the order of preference of uses established in each basin's hydrologic plan.<sup>66</sup> In other words, if an agency has to choose between two incompatible uses, the use that is higher on the list of preferences of that particular basin will be awarded the concession. Despite the potential for differences in the prioritization of certain uses, the Spanish Water Act requires that the supply for towns and cities, including low consumption industrial users located in a settled area, have preference over any other kind of use.<sup>67</sup> Further, if a plan does not specify an order of preference of uses, the water agency must abide by the order provided in the Spanish Water Act. The statute lists the following uses, in decreasing order of preference: (i) water supply to towns and cities, including low consumption industrial users located in a settled area; (ii) irrigation and farming uses; (iii) industrial uses for the generation of energy; (iv) other industrial uses; (v) aquiculture; (vi) recreation; (vii) navigation and aquatic transportation; and (viii) other uses.<sup>68</sup>

Similar to water rights in California, water rights in Spain can also be lost in a variety of situations, which are established in the Spanish Water Act.<sup>69</sup> First, as noted earlier, water concessions are granted for a certain period of time.<sup>70</sup> Therefore, if not renewed, a water right will expire at the end of the term for which it was granted.<sup>71</sup> Second, pursuant to the doctrine of caducity, a water agency may forfeit water rights if the user breaches one of the essential conditions<sup>72</sup> or terms of the concession,<sup>73</sup> or if the use is discontinued for more than three consecutive years, as long as the interruption can be imputed to the water user.<sup>74</sup> Third, administrative concessions can be expropriated if the resource is going to be put to a use that is given preference in the basin's

---

63. *Id.* art. 59.4.

64. *Id.* art. 59.2.

65. *Id.*

66. *Id.* art. 60.1.

67. *Id.* art. 60.3.

68. *Id.*

69. *Id.* at art. 53.

70. *See supra* text accompanying note 59.

71. Water Act art. 53.1(a).

72. Essential conditions include the identity of the concession holder, maximum annual and monthly volume, maximum flow, use . . . Hydraulic Public Domain Regulation art. 144.2 (B.O.E. 1986, 849) (Spain).

73. Water Act art. 66.1.

74. *Id.* art. 66.2.

hydrological plan.<sup>75</sup> Last, water rights can be extinguished if expressly relinquished by the user.<sup>76</sup>

### III. TAKINGS IN CALIFORNIA AND SPAIN

#### A. TAKINGS IN THE UNITED STATES

The Fifth Amendment to the Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>77</sup> The purpose of the so-called takings clause has been described by the Supreme Court of the United States as follows: “just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project.”<sup>78</sup> While the provisions of the Fifth Amendment initially only applied to the federal government, the Fourteenth Amendment extended those protections to state governments.<sup>79</sup>

It follows from the reading of the Fifth and Fourteenth Amendments that the key inquiries that must be made when examining takings claims are determining (i) if a property right is involved,<sup>80</sup> (ii) whether it has been taken,<sup>81</sup> and if so, (iii) if the taking serves a public use.<sup>82</sup> The question of whether a certain interest constitutes private property is one that has to be answered by looking at state law.<sup>83</sup>

The second step of the analysis and the main focus of this article—i.e., determining if private property has been taken—varies substantially depending on whether we apply the physical or regulatory takings analysis.<sup>84</sup> A physical taking occurs “[w]hen the government physically takes possession of an interest in property for some public purpose . . . .”<sup>85</sup> Physical takings give rise to the categorical duty to compensate the owner even in cases where only a part of the interest is taken.<sup>86</sup>

Regulatory takings, on the other hand, occur when nonpossessory governmental activity<sup>87</sup> prohibits private uses,<sup>88</sup> and they are generally analyzed under the

---

75. *Id.* art. 60.2.

76. *Id.* art. 53.1(d).

77. U.S. CONST. amend. V.

78. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

79. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

80. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009).

81. *Id.*

82. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005).

83. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 732 (2010).

84. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002).

85. *Id.*

86. *Id.* at 322.

87. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

88. *Tahoe-Sierra*, 535 U.S. at 323.

so-called *Penn Central* test, a multi-factor framework that balances (i) the economic impact of the regulation, (ii) the degree of interference with investment-backed expectations, and (iii) the character of the regulation.<sup>89</sup> In these cases, the courts apply the “parcel-as-a-whole rule,” according to which:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*.<sup>90</sup>

In some cases, however, courts do not analyze regulatory takings under the *Penn Central* framework. The Supreme Court has treated certain situations not involving physical occupation as a *per se* taking: “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>91</sup> The Court has nonetheless provided an exception to this categorical rule: no taking occurs when the limitations contemplated in the regulation inhere in the title itself as a result of “background principles of nuisance and property law.”<sup>92</sup> Therefore, no taking occurs when the government action merely duplicates the result that could have been achieved in the courts.<sup>93</sup>

Courts have also used a different framework to determine whether private property has been taken in cases where the government grants a property owner a certain discretionary interest—e.g., a building permit—but at the same time imposes a condition that, regarded independently, would constitute a *per se* taking.<sup>94</sup> When this happens, the Supreme Court has employed the so-called exactions test, which provides that a taking has occurred when the condition in question imposes a burden that is not roughly proportional to the public harm the regulation is designed to avoid or where there is no “essential nexus” between the condition and the legitimate interest the regulation is designed to serve.<sup>95</sup>

Even if the government is willing to provide compensation, a taking violates the Fifth and Fourteenth amendments if the property is not going to be applied to a public use.<sup>96</sup> The question that needs to be answered is: what constitutes public use? The Supreme Court analyzed this issue and concluded that the meaning of “public use” is broader than “use by the public,” and thus not limited to situations

---

89. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

90. *Id.* at 130-31 (emphasis added).

91. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis omitted).

92. *Id.* at 1029-30.

93. *Id.* at 1029.

94. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

95. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

96. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

such as when land is condemned for a railroad.<sup>97</sup> It also includes the notion of “public purpose,” which, if interpreted broadly, would support a conveyance of property to private hands as long the purpose it serves can be considered “public.”<sup>98</sup> The clear limitation that remains after the *Kelo* opinion is that “the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”<sup>99</sup>

#### B. TAKINGS IN CALIFORNIA

Although the Fourteenth Amendment applies the above takings prohibitions to the states, some have also included provisions to protect private property in their own constitutions. The California Constitution, in particular, provides that “[p]rivate property may be taken or damaged for a public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”<sup>100</sup>

The existence of two potentially overlapping takings clauses raises two issues: whether there are any differences between the two constitutional provisions, and if so, whether the California Constitution provides additional protection against the taking of private property. The answer to the first question can seem rather obvious, since the mere wording of the California takings clause includes the word “damage,” which does not appear in the Fifth or Fourteenth Amendments to the U.S. Constitution. The California courts have noted that, as a result of the inclusion of that additional term, the state takings clause includes “a somewhat broader range of property values than does the corresponding federal provision.”<sup>101</sup> As for the second issue identified above, the California Supreme Court has concluded that “[a]side from that difference, California courts have construed the clauses congruently. . . . Thus, courts have analyzed takings claims under decisions of both the California and United States Supreme Courts.”<sup>102</sup>

#### C. TAKINGS IN SPAIN

The Cadiz Constitution of 1812 provided, in article 171, that the King could not take property from a person or corporation, or affect their possession, use and enjoyment thereof, unless it was for a public use and he compensated the

---

97. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005). For an in depth analysis of this case and the public use requirement, see Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 *ECOLOGY L.Q.* 1 (2007).

98. *Kelo*, 545 U.S. at 485; see also DARREN BOTELLO-SAMSON, *REGULATORY TAKINGS AND THE ENVIRONMENT: THE IMPACT OF PROPERTY RIGHTS LITIGATION* 54 (2010).

99. *Kelo*, 545 U.S. at 477.

100. CAL. CONST. art. I, § 19(a).

101. *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75, 98 (Cal. Ct. App. 2008) (internal quotation omitted).

102. *Id.* at 98 (internal quotation omitted).

owner.<sup>103</sup> More than a hundred years later, the main statute that continues to govern expropriations in Spain was enacted. The Expropriation Act of 1954 sets out the main requirements and procedures that apply to this area of the law. While this statute limits the kinds of rights that the executive may expropriate and dictates the procedures that it must follow, the main protection against the taking of private property without just compensation is set out in article 33 of the current Spanish Constitution.<sup>104</sup>

Article 33 of the Spanish Constitution is divided into three subsections, all dealing with property rights. The first subsection recognizes the right to private property and inheritance.<sup>105</sup> Subsection two provides that the social function of these rights determines their contours.<sup>106</sup> Finally, article 33.3 states that no one may be deprived of their property and rights unless it is justified on grounds of public utility or social interest and the government pays just compensation.<sup>107</sup>

As noted earlier, the Expropriation Act of 1954 regulates, in more detail, the limitations and procedures that apply to the taking of private property for public use. The definition of expropriation that article 1 provides is particularly relevant because it includes any “individual deprivation of private property or legitimate patrimonial rights or interests.”<sup>108</sup> Therefore, the protection this section affords is not limited to ownership but also extends to any right or interest of an economic nature. The Spanish Constitutional Court has confirmed that this expansive definition of property is consistent with the protection granted in article 33.3 of the Spanish Constitution.<sup>109</sup>

Although the 1954 Act is a central piece of the expropriation framework in Spain, it is not uncommon to find provisions dealing with this area of the law in other statutes.<sup>110</sup> Some of these provisions implicitly reflect the distinction between physical and regulatory takings. A good example of this is the 2008 Land Use Act, which regulates the basic situations where the issuance of a town plan or its implementation will trigger the government’s obligation to compensate the holders of certain rights or interests. Article 35 of the statute treats physical occupations of land as a separate compensable category of government action,<sup>111</sup> while the other provisions list the particular kinds of restrictions in the use of the land that entitle the landowner—or other holder of a right or interest—to compensation. While the definition of property for the purposes of expropriation analyses is rather expansive, the Land Use Act only recognizes as compensable

---

103. CADIZ CONSTITUTION, Mar. 19, 1812, art. 172 (Spain).

104. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 33 (Spain).

105. *Id.* art. 33.1.

106. *Id.* art. 33.2.

107. *Id.* art. 33.3.

108. Forced Expropriation Law art. 1 (B.O.E. 1954, 351) (Spain).

109. S.T.C., Nov. 29, 1988 (B.O.E., No. 307) (Spain).

110. Land Use Law (B.O.E. 2008, 2); Water Act art. 60.2.

111. Land Use Law art. 35(e).

the interferences with rights that are vested. For example, if a local government amends the town plan and, as a result, limits a certain landowner's ability to build on his property, no compensation will be due. If, on the other hand, the government had already granted a building permit to the landowner, he will be entitled to compensation.

Unfortunately, many other areas of the law are not governed by statutes, like the Land Use Act, that lay out the specific cases in which a right can be considered taken as a result of a non-possessory governmental action. The Spanish Constitutional Court, however, provided some guidance to the legislature and executive in a 1988 case involving water rights.<sup>112</sup> The court noted that taking away a right—such as ownership—is a clear compensable taking.<sup>113</sup> Nevertheless, the regulation of a right that modifies the previous *status quo*, causing the restriction on the use of property, is not necessarily a taking unless the limitation affects the “essential content” of the right.<sup>114</sup> Similar to what the U.S. Supreme Court concluded in *Lucas*,<sup>115</sup> the Spanish Constitutional Court held that this occurs when the governmental action deprives the property from all of its economic profitability or private use.<sup>116</sup> In the 1988 case, the court concluded that introducing a 75-year limit to water concessions did not impinge on the essential content of the right, and therefore, the water users were not entitled to compensation.

In short, the Spanish system, like California, treats physical and regulatory takings differently. While physical takings are generally governed by per se rules, the regulation of a right does not require compensation unless a statute so provides, or the government impinges on its “essential content.”

#### IV. PROPERTY RIGHTS IN WATER

The United States Constitution protects property rights but does not create them.<sup>117</sup> Therefore, courts must determine the existence of a property right “by reference ‘to existing rules or understandings that stem from an independent

---

112. S.T.C., Nov. 29, 1988 (B.O.E., No. 307) (Spain).

113. *Id.*

114. *Id.* In other cases, the Constitutional Court has adopted a different standard to determine whether the government has effected a compensable expropriation. For example, in a case dealing with groundwater depletion, the court based its determination that no expropriation had taken place on the high number of property owners that had been affected by the governmental regulation. This, according to the court, reflected that the regulation had imposed a “general” limitation on property rights, as opposed to a “singular” limitation. Only the latter would have required the government to compensate the water users. Gabriel Doménech Pascual, *Prohibido regar: ¿expropiación o delimitación de la propiedad no indemnizable?*, REVISTA ARAGONESA DE ADMINISTRACIÓN PÚBLICA, 2012, at 269, 273-75.

115. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

116. S.T.C., Mar. 20, 1997 (B.O.E. No. 159) (Spain); *see also* Gabriel Doménech Pascual, *Cómo distinguir entre una expropiación y una delimitación de la propiedad no indemnizable*, INDRET, Jan. 2012, at 8-22. (explaining the different criteria that can be used to differentiate expropriations and non-compensable limitations of property rights).

117. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

source such as state law.”<sup>118</sup> Relevant to this evaluation, this specific inquiry requires examining how the California legislature and courts have shaped water rights. A good starting point is section 102 of the California Water Code, which dictates that the water within the State is the property of the people and that “the right to the use of water may be acquired by appropriation.”<sup>119</sup> This notion that, although the state may grant the right to use a certain amount of water, the state nevertheless owns the resource is frequently illustrated by signifying that water rights are “usufructuary.”<sup>120</sup> Some commentators have even pointed out that two different property interests coexist in water; similarly to what occurs in the land context with the rights a landlord and a lessee hold in the same building.<sup>121</sup>

Water rights in Spain are governed by similar principles. The legislature took advantage of article 132.2 of the Spanish Constitution, which allows the parliament to incorporate certain resources to the “public domain,” and applied it to surface water.<sup>122</sup> This mirrors the system adopted in California, where only the right to use a certain amount of water, not its ownership, is transferred to private entities. Interestingly, despite the fact that usufructuary rights are an important, widely known part of Spanish private law,<sup>123</sup> the word “usufruct” is not generally used to describe this situation of concurrent interests in water. This is not surprising, however, in light of the important distinction between public and private law that exists in Spain, which is reflected by the fact that, when the legislature declared the vast majority of fresh water as part of the public domain, the rules and principles of public law became the body of law governing the resource.<sup>124</sup> Therefore, a reference to a private-law doctrine, like the usufruct, to describe the right to use a public resource pursuant to an administrative concession is probably misplaced.

Unfortunately, knowing how these two legal systems have defined the nature of water rights does not automatically answer the next and more important question: how does the nature of the right affect how courts are going to decide water-related takings cases? The courts have analyzed this particular issue under California and Spanish law and have reached the conclusion that, despite their *sui generis* nature, water rights enjoy some of the protections that both constitutions afford to private property.<sup>125</sup>

---

118. *Id.* (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

119. Cal. Water Code § 102 (West, 2015).

120. *See Rancho Santa Margarita v. Vail*, 81 P.2d 533, 560 (Cal. 1938). For an analysis of this case, see LITTLEWORTH & GARNER, *supra* note 28, at 42-45.

121. ADLER, CRAIG, & HALL, *MODERN WATER LAW*, *supra* note 5, at 135.

122. Water Act art. 1.3

123. *See* CÓDIGO CIVIL [C.C.] [Civil Code] Title VI, Chapter I, Section 1, art. 467 (Spain). Civil codes of some Autonomous Communities also regulate these kinds of rights. *See* DIARI OFICIAL DE LA GENERALITAT DE CATALUNYA [D.O.G.C.] [CATALONIAN CIVIL CODE] 5th book, art. 561-1-34. (Catalonia).

124. *See supra* Part II.C. As explained earlier in further detail, water law in Spain brought the resource within the scope of various statutes such as the Public Administrations Patrimony Act.

125. S.T.C., Nov. 29, 1988 (B.O.E. No. 307) (Spain); *see Casitas Mun. Water Dist. v. United States*, 708 F.3d

The United States Court of Appeals for the Federal Circuit dealt with a takings claim brought by the Casitas Municipal Water District, in Southern California, against the United States.<sup>126</sup> In its decision, the court noted that Casitas' right to use water was considered property, despite the fact that private entities cannot own the water itself.<sup>127</sup> The court then defined the scope of Casitas' right. The license had a limit of 107,800 acre-feet per year on the total amount of water that Casitas could divert to its reservoir, of which only 28,500 could be put to beneficial use<sup>128</sup>—i.e., delivered to its residential, industrial, and agricultural customers. The rest could be diverted and stored on a particular year, but not used. The Federal Circuit concluded that, because California law limits water rights to the amount that can be beneficially used, only water rights that apply water to beneficial use—unlike those to divert or store it—are compensable.<sup>129</sup> In that particular case, this meant that only the 28,500 acre-feet per year were protected for takings purposes.<sup>130</sup> Applying this rule in situations where all the water that a user diverts will be put to beneficial use, the compensable right could then reach the total amount recognized in the permit.

In Spain, although the right to use surface water to the exclusion of others is granted by the government and recognized in an administrative concession, courts have held that article 33 of the Spanish Constitution, which forbids the taking of private property without just compensation, applies to such rights.<sup>131</sup> The Spanish Constitutional Court, in its decision 227/1988, stated that the protections of article 33.3 reach not only the limitation of the right of ownership but also the deprivation of any “right or interest of an economic nature, which includes, undoubtedly, the rights of private and special use of public domain property.”<sup>132</sup> While this does not mean that any restriction of the right, no matter how minimal, will necessarily require compensation,<sup>133</sup> the court confirmed that the legislature and government are not immune from the limitations in article 33 of the constitution when they impose restrictions on water concessions. As discussed below, the Spanish Water Act defined the particular situations where a modification of a water right is compensable, consistent with the Constitutional Court's decision 227/1988.<sup>134</sup>

In short, water permits and concessions only confer the right to use water and not the ownership of the resource itself in both California and Spain. Some courts

---

1340, 1357 (Fed. Cir. 2013).

126. Casitas Mun. Water Dist., 708 F.3d 1340 (Fed. Cir. 2013).

127. *Id.* at 1354.

128. *Id.* at 1355.

129. *Id.* at 1357.

130. Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 455 (Fed. Cl. 2011).

131. See S.T.C., Nov. 29, 1988 (B.O.E., No. 307) (Spain).

132. *Id.*

133. *Id.*

134. Water Act art. 65.3.

have found that this unusual nature of water rights has sometimes been considered to justify the claim that these rights are immune from the constitutional protections of private property.<sup>135</sup> Nevertheless, the federal courts that have analyzed this issue in light of California state law and the Spanish Constitutional Court have held that this right of use, once granted, is afforded the protections conferred by the respective constitutions against takings without the payment of just compensation. This does not mean, however, that any limitation of the right will trigger the government's duty to compensate. Courts will still have to determine whether the right can be deemed taken and evaluate the strength of any defenses raised by the government.

## V. WATER AND TAKINGS

After concluding that rights in water are protected against uncompensated takings, the next logical step is to examine the framework that courts apply to determine whether such rights have been taken. The courts that deal with the limitation of water rights in California must follow the general takings doctrine laid out in the decisions of the United States Supreme Court, as explained in Part III.A. Spanish courts on the other hand, are bound by the specific compensation provisions of the Spanish Water Act.<sup>136</sup> Associated defenses invoked by the government will be analyzed in part VI.

### A. TAKINGS OF WATER RIGHTS IN CALIFORNIA

One of the key inquiries of the takings analysis that courts in the United States face regularly is deciding which takings framework—physical or regulatory—applies to a particular case. While this may be an easy undertaking in some cases, the dichotomy has generated abundant controversy in the area of water rights.<sup>137</sup> The distinction is especially relevant in cases where the amount of water the users are prevented from putting to beneficial use is relatively small compared with the total amount recognized by their licenses. The two main differences that explain why the outcome in these cases can differ substantially depending on the takings framework used are: the doctrine of the “parcel as a whole,” and the influence that the amount of water reallocated to maintain instream flows has on the first two prongs of the *Penn Central* balancing test.<sup>138</sup>

---

135. T.S.J., July 1, 2005 (R.J., No. 265) (Spain).

136. Water Act art. 65.

137. *See, e.g.*, *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 445 (Fed. Cl. 2011) (explaining how the Federal Circuit reversed the court's ruling that the obligation imposed upon the plaintiff to reroute a portion of water should be analyzed as a regulatory taking).

138. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The rule of the “parcel as a whole,” which applies only to regulatory takings,<sup>139</sup> was initially adopted by the courts in cases involving real property.<sup>140</sup> This doctrine limits the obligation to compensate the property owner in situations where, although the effect of the government’s activity or regulation on a small part of the parcel is significant, the impact it causes on the entire property is rather mild.<sup>141</sup> When applied to water, if the obligation to maintain an instream flow only entails a small reduction of the amount of water the permit recognizes, the doctrine of the “parcel as a whole” would not require the government to pay compensation. If, on the other hand, the same situation is analyzed as a physical taking, the parcel-as-a-whole rule would not apply,<sup>142</sup> and the governmental action would be deemed a taking regardless of whether it “achieves an important public benefit or has only minimal economic impact on the owner.”<sup>143</sup>

Further, the framework under which courts analyze regulatory takings is also very favorable to the government when the restriction on the amount of water a user can utilize is proportionally small. Except in cases where the property is rendered economically idle,<sup>144</sup> courts employ the *Penn Central* test to determine whether the government has effected a regulatory taking, which requires the balancing of the following factors: (i) the economic impact of the regulation, (ii) the degree of interference with investment-backed expectations, and (iii) the character of the regulation.<sup>145</sup> If the government only deprives the user from a small volume of water, a court is likely to find that both the impact and the interference caused are also small, and ultimately conclude that the government is not required to pay compensation.

As noted earlier, the general rule differentiating physical and regulatory takings is that, in the latter, the government does not acquire the right to use the property, does not dispossess the owner, and does not affect his right to exclude others.<sup>146</sup> This distinction, however, has not provided clear guidance to the courts, which have reached different conclusions on the issue of whether limitations on water use should be treated as a physical or regulatory taking.<sup>147</sup>

In 2001, the United States Court of Federal Claims concluded that the decrease of water made available to the plaintiffs as a result of the implementation of a biological opinion—issued pursuant to the Endangered Species Act—constituted a physical taking. The court acknowledged the unusual situation water rights present and stated that:

---

139. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

140. *Penn Cent.*, 438 U.S. at 130-31.

141. *Id.*

142. *Tahoe-Sierra*, 535 U.S. at 322.

143. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982).

144. In those cases, a *per se* rule is applied. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

145. *Penn Cent.*, 438 U.S. at 124.

146. *Tahoe-Sierra*, 535 U.S. at 324, n.19.

147. See S.T.C. Nov. 29, 1988 (B.O.E., No. 307) (Spain).

In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is to the use of the water . . . . To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.<sup>148</sup>

More recently, in the Casitas litigation, the Court of Federal Claims and the Federal Circuit addressed whether restrictions on water rights should be analyzed as a physical or a regulatory taking.<sup>149</sup> Casitas operates a water project that provides water to residential, industrial, and agricultural customers in Southern California.<sup>150</sup> To do so it diverts water from the Ventura River, which hosts a population of west coast steelhead trout.<sup>151</sup> A federal agency listed this salmonid as an endangered species under the Endangered Species Act, and Casitas was obliged to construct a fish passage facility and maintain an adequate flow in the Ventura River.<sup>152</sup> The Court of Federal Claims considered that the reduction in the water available for Casitas’ use should be examined under the regulatory takings analysis because “*Tahoe-Sierra* admonishes that only the government’s active hand in the redirection of a property’s use may be treated as a per se taking.”<sup>153</sup>

On appeal, the Federal Circuit held that “[t]he government requirement that Casitas build the fish ladder and divert water to it should be analyzed under the physical takings rubric.”<sup>154</sup> To justify that conclusion, the court explained that the government had required Casitas to physically divert, for a public use, water that the latter had already withdrawn from the river.<sup>155</sup> The court distinguished this situation from another recent case where it held that the government’s fencing of an area that the plaintiff needed for accessing his entitled water use constituted a taking, but not a physical one.<sup>156</sup>

Interestingly, the Court of Federal Claims and the Federal Circuit did not examine this issue in the same light. The former analyzed the obligation to leave some water in the river while the latter focused on the requirement to release water through the fish ladder.<sup>157</sup> As a result, some commentators argue that the

---

148. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001).

149. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (Fed. Cl. 2007); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008); *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 446 (Fed. Cl. 2011).

150. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 446 (Fed. Cl. 2011).

151. *Id.* at 446.

152. *Id.* at 448.

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

154. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

155. *Id.*

156. *Estate of Hage v. United States*, 687 F.3d 1281, 1290 (Fed. Cir. 2012).

157. John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 *Vt. J. ENVTL. L.* 579, 592. (2010).

Federal Circuit's conclusion that the limitation of a water right constitutes a physical taking should be construed to apply only to the requirement that water be passed through a fish-passage facility and not to mere restrictions on the diversion of water.<sup>158</sup>

In short, the decision of whether instream flow restrictions to existing water rights—in particular those involving a proportionally small amount of water—should be treated as a physical or regulatory taking can have a strong impact on the outcome of these kinds of cases. This explains why in the *Casitas* litigation, the government requested the court apply the regulatory takings standard, while the plaintiff claimed that the analysis should be conducted under the physical takings rubric.<sup>159</sup> The Federal Circuit has shown its preference to treat certain obligations to release water for the maintenance of minimum flows as a physical taking. In *Tulare*, this resulted in the court's granting of the plaintiff's motion for summary judgment, and in *Casitas*, the court recognized that the plaintiff would have a valid takings claim when it proves an injury to its right to the beneficial use of water.<sup>160</sup> The outcome, however, could be different when the court examines a situation where the government merely requires the water user to limit the amount of water it withdraws from the river.

#### B. A COMPARISON WITH THE SPANISH SYSTEM

As explained above, the protection of water rights against takings in Spain has two different layers. Article 33.3 of the Spanish Constitution and related case law set a floor, but the legislature may adopt a more generous compensation framework by statute. The following analysis examines both the constitutional and statutory layers.

The Spanish Constitutional Court dealt with the limitation of water rights in its ruling 227/1988.<sup>161</sup> The controversy arose because a 1985 water law imposed a seventy-five-year limitation on water concessions that had initially been granted either for a longer period of time or not subject to any time restriction at all.<sup>162</sup> The court examined whether this modification of the right amounted to a compensable expropriation and held that this change should not be treated as a *per se* expropriation—i.e., a total deprivation—but as a non-compensable restriction or regulation of the right.<sup>163</sup> The court reasoned that, given the type of right involved, which relates to a resource that is part of the public domain and that requires the government to ensure its rational and socially acceptable use, the

---

158. *Id.* at 583.

159. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 450 (Fed. Cl. 2011).

160. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1360 (Fed. Cir. 2013).

161. S.T.C., Nov. 29, 1988 (B.O.E., No. 307) (Spain).

162. Water Act art. 135.

163. S.T.C., Nov. 29, 1988 (B.O.E., No. 307) (Spain).

imposition of a time limitation does not affect the right's essential content.<sup>164</sup> Therefore, no compensation was owed to plaintiffs.<sup>165</sup>

Whether the Constitutional Court would reach a similar conclusion about the requirement to leave a minimum flow in the river is uncertain. However, the arguments the court used in decision 227/1988 suggest that a moderate reduction of the amount of water could easily be considered a non-compensable regulation of the right.<sup>166</sup> This approach leads to an outcome that is very similar to one that would be reached in the United States if the case were analyzed under a regulatory takings rubric.

In contrast, the framework that the legislature created would require the government to compensate water users—whose right is diminished to preserve instream flows—regardless of the extent of water reduction. Article 65 of the Spanish Water Act provides that the government may modify water concessions in three different situations: (i) when there are changes in the facts that justified their issuance,<sup>167</sup> (ii) in the case of an act of God, and (iii) to adapt the title to the provisions of hydrologic plans.<sup>168</sup> Interestingly, pursuant to article 65.3, only in the third case does the government have the obligation to compensate the water user.<sup>169</sup>

Therefore, there are two key questions that need to be answered in order to determine if the government must compensate water users for the obligation to leave a minimum flow in the river. First, are instream flow restrictions to concessions established in hydrologic plans (the only situation that gives rise to compensation)? Second, because article 65 of the Act only applies to the modification of administrative concessions, may the government avoid the duty to compensate water users by imposing the obligation to comply with instream flows through regulation without formally modifying the administrative concession?

Article 59 of the Spanish Water Act provides a simple answer to the first question: “instream flows are set in Basin Hydrological Plans.”<sup>170</sup> Thus, the government would have the obligation to compensate if it modified a water concession to incorporate instream flow restrictions. The second question—whether the government may simply avoid this obligation by not modifying the concession while still requiring the user to comply with instream flow limitations—is not clearly answered in the Spanish Water Act. However, article 26.3 of the National Hydrologic Plan sheds light on this issue by noting that the lack of

---

164. *Id.*

165. *Id.*

166. *See id.*

167. This includes situations where the use to which the water is put, or the acreage of irrigated land, are modified.

168. Water Act art. 65.1.

169. *Id.* art. 65.3.

170. *Id.* art. 59.7; *see also*, José Esteve Pardo, *DERECHO DEL MEDIO AMBIENTE* 196 (2014).

an express obligation concerning the maintenance of instream flows in authorizations and concessions granted by the Hydraulic Administration does not exempt the concessionary from the fulfillment of such obligations.<sup>171</sup> This same subsection then adds that this will not affect the water user's "right to receive the possible compensation set out in article 63.3 [now article 65.3] of the Water Act."<sup>172</sup>

In short, regardless of whether water agencies decide to modify water concessions or not, instream flows must be established through hydrological plans, which in turn triggers the obligation to compensate water users if their right is negatively affected. The Spanish Supreme Court recently stated that the decision of whether the government must compensate water users will be made on a case-by-case basis when each concession is reviewed by the water agencies, but the Court has refused to enunciate a general rule on the issue.<sup>173</sup> In any event, with the legal framework currently in place, minor reductions of the right should be compensated, similarly to what occurs in the United States under a physical-takings analysis. Nevertheless, even if the foregoing analysis reveals that the rights of a water user have been taken, the government may still avoid the duty to pay compensation by successfully invoking certain defenses.<sup>174</sup> Part VI will analyze some of the most relevant defenses in the water-rights context.

## VI. DEFENSES TO TAKINGS CLAIMS

Under certain circumstances, the obligation to leave a minimum flow in the river may not give rise to compensation. In the United States, one of the defenses invoked by the government is that the limitation being imposed is part of the title. This theory derives from the idea that there are "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>175</sup> In the context of water law, the use of the public trust doctrine as a background principle to defeat takings claims is growing in popularity.<sup>176</sup> In Spain, on the other hand, the most successful exemptions to the expropriation requirements in the Spanish Water Act are the temporary restrictions that the government imposes during periods of extraordinary droughts.<sup>177</sup>

---

171. National Hydrologic Plan Act, (B.O.E. 2001, 10), July 6, 2001, art. 26.3 (Spain).

172. *Id.*

173. S.T.S., Dec. 5, 2014 (R.J., No. 4997) (Spain).

174. It is worth noting that some defenses, such as those based on background principles, do not question the "takings" part of the analysis, but the existence or extent of property in the first place. *See supra* text accompanying note 164. Therefore, in a given case, these defenses should be examined before undertaking the complete takings analysis. *See* BOTELLO-SAMSON, *supra* note 98, at 46 (suggesting that the determination of whether the challenge action prevents a nuisance should be made before applying the *Penn Central* test).

175. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

176. *See* John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. Davis L. Rev. 931, 955 (2012).

177. S.T.S., Dec. 15, 2008 (R.J., No. 7874) (Spain).

### A. UNITED STATES: THE PUBLIC TRUST DOCTRINE

The public trust doctrine has been recognized by some courts as a background principle that may, in takings claims, exempt the government from the duty to compensate a property owner.<sup>178</sup> For example, in *Esplanade Properties v. City of Seattle*, the City denied Esplanade's application to develop shoreline property, which led the developer to file a takings lawsuit.<sup>179</sup> The court concluded that no taking had occurred because the public trust doctrine was a background principle that unquestionably burdened Esplanade's property.<sup>180</sup>

#### 1. The Public Trust Doctrine in California

The power to “determine the scope of the public trust over waters within their borders” is held by the states.<sup>181</sup> Therefore, the analysis of whether this doctrine may defeat a takings claim in the context of instream flow obligations in California requires first examining the contours of the public trust under state law. The leading case in this area is *National Audubon v. Superior Court*,<sup>182</sup> where the plaintiffs filed suit to enjoin the Department of Water and Power of the City of Los Angeles from diverting virtually the entire flow of four streams flowing into Mono Lake.<sup>183</sup> The court reached the following conclusions: (i) the public trust doctrine “prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust,”<sup>184</sup> (ii) the Water Board may, in certain cases, permit an appropriator to take water even though this taking may harm the trust uses,<sup>185</sup> and (iii) the state has the power to “reconsider allocation decisions.”<sup>186</sup> The relevant question, however, is whether a modification of the right is immune from the obligation to pay just compensation in light of how the public trust has been defined by the Supreme Court of California.

#### 2. The Public Trust Doctrine as a Defense in Takings Cases

This issue was examined by the Court of Federal Claims in the *Casitas* and *Tulare* cases.<sup>187</sup> In *Tulare*, California water users claimed that their right to use

---

178. Echeverria, *supra* note 176, at 934.

179. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 981 (9th Cir. 2002); *see also* Echeverria, *supra* note 176, at 934.

180. *Id.* at 986.

181. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012).

182. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

183. *Id.* at 711-12.

184. *Id.* at 727.

185. *Id.*

186. *Id.* at 728.

187. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443 (Fed. Cl. 2011); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001).

water was taken when the federal government limited withdrawals pursuant to the Endangered Species Act.<sup>188</sup> The court disagreed with the defendant's view that the public trust doctrine barred the plaintiff's takings claim, noting that the responsibility for allocating water is vested in the Water Board and that once the allocation has been made, the Water Board's "determination defines the scope of plaintiffs' property rights, pronouncements of other agencies notwithstanding."<sup>189</sup> In other words, the court declined to accept the public trust doctrine as a defense to the takings claim because it found that the decision of whether the public trust had been injured in a particular case had to be made by the state, and neither the Water Board nor the California courts had determined that the public trust had been harmed.<sup>190</sup> For this reason, this decision has been interpreted as supportive of the proposition that the public-trust defense would succeed in cases where state legal institutions had modified existing water rights to protect the public trust.<sup>191</sup> This would include not only situations where the state government is limiting the right, but also those in which the federal government is effecting such limitation—as long as a state institution has declared that the way the property owner is exercising his right is harmful to the public trust.

The Casitas case, as noted earlier, involved a reduction of the amount of water Casitas could withdraw from the Ventura River and an obligation to return a certain flow through a fish ladder.<sup>192</sup> Thus, some water that Casitas may have been able to provide to its domestic, agricultural, or industrial clients was instead dedicated to the preservation of the Steelhead Trout.<sup>193</sup> The court disagreed with the government's argument that the public trust doctrine precluded Casitas' claim. First, it stated that *National Audubon* recognized that the "[i]mplementation of the public trust doctrine requires not only the balancing of the various public trust values, but also the weighing of those values against other, broader public interests."<sup>194</sup> The court then added that the public trust defense had failed because Casitas dedicated its water to uses of paramount importance, and the defendant did not show that protecting the Steelhead Trout was a superior use.<sup>195</sup>

In short, the court's interpretation of *National Audubon* for takings purposes is that the existence of an injury to the public trust is not enough to bar a claim for compensation unless it is clearly established that the use to which the water is going to be rededicated serves a superior public interest than the original use. This view has been criticized on the grounds that *National Audubon* does not require a balancing test, but instead supports the conclusion that "if the exercise

---

188. *Tulare Lake*, 49 Fed. Cl. at 314 (Fed. Cl. 2001).

189. *Id.* at 322.

190. *Id.*

191. Echeverria, *supra* note 176, at 936.

192. *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 446 (Fed. Cl. 2011).

193. *Id.*

194. *Id.* at 459.

195. *Id.* at 461.

of a water right harms the public trust, a regulatory constraint that serves to prevent this harm cannot give rise to a viable takings claim because the regulation does not constrain a property entitlement recognized under California law.”<sup>196</sup>

B. SPAIN: DEFENSES BASED ON THE CONSIDERATION OF WATER AS PART OF THE PUBLIC DOMAIN

1. Parallels with Public Trust Doctrine: The General-Restriction Defense

In Spain, the notion that the preservation of the ecosystem should, as a matter of principle, justify the denial of takings claims in the water context has also found its supporters.<sup>197</sup> Although the nature of rivers and their beds as part of the public domain certainly justifies the special treatment afforded to water in the Spanish Water Act, proponents of the theory that the obligation to maintain a minimum flow is not compensable have relied on article 59.7.<sup>198</sup> This section provides that instream flows are not subject to the basin’s order of preference but instead should be deemed a *general restriction* to the system.<sup>199</sup> This argument implies, as the Supreme Court of California implied in *National Audubon* with regard to the public trust, that a water user cannot acquire a vested right to use water in a way that harms the public domain.

Without explicitly relying on article 59.7 of the Spanish Water Act, the Superior Court of Catalonia adopted a similar view in a series of cases where the Catalan Water Agency had included instream flow requirements when the water concessions were transferred to a different user.<sup>200</sup> The court held that, given that water is a public domain good, subject to the public interest, the incorporation of an obligation to maintain a minimum flow into an existing concession should not be treated as a compensable expropriation of private property.<sup>201</sup> This line of decisions ignored the provisions in the Spanish Water Act and the Hydrologic National Plan describing the obligation to compensate water users, as well as the case law of the Constitutional Court that dictates that rights conferred through an administrative concession are protected under article 33.3 of the Spanish Constitution.

Unsurprisingly, the court changed its position a few years later and concluded that the imposition of instream flow restrictions was only allowable where a hydrologic plan had previously established those minimum flow requirements.<sup>202</sup>

---

196. Echeverria, *supra* note 176, at 969.

197. The establishment of environmental flows and preexisting concessions, ECOLOGISTAS EN ACCIÓN (Feb. 3, 2014), <http://www.ecologistasenaccion.org/article27428.html>.

198. *Id.*

199. Water Act art. 59.7.

200. *See, e.g.*, T.S.J., July 1, 2005 (R.J., No. 265) (Spain).

201. *Id.*

202. T.S.J., Apr. 14, 2008 (R.J., No. 269) (Spain).

Nothing was said about whether the government should compensate water users. Given that the Spanish Water Act mandates that water users be compensated when their right is modified as a result of a hydrologic plan, the conclusion that would logically follow from the more recent view of the Superior Court of Catalonia is that water users are entitled to compensation when the instream flows are included in their concession pursuant to a hydrologic plan. This would render the general-restriction defense inoperable.

The government has recently invoked this defense in several proceedings where the Court was reviewing the validity of certain provisions in hydrologic plans that established instream flows and limited the situations in which water users would be compensated.<sup>203</sup> Unfortunately, the Court has not reached a final conclusion. In one case, it concluded that the demand for compensation was premature and should be considered when water agencies review each water concession.<sup>204</sup> In another case, the hydrologic plan provided that water users should be compensated only if their right or use virtually disappeared.<sup>205</sup> The court dodged the main issue—whether the defense insulates the government from the duty to compensate—by concluding that the middle-ground approach adopted in the hydrologic plan is inconsistent with the general-restriction defense, which if accepted, would exclude the right to compensation for all water users.<sup>206</sup> In other words, the government may not craft its own regulations in a way that provides compensation to certain users and also invokes the general-restriction defense to exclude the remaining titleholders from compensation. The Court, however, did not answer the more important question: can the government use this defense to deny compensation to *all* water users, when it imposes minimum flow obligations?

The foregoing analysis shows that, in both California and Spain, if water rights are subject to the public trust or part of the public domain, certain restrictions and reallocations may not be compensable. In California, while this defense was not successful in the *Tulare* and *Casitas* cases—where the federal court decided this issue taking into account California state law—a different result may be reached if the Water Board determines that a certain use harms the public trust. The situation in Spain is slightly different. While some courts have been receptive to a general-restriction defense to takings claims, a literal interpretation of the compensation provisions in the Spanish Water Act leads to the conclusion that the imposition of minimum flow obligations on existing water concessions should be treated as a partial or total expropriation of any other right.

---

203. S.T.S., Sept. 23, 2014 (R.J., No. 4837) (Spain); S.T.S., Dec. 5, 2014 (R.J., No. 4997) (Spain).

204. S.T.S., Dec. 5, 2014 (R.J., No. 4997) (Spain).

205. S.T.S., Sept. 23, 2014 (R.J., No. 4837) (Spain).

206. *Id.*

## 2. Drought Periods: The Temporary-Restriction Defense

While the effectiveness of the general-restriction defense remains to be seen, the limitations in the use of water during serious droughts have been found to be immune from takings claims.<sup>207</sup> Article 58 of the Spanish Water act gives the government the power to adopt any necessary measure relating to the use of the hydraulic public domain in limited situations such as an extraordinary drought, even if they affect rights that have been granted by a water concession.<sup>208</sup> The government has taken advantage of article 58 and analogous provisions<sup>209</sup> several times, such as when the Catalanian executive adopted the 1999, 2005, and 2007 drought decrees.<sup>210</sup> These decrees imposed temporary restrictions on water users in order to guarantee the availability of water for domestic uses.<sup>211</sup> Further, the government limited diversions by hydroelectric power operators to ensure that a minimum river flow was maintained.<sup>212</sup>

Although these decrees contained provisions that stated that the measures adopted to ensure the availability of water for domestic uses would not give rise to compensation,<sup>213</sup> affected parties sought judicial review. The decisions on the 1999 decree are of particular interest because they were issued by the highest courts in Catalonia and Spain.<sup>214</sup> The Superior Court of Catalonia held that the measures adopted by the government during the drought were a mere limitation—as opposed to a deprivation—of the right, and that consequently, water users had no right to compensation.<sup>215</sup> The Spanish Supreme Court agreed and concluded that temporary restrictions imposed on water rights pursuant to the Spanish Water Law are mere non-compensable “use limitations.”<sup>216</sup>

It is uncertain whether the courts would adopt a similar reasoning when examining permanent restrictions to water rights, mainly because they would have to apply different provisions of the Spanish Water Act.<sup>217</sup> In any event, it has long been settled that minimum flow obligations imposed under the extraordinary

---

207. S.T.S., Dec. 15, 2008 (R.J., No. 7874) (Spain).

208. Water Act art. 58.

209. *E.g.* Catalanian Consolidated Text of Water Legislation art. 31.2.c (D.O.G.C. 2003, 3).

210. Exceptional and Emergency Measures on Use of Water Resources Decree [1999 Drought Decree] (D.O.G.C. 1999, 94); Exceptional and Emergency Measures on Use of Water Resources Decree [2005 Drought Decree] (D.O.G.C. 2005, 93); Exceptional and Emergency Measures on Use of Water Resources Decree [2007 Drought Decree] (D.O.G.C. 2007, 84).

211. 2007 Drought Decree art. 1; 2005 Drought Decree art. 1; 1999 Drought Decree art. 1.

212. 2007 Drought Decree art. 17; 2005 Drought Decree art 14; 1999 Drought Decree art. 4.2c,7.

213. 2007 Drought Decree art.3; 2005 Drought Decree art 3; 1999 Drought Decree art. 11.

214. These decisions were issued without prejudice of the jurisdiction of the Spanish Constitutional Court over constitutional matters. CONSTITUCION ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 161.

215. T.S.J., July 1, 2005 (R.J., No. 265) (Spain).

216. S.T.S., Dec. 15, 2008 (R.J., No. 7874) (Spain).

217. These would mainly include the compensation provisions in the Spanish Water Act. *See* Water Act art. 65.

drought provisions in the Spanish Water Act are immune from expropriation claims.

## VII. CONCLUSION

The water law systems in Spain and California have important similarities, reflecting the complexity of managing this resource in a territory that, despite receiving abundant precipitation in the north, has vast arid areas in the south. In both jurisdictions, water belongs to the public,<sup>218</sup> and private entities may only acquire a right of use. Nevertheless, the two legal systems have considered water rights worthy of protection against uncompensated takings.

Going back to the hypothetical in the introduction, the analysis of the takings framework in California and Spain reveals that the government may have to compensate water users like Michael when, to ensure that a minimum flow remains in the river, it imposes restrictions on their right. This would include cases where the limitations are proportionally small as compared to the total amount of water recognized in the permit or concession. In the cases dealing with water rights in California, this results from the adoption by most courts of a physical—as opposed to regulatory—takings analysis. In Spain, on the other hand, this outcome follows from the compensation provisions of the Water Act.

Both jurisdictions, however, have a common problem—uncertainty. In California, and the United States more generally, the position that a physical analysis should apply to all cases involving instream flows is not completely settled, with some commentators warning that the conclusions reached by some of the recent cases should be interpreted narrowly. This is also true with respect to the public trust doctrine as a defense, which has not been particularly successful in this context but could be fruitful under facts slightly different from those that courts have already considered. Water users and the government will have to live with this uncertainty until the courts rule on the unresolved permutations of the problem.

In Spain, the provisions of the Water Act and National Hydrological Plan strongly suggest that modifications of existing water rights to introduce instream flows should be treated as an expropriation. The argument has been made, however, that because instream flows are a general restriction to the water system, the limitations they impose on concessions are not compensable. It is unclear whether the Spanish Supreme Court would accept that reasoning, especially in cases where the amounts of water the user is not able to withdraw from the river are small relative to the total right. In the particular case of Spain, the legislature could take certain steps to mitigate this uncertainty. The Spanish

---

218. Compare Cal. Water Code § 102 (West 2015) (providing that water is owned by the people of the state), with Public Patrimony Act art. 5.1 (Spain) (providing that water is owned by the government but it must be destined to a public use or service due to its public domain character).

Congress could amend the Water Act to more clearly state whether restrictions stemming from the obligation to maintain minimum flows give rise to compensation, and if so, incorporate into that statute the provision of the National Hydrological Plan that addresses this same issue. In doing so, the legislature would have to observe the constitutional doctrine on expropriation of property rights to ensure that in cases where a right's essential content is eviscerated, the government compensates the affected water users.