

Is Water Property?

- 1. Who cares (and why)
- 2. The nature of property
- 3. The nature of water
- 4. Nebraska & Claims Court Precedent
- 5. *Answer: It depends!*

Who Cares (and Why)

- **Classification matters**
 - Rule of law norms
 - Assimilate new knowledge; guideposts for learning
- **Property matters**
 - Protect value of reasonable investment-backed expectations
 - Foster stability
 - Constitutional dimensions
- ***“Water law is a new central battlefield for the definition of property rights.”*** -Joe Sax 2007.

The Nature of Property

- Rest 1st: “Legal relationships between persons with respect to a thing”
- Some Chix Nix the Bundle of Stix, *but*
- Standard incidents of ownership:
 - Right: non-ephemeral, secure expectation
 - To Exclude
 - To Use
 - To Dispose
 - Responsibility: not to harm others
 - Discrete Asset: something of value, created & exchanged by economic actors with some regularity

“Property”

- Present and future interests
 - *Fee tail; Fee simple determinable*
- Incorporeal hereditaments
 - *Timber, Minerals, Lordships*
- Goodwill (business asset)
- Internet domain name
- Vested military retirement pay, CO 1988 (marital property)
- Identity, 9th Cir. 1995 (*Abdul-Jabbar v. GM*)
- Sperm (CA probate code: anything subject to ownership)
- Groundwater? *An article of commerce, but not “any other species of property,” Sporhase, SCT 1982*

Not “Property”

- Air Space & Deep Subterranean Space (no trespass or takings)
 - *The “ancient doctrine that ownership extended to the periphery of the universe - Cujus est solum ejus est usque ad coelum. . . has no place in the modern world,” Causby, SCT 1946*
- Migratory Birds, *Holland, SCT 1920*
- News, *Int’l News v. A.P., SCT 1918*
 - *“Quasi property,” between competitors but not vis general public*
- An MBA, CO 1978 (not marital property)
- Tenure Opportunity (no legitimate entitlement, no discernible boundaries, no Due Process), *Roth, SCT 1972*
- Spleen Cells, CA 1990 (no conversion)
- Embryos (destroy rather than use)
- Children (!)

The Nature of Water & Water Law

- Non-exclusive
- Rights develop only if you:
 - Divert
 - Put to beneficial use
 - No waste
 - Use it or lose it (forfeiture & abandonment)
- Transfers and changes in use tightly regulated
 - Allowed only if there’s *no harm* to other users
 - Unlike real property, where *Restraints on Alienation* are disfavored

The Public Trust/Public Interest

- Most western constitutions provide that water is dedicated to the **people**:
 - “The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.” NE Const. Art. XV, § 5.
- But -
 - “The right to divert unappropriated waters for beneficial use shall never be denied . . .
 - *except when demanded by the public interest.*” NE Const. Art. XV, § 6

Nebraska Precedent

- “[A]n appropriator of water, who has complied with statutory requirements, *obtains a vested property right.*”
 - This is wise public policy to afford an economical & speedy remedy to those whose rights are wrongfully disregarded by others & avoid unseemly controversies that occur when many persons are entitled to share in a limited supply of water. *Enterprise Irrigation District (1939)*.
- “A right to appropriate. . . *is not an ownership of property.*”
 - Instead, the water is a *public want* and the appropriation is merely a *right to use* the water, *Spear T Ranch (2005)*.
- Result: No taking; No conversion.

Nebraska Precedent

- *CNPPID v. NPNRD (2010)* – Central not an “aggrieved person”; no standing, despite allegations of harm to interest in Lake McConaughy and its members’ water rights.
 - “Threadbare recitals” & “apocalyptic rhetoric” won’t do.
- *In re 2007 Administration of Appropriations of the Waters of the Niobrara River (2009)* -
 - “We have recognized the priority of an appropriation as an *important property right.* . . . [A] senior appropriation entitles the permit holder to compensation from a superior-use appropriator.”
 - Result: Jr. appropriators have cognizable interests in outcome of DNR administrative proceeding. . . The case is not moot.

Nebraska Precedent

- *Keating v. Nebraska Public Power Dist.*, 562 F.3d 923 (8th Cir. 2009)
- Jr. appropriators on the Niobrara appealed the dismissal of their claims against the DNR under 42 U.S.C. § 1983.
 - Issue: Did DNR deprive jrs. of procedural due process by ordering them to cease diverting water without prior notice or hearing?
- On remand, No. 7:07CV5011 (May 12, 2010):
 - Plaintiffs do not have a property right to be free from DNR's regulation of water distribution
 - Their property rights are limited to the quantity limits of appropriation as specified in their permits, are subject to the rights of other appropriators (i.e., seniors), and are subject to regulation by the state
 - Held: DNR did not deprive the plaintiffs of a protected property right through the issuance of closing notices

Claims Court Precedent

- *Tulare Lake v. U.S.* (2001) - Irrigators got \$20 million when BOR curtailed contract allowances to provide flow for endangered salmon.
 - The court concluded irrigators had *vested property rights* by virtue of their contracts and CA water law.
 - Rights were subject to the Public Trust, but *only the State Water Board* could modify permit terms to reflect changing public needs.
- *Klamath Irrigation District v. U.S.* (2005) – Any right to BOR water was contractual and not property.
 - “*Tulare oversimplifies - and misapprehends - the nature of water rights under state law.*”
 - The Public Trust is an inherent limitation on title, the exercise of which is not a taking.

Claims Court Precedent

- Casitas Municipal Water Dist. v. U.S. (2006, 2008)**
- Judge Wiese repudiated *Tulare*:
 - SCT in *Tahoe Sierra* precludes a physical or *per se* takings analysis re: water regulations; *Penn Central* balancing applies.
 - A divided panel reversed and held that a mandate imposed under the ESA--that the operator of a dam on the Ventura River pass water *that had already entered the operator's private canal* through a fish ladder--was a “**physical taking**” of the water, triggering *per se* takings analysis.
 - The US “did not merely require some water to remain in stream, but instead actively caused the physical diversion of water away from the Casitas Canal--after the water had left the River and was in the Canal--and towards the fish ladder, thus reducing Casitas' watersupply.”
 - *Huh???*

Property . . . or Human Right?

The Cochabamba Declaration:

- "W is a **fundamental human right**...to be guarded by all levels of government, therefore, it should not be commodified, privatized or traded for commercial purposes."
- But Property is a fundamental right, too.

→ CONCLUSION: It's Complicated.

Interests in Surface Water in most western states are not Property for purposes of Regulatory Takings.

But: May be Property for Due Process, marketing, and other purposes.
