Involuntary Payments for Watershed Services and Habitat: 5th Amendment Takings

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Sept. 17, 2015
5th Amendment Takings

• Governments (federal or state) may not take private property for public use without paying just compensation.

• When takings claims are successful, in effect, they may create an involuntary market for the resource or ecosystem service in question by forcing governments to pay for the land or water affected by their actions.

- U.S. Const. Amd. V
5th Amendment Takings

Takings can occur in several ways:

– Condemnation: Eminent Domain (government purchases title)

– Inverse Condemnation
  • Physical Occupation: Government program or activity occupies property and government is judicially forced to take title
  • Regulatory Taking: Regulation strips property of all value (a “per se” taking) or goes “too far” in adversely affecting reasonable investment-backed expectations of property owner
Federal Environmental Law, Water & Habitat

**Endangered Species Act of 1973**
- Protects listed species from federal actions that cause “jeopardy” (federal nexus)
- Protects listed species from “take” by any person, including habitat modification that causes harm to species

**Clean Water Act of 1972**
- No discharge of pollutants from point sources to waters of U.S. absent 402 permit
- No dredge or fill of waters of the U.S. absent 404 permit

**Flood Control Act of 1944**
- Dams for flood control & navigation, plus recreation, fisheries & irrigation
Regulatory Takings

*Lucas v. SCCC, 505 U.S. 1003 (1992)*

- David Lucas bought two coastal properties for $975,000
- Coastal management statute prevented construction of permanent habitable structures on barrier dunes
- Lucas alleged that the value of his two lots was completely diminished
  - SC didn’t contest this
- SCOTUS found “per se” taking; SC paid Lucas $1.5 million
  - SC rejected an offer from neighbors to purchase one of the lots for $315,000 and preserve it undeveloped
  - SC then sold the lots to other developers for $400,000 each and repealed the coastal management statute
Physical Takings

Casitas v. U.S., 543 F.3d 1276 (Fed. Cir. 2008)

BOR forced Casitas Muni. Water Dist. to divert water that it had already “captured” in the Casitas Canal to a fish ladder to protect listed steelhead trout.

Casitas claimed it was a *physical per se taking* of the water.

BOR did not itself divert the water, but required Casitas to build the fish ladder and to divert the water to it pursuant to an ESA BiOp.
Casitas v. U.S., 543 F.3d 1276 (Fed. Cir. 2008)

*Held:* U.S. “took” property by directly appropriating water that Casitas had a right to use under state law.

- The ladder was constructed on the Casitas Canal, thus, the U.S. “did not merely require some water to remain in stream, but instead actively caused the physical diversion *away* from the Canal -- after the water had left the River and was in the Canal -- and *towards* the ladder, reducing Casitas's water supply.”

- In effect, the U.S. commandeered physical possession of water for government use by forcing Casitas to reroute the water to a fish ladder for the public purpose of protecting trout.

Corps’ ESA-Compelled Activities

- Some flow modifications (dam retention or release) for a more natural hydrograph
- Habitat restoration
  - Emergent sandbar habitat
  - Shallow water habitat
2011 Flood

Land owned by Ideker Farms, Inc., in Holt County, Missouri

Plaintiff Hodde’s home and farm near Hamburg, Iowa, after the 2011 flood deposited sand throughout his 600 acres, *Complaint ¶ 498.*
IN THE U.S. COURT OF FEDERAL CLAIMS

Ideker Farms, Inc., et al.
v.
U.S.
(Mar. 5, 2014)

400+ plaintiffs bring claims for a taking of their land for floodwaters resulting from the Corps’ policies and practices in managing the Missouri System for ESA purposes . . . to the tune of $350M.

Per se physical takings:

Issue: Will the Corps be forced to pay for dam operations (in part to avoid jeopardy to species) if it contributed to flood damage?

Precedent:
• Casitas
• Ark. Fish & Game Comm. v. U.S. (SCOTUS 2012)

- Black River State Wildlife Management Area - 23,000 acres “forested with multiple hardwood species that support[ed] a variety of wildlife habitats”; inundation destroyed trees and encouraged invasive wetland species
- Held: Corps took a 7-year flowage easement to benefit nearby farmers; $5.6 million awarded for losses and restoration costs
Involuntary Payments for Watershed Services and Habitat: The Merits