32 ELR 11162

ELR
NEWS & ANALYSIS

10-2002

Environmental Takings of Private Water Rights—The Case for Water Privatization

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This discussion is divided into two parts. The first, which addresses takings of private water rights, makes the following points: government regulation of private property for a public purpose, such as protection of species, raises important constitutional questions concerning whether a compensable "taking" of private property has resulted. This section discusses the property and liberty interests that arise when legislation or regulation is used as a reason for the government to breach a contract to provide water to farmers. It concludes by suggesting that the U.S. Constitution mandates that we should all share in the costs associated with a taking of private water rights for environmental purposes by the government. The second portion makes the more general philosophical point that the public interest and the cause of justice would be enhanced if *all* bodies of water were transferred from the public to the private sector. Then, among other benefits, there would be no need for all to share in the costs associated with a taking of private water rights for environmental purposes by the government; there would be no need for such takings in the first place.

Water Rights and Takings

In the summer of 2001, the eyes of the nation were focused with considerable discontent on the California electrical power crisis. But, alas, a worse crisis is lurking in the arid West.[1] The demand for water exceeds the supply. What is the most beneficial use of water in California and the West? All sorts of troubling issues arise. Recently, in the Klamath Basin of Oregon, the U.S. Bureau of Reclamation (BOR) breached a 1909 contract to provide water to farmers to protect the sucker fish, a bottom feeding scavenger. The government's action may result in as many as 1,400 farmers filing for bankruptcy.[2] It has already driven some of them to acts of civil disobedience by cutting open the dam gates to release water into their parched fields.[3] How should water be allocated? Should it go to farmers to raise crops, or should the federal government intercede under the Endangered Species Act (ESA)[4] and impose water use restrictions to protect endangered fish species.[5] If water is taken from the user, who should suffer?[6] Should all of society, or solely the impacted farmers? Some concerned commentators contend that there is a significant public policy danger in requiring compensation for environmental takings because the government engages in many actions that reduce property values. They contend that to require the government to pay negatively affected owners is a recipe for inaction on important environmental issues.[7] This section responds by examining the thorny legal and ethical questions that arise when agricultural water users have the contractually conferred right to access water taken from them because the government imposes water use restrictions under the ESA. The case of *Tulare Lake Basin Storage District v. United States*[8] entangled the court in the thorny issues raised above and presents a unique medium to use to decide whether the taking of contractually conferred water rights constitutes a "taking" of protected property under the Fifth Amendment of the Constitution.[9]

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1. *See generally* Mort Rosenbum, *As All Eyes Turn to the Power Crunch, a Worse Crisis Looms: Water*, *at* http://www.tbo.com/ap/breaking/MGA4ZWIKNMC.html (last visited Jan. 21, 2002). Rosenbum contends that the planet has no more water than it did a millennia ago. But with today's rocketing growth, conflicting needs of farms, cities, industry, recreation, and government wetlands protection, there exists the potential for bitter water wars. But where have these wars happened? Nowhere, according to BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST 149 (2001). He says the water "problem" is logistical rather than a true shortage.

2. *See* Michael Kelly, *Evicted by Environmentalists*, WASH. POST, July 11, 2001, at A19. Kelly points out that all the battles over the Endangered Species Act (ESA) are episodes in a continuing war of values fundamental to the nation. This war is best understood as taking place between increasingly poor and powerless rural voters and those voters in increasingly rich and powerful urban-suburban areas. Because few people are still in direct contact and competition with nature, or directly affected by environmental decisions, the balance of power has shifted away from the rural residents who are today's stewards of the land to urban voters.

3. *See* Kimberley L. Strassel, *Thoreau the Bums Out: Oregon's Farmers Embrace Civil Disobedience*, WALL ST. J., July 12, 2001, at A21.

4. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

5. It has come to the point in the West where "endangered species protection is the most significant factor in water shortages." Janet Raloff, *Endangered Species Are Keeping Some Landowners Thirsty*, SCI. NEWS, Dec. 1, 2001, at 344.

6. The "leftists" want capitalists and the rich to suffer for the sake of the poor, while the "greens" want property owners to suffer, "for the sake of lower animals and inanimate nature." GEORGE REISMAN, CAPITALISM: A TREATISE ON ECONOMICS 102 (1996).

7. For this proposition, see generally Editorial, *Taking Lake Tahoe*, WASH. POST, Jan. 20, 2002, at B6, where the editors articulate the constitutionally suspect position that the determination to compensate landowners should be a policy judgment, not a constitutional command. But when does a policy judgment made by a government agency trump the Constitution? The *Washington Post*'s proposition is nonsense on stilts; the answer is easy—never.

8. 49 Fed. Cl. 313, 31 ELR 20648 (Fed. Cl. 2001).

9. U.S. CONST. amend. V states, " . . . nor shall private property be taken for public use, without just compensation." *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

Tulare Lake Basin: *Background*

The Facts

The controversy commenced with efforts by the U.S. Fish and Wildlife Service (FWS) to protect the delta smelt and the winter-run chinook salmon, two species of fish said to be in jeopardy of extinction.[10] The effort to protect the fish, specifically by restricting water out-flows in California's primary water distribution system, bring into conflict the ESA and California's century-old regime of private water rights. The science that the FWS relying on by increasing water flows to protect the fish is questionable.[11] But that issue is beyond the scope of this discussion.[12]

The California water system "involves a transport of water from water-rich areas in Northern California to the more arid parts of the state."[13] "Various water projects and aqueduct systems have been built to facilitate that goal."[14] Two of them, the Central Valley Project (CVP) and the State Water Project (SWP), were the focus of the case. "In order to operate the two projects, water is diverted from the Feather and Sacramento Rivers, captured by the pumping systems located at the southern edge of the Sacramento-San Joaquin Delta, and then distributed through a series of canals to end-users in southern California."[15]

The BOR and the California Department of Water Resources (DWR) "are granted water permits by the State Water Resources Control Board (Board), a state agency given the ultimate authority of controlling, appropriating, using, and distributing state waters."[16] The BOR and the DWR "in turn contract with county water districts, conferring on them the right to withdraw or use certain quantities of water."[17] The plaintiff farmers contracted directly with the state water project.[18]

The water projects are "required to be financially self-sustaining, with the cost of construction and maintenance to be paid entirely by those who ultimately receive the water. The water contractors are thus obligated to pay to maintain the operation of the system regardless of the amount of water actually received" for their benefit.[19] Since "the amount of water available to users in a particular year is largely a function of natural causes, however, permits explicitly provide that the state will not be liable for shortages due to drought or other causes beyond its control."[20]

"Against this backdrop of water transportation entitlements,"[21] the U.S. Congress enacted the ESA in 1973. The Act was, the *Tulare Lake Basin* court noted, designed to "halt and reverse the trend toward species extinction, whatever the cost,"[22] according to the U.S. Supreme Court in *Tennessee Valley Authority v. Hill*.[23] In *Hill*, the Court was confronted with the situation that millions of federal dollars had already been appropriated and spent on a dam on the Tennessee River. The majority decided that the Congress had spoken in the plainest words, making it clear that endangered species were to be accorded the highest priority.[24] It reasoned that Congress intended to give the Act precedence over the primary missions of government agencies.[25] Accordingly, the ESA requires them to consult with the Secretary of the Interior about actions that might harm endangered species.[26] "In fulfillment of the duties assigned to it under the ESA, the National Marine Fishery Service [NMFS] initiated discussion with the [BOR] and the [DWR] to determine the impact of water projects on the winter-run Chinook salmon."[27] As a result, the National Marine Fishery Service (NMFS) released a biological opinion on February 14, 1992. It concluded that "the proposed operation of SWP and CVP was likely to jeopardize the continued existence of the salmon population."[28] Included in the NMFS' "finding was a reasonable and prudent alternative (RPA) designed to protect the fish by restricting the time and matter of pumping the water out of the Delta."[29]

10. 49 Fed. Cl. at 313, 31 ELR at 20648.
11. The National Academy of Sciences (NAS) has concluded that federal biologists had "no substantial scientific foundation" for their efforts to protect endangered fish by withholding water in the Klamath Basin. *See* Michael Grunwald, *Scientific Report Roils a Salmon War*, WASH. POST, Feb. 4, 2002, at A1. The NAS concluded that the data "has not shown a clear connection between the water level in upper Klamath Lake and conditions adverse to the welfare of the suckers." *Id.* It noted that "the best year ever recorded for sucker survival was a low-water year." *Id.* Chuck Cushman, of the American Land Rights Association, said of the FWS biologists, "[y]ou can't trust the science, because you can't trust the scientists. They've got a biased point of view, and there is no way to fight back." *Id.*
12. But faith in the ethics of government agencies has been destroyed in the West by instances of "bio-fraud" on the part of government employees in cases involving the alleged planting of lynx and grizzly fur in an attempt to establish evidence of a habit under the ESA. *See* Valerie Richardson, *"Biofraud" Angers West, Taints Federal Stewards*, WASH. TIMES, Jan. 21, 2002, at A13. She relates that many westerners view the ESA as a device to move people off the land they developed and love.
13. 49 Fed. Cl. at 314, 31 ELR at 20648.
14. *Id.*
15. *Id.*
16. *Id.* at 315, 31 ELR at 20648.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, 8 ELR 20513 (1978)).
23. 437 U.S. 153, 184, 8 ELR 20513, 20520 (1978). Here, the Court considered the famous snail darter case and decided to allow enforcement of the Act "whatever the cost." *Id.* "Whatever the cost" seems a bit extreme. Should there not be some balancing of the opposing interests? Some consideration; for example, of the interests of creatures with opposable thumbs who happen to be the stewards of private property? Some consideration of the millions of taxpayer dollars spent on a nearly completed dam? This is exactly what Justice Lewis Powell advocated in his dissent. He wrote that "[t]his decision casts a long shadow over even the most important projects, serving vital needs of society and national defense, whenever it is determined that continued operation would threaten extinction of an endangered species or its habitat." *Id.* at 195-96, 8 ELR at 20523. (Powell, J., dissenting). He continued, "I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal." *Id.* at 196, 8 ELR at 20523.
24. *Id.* at 183, 8 ELR at 20520.
25. *Id* at 181, 8 ELR at 20519.
26. This consultation is to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."16 U.S.C. §1536(a)(2), ELR STAT. ESA §7(a)(2).
27. 49 Fed. Cl. at 315, 31 ELR at 20648.
28. *Id.*
29. "Where activities of a federal agency are seen to jeopardize the continued existence of listed species or cause the destruction or adverse modification of critical habitats, the Act directs the secretary to suggest "reasonable and prudent alternatives" to avoid such harms." *Id.* at 315 n.2, 31 ELR at 20648 n.2. *See* 16 U.S.C. §1536(b)(3)(A), ELR STAT. ESA §7(b)(3)(A).

"As a result, water that otherwise have been available for distribution to the farmers was made unavailable."[30]

Sadly, the whole "process was repeated the following year, with the addition of a biological opinion from the FWS, which found that the delta smelt was at risk."[31] Again, RPAs were adopted that "again restricted the time and manner in which water could be pumped from the Delta," thereby further "limiting the water available to the distribution system."[32]

On March 19, 1992, the Board examined the NMFS' first biological opinion. In acknowledging that the BOR and the DWR could not comply with the RPA and still meet the water quality standards imposed on them by permits issued by the Board, the Board concluded that "the federal requirements under the ESA overrode the [contractual] terms set forth in the permits."[33] In order to maintain the quality of the water, the Board adopted the NMFS' RPA, which resulted in a considerable restriction on the amount of water that the plaintiffs could draw from the project.[34]

The RPA implemented "deprived the Tulare Lake Basin [Water District] of at least 9,770 acre-feet of water in 1992, at least 26,000 acre-feet of water in 1993, and at least 23,050 acre-feet of water in 1994."[35] The Kearn County water agency "lost a minimum of 319,428 acre-feet over the same period."[36]

The Issue

The *Tulare Lake Basin* court recognized that the purpose of the Takings Clause, according to the Court in *Armstrong v. United States*,[37] is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole."[38] The issue, according to the court, was "not whether the federal government has statutory authority to protect the winter-run Chinook salmon and Delta smelt under the ESA, but whether it may impose the cost of their protection solely on plaintiffs."[39]

30. 49 Fed. Cl. at 315, 31 ELR at 20648.
31. *Id.*
32. *Id.*, 31 ELR at 20649.
33. *Id.*
34. *Id.*
35. *Id.* An acre-foot of water is the amount necessary to raise the level of water of a pond with the area of an acre by one foot. It is equal to 43,560 cubic feet or 325,851 gallons or 1,233 cubic meters.
36. *Id.*
37. 364 U.S. 40 (1960).
38. 49 Fed. Cl. at 315, 31 ELR at 20649 (citing *Armstrong*, 364 U.S. at 49). In *Armstrong*, a contractor had a state lien on an uncompleted vessel and the material furnished for its construction. The builder of the vessel had a contract that allowed the United States to require the builder to transfer title to the government on default. The government contended that after default it was immune from paying the contractor's liens. For an understanding of the *Tulare Lake Basin* case it is important to note that Justice Hugo Black wrote in *Armstrong* that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every element of a Fifth Amendment 'taking' and is not a mere 'consequential' taking." 364 U.S. at 48.
39. 49 Fed. Cl. at 315, 31 ELR at 20649. A similar issue arises with regard to rent control. Given, arguendo, that it is a governmental responsibility to guarantee the poor cheap rental accommodation, it by no means logically follows that the entire expense of this program be the responsibility of landlords alone, as opposed to the general taxpayer. After all, we have similar policies concerning feeding the poor, and manage to acquit this "responsibility" without saddling grocers and restauranteurs, alone, with the entire expense. For the general case against rent control, see RICHARD J. ARNOTT & JACK M. MINTZ, RENT CONTROL: THE INTERNATIONAL EXPERIENCE (1987); CHARLES BAIRD, RENT CONTROL: THE PERENNIAL FOLLY (1980); RENT CONTROL: MYTHS AND REALITIES (Walter Block & Edgar Olsen eds., 1981); Walter Block, *A Critique of the Legal and Philosophical Case for Rent Control*, J. BUS. ETHICS (forthcoming 2002); Walter Block, *Rent Control: A Tale of Two Canadian Cities*, 25 MID ATLANTIC J. OF BUS. 85 (1989); Walter Block, *An Analysis and Evaluation of* Rental Housing in the City of New York: Supply and Conditions 1975-1978 *by Peter Marcuse*, INT'L J. FOR HOUSING SCI., Fall 1980, at 343; Walter Block, *The Negative Impact of Government Policies on the Built Environment*, INT'L J. HOUSING SCI., Spring 1981, at 131; Walter Block, *Rent Control: A Case Study of British Columbia*, MID ATLANTIC J. OF BUS., Dec. 1994, at 299; Walter Block, *Housing Is Not a Basic Human Right*, CANADIAN HOUSING, Spring 1989, at 30; Walter Block, *Rent Controls—Who Benefits and Who Is Hurt*, *in* HOUSING IN CANADA: A CONTINUING CHALLENGE 197 (Paul Cosgrove & Raymond V. Hession eds., 1982). Walter Block, *On Rent Control*, *in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 421 (David Henderson ed., 1993); Walter Block et al., *Rent Control: An Economic Abomination*, 11 INT'L J. VALUE BASED MGMT. 253 (1998); ANTHONY DOWNS, RESIDENTIAL RENT CONTROLS: AN EVALUATION (1988); R.W. GRANT, RENT CONTROL AND THE WAR AGAINST THE POOR (1989); RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST (M. Bruce Johnson ed., 1982); PETER D. SALINS, THE ECOLOGY OF HOUSING DESTRUCTION: ECONOMIC EFFECTS OF PUBLIC INTERVENTION IN THE HOUSING MARKET (1980); WILLIAM TUCKER, THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICIES (1990).
40. For a comment on the makeup of some activist environmental groups, see generally Frank Cross, *The Subtle Vices Behind Environmental Values*, 8 DUKE ENVTL. L. & POL'Y F. 151 (1997). *See also* WALTER BLOCK, ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION (1990) [hereinafter BLOCK, RECONCILIATION]; Walter Block, *Environmentalism and Freedom: The Case for Private Property Rights*, J. BUS. ETHICS, Dec. 1998, at 1887 [hereinafter Block, *Environmentalism and Freedom*]; Walter Block & Roy Whitehead, *The Unintended Consequences of Environmental Justice*, FORENSIC SCI. INT'L, Mar. 1999, at 57; THOMAS DILORENZO, DOES CAPITALISM CAUSE POLLUTION? (Wash. Univ. Center for the Study of American Business, Contemporary Issues Series No. 38, 1990); PETER J. HILL & ROGER E. MEINERS, WHO OWNS THE ENVIRONMENT? (1998); Robert McGee & Walter Block, *Pollution Trading Permits as a Form of Market Socialism, and the Search for a Real Market Solution to Environmental Pollution*, 6 FORDHAM L. & ENVTL. J. 51 (1994); Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, *in* BLOCK, RECONCILIATION, *supra*; RICHARD L. STROUP & JOHN C. GOODMAN ET. AL., PROGRESSIVE ENVIRONMENTALISM: A PRO-HUMAN, PRO-SCIENCE, PRO-FREE ENTERPRISE AGENDA FOR CHANGE (1991).
41. 49 Fed. Cl. at 314, 31 ELR at 20648.
42. *Id.* at 317, 31 ELR at 20649.
43. *Id.*

Examining the Takings Issue

The government and supporting amici curiae, a noteworthy collection of white, middle-class urban environmental groups,[40] including the Sierra Club, Defenders of Wildlife, Environmental Law Foundation, and various and sundry paternalistic law professors,[41] contended in *Tulare Lake Basin* that a taking did not occur under the Fifth Amendment, for three reasons. First, they maintained that the implementation of the RPAs "merely frustrated the contract's purpose" and did "not therefore effectuate a taking."[42] Second, they argued that the needed "criteria for a regulatory taking," specifically the existence of a reasonable, investment-backed expectation and a significant decrease in economic value, were not met.[43] Finally, they contended that the "government cannot be liable for a taking when it does no more than impose a limit on plaintiff's title that the

background principles of California state law would otherwise require."[44]

Frustration

The government argued that it may not be held liable to the farmers for lawful actions that, although they may injure or destroy contract rights, do not *take* them as the phrase is understood in the constitutional sense.[45] No *taking* occurs, the government asserted, when "expectations under a contract are merely frustrated by lawful government action not directed against the taking claimant."[46] The government contended that the RPAs "represent a legitimate exercise of federal authority that does no more than frustrate, rather than appropriate, the plaintiff's contractual rights in the water."[47]

Unfortunately for the government, but happily for the long compelling tradition of liberty and property rights found in the Constitution, the plaintiffs in this case can claim an identifiable ownership interest in the stipulated volume of water. The government's frustration argument only applies when the claimant has a contractual right to buy at a certain price but cannot claim actual ownership of the property because title has not passed to the party seeking compensation, as was held in *Omnia Co. v. United States*.[48] The Omnia Company, in May 1917, during World War I, became the owner by assignment of a contract that gave it the right to buy steel from the Allegheny Steel Company.[49] In October 1917, before any deliveries occurred under the contract, the government requisitioned the company's entire production of steel.[50] In holding that the contract had merely been frustrated, rather than *taken*, the Court addressed the situation in which a litigant claims a right to buy but cannot claim actual ownership of the property because title has not passed to the party seeking compensation.[51] The *Tulare Lake Basin* court said that, unlike *Omnia*, "where the steel company could only claim a contract expectancy but not an ownership right in the steel, our plaintiffs can claim an identifiable interest in a stipulated volume of water."[52] Here, the farmers possessed an actual property interest in receiving a volume of water, rather than merely a future expectancy.[53] Although under "California law the title to water always remains with the state, the rights to the water's use is transferred first by permit to [the] DWR, and then by contract to end-users, such as the plaintiffs."[54] The "contracts confer on plaintiffs the right to the exclusive use of a prescribed quantity of water, consistent with the terms of the permits."[55] The right to use of the water "remains in place until formally changed by administrative process."[56] Thus, it is clear that the plaintiff's contract right in the water's use is superior to all competing interests. The expectation in receiving the water is therefore deemed a property interest sufficiently matured to characterize it as an actual interest in the subject water rather than a mere expectation of its use.[57]

Nature of Taking

Courts have traditionally divided their analysis of Fifth Amendment takings into two categories: physical takings and regulatory takings. A physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the function equivalent of a "practical ouster of the owner's possession" as articulated by the Court in *Teleprompter Manhattan CATV Corp.*[58] A regulatory taking arises, on the other hand, when the government's regulation restricts the use to which the owner may put his property. In deciding whether a regulatory taking has occurred, courts generally employ the balancing set out in *Penn Central Transportation Co. v. City of New York*,[59] by balancing the character of the government's regulation and the reasonableness of the property owner's investment-backed expectations.[60] On the other hand, regulations that are found to be too restrictive, those that deprive the property of its entire economical beneficial productive use, commonly identified as categorical takings are treated like physical takings and require no such balancing, as noted in *Lucas v. South Carolina Coastal Council*.[61] There, the state sought to limit the use of petitioner's beachfront lots in the interest of restricting coastal zone development.[62] The

44. *Id.*
45. *Id.*
46. *Id.* (citing 767 Third Ave. Ass'n v. United States, 48 F.3d 1575, 1581 (Fed. Cir. 1995)). There the lessor claimed reimbursement from the U.S. government for leases breached by a foreign government (Socialist Federal Republic of Yugoslavia) after the foreign government's offices were ordered closed and its assets frozen. The court said that the "lessor had no compensable investment backed expectation to be free from government interference, within the meaning of the just compensation clause, regarding its rights under lease with entities of foreign government." 48 F.3d at 1581. It concluded that the lessor had merely "leased office space to foreign government entities with notice that the United States was statutorily and constitutionally authorized to take action against foreign government by closing its offices and blocking its assets, and the United States had done so in the past." *Id.*
47. 49 Fed. Cl. at 317, 31 ELR at 20649.
48. 261 U.S. 502 (1923).
49. *Id.* at 507.
50. *Id.*
51. *Id.* at 510. The high court said "that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Id.* Obviously, however, the power was used to prosecute the war.
52. 49 Fed. Cl. at 317, 31 ELR at 20649.
53. *Id.* at 318, 31 ELR at 20650.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. 458 U.S. 419 (1982). In *Loretto*, the Court decided that a New York law requiring landlords to allow cable television wires and facilities to be installed on their property was a "taking" of property compensable under the Fifth Amendment. In writing for the Court, Justice Thurgood Marshall said that "[w]e affirm the traditional rule that a permanent physical invasion of property is a taking" *Id.* at 441.
59. 438 U.S. 104, 8 ELR 20528 (1978).
60. New York's Landmarks Law prevented the owner from using air space above Grand Central Terminal for office buildings of over 50 stories because the city determined they would adversely effect the architectural features of the landmark building. The Court ruled that the statute did not effect a taking of private property, because it did not interfere with the owner's present use of the building, necessarily prohibit occupancy of any of the airspace above the landmark building, or deny all use of the air rights above the landmark. The Court concluded that "[t]he restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford appellants opportunities to enhance not only the Terminal site proper but also other properties." 438 U.S. at 139, 8 ELR at 20536.
61. 505 U.S. 1003, 22 ELR 21104 (1992).
62. *Id.* at 1020, 22 ELR at 21105. There is always a risk that regulations, by requiring private property to be left substantially in its natural state, as in *Lucas*, carry a risk that private property is being pressed into some form of public service "under the guise of mitigating pub-

trial court found that the lots had been rendered valueless by the regulations.[63] The Court noted that "there are good reasons for our frequently expressed belief that 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."[64] In *Tulare Lake Basin*, the farmers, as in the case of the petitioner in *Lucas*, had been deprived of all beneficial use of the property.

Precedent indicates that the "distinction between a physical invasion and a governmental activity that merely impairs the use of that property"[65] depends on whether the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it, as stated in *United States v. Causby*."[66] In *Causby*, the Court found that numerous airplane flights immediately above a landowners property constituted a taking, "comparing such actions to a more traditional physical taking."[67] The Court noted that "[i]f, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered on the surface of the land and taken exclusive possession of it."[68]

While water rights present an unusual taking situation, the cited *Causby* example is a useful one. As the *Tulare Lake Basin* court noted, "[i]n the context of water rights, a government regulation that places a restriction on use completely eviscerates the property right itself since the user's sole entitlement is to the use of the water."[69] Indeed, "the right of property in water is usufructuary, and consists not so much of the fluid itself as to the advantage of its use."[70] Unlike other types of property, for which use restrictions "may limit some, but not all of the incidents of ownership, the denial of a right to use water accomplishes an extinction of all value of it."[71] Thus, "by limiting the plaintiffs' ability to use an amount of water to which they were contractually entitled, the government has essentially substituted itself as the beneficiary of the contract rights . . . and totally displaced the contract holder."[72] The "complete occupation" of the farmers' water rights clearly "mirrors the [physical] invasion present in *Causby*."[73] The government's total destruction of all value of the water contracts has the same elements of a total taking highlighted by Justice Hugo L. Black in *Armstrong*.[74] The federal government, the *Tulare Lake Basin* court concluded, had rendered the farmers' rights to the water valueless and therefore had affected a physical taking.[75] The Court long ago held that water rights can be the subject of a physical taking. In a 1931 decision, *International Paper Co. v. United States*,[76] the Court ruled that when the government diverted water from petitioner's mill for production of power elsewhere, a compensable taking occurred.

Ownership at Time of Taking

The next inquiry in a takings case is whether in fact the farmers owned the property at the time of the taking.[77] The government alleged that "background principles of state law" and California's public trust doctrine rendered the farmers' loss noncompensable.[78] Under the terms of the applicable contract, the state was protected from liability for any damages resulting from the shortage of water available for distribution by the DWR. The *Tulare Lake Basin* court quickly pointed out that the case involved the federal government as the defendant, and that the government enjoys no such contractual immunity from liability.[79]

The government then contended that the farmers had no vested property interest in the water if its intended use violates a public trust.[80] That contention might have been valid if the use was a nuisance that, for example, pollutes the state's groundwater.[81] But the farmers' use of their water rights did not constitute a nuisance.[82] The government also argued that, given the determination under the ESA, the farmer's use of the water is unreasonable and violates the public trust.[83] The court refused to accept this contention. First, the allocation of water covered by the contract had already been made by the Board and that determination clearly defined the scope of the farmer's property rights.[84] The court also pointed out that this is not a case under state nuisance law. The farmer's use of the water for producing food and fiber is a legitimate one not harmful to the public trust.[85]

lic harm." *Id.* at 1018, 22 ELR at 21108. Here the Court foresaw the situation discussed *infra* note 140, where the FWS used the "guise" of Incidental Take Statements to prohibit the grazing of cattle where there was no evidence of the presence of endangered species on the land.

63. *Id.* at 1019, 22 ELR at 21108.
64. *Id.*
65. 49 Fed. Cl. at 318, 31 ELR at 20650.
66. 328 U.S. 256, 265 (1946).
67. 49 Fed. Cl. at 318, 31 ELR at 20650.
68. 328 U.S. at 261.
69. 49 Fed. Cl. at 318, 31 ELR at 20650 (citing Eddy v. Simpson, 3 Cal. 249, 252-53 (1853)).
70. *Eddy*, 3 Cal. at 253.
71. 49 Fed. Cl. at 319, 31 ELR at 20650.
72. *Id.*
73. *Id.*
74. *See supra* note 37.
75. 49 Fed. Cl. at 319, 31 ELR at 20650.
76. 282 U.S. 399, 407 (1931). There, in determining whether the government's acquisition of a corporation's right to use water power constituted a taking, the Court emphasized that the "petitioner's right was to the use of water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the government could do to take that use." *Id.* at 407. *See also* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 285 (1958) ("depriving the owner of its profitable use was the imposition of such servitude as would constitute an appropriation of property for which compensation should be made").
77. 49 Fed. Cl. at 320, 31 ELR at 20650.
78. *Id.*
79. *Id.*
80. *Id.* at 321, 31 ELR at 20650.
81. Rith Energy v. United States, 44 Fed. Cl. 108, 29 ELR 21389 (Fed. Cl. 1999), *aff'd*, 247 F.3d 1355, 31 ELR 20603 (Fed. Cir. 2001). There, the court rejected the takings claim of a surface miner when it was determined that the mining operation did violence to the state's citizens by polluting groundwater.
82. 49 Fed. Cl. at 323, 31 ELR at 20652. Growing food and fiber appears to fit into those activities that should be supported as contributing to the public good.
83. *Id.*
84. *Id.*
85. *Id.*

Confronting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*

The Court recently decided the long-awaited case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[86] Several property rights advocates have expressed disappointment in the decision. Make no mistake, we as libertarians would have been delighted had the Court ruled that any taking of private property, however temporary, must be compensated. We contend, however, that a fair reading of the case does not impact the holding in *Tulare Lake Basin* and, given the narrow issue framed in the grant of certiorari and decided by the Court in *Tahoe-Sierra*, the result was entirely predictable. Unlike the categorical taking of the plaintiff's entire beneficial interest in water considered in *Tulare Lake Basin*, the sole issue considered by the Court in *Tahoe-Sierra* was whether a moratorium on development imposed during the process of devising a comprehensive land use plan constitutes a per se taking of property under the Takings Clause.[87] At trial, the *Tahoe-Sierra* federal district court stated that a "regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land."[88] The court then decided that the regulation would advance a legitimate state interest by preventing additional damage to the lake.[89] The court next looked to the factors discussed by the Court in *Penn Central*[90] to decide whether the moratorium regulations had effected either a partial or a total taking.[91]

Relying on the temporary nature of the regulations, as well as the critical fact that the petitioners failed to offer any evidence of individual harm, the lower court decided that "consideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking." As we shall see, this is a critical distinction between *Tulare Lake Basin* and *Tahoe-Sierra*.[92] The critical difference is that the *Tulare Lake Basin* plaintiffs demonstrated individual harm. However, the *Tahoe-Sierra* plaintiffs nonetheless prevailed on the "total taking" issue because the district court found that they had been temporarily deprived by the regulations of "all economically viable use of their land."[93] The court reasoned that the regulations constituted a "categorical" taking under the holding in *Lucas* because the regulations, while intended to be temporary, contained no definite termination date.[94]

On appeal to the U.S. Court of Appeals for the Ninth Circuit, the petitioners did not challenge the district court's findings or conclusions regarding the *Penn Central* factors. Interestingly, the petitioners stated specifically on appeal that they did not argue that the regulations constituted a taking under the *Penn Central* multi-factor approach.[95] One can only speculate that this, as it turned out, risky all-or-nothing approach was adopted to give the appellate court an opportunity to hold that a regulatory taking might always constitute a per se taking. Because the petitioners brought only a facial challenge, the only issue before the Ninth Circuit was whether the mere enactment of the regulations constituted a taking.[96] The court decided that no "categorical" taking had occurred because the regulations had only a temporary impact on the petitioner's fee interest in the property.[97] The court said that the *Lucas* categorical holding applies to only the "relatively rare" case in which the regulation denies all productive use of the entire property.[98] Here, they found that the moratorium involved only a "temporal slice" of the property.[99] To, we expect, the plaintiff's considerable dismay, the Ninth Circuit concluded that *Penn Central* was the appropriate framework to determine whether a taking had occurred. But, alas, that framework was not before the court for review because the plaintiffs had failed to challenge the district court's conclusion that they could not maintain a claim under *Penn Central*.

On certiorari to the Supreme Court, the petitioners made a facial attack on the moratorium imposed by the regulations. The sole issue considered by the Court was whether a moratorium on development imposed during the process of devising a comprehensive land use plan constitutes a per se taking.[100] As Justice John Paul Stevens wrote, under the petitioner's proposed per se rule, "there is no need to evaluate the landowner's investment backed expectations, the actual impact of the rule on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction."[101] In other words, the petitioners advocated scrapping the *Penn Central* approach even in a temporary taking situation. The Court commenced its analysis by saying that the Fifth Amendment provides a basis for drawing a distinction between physical and regulatory takings.[102] Payment of compensation is always required when there has been a physical occupation. But there is no comparable constitutional reference to regulations that prohibit a property owner from making certain uses of her property. Justice Stevens pointed out that the Court's regulatory takings jurisprudence is characterized by "essentially ad hoc, factual inquiries,"[103] and is designed to allow "careful examination and weighing of all the relevant circumstances."[104]

On the other hand, when the government physically takes possession of private property or even occupies the property

86. 122 S. Ct. 1465, 32 ELR 20627 (2002).

87. *Id. See* Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View From* Lake Tahoe, 31 ELR 10224 (Feb. 2001).

88. 34 F. Supp. 2d 1226, 1239, 29 ELR 21291, 21295 (D. Nev. 1999).

89. *Id.* at 1240, 29 ELR at 21295.

90. *Id.* The *Penn Central* approach involves a "complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with the reasonable investment-backed expectations, and the character of the government action." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

91. 34 F. Supp. 2d at 1240, 29 ELR at 21295.

92. *Id.*

93. *Id.* at 1245, 29 ELR at 21297.

94. *Id.* at 1250-51, 29 ELR at 21298.

95. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 773, 30 ELR 20638, 20641 (9th Cir. 2000).

96. *Id.*

97. *Id.* at 774, 30 ELR at 20641.

98. *Id.* at 773, 774, 30 ELR at 20641.

99. *Id.*

100. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 32 ELR 20627 (2002).

101. *Id.* at 1475, 32 ELR at 20629.

102. *Id.*

103. *Id.* (citing *Penn Central*).

104. *Id.* (citing *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).

temporarily for its own purposes a categorical taking has occurred.[105] Critical to the *Tulare Lake Basin* holding, and we suggest squarely on point with the *Tulare Lake Basin* holding that there was a taking of the farmers' water rights, the *Tahoe-Sierra* majority then cited *Loretto* and *Causby* as examples of government regulations that constitute a categorical taking.[106] In contrast, when the government does not effect the equivalent of a physical occupation, but merely prohibits a private use, like the private use of airspace above the building in *Penn Central*, the necessity for a factual assessment of the purposes and economic effect of the government action arises.[107]

The majority then explained that the categorical rule that was applied in *Lucas* is required only when the regulation deprives the owner of "all economically beneficial uses" of his property."[108] And the *Lucas* holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted."[109] Anything less than a "complete elimination of value" will require the multi-factor analysis applied in *Penn Central*.[110] The majority was unwilling to say that the moratoria at issue in *Tahoe-Sierra* met the *Lucas* test for a categorical taking and decided that the *Penn Central* factual inquiry was the correct standard.[111]

But what of Justice Black's often-quoted *Armstrong* comment that private property owners should not pay for public burdens "which, in all fairness and justice, should be borne by the public as a whole."[112] The majority pointed out that the case came to the Court on a per se argument and that the *Penn Central* inquiry was foreclosed because the district court's decision under that theory was not appealed.[113] In what has to be a chilling comment for the petitioners' lawyers, Justice Stevens wrote that "[f]inally, if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."[114] The Court also noted that "*Armstrong*, like *Lucas*, was a case that involved the total destruction by the government of all value in a specific property interest."[115] Finally, the majority characterized the Institute for Justice amicus curiae brief as making the primary argument that *Penn Central* should be overruled.[116] In response, the majority decided that the interests of fairness and justice espoused by Justice Black will be best served by adopting the approach advocated by Justice Sandra Day O'Connor in *Palazzolo v. Rhode Island*.[117] There she wrote, "[w]e are persuaded that the better approach to claims that a regulation has effected a temporary taking requires careful examination and weighing of all the relevant circumstances."[118] The court continued, that unlike the extraordinary circumstances in *Lucas*, (and, we might add, *Tulare Lake Basin*) in which the government deprives a property owner of all economic use, moratoria are widely used for land use planners to preserve the status quo while deciding on a development plan.[119] The majority was clearly concerned that a decision holding that the moratorium was a taking would unduly hamper land use planners nationwide. Consequently, we believe that the Court's decision is intended to advance the public interest in assisting informed decisionmaking that is valuable to both planners and private property owners. Sadly, in the absence of an appeal, the Court did not have before it the other side of the equation, namely whether the individual petitioner's property rights had been abused by the delay in implementation of the development plan. The Court therefore concluded that the interest of "fairness and justice" will be best served by relying on the familiar *Penn Central* approach in deciding these temporary taking cases.[120]

We believe that the decision was setback for those, who like us, advocate for private property rights *only* in the sense that those rights were not expanded beyond the categorical taking discussed in *Lucas*. This is so because the Court chose to focus on the narrow issue of the moratorium regulations and refused to consider the abusive effect of the moratorium on the individual property owners. The good news is that the Court has clearly set out a marker that even a temporary regulatory taking may be compensated under the multi-factor test found in *Penn Central*. This good news is reinforced by Justice Stevens' comment that some of the plaintiffs might have prevailed under a *Penn Central* analysis.[121] Finally, we conclude that because *Tulare Lake Basin* fits nicely under the categorical takings theories of *Lucas, Loretto*, and *Causby*, the *Tahoe-Sierra* holding has no practical effect on the *Tulare Lake Basin* decision. We also contend that *Tulare Lake Basin* is one of those cases that is cloaked in Justice Black's *Armstrong* statement that private property owners should not pay for public burdens "which in all fairness and justice, should be borne by the public as a whole." The majority in *Tahoe-Sierra* took pains to point out that *Armstrong*, like *Lucas*, was a case that involved total destruction by the government of all value of a specific property interest.[122] And in *Tulare Lake Basin*, the court determined that the government took all of the farmers' interest in the use of the water.

Concluding Thoughts on *Tulare Lake Basin*

The *Tulare Lake Basin* case highlights the conflict between the "Holy Grail" of some urban environmentalists,[123] the

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id. See Lucas*, 505 U.S. at 1019-20 n.8, 22 ELR at 21108 n.8.
111. 122 S. Ct. 1475, 32 ELR at 20629.
112. Armstrong v. United States, 364 U.S. 40, 49 (1960). For the facts of the case, see *supra* note 37.
113. 122 S. Ct. at 1475, 32 ELR at 20629.
114. *Id.*
115. *Id.* at 1483 n.27, 32 ELR at 20632 n.27.
116. *Id.* at 1483 n.28, 32 ELR at 20633 n.28.
117. *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring).
118. *Id.*
119. 122 S. Ct. 1476, 32 ELR at 20631.
120. *Id.* at 1483, 32 ELR at 20632.
121. *See supra* note 114. Justice Steven's comment confirms a previous observation that partial taking are compensable under *Penn Central*. *See* Joel Burcat & Julia Glencer, Palazzolo v. Rhode Island *and the U.S. Supreme Court's Increased Support of the Constitutional Protection of Private Property: A Response to Echeverria*, 32 ELR 10245, 10252 (Feb. 2002), for an obsevation that the Court in *Palazzolo* acknowledged that, under the right circumstances, a partial taking, under *Penn Central*, will constitute a compensable taking.
122. 122 S. Ct. at 1483 n.27, 32 ELR at 20632 n.27.
123. *See generally* Cross, *supra* note 40, for the idea that many staunch environmentalists are middle class urban dwellers. *See also* Kelly,

ESA, and the noble liberty and property interests enjoyed by all Americans, even rube farmers, protected by the Fifth Amendment. The use of the term "Holy Grail" is not a misnomer. Witness the fact that river water was denied firefighters in a recent fire in the northern Cascades because of concerns that its use would violate the ESA.[124] Four of the firefighters, including two females, died horrible deaths in the raging flames.[125] No reasonable person wishes to see fish and animals become extinct. But, when we decide to protect endangered species at the expense of private property interests, who should bear the burden?[126] Should the cost be borne solely by the impacted farmers? Or should all of society shoulder the burden? We believe this case strikes a reasonable balance and has set the stage for a new era of environmental responsibility.[127] As the Court foresaw in *Armstrong*,[128] if we truly believe it is in the public interest to take private property to protect endangered species,[129] we should all willingly share in and bear the resulting economic costs.[130] Finally, these pitched battles between farmers and federal[131] agencies often arise because of the paternalistic approach of the government. Rather than consulting with the impacted community, as a fair reading of §101 of the National Environmental Policy Act (NEPA)[132] mandates,[133] government agencies often rely solely on so-called scientific opinion to justify top-down management.[134] The top-down management is certain to create conflict with and is insultingly paternalistic toward the impacted community[135] because private property owners have a compelling self-interest in protecting the environment.[136] What sane private property owner wants to destroy the beneficial use of his property?[137] It is encouraging for advocates of private property rights to see that the courts are catching on to the trampling of private property rights by leftist environmentalists and their captive[138] ideology-driven government agencies[139] in the guise[140] of protecting endangered species.

supra note 2, for support of the proposition that environmental regulations are increasingly reflective of the values of urban dwellers who have little connection with the land or nature. Why should they care about the cost of protecting fish and fuzzy creatures? They have nothing to lose and don't have to pay. And it makes them feel good.

124. *See* Chris Solomon, *Why Thirty Mile Fire Raged Without Water*, SEATTLE TIMES, Aug. 1, 2001, at A7.

125. *See* Walter Block, *Four Firemen Perish*, *at* http://www.lewrockwell.com/orgin.block2.html (last visited June 8, 2002).

126. And when we realize that *human life* hangs in the balance, it is not clear that there is any justification for this policy at all.

127.

> What the claims court has potentially done is to set the stage for a new era of environmental responsibility. The key problem in America's environmental debate is that most people have no concept of how much it costs to protect natural resources, and feel there is nothing to lose from more regulations.

Editorial, *The Earth Rebalanced*, WALL. ST. J., July 10, 2001, at A18.

128. 346 U.S. at 49. One purpose of the Fifth Amendment is "to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*

129. Private property rights are a far more reliable means toward this end, as well as being more in accord with our traditions of relying upon this institution.

130. Recall that the *Tahoe-Sierra* court said that *Armstrong* was one of those cases in which the owner was deprived of all economically beneficial use of the property. 122 S. Ct. at 1483 n.27, 32 ELR at 20632 n.27. But what of the situation in which the landowners were prevented from developing their lots for several years to protect against runoff into the lake? But why should it make any difference if the taking has not been finalized because of the idle meanderings of an administrative agency of the city, state, or federal government? Such delay provides an incentive for the administrative agency to postpone, sometimes for decades, a final decision. Meanwhile, the owner has been deprived of the use of his property. And the government can use this delay to "play the owner like a yo-yo and never give him his day in court." Timothy Sandefur, *The Obstacle of the Takings Clause*, IDEAS ON LIBERTY, Jan. 2002, at 45, 46. And what of situations in which the government regulations are used as a guise to prohibit legitimate development or use of property?

131. *See generally* Lanton Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 203-09 (1998), about how to provide early opportunities for resolution of disputes and building community support by using the productive harmony provisions of §101 of the National Environmental Policy Act, 42 U.S.C. §4331, ELR STAT. NEPA §101.

132. 42 U.S.C. §4331, ELR STAT. NEPA §101.

133. *See* Kevin Preister & Jim Kent, *Using Social Ecology to Meet the Productive Harmony Intent of the National Environmental Policy Act*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 235, 239-41 (2001), for a detailed discussion of the use of §101 of NEPA to achieve productive harmony with the impacted community.

134. Roy Whitehead & Walter Block, *Environmental Justice Risks in the Petroleum Industry*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 67, 81 (2000).

135. *See generally* Richard Merritt & Roy Whitehead, *Including the Excluded Population in Marine Corps Environmental Decisions*, MARINE CORPS GAZETTE, Oct. 2000, at 42. In the Louisiana Shintech environmental justice case, for example, over 70% of the black elected community representatives favored the proposed plastics plant. White, middle class, urban environmentalists, paternalistic members of the U.S. Congress, and the U.S. Environmental Protection Agency objected to the location and ultimately drove the plant elsewhere without regard to the community's economic needs and wishes.

136. For the contention that private property rights and a system of private causes of action are preferable to government regulation in preventing violence against the environment, see Block, *Environmentalism and Economic Freedom*, *supra* note 40.

137. The concept of private property rights, although much reviled by self styled defenders of the environment, is the key to its protection. "When people are allowed full title to property, they treat it as if they own it; that is, they tend to protect it. When property rights are unprotected, allowing others to violate them with impunity, they tend to do so. Spoiling the environment is the result." BLOCK, RECONCILIATION, *supra* note 40, at 284.

138. Just as private "entrepreneurs in the marketplace recognize and fill demands for goods and services, politicians and bureaucrats discover opportunities to meet the demands of their constituencies," TERRY ANDERSON, THE MARKET PROCESS AND ENVIRONMENTAL AMENITIES, ECONOMICS, AND THE ENVIRONMENT: A RECONCILIATION 141 (1990). Bureaucrats, like the officials involved in the *Tulare Lake Basin* case who provide services to environmental interest groups, do not have to pay the opportunity costs of expended resources. "They can increase their own utility by increasing budgetary discretion, power, and wealth" at the expense of hayseed, private property owning farmers. *Id.* at 141.

139. The aforementioned bio-fraud article, Richardson, *supra* note 12, alleged the planting of lynx fur. "The lynx fur scandal underscores everything that's wrong with the Fish and Wildlife Service and the Forest Service. It shows how the agencies succumbed to the Clinton-era ideology ahead of science. It demonstrates the undue influence environmental groups have over the departments." Kimberley Strassell, *The Missing Lynx*, WALL ST. J., Jan. 24, 2002, at A18. Strassell quotes Jim Beers, a 30-year veteran of the FWS: "In recent years the agency eliminated all the real requirements, pushed out people that didn't fit the anti-hunting, anti-fishing, anti-land-management profile. They've got to get back to science." *Id.* She relates that anti-development environmental groups that have captured a government agency "quickly realized how easy it is to exploit the law. Getting a plant or animal listed meant putting large areas of rural America off limits." Finally, the article reveals that the former director of the FWS, as well as the former head of the U.S. Forest Service "have gone to work for the left-wing, activist National Wildlife Federation." *Id.*

140. The use of the term "guise" is not a misnomer. The *Lucas* court expressed a concern that private property might be pressed into some

Water Privatization

Introduction

Private property rights have benefitted every arena of human experience they have touched.[141] The economy of the Soviet Union fell apart mainly because of the absence of this system.[142] The U.S. economy is one of the foremost in the world largely due to its relatively greater reliance on this institution.[143] And yet, there are vast areas in which private property rights play no role at all: namely, oceans, seas, rivers, and other bodies of water. But why should we expect that there would be any better results from such "water socialism" than we have experienced from socialism on land? Indeed, the evidence is all around us attesting to this fact: whales are an endangered species; fish stocks are precipitously declining; oil spills are a recurring problem; droughts are becoming increasingly severe and prolonged, and not only in the underdeveloped countries of the world; rivers are polluted, some so seriously that they actually catch fire; lakes are becoming overcrowded with boaters, swimmers, fishermen, etc., and there is no market mechanism to allocate this scarce resource amongst the competing users; deep sea mining (manganese modules) is in a state of suspended animation due to unclear titles; and the legal status of offshore oil drilling rigs is unclear. Most revealing, water covers some 79% of the earth's surface,[144] but accounts for only a small percentage of world gross domestic product (GDP).[145] While no one expects an exact proportionality between surface coverage and contribution to economic welfare, such a strong disparity suggests that the economic system pursued in these two realms may not be totally unrelated to these results.

Our claim is that we have no warrant to believe that socialism, the absence of private property rights, is any more workable on land than on water. It is time—indeed, it is long past time—to explore ways in which this institution can be applied to aqueous resources.

The Case for Privatization

Privatization is the process of transferring governmental ownership, management, and control from governmental to private hands. The case for privatization, in general, is straightforward. It consists of utilitarian and deontological reasons extolling the benefits of this course of action.

What is the utilitarian case? Individual firms, owned by private persons, are better able to promote consumer sovereignty[146] than are statist agglomerations. This comes about mainly through the weeding out process[147]: those entrepreneurs who cannot satisfy customers are forced into bankruptcy through such competition.

Similarly, the deontological case for privatization is simple and straightforward. Individuals, but not governments, can come to own land and other resources through homesteading,[148] the only method which can justify ownership on the basis of the libertarian legal code.[149] Any attempt

form of public service "under the guise of mitigating public harm." *See supra* note 62. Recently, the Ninth Circuit dealt with a situation in which the FWS used Incidental Take Statements to prohibit the grazing of cattle where there was absolutely no evidence that endangered species existed on the land. The court found that the FWS acted in an arbitrary and capricious manner by imposing terms and conditions on the land without evidence of the existence of an endangered species. Arizona Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 32 ELR 20392 (9th Cir. 2001). This sort of "guise" practice hardly contributes to the public trust in government agencies.

141. TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES (1998); RICHARD PIPES, PROPERTY AND FREEDOM: THE STORY OF HOW THROUGH THE CENTURIES PRIVATE OWNERSHIP HAS PROMOTED LIBERTY AND THE RULE OF LAW (2000).

142. F.A. Hayek, *Socialist Calculation I, II, & III. in* INDIVIDUALISM AND ECONOMIC ORDER (1948); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM (1989); LUDWIG MISES, SOCIALISM (1969); Walter Block, *Socialist Psychology: Values and Motivations*, 5 CULTURAL DYNAMICS 260 (1992); PETER J. BOETTKE, WHY PERESTROIKA FAILED: THE POLITICS AND ECONOMICS OF SOCIALIST TRANSFORMATION (1993); PETER J. BOETTKE, THE COLLAPSE OF DEVELOPMENT PLANNING (1994); Peter J. Boettke & Gary Anderson, *Perestroika and Public Choice: The Economics of Autocratic Succession in a Rent Seeking Society*, PUB. CHOICE, Feb. 1993, at 101; Peter J. Boettke & Gary Anderson, *Soviet Venality: The USSR as a Mercantilist State*, PUB. CHOICE, Jan./Feb. 1997, at 93.

143. JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD, 1975-1995 (1996).

144. 4 THE NEW ENCYCLOPAEDIA BRITANNICA 320 (15th ed. 1998) ("The planet's total surface area is roughly 509,600,000 square km (197,000,000 square miles), of which about 29 percent, or 148,000,000 square km (57,000,000 square miles), is land. The balance of the surface is covered by the oceans and smaller seas.").

145. Mike Dowling, *Interactive Table of World Nations Sorted by Gross Domestic Product, at* http://www.mrdowling.com/800gdp.html (last updated Sept. 5, 2000).

146. *See* William H. Hutt, *The Concept of Consumers' Sovereignty*, ECON. J., Mar. 1940, at 66. For the related concept, individual sovereignty, which is even more in accord with libertarian free enterprise principles, see MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE (1962).

147. HENRY HAZLITT, ECONOMICS IN ONE LESSON (1979).

148. Walter Block, *Earning Happiness Through Homesteading Unowned Land: A Comment on* Buying Misery With Federal Land *by Richard Stroup*, J. SOC. POL. & ECON. STUD., Summer 1990, at 237; HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); John Locke, *An Essay Concerning the True Origin, Extent, and End of Civil Government, in* TWO TREATISES OF GOVERNMENT 17 (P. Laslett ed., 1960) (1690); JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (Henry Regnery Press 1955) (1690); MURRAY N. ROTHBARD, POWER AND MARKET: GOVERNMENT AND THE ECONOMY (1970); MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1978); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (New York Univ. Press 1998) (1982).

149. Terry Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The* Not *so Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998); Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, J. LIBERTARIAN STUD., Winter 1989, at 1; Alfred G. Cuzán, *Do We Ever Really Get Out of Anarchy?*, J. LIBERTARIAN STUD., Summer 1979, at 151; ANTHONY DEJASAY, AGAINST POLITICS: ON GOVERNMENT, ANARCHY, AND ORDER (1997); DAVID FRIEDMAN, THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM (2d ed. 1989); HANS-HERMANN HOPPE, DEMOCRACY, THE GOD THAT FAILED: THE ECONOMICS AND POLITICS OF MONARCHY, DEMOCRACY, AND NATURAL ORDER (2001); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 REV. AUSTRIAN ECON. 88 (1990); Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, REASON PAPERS No. 17, Fall 1992, at 61; Andrew P. Morriss, *Miners, Vigilantes, and Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998); FRANZ OPPENHEIMER, THE STATE (1914); Aeon J. Skoble, *The Anarchism Controversy, in* LIBERTY FOR THE 21ST CENTURY: ESSAYS IN CONTEMPORARY LIBERTARIAN THOUGHT 77 (Tibor Machan & Douglas Rasmussen eds., 1995); Larry J. Sechrest, *Rand, Anarchy, and Taxes*, J. AYN RAND STUD., Fall 1999, at 87; LYSANDER SPOONER, NO TREASON (1870); Edward Stringham, *Justice Without Government*, J. LIBERTARIAN STUD., Winter 1998-1999, at 53-77; Patrick Tinsley, *With Liberty and Justice for All: A Case for Private*

on the part of the state to engage in this activity is fatally compromised by its essentially coercive nature. Government ownership of resources is only legitimate in the statist philosophy of coercive socialism or fascism. (We here abstract from the limited government libertarian perspective which makes an exception for what it characterizes as legitimate state functions: armies to repel foreign invaders, police to reduce invasive acts on the part of local miscreants, and courts to determine who is who in this regard.)[150]

If the case for privatization is a simple one, so too does this apply to many specific instances of this doctrine. For example, the privatization of public housing,[151] state enterprises in western countries,[152] in the Soviet Union and other former communist countries,[153] and the U.S. Post Office.[154] Privatization of roads, highways, and sidewalks are perhaps more conceptually complex, but even here there is a plethora of literature attesting to benefits and justification.[155]

Perhaps the most difficult case to make on behalf of privatization concerns water resources. Under this rubric we include anything[156] which admits of moisture: aquifers, brooks, canals, channels, drinking water, drainage ditches, ducts, estuaries, flumes, groundwater, icebergs, irrigation ditches, lagoons, lakes, oases, oceans, ponds, puddles, reservoirs, rivers, runoff, seas, springs, streams, swamps, underground water, water basins, watercourses, waterfalls, watermains, watersheds, water tables, water traps on public golf courses, waterways, wetlands, etc.[157] In addition, privatization of air and water where appropriate is a necessary if not sufficient condition for reducing the harm done to mankind by clouds, flooding, fog, hurricanes, storms, tidal

Police, J. LIBERTARIAN STUD., Winter 1998-1999, at 95-100; MORRIS TANNEHILL & LINDA TANNEHILL, THE MARKET FOR LIBERTY (1984); WILLIAM C. WOOLRIDGE, UNCLE SAM THE MONOPOLY MAN (1970).

150. For an articulation of the minarchist free market philosophy, see Tibor Machan, *Against Nonlibertarian Natural Rights*, J. LIBERTARIAN STUD., Fall 1998, at 233; CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN (1997); LEONARD E. READ, ANYTHING THAT'S PEACEFUL (1964).

151. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1989).

152. PRIVATIZATION AND DEVELOPMENT (Steven H. Hanke ed., 1987); MICHAEL A. WALKER, PRIVATIZATION: TACTICS AND TECHNIQUES (1988); T.M. OHASHI ET AL., PRIVATIZATION THEORY & PRACTICE (1980); MADSON PIRIE, PRIVATIZATION IN THEORY AND PRACTICE (1986); BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE (1998); Terry L. Anderson & Peter J. Hill, *Privatizing the Commons: An Improvement*, 50 SO. ECON. J. 438 (1983); THE MECHANICS OF PRIVATIZATION (Eamonn Butler ed., 1988).

153. Peter J. Boettke, *The Austrian Critique and the Demise of Socialism: The Soviet Case*, in 17 AUSTRIAN ECONOMICS: PERSPECTIVES ON THE PAST AND PROSPECTS FOR THE FUTURE 181 (Richard M. Ebeling ed., 1991); DAVID CONWAY, A FAREWELL TO MARX: AN OUTLINE AND APPRAISAL OF HIS THEORIES (1987); RAIMONDO CUBEDDU, THE PHILOSOPHY OF THE AUSTRIAN SCHOOL 109 (1993); James Dorn, *Markets True and False in Yugoslavia*, J. LIBERTARIAN STUD., Fall 1978, at 243; Richard M. Ebeling, *Economic Calculation Under Socialism: Ludwig von Mises and His Predecessors*, *in* THE MEANING OF LUDWIG VON MISES 56 (Jeffrey Herbener ed., 1996); Nicolai Juul Foss, *Information and the Market Economy: A Note on a Common Marxist Fallacy*, 8 REV. AUSTRIAN ECON. 127 (1995); DAVID GORDON, RESURRECTING MARX: THE ANALYTICAL MARXISTS ON FREEDOM, EXPLOITATION, AND JUSTICE (1990); Friedrich A. Hayek, *Socialism and War: Essays, Documents, Reviews*, *in* 10 THE COLLECTED WORKS OF F.A. HAYEK (B. Caldwell ed., 1997); Robert Heilbroner, *Analysis and Vision in the History of Monetary Economic Thought*, J. ECON. LITERATURE, Sept. 1990, at 1097; Hans-Hermann Hoppe, *De-Socialization in a United Germany*, 5 REV. AUSTRIAN ECON. 77 (1991); Steven Horwitz, *Money, Money Prices, and the Socialist Calculation Debates*, 3 ADVANCES IN AUSTRIAN ECON. 59 (1996); Willem Keizer, *Schumpeter's Walrasian Stand in the Socialist Calculation Debate*, *in* AUSTRIAN ECONOMICS IN DEBATE (Willem Keizer et al. eds., 1997); Peter G. Klein, *Economic Calculation and the Limits of Organization*, 9 REV. AUSTRIAN ECON. 3 (1996); DON LAVOIE, RIVALRY AND CENTRAL PLANNING: THE SOCIALIST CALCULATION DEBATE RECONSIDERED (1985); Peter Lewin, *The Firm, Money, and Economic Calculation*, AM. J. ECON. & SOC., Oct. 1998, at 499-519; YURI N. MALTSEV, REQUIEM FOR MARX (1993); LUDWIG VON MISES, SOCIALISM (1981); GERALD P. O'DRISCOLL JR., ECONOMICS AS A COORDINATION PROBLEM (1977); GEORGE REISMAN, CAPITALISM: A TREATISE ON ECONOMICS 135-39, 267-82 (1996); Morgan O. Reynolds, *The Impossibility of Socialist Economy*, Q. J. AUSTRIAN ECON., Summer 1998, at 29; Murray N. Rothbard, *How and How Not to Desocialize*, 6 REV. AUSTRIAN ECON. 65 (1992); Joseph T. Salerno, *Ludwig von Mises as a Social Rationalist*, 4 REV. AUSTRIAN ECON. 26 (1990); David Ramsey Steele, *From Marx to Mises: Post-Capitalist Society and the Challenge of Economic Calculation* (1992); Karen I. Vaughn, *Economic Calculation Under Socialism: the Austrian Contribution*, ECON. INQUIRY, June 1980, at 535.

154. Douglas K. Adie, *Why Marginal Reform of the U.S. Postal Service Won't Succeed*, *in* FREE THE MAIL: ENDING THE POSTAL MONOPOLY (Peter J. Ferrara ed., 1990) [hereinafter FREE THE MAIL]; Thomas Gale Moore, *The Federal Postal Monopoly: History, Rationale and Future*, in FREE THE MAIL, *supra*; George Priest, *The History of the Postal Monopoly in the United States*, 18 J. LAW & ECON. at 33 (1975); Stuart M. Butler, *Privatizing Bulk Mail*, 6 MGMT. at 155 (1986); Stephen Moore, *Privatizing the U.S. Postal Service*, *in* PRIVATIZATION (Stephen Moore & Stuart Butler eds., 1987).

155. David T. & Linda Royster Beito, *Rival Road Builders: Private Toll Roads in Nevada, 1852-1880*, NEV. HIST. SOC. Q., Summer 1998, at 71; Walter Block, *Free Market Transportation: Denationalizing the Roads*, J. LIBERTARIAN STUD., Summer 1979, at 209; Walter Block, *Congestion and Road Pricing*, J. LIBERTARIAN STUD., Fall 1980, at 299; Walter Block, *Public Goods and Externalities: The Case of Roads*, J. LIBERTARIAN STUD., Spring 1983, at 1; Walter Block, *Theories of Highway Safety*, TRANSP. RES. REC. No. 912, 1983, at 7; Walter Block, *Road Socialism*, 9 INTL. J. VALUE-BASED MGMT. 195 (1996); Walter Block & Matthew Block, *Roads, Bridges, Sunlight, and Private Property Rights*, J. DES ECONOMISTES ET DES ETUDES HUMAINES, June/Sept. 1996, at 351; Walter Block, *Roads, Bridges, Sunlight, and Private Property: Reply to Gordon Tullock*, J. DES ECONOMISTES ET DES ETUDES HUMAINES, June/Sept. 1998, at 315; FRED FOLDVARY, PUBLIC GOODS AND PRIVATE COMMUNITIES: THE MARKET PROVISION OF SOCIAL SERVICES (1994); Michelle Cadin & Walter Block, *Privatize the Public Highway System*, THE FREEMAN, Feb. 1997, at 96; Dan Klein et al., *From Trunk to Branch: Toll Roads in New York, 1800-1860*, *in* ESSAYS IN ECONOMIC AND BUSINESS HISTORY 191 (Dan Klein ed., 1993); Dan Klein & G.J. Fielding, *Private Toll Roads: Learning From the Nineteenth Century*, TRANSP. Q., July 1992, at 321; Bertrand Lemennicier, *La Privatisation des Rues*, J. DES ECONOMISTES ET DES ETUDES HUMAINES, June/Sept. 1996, at 363; John Semmens, *The Privatization of Highway Facilities*, TRANSP. RES. F., Nov. 1983, at 54-59; JOHN SEMMENS, WHY WE NEED HIGHWAY PRIVATIZATION (1991); John Semmens, *Privatizing Vehicle Registrations, Driver's Licenses, and Auto Insurance*, TRANSP. Q., Fall 1995, at 125-35.

156. However, it must be underscored that only scarce resources are candidates for property ownership. *See* Gene Callahan, *Rethinking Patent Law*, Mises Inst., July 18, 2000, *at* http://www.mises.org/fullstory.asp?control=468&FS=Rethinking+Patent+Law (last visited June 4, 2002); Julio H. Cole, *Patents and Copyrights: Do the Benefits Exceed the Costs?*, *at* http://www.economia.ufm.edu.gt/Catedraticos/jhcole/Cole%20 MPS .pdf (last visited June 4, 2002); Stephan N. Kinsella, *Against Intellectual Property*, J. LIBERTARIAN STUD. (forthcoming 2002); Stephan N. Kinsella, *Is IP Property or Not?*, NAT'L POST, Feb. 22, 2001, at 1; Stephan N. Kinsella, *In Defense of Napster and Against the Second Homesteading Rule*, *at* http://www.lewrockwell.com/orig/kinsella2.html (last visited June 4, 2002); Wendy McElroy, *Intellectual Property: Copyright and Patent in* Liberty, *at* http://www.zetetics.com/mac/intpro1.htm (last visited June 4, 2002); Moore D. Adam, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65 (1977).

157. The head police character in the movie the *Fugitive* demanded of his minions that they search every "house, barn, shed, palace, outhouse, doghouse, etc. . . . ." Our goal is to be as exhaustive as he.

waves, tornados, torrential rain, tsunamis, typhoons, whirlpools, winds, etc.

Why is it necessary that extra care and thoroughness be taken in the attempt to build the case for privatizing water? There are several reasons.

Opposition to Water Privatization

Rare

Water privatization has rarely, if ever, been done. Apart from a few small private lakes and ponds used for fishing, boating, and swimming, there are no cases[158] of private ownership, even in countries ostensibly devoted to free enterprise but which in actuality practice various versions of "water socialism."

Unexplored

Indeed, the topic has not even been explored in the literature. There is, of course, a wealth of information available concerning water resources, but very little of it speaks in favor of full privatization.

Out of Fashion

Water privatization is simply not in keeping with current intellectual opinion. People balk at privatization for roads and other facilities mentioned above on the rare occasions the subject is acknowledged at all in what might be characterized as the "mainstream" literature. It is probably no exaggeration to predict that when and if the typical public policy wonk hears of the thesis which motivates the present enterprise, to wit, to privatize bodies of water as fully as land masses, he will dismiss it out of hand as a particularly noxious form of lunacy.

Interconnectedness

According to that old song, "the hip bone is connected to the thigh bone, is connected to . . . ." In like manner, most bodies of water are joined with most others. That is, although we call the various oceans of the world by different names, e.g., Atlantic, Pacific, Indian, they all touch upon and flow into each other at their common boundaries. Even a seemingly isolated lake is not totally separated from other bodies of water insofar as it has streams feeding into and out of it. These water avenues lead to still others and eventually to the sea, where they are linked to all others.

But the colors of the rainbow also shade into one another.[159] Yet we have no trouble distinguishing one from the other, except of course at their very boundaries. And with precision scientific instruments, we can at least mark off an agreed upon fence post. Land, too, is all interconnected, apart from where it ends at water's edge. And, for a time, our society had difficulty marking off one man's holdings from that of another. But with the advent of fencing materials, particularly barbed wire, this became easier and easier.

No, the interconnectedness of even all bodies of water constitutes no overwhelming objection to privatization. The reason we have no "fences" to place in the water is not because this is an impossible idea: it is rather due to the fact that absent aqueous property rights, there has been no financial incentive to engage in research to this end. But imagine the opposite. Suppose, that is, that property rights in bodies of water were recognized by law. It takes no great leap of imagination to suppose that scientists and engineers would soon be able to offer new technology which could distinguish between "mine and thine."

Nor need these water fences be used only to demarcate the property holdings of one firm from that of another. They can also be used to corral fish, whales, and other ocean livestock. For all too long these creatures have been free to roam the range of the oceans. It is time, it is past time, for we humans to do for them what we have done for land-based animals[160]: to tame and domesticate them,[161] and to bring them within the purview of economic rationality.[162]

Not only is water connected in the horizontal realm, so to speak, the same pertains in the vertical. That is, the three-quarters of the earth's surface on which water rests is the horizontal axis, while the vertical dimension refers to the fact that a molecule is at one time water in the ocean, and at another it evaporates and travels into the clouds, whereupon it rains down onto the surface of the earth, either on land or in the sea, but eventually comes to rest in the latter, after traveling through the river system. It is thus insufficient to ascertain only who is the owner of water in the sea; ownership must also be determined, if we are to specify a complete system, for water while it is on its way up to the sky through evaporation, while it is in a (temporary) state of "rest" in the clouds, and when it is on its way down again in the form of rain.

But these are mere technical issues. Where there is a will (and a legal system that supports it), there is a way. The reason this has not yet occurred is not entirely due to costs; a large part of the blame must rest, also, with the fact that we have not pushed the private property rights envelope far enough, yet, in terms of water.

Arrogance[163]

The idea that man should own the oceans and the seas will appear as arrogance to some people. The "tower of Babel" story in the *Bible*[164] would appear to be apropos. When

158. We here abstract from such things as backyard swimming pools, jacuzzis, bath tubs, showers, water faucets, cesspools, water fountains, septic tanks, etc., which already fall under private control.

159. Similarly for the boundaries between radio and television stations on the electromagnetic spectrum. For the case in favor of privatization in this regard, see Ronald H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959).

160. For the argument that elephants, rhinos, and other endangered species would benefit from being barnyardized, e.g., fenced in with electrically charged wires, see Randy Simmons & Urs Kreuter, *Herd Mentality: Banning Ivory Sales Is No Way to Save the Elephant*, POL'Y REV. Fall 1989, at 46; *Environmental Problems, Private Property Rights Solutions*, *in* BLOCK, RECONCILIATION, *supra* note 40; Walter Block, *Environmentalism and Freedom: The Case for Private Property Rights*, J. BUS. ETHICS, Dec. 1998, at 1887.

161. For the argument that this is symbiotic, e.g., beneficial to both mankind and animal and fish species, see Henry E. Heffner, *The Symbiotic Nature of Animal Research*, 43 PERSP. IN BIOLOGY & MED., Autumn 1999, at 128.

162. It is time, too, to jettison such socialist and profoundly anti-private property rights songs as: "Home, home on the range," and "Where the deer and antelope play."

163. We owe this objection to Marybeth Block.

164. *See also* Aristophanes' theory of love.

man's pride and ambition got him above himself, God struck back by making it difficult for him to communicate with his fellows.

But why should land be any different than water? If it is not morally sinful to aspire to ownership of the former, why should this apply to the latter? One might with as much reason claim that walking is justified, but that driving a car, sailing a boat, or, perish the thought, flying an airplane are perversions, or somehow impious.

Legal Nightmare

Suppose a river, such as the Mississippi, changes its course, and starts moving over previously dry land. Or that any river overflows, flooding surrounding farms and neighboring houses. If the river in question were privately owned, a charge could be made that this would create a legal nightmare.

This is only legally problematic, however, because there are no precedents, and there are no precedents, in turn, because rivers are presently unowned. Their mismanagement hence now constitutes an "act of God." Instead of blaming the Deity, we would do well to attempt to address these dangers and inconveniences. Just as there should be no "fish freedom" the same should apply to rivers. Flooding and course changes[165] should be seen for the mismanagement they are. The reason there has been no private investment in taming these unruly bodies of water is that there are no economic incentives to do so. It would not pay for any single farmer located on the banks of a river to attempt to take on so gargantuan a task. Neoclassical economists would characterize this as a "market failure," since such a farmer would not be able to recoup an amount even near to his total investment. But these so-called external economies stem not from anything intrinsic to the situation; rather, they are the result of lack of ownership and responsibility.

Of course, there will be complications when this arena of the law is recognized. Absent any contract to the contrary, for example, a river owner should not be liable for all damages caused, say, by flooding due to heavy rain,[166] but only for those in excess of the amount that otherwise would have ensued. For example, if it can be shown that ordinarily, under river socialism, a storm of a certain severity would cause $100 in damages, and that in the actual event it caused only $75, then plaintiff should not be able to collect anything at all from the river owner. On the other hand, if under our assumptions $125 worth of harm was inflicted upon owners whose property abuts the river, than the defendant would be responsible for at most $25.

Equity

Another argument against private ownership is that the rich would hog it all up, and leave the short end of the stick for the poor. There is no doubt that this fear motivates, at least in part, the United Nations (U.N.) Law of the Sea Treaty, according to which "the oceans are the common heritage of all of mankind,"[167] and that therefore no individual nation, let alone private person, should be allowed to own any of it. The fear on the part of the U.N. bureaucrats who hail from the underdeveloped nations is that they do not have the requisite technology to mine manganese nodules at the bottom of the ocean, for example, and that it is "unfair" for those with this ability to be able to make us of it on their own accounts. Another way of putting this matter is that the landlocked nations would be at a disadvantage vis-à-vis those which border on the sea, and that the former are poorer than the latter, and thus it would be "inequitable" to allow a competitive race to take advantage of such watery resources.

The implication seems to be better that no one should be able to own aqueous possessions than that the rich be afforded this opportunity. One difficulty with this position is that it equates "equity" or "fairness" with "egalitarianism." But nothing could be further from the truth. If it were so, then advocates of this position would be willing to give up their own "excessive" intelligence, or "IQ" points, were this possible, to their less intellectually well-endowed brethren. That no one has even taken this position shows that even its advocates shrink in horror from the logical implications of their own system.

Insofar as is the economic well-being of the poor of the earth is concerned, it is clear that the wealth of the less fortunate would be enhanced, not worsened, by allowing economic opportunity to the rich. This is because economic development is a positive, not a zero, sum game. Under capitalism, the wherewithal enjoyed by both parties to a transaction, at least in the ex ante sense, is increased. The rich do not increase their income at the expense of the poor; rather, their income rises by *enriching* the less well to do. It is no accident that the poor in the more capitalist West enjoy a standard of living that is the envy of those at the bottom of the income distribution, and even in the middle of it, in countries infected by coercive socialism.[168]

Monopoly

There is the fear that under private ownership of seas, there could be monopolistic encroachment. For example, A owns an island which is completely surrounded by ocean,[169] and B owns the surrounding patch of water. Thus, A would be trapped on his island prison. Some property rights for A!

But a moment's reflection should convince us that this is an unlikely, if not an impossible, situation.[170] First of all, the primary and first user of the waterway surrounding A's island is likely to be A himself. According to homesteading

165. This applies only to *unwelcome* flooding and course changes. But railroads and highways sometimes change their location. If there is an economic need for this in the case of a river, and it is accomplished at minimal cost, then this constitutes an exception to the claim made in the text.

166. We assume, for the moment, that the level of technology, or of the law, is such that the clouds themselves are not owned, and that thus no one is liable for their excessive and unwarranted rain on the river. For some people, to blame rain or storm on the state is only a joke. This is not the case at present. Had the government not taken as much of the GDP as it has, to fritter it away on warfare and welfare state considerations (and for numbered bank accounts in Switzerland), there would have been just that much more available to address private needs. Some of this, undoubtedly, would have been spent in an effort to domesticate weather conditions.

167. *Available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

168. *See, e.g.*, JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD, 1975-1995 (1996).

169. This is by definition.

170. A similar objection with regard to private roads and streets has been dealt with in Walter Block, *Free Market Transportation: Denationalizing the Roads*, J. LIBERTARIAN STUD., Summer 1979, at 209.

theory, A would thus be the rightful owner of the surrounding aqueous area, not B. Second, if B first homesteaded the water, and only then, later, did A come upon the island to take up ownership over it, the latter would never have done so unless his access and egress rights were clearly specified in such a manner so as to not preclude the economic viability of ownership of the island in the first place. Third, there are airplanes and helicopters available, at least in the modern era.[171]

Full and Complete Privatization

Notwithstanding all the objections, there are good and sufficient reasons to contemplate the privatization of bodies of water. With this introduction, we are now in a position to consider some of them.

The thesis of this discussion is that all bodies of water should be fully and completely privatized. Consider the ocean in this regard. This would mean not merely that fishing should be limited to those who purchase rights to do so, but that the whole kit and kaboodle would be treated in much the same way as are land holdings.[172] That is, the surface of the ocean would be owned, just as railroads presently are, at least in the United States, and just as roads and highways would be, at least as contemplated by authors who advocate such a situation.[173] This is not to say that it is contemplated that all of the oceans, every single cubic foot of them, should immediately be privatized. Many of them are as presently worthless for prospective owners, for all practical purposes, as are some of the more out of the way acreage in Alaska, Antarctica, and Siberia.[174] All we are deliberating upon is the *legal status* of these places. At present, it is impossible to own them both because the law does not allow it, and, in many cases,[175] ownership is not yet economically viable. What is being advocated is a change in the *law*, such that those parts of the watery domain for which private property is now economically workable would be allowed at once to be owned, and that more and more of them could come to be owned when their economic status changed so as to make private ownership a paying proposition.

One clear benefit would be that world GDP would rise. At present, the oceans and seas, as we have seen, account for a large part of the earth's surface, but only a small percentage[176] of world GDP. It need not be the case that each and every acre of the earth's surface account for the same proportionate contribution to GDP as every other. Deserts are less productive than fertile land. But at least a large part of the vast disparity between productivity on land and in and on water must be due to the beneficial effects of private property rights on land that do not apply to water.[177]

On land, man went through the hunting and gathering stage, during which his standard of living was appropriate to the stone age. When he graduated from this precarious existence to one of farming, his standard of living exploded in an upward direction, as did sustainable population size. After that came manufacturing, and then the information age, with similar upward spurts in how well man could live, and how many of his species could be supported.

As far as the seas are concerned, however, we are still back in a "caveman" type of development, wherein hunting and gathering are in the main the only avenues open to us. It was not until the institution of private property took hold on the land that farming, herding, and later developments could be supported. It is a well-known fact, at least within the free market environmental community, that the cow prospered, due to private property rights which could avert the tragedy of the commons, while the bison almost perished as a species due to lack of same. Nowadays, happily, this problem has been remedied with regard to the buffalo.[178] But the whale, the porpoise, edible fish, and other sea species are dealt with, at present, in precisely the same manner that almost accounted for the disappearance of the bison.

Individual transferable quotas (ITQs), of course, are a vast improvement over nonownership, with attendant and uneconomic overfishing. But they constitute only a quasi-private property rights system, not the pure form of this institution. In order to see this, consider imposing ITQs on buffalo, or elephants. This would mean that these animals would still be free to roam as they wished, but it would be legal for only certain people to be able to hunt them. The point is, we would still be in the hunting stage of human existence with regard to such species. But if economic history has taught us anything, it is that herding is far more efficient than hunting. E.g., corralling fish in the open ocean is far more effective than fishing, or hunting, for them.

This scenario assumes, of course, that the necessary complementary technological breakthroughs occur, such as either genetic branding, or perhaps better yet, electrified fences, which can keep the denizens of the deep penned in where deep-sea fish farmers want them. Yes, this seems unlikely at present, given that under present law there would be

171. This, of course, invites discussion of ownership of the relevant air travel rights, a topic we address below.

172. There are several publications whose titles indicate they are compatible with this very radical enterprise, but they are misnomers. *See, e.g.*, TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991). The authors call their chapter nine *Homesteading the Oceans*, a policy taken seriously in the present paper, but these authors discuss only schemes to quasi-privatize fish. Similarly, the title employed by Birgir Runoflsson, *Fencing the Oceans*, REG., Summer 1997, at 57, is misleading in that it also advocates only individual transferable quotas (ITQs) in fish, as its subtitle (*A Rights-Based Approach to Privatizing Fisheries*) makes clear. A similar analysis applies to ROSS D. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES: ECONOMICS AND THE LAW OF THE SEA (1979). For a critique of tradeable emissions rights (TERs), the air analogue of ITQs in the water, see Robert W. McGee & Walter Block, *Pollution Trading Permits as a Form of Market Socialism, and the Search for a Real Market Solution to Environmental Pollution*, 6 FORDHAM U. L. & ENVTL. J. 51 (1994). Kent Jeffreys, in *Who Should Own the Ocean?*, COMPETITIVE ENTERPRISE INST. UPDATE, No. 8, Aug. 1991, at 1, perhaps comes the closest of the material cited in this footnote to our own vision of full water privatization, but even he focuses mainly on the problem of overfishing, and contemplates "permitting . . . outright ownership of limited ocean areas. For example, offshore rigs . . . ." *Id.* But why not outright ownership of *all* as opposed to "limited" ocean areas? Private ownership of offshore rigs, moreover, is already a staple of present sea law.

173. *See supra* note 155.

174. Actually, these are particularly inept examples, in that land in none of these three places is fully open for private holdings.

175. Apart from those areas of the seas which are located near population centers. There is no doubt that did the law but allow it, for example, private individuals would be willing—indeed, and more than willing—to own the Hudson River.

176. *See supra* notes 144, 145 and accompanying text.

177. See on this point the extensive "tragedy of the commons" literature. Indeed, one could expand this so as to include the literature on the failure of socialism, "water socialism" in this case.

178. And other previously endangered species also, such as the elephant, the rhinoceros, the alligator.

no economic benefit to such inventions. But this is due, in turn, not to any primordial fact of nature or law. Rather, it is because the law has not yet been changed so as to recognize even the possible future scenario in which ocean privatization would be economic. The public policy recommendation stemming from this analysis is merely that the law should now be changed so as to recognize fish ownership in a given cubic area of ocean when and if such an act becomes technically viable. Then, whether or not it actually occurs is only an empirical question. It will, if and only if the complementary technology is forthcoming to make it feasible. But under this ideal state of affairs, there would be no legal impediment, as there now is, in this direction. That is, suppose that the needed innovations never occur, or are always too expensive, compared to the gains to be made by herding fish instead of hunting them. Then, of course, there can be no private property rights used in this manner in the ocean, as a matter of fact. But as a matter of *law*, things would still be different under the present proposal. There would always be the contrary to fact conditional in operation that *if* technology were such, *then* it would be legal to fence in parts of the ocean for these purposes. Under this state of affairs, there would be no legal impediments to the development of the requisite technology.[179]

Another benefit would be making the earth a more habitable place in which to live. Consider in this regard clouds, flooding, fog, hurricanes, storms, tidal waves, tornados, torrential rain, tsunamis, typhoons, whirlpools, winds, etc. At present, these are considered acts of God. If the oceans and the air, from which and in which these disasters emanate, were allowed by law to be owned by firms or individuals, at least in principle, this might well set up the first steps in mankind's long journey to quelling these "natural" disasters. How else could this ever be done, other than by employing the institution of private property rights, which is responsible for so much else we include under the category of "good works?"

Foundations

Libertarian

Let us now consider a theory of ownership in bodies of water that can be characterized as "libertarian," or "Lockean" or as one based on homesteading. An almost entirely accurate rendition of this philosophy is offered by Frank J. Trelease[180]:

> The Code is designed for an easterner seeking a new water law for his state. He should clearly understand this choice. To help him, I offer an analogy to another resource with which he is quite familiar, and which like water must be wisely used, protected, sometimes preserved from use, and which must be shifted from old uses to new and more desirable uses as times and needs change. *Think land.* Land is just as valuable and indispensable a resource as water. Our lives and our wealth depend upon it. The government, the ultimate source of title, wishes to see that the resource is put to its highest and best use. It could do this administratively. A "land bureaucrat" could allow its temporary use for particular regulated purposes at will or for a term of years, but when a new or better use is seen, reallocate it by moving off the present tenant and installing a new one. Instead, the government allocates the land in discrete and identifiable parcels, as private property. The land laws make these property rights very firm and secure. Land is then available for use by individuals to produce wealth. Since each person will try to make the best use of it that he can, the total of individual wealth will approach the production of maximum national wealth. Yet new and more productive uses by a different person may come to be seen [as] desirable. Since the land is a valuable asset, if it were to be transferred to another person without compensation, the first holder would be impoverished and the later enriched. Therefore, the laws provide that the property rights are not only secure but are voluntarily transferable. The land can be bought by the new user for the new purpose by paying the owner a price. In most cases the government is willing to let the change occur because it knows the new use is better than the old, since otherwise the buyer could not afford to pay the seller the capitalized values of the seller's use plus a profit . . . .
>
> How is the situation different if we say "water" instead of "land" in the above paragraph?[181]

Although Trelease does not answer his own question, based on the context it seems a rhetorical one. The clear answer is that there is no difference whatsoever between land and wa-

179. It is on this point that the "Chicago School" analysis of property rights goes wrong. In that perspective, private property rights only arise when technology, an exogenous force, makes them economically practicable. There can *be* no private property rights in the ocean unless and until electric sea fences are invented. Science is the dog, while the law is the tail that is wagged. In contrast, in the libertarian vision that underlies the present paper, technology is endogenous. It is the tail that is wagged by the legal dog. Private property rights to *anything* will *always* be recognized in law, as a matter of course, stemming from homesteading: when and if ocean owners stake claims, based on mixing their labor with this element, for which new presently nonexisting technology is available, then it will be recognized. The difference in this case is a subtle one: in the libertarian legal code, the law gives incentives for such innovations, by guaranteeing recognition of such property titles when they are achieved; in the Chicagoite tradition, the law does not. For the Chicago view of property rights, see Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998) [hereinafter POSNER, ECONOMIC ANALYSIS]; Ronald H. Coase, *The Problem of Social Cost*, J.L. & ECON., Oct. 1960, at 1; Harold Demsetz, *Some Aspects of Property Rights*, J.L. & ECON., Oct. 1966, at 61; Demsetz, Harold, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). For the libertarian critique, see Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner*, 3 EUR. J.L. & ECON. 265 (1996); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 HAMLINE L. REV. 229 (1989); ROY E. CORDATO, WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN-ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE (1992); Elizabeth Krecke, *Law and the Market Order: An Austrian Critique of the Economic Analysis of Law*, J. DES ECONOMISTES ET DES ETUDES HUMAINES, Mar. 1996, at 19; COMMENTARIES ON LAW & ECONOMICS 86 (Robert W. McGee ed., 1997); GARY NORTH, TOOLS OF DOMINION: THE CASE LAWS OF EXODUS (1990); GARY NORTH, THE COASE THEOREM (1992). For the debate between Block and Demsetz on these matters, see Walter Block, *Coase and Demsetz on Private Property Rights*, J. LIBERTARIAN STUD., Spring 1977, at 111; Harold Demsetz, *Ethics and Efficiency in Property Rights Systems*, *in* TIME, UNCERTAINTY AND DISEQUILIBRIUM: EXPLORATIONS OF AUSTRIAN THEMES (Mario Rizzo ed., 1979); Walter Block, *Ethics, Efficiency, Coasean Property Rights and Psychic Income: A Reply to Demsetz*, 8 REV. AUSTRIAN ECON. 61 (1995); Harold Demsetz, *Block's Erroneous Interpretations*, 10 REV. AUSTRIAN ECON. 101 (1997); Walter Block, *Private Property Rights, Erroneous Interpretations, Morality, and Economics: Reply to Demsetz*, Q. J. AUSTRIAN ECON., Spring 2000, at 63.

180. Frank J. Trelease, *The Model Water Code, The Wise Administrator and the Goddam (sic!) Bureaucrat*, 14 NAT. RESOURCES J. 207 (1974) (*reprinted in* FRANK J. TRELEASE, WATER LAW, CASES, AND MATERIALS 9 (3d ed. 1979) [hereinafter TRELEASE, WATER LAW].

181. *Id.*

ter as far as privatization is concerned. This is the essence of the libertarian theory of water privatization: aqueous resources should be treated exactly the way land would be dealt with, in a fully free enterprise society.[182]

Riparian, Appropriation

In contrast to this libertarian view, there are two main legal precedents at work in the United States with regard to water rights. They are the main competitors with the libertarian theory. They are, respectively, riparian ownership, in which the rights to the use of a body of water is given to the abutting landowners, and appropriation, wherein use of the water establishes not ownership, but the right to continued use.

Richard Posner notes, in this regard, that

> [i]n the eastern states, where water is plentiful, water rights are communalized to a significant extent, the basic rule being that riparian owners (i.e., the owners of the shore of a body of water) are each entitled to make reasonable use of the water—a use that does not interfere unduly with the uses of the other riparians. In the western states, where water is scarce, exclusive rights can be obtained by appropriation (use).[183]

And in the view of Trelease:

> Riparian rights are governed by the common law. The modern form of riparian law gives each owner of land bordering on the stream a right to make a reasonable use of the water and impose liability on the upper riparian owner who unreasonably interferes with that use. The right exists whether or not the water is actually used, and a use may be initiated at any time. The use must usually be made on the riparian land and within the watershed of the stream. A non riparian who uses water is liable to any riparian he injures and conversely a riparian who initiates a use which interferes with a prior non-riparian use is subject to no liability. Some states do not give effect to attempts of riparian proprietors to grant their water rights to non-riparians.
>
> Appropriative rights are governed primarily by statute. An appropriation may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations. The right is initiated by an application for a permit. The place of use is not restricted to riparian land or even to the watershed. The right may be sold and its use or place of use changed, and it may cease to exist if it is not used.
>
> Riparian law, developed in the green countrysides of England and Eastern America, seems to be based on the unspoken premise that if rights to the use of water are restricted to those persons who have access to it through the ownership of the banks and if those persons will restrict their demands on the water to reasonable uses, there will be enough for all. Appropriation law, developed in the arid West, is usually thought of as a system for water-short areas. Where there is not enough for everyone, the rule of priority insures that those who obtain rights will not have their water taken by others who start later. The theory is that as demands arise water rights to supply them will be given out until the water is exhausted, after which those with new demands must purchase rights.[184]

In contrast with these "mainstream" theories of water ownership, the libertarian theory of property in water is more radical than either of them, in that it applies to *all* bodies of water, not just streams or rivers, as do the other two. It is very similar to appropriation; after all, "appropriation" is practically a synonym for "homesteading." But there are subtle differences between the two. How do the three systems compare with one another: the riparian, the appropriation, and the libertarian? Table 1 affords a summary look.

As can be seen, the appropriation and the libertarian system are very similar. Let us explore their differences, if only to defend against the claim that they are identical. One clear difference is in terms of category seven, as noted in Table 1: "Application." Appropriation applies only to streams and rivers (as does the riparian theory of rights), while the libertarian applies to all bodies of water, including those two but also oceans, seas, etc. Another difference concerns category three: "What get?" In actual practice, the appropriation owners each get a small share of the total water available. While this might upon some occasions be the libertarian conclusion as well, it is also possible under the latter system, but not the former, for one person or firm to take over ownership of an entire body of water. If Henry Hudson not only discovered the Hudson River, but mixed his labor with it in its entirety before anyone else came upon the scene, then under the libertarian provision he could have been the owner of the entire river.

Table 1

	Appropriation	Riparian	Libertarian
1. How established	Use	Abutting land ownership	Use
2. Can sell?	Yes	No	Yes
3. What get?	Specific quantity	Reasonable use	Whatever
4. Permanent?	Yes		Yes
5. Absentee owner?		Yes	Yes
6. Where must use	Anywhere	On riparian land only	Anywhere
7. Application	Streams, rivers	Streams, rivers	All bodies of water

182. Trelease makes several concessions as regards land ownership for "zoning, land use planning laws," and condemnation for "a public purpose." This would be incompatible with the libertarian legal code, whether on land or in water.

183. POSNER, ECONOMIC ANALYSIS, *supra* note 179, at 34-35.

184. TRELEASE, WATER LAW, *supra* note 180, at 10-11.