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THIS LAND IS YOUR LAND . . . BUT WHAT ABOUT MY WATER? APPLYING AN EXACTION ANALYSIS TO WATER DEDICATION REQUIREMENTS FOR FACILITIES ON FEDERAL LAND

*J. Craig Smith**

I. INTRODUCTION

Snowpack accumulating in mountain ranges each winter is the principal source of water in the western United States. Most mountain ranges are now reserved as national forests. However, many private and public facilities that collect, store, transport, and distribute water are constructed on easements granted under various federal laws during the nineteenth and the first three quarters of the twentieth century. Without these facilities, water right holders cannot divert and transport their water to its intended beneficial use.

During recent decades, conflicts between the federal government, which manages the forests and other federal land, and water right holders arose, particularly when water right holders have sought to maintain, rebuild, or expand their water facilities on federal land. Thus far, when faced with adjudicating these disputes, courts have not considered the constitutionally protected property aspect of state appropriated water rights of the water these facilities convey.¹ Courts have sanctioned governmental edicts exacting part or all of these water rights by

* J. Craig Smith is a partner in the Salt Lake City based law firm of Smith Hartvigsen and would like to dedicate this article to my wife, Anneli, and thank colleagues Jeffrey R. Gittins and Scott M. Ellsworth as well as the Editors of the *Wyoming Law Review* for their suggestions and editing of this article.

¹ See *Trout Unlimited v. United States Dep't of Agric.*, 320 F. Supp. 2d 1090 (D. Colo. 2004) (reasoning that the requirement of a bypass flow did not interfere with state appropriated water rights).

requiring bypass flows, conservation pools, and even prohibiting maintenance of water facilities under a deferential “reasonable regulation” standard of review.²

In adjudicating these disputes, courts should recognize that water right holders have a constitutionally protected property right in the water. Furthermore, courts should utilize the test developed by the United States Supreme Court in two seminal opinions on the constitutionality of similar exactions by local governments as part of land use approvals.³ The Nollan/Dolan, nexus/rough proportionality test is constitutionally appropriate to determine if an exaction of water imposed by the federal government as a condition of continued use of water facilities on federal land rises to the level of a compensable taking.

II. BACKGROUND

A. 1850–1950: *The Creation of “State” Water Rights*

The thirteen English colonies, later recognized as the first United States, lay upon North America’s eastern coastal plain and lush Appalachian highlands where water is abundant. The colonists—just as their forebears did for generations in the well-watered British Isles—adopted England’s straightforward riparian water allocation system,⁴ “giv[ing] each owner of land bordering on a stream the right to make a reasonable use of the water.”⁵ Each new territory, and later states, successfully applied this system as the new nation expanded westward. However, when expansion reached the arid lands beyond the Mississippi’s flood plains—more than a million square miles of sparse rainfall, small rivers, and few springs—the riparian system died of thirst. In the nineteenth century what we now call the “Great Plains” was known as the Great American Desert.⁶ Further west lay even drier sagebrush and Joshua tree deserts. Settling this parched land required a new system collecting, transporting, and allocating what little water

² *Elko Cnty. Bd. of Supervisors v. Glickman*, 909 F. Supp. 759 (D. Nev. 1995).

³ *Nollan v. Cal. Coastal Comm’n*, 423 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* are discussed in Part V. See *infra* Part V.

⁴ James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 385 (1997) (“In England and early American legal history, water use was allocated under the riparian water rights system”); Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENV’T L.J. 343, 345 (1995) (“The riparian doctrine has long ruled water rights in water-rich areas such as England and the eastern portion of the United States.”); G. Oliver Melgar, Note, *Sewage Effluent: But Who Has the Right to Its Beneficial Use?*, 24 J. LAND RESOURCES & ENV’T L. 587, (2004) (“The doctrine of riparian rights originated in England, and many eastern states adopted its basic principles.”).

⁵ George A. Gould *et al.*, *CASES AND MATERIALS ON WATER LAW*, 8 (7th ed. 2005).

⁶ See *Cal. Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (“It became the determining factor in the long struggle to expunge from our vocabulary the legend ‘Great American Desert,’ which was spread in large letters across the face of the old maps of the far west.”).

was available.⁷ Indeed, water was simply insufficient for the “more-than-enough” premise of riparian water allocation.⁸

Settlers of these dry lands, “[s]purred by the need to obtain water for domestic, irrigation and mining uses, . . . developed their own laws, customs and judicial decisions recognizing priority of appropriation, linked to beneficial use of the water, as the basis for obtaining rights to this vital resource.”⁹ These customs and practices grew into a fairly uniform body of water law in western states. While western water law developed during the last half of the nineteenth and first half of the twentieth centuries, the federal government—which as the sovereign was the original owner of almost all Western land and water—chose to acquiesce to local control, management, and allocation of water.¹⁰

Various Western competing interests ultimately found common ground in the doctrine of “prior appropriation”—the legal principle that the first “beneficial user” holds the paramount right to the water.¹¹ “First in time is first in right”

⁷ *California v. United States*, 438 U.S. 645, 653 (1978) (“[T]he settlers in this new land quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West.”); *Clark v. Nash*, 198 U.S. 361, 370 (1905) (“[Water rights] are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western States by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed”); Kathryn M. Casey, *Water in the West: Vested Water Rights Merit Protection Under the Takings Clause*, 6 CHAP. L. REV. 305, 320 (2003) (“The common law Riparian Doctrine, recognized in the eastern United States, did not satisfactorily address the high demand for water in the arid western states”); *id.* (“[T]he ‘hydrological, climatic, and geologic conditions of the West’ prompted westerners to seek a more fitting water allocation regime.”) (quoting Marcus J. Lock, *Braving the Waters of Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights from Federal Environmental Regulation?*, 4 U. DENV. WATER L. REV. 76, 77 (2000)).

⁸ Riparian water law is premised on a land owner being able to use water associated with the land. In the West, the vast majority of the land had no appreciable water associated with it. Thus the ability to divert, collect, and transport water from where it could be found to where it could be used is the cornerstone of the appropriation doctrine that replaced riparian water law in the West.

⁹ *State v. Sw. Colo. Water Conservation Dist.*, 671 P.2d 1294, 1305 (1983).

¹⁰ *California*, 438 U.S. at 654 (“Even in this early state of the development of Western water law, before many of the Western States had been admitted to the Union, Congress deferred to the growing local law.”); *United States v. City and Cnty. of Denver*, 656 P.2d 1, 7 (Colo. 1983) (citing *Cal. Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935)) (“Notwithstanding its ownership of water forming a part of the public domain, the United States for a period of years silently acquiesced in the creation of private appropriative rights in water on the public domain under customary local uses.”); GOULD ET AL., *supra* note 5, at 3 (“Although the federal government has extensive authority to deal with water pursuant to a number of constitutional powers, the federal government has never attempted to create a general system of water rights.”).

¹¹ *See Arizona v. California*, 373 U.S. 546, 555 (1963) (“Under [the law of prior appropriation] the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time.”); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL L. REV. 281, 310 (2002) (“The doctrine of prior appropriation in Western

became western water law's mantra.¹² In other words, those who first accessed and transported water to where it could be beneficially used gained a paramount right to continue to use the water.

Out of necessity, the right to use water was severed from land ownership. Water did not come with the land it was brought to the land. Recognizing the necessity of the right to use water being separate from the land, the federal government granted land patents without an interest in water.¹³ While arable federal land became privately owned through land disposition acts, water remained a public resource under local control. Private land owners could obtain the right to use a particular amount of this public resource, but could not own the water itself, unlike the riparian system ownership of water on or under land. Such right to use water was obtained by local custom and later by state law.¹⁴ Consequently, river basins became fully appropriated, with no water left to claim. The right to use water became increasingly valuable, a trend continuing to this day, where even in rural Western areas, an acre foot of water routinely trades for thousands of dollars.¹⁵

Thus, while the federal government disposed of the public domain it allowed the scarcer water to be allocated by territories and states. Federal laws sanctioned local and state water control and disposition. For example, the 1866 Federal Mining Act explicitly recognized local custom and state law as controlling Western water rights.¹⁶ With the 1877 Desert Lands Act, Congress effectively gave

states—essentially a first-in-time, first-in-right concept based on appropriation and beneficial use of water often far from the withdrawal source—developed in contrast to the Eastern states' riparian doctrine.”).

¹² See Lonie Boens, Casenote, *Aberdeen-Springfield Canal Company v. Peiper: Interpreting Idaho's Forfeiture Statute as Applied to Carey Act Companies*, 5 GREAT PLAINS NAT. RESOURCES J. 237, 241 (2001) (“The doctrine of prior appropriation with its maxim of ‘first in time, first in right’ was developed in response to the unique circumstances prevalent in the western states.”).

¹³ Gregory J. Hobbs, Jr., *State Water Politics versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 125 (2001) (“Congress early decided to separate legal interests in land and water. Through federal statutes, it authorized conveyance of patents to land without interests in water.”); Christopher H. Meyer, *The Federal Reserved Water Rights Doctrine in a Skeptical Age*, SG039 A.L.I.-A.B.A. 219, 223–24 (Oct. 2001) (“Congress ‘severed’ the water flowing on public lands from the land itself. Thus, for instance, when Congress issued patents conveying land to homesteaders and miners, those conveyances did not include water rights.”).

¹⁴ See Hobbs, *supra* note 13, at 125–26.

¹⁵ For example, The Water Right Exchange, a website that lists water rights and shares for sale throughout Utah, does not have a single listing for less than \$1,000 per acre foot. Most are between \$3,000 to \$5,000 per acre foot. *Water Rights for Sale*, UTAH WATER RIGHTS EXCHANGE, <http://www.waterrightexchange.com/> (last visited Nov. 21, 2013).

¹⁶ An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes (Mining Act), ch. 262, § 9, 14 Stat. 251, 253 (1866) (codified as amended at 30 U.S.C. § 51 (2012); 43 U.S.C. § 661 (2012)) [hereinafter 1866 Mining Act] (“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other

local law and custom jurisdiction to create property interests in all waters in the public domain.¹⁷

B. *Water Facilities on Federal Land*

Various homestead, grazing, and cultivation acts were designed and implemented to dispose of arable, irrigable public domain land into private ownership.¹⁸ While the source of nearly all Western water is mountain snowpack, with a few exceptions, the mountains and their snowpack, were not subject to disposition and remained federally owned and controlled. To efficiently and economically divert, collect, and direct precious snowmelt to their land, water users in valleys and plains constructed canals, diversion works, dams, and reservoirs on federal mountain land.

Instead of being transferred out of federal ownership and control, beginning with passage of the Forest Reserve Act of 1891,¹⁹ mountain range lands were set aside as national forests, withdrawn from the public domain and forever removed from private acquisition.²⁰ The President could set apart and reserve public domain land as national forest by proclamation without further Congressional approval.²¹ As a result, nearly every major Western mountain range is now predominantly national forest.

Initially, individuals and cooperatives constructing water facilities on federal lands did not need specific federal permission. The United States authorized

purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same . . .”).

¹⁷ An Act to Provide for the Sale of Desert Lands in Certain States and Territories (Desert Lands Act), ch. 107, § 1, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. § 321 (2012)); see also *Cal. Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935) (“[F]ollowing the [Desert Lands] act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.”); Hobbs, *supra* note 13, at 125 (stating that through the 1866 Mining Act and the 1877 Desert Lands Act, Congress “conceded to the states and territories jurisdiction to create property interests in the use of all available unappropriated waters on the public domain”).

¹⁸ See generally James A. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL L. 1, 10 n.39 (2001) (listing some homestead, grazing, and cultivation acts).

¹⁹ An Act to Repeal Timber-Culture Laws, and For Other Purposes (Forest Reserve Act), ch. 561, 26 Stat. 1095 (1891) (codified as amended in scattered sections of 16 U.S.C., 25 U.S.C., 30 U.S.C., and 43 U.S.C.), *repealed* by Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2792 (1976) [hereinafter 1891 Forest Reserve Act].

²⁰ *Id.*

²¹ *Id.* § 24.

by statute building water facilities on both public domain and withdrawn federal land.²² Beginning in 1866, Congress expressly recognized and granted construction and maintenance easements for facilities diverting, storing, and transporting water on federal land for water obtained under local custom or state authority.²³ Many of these easements exist to this day and private and publicly owned water facilities are located upon these easements.

C. The Era of Water Facility Easements on Federal Land

Congress passed three separate acts recognizing and allowing construction of water storage and conveyance facilities on both public domain and what later became national forest lands. The first was the 1866 Ditch Right-of-Way Act.²⁴ Section 9 of the Act granted ditch and canal easements on federal land.²⁵ Such easements, now commonly known as “1866 Easements,” were obtained by use alone until 1891 when Congress enacted the 1891 Forest Reserve Act.²⁶ The 1891 Act provided rights-of-way through public lands for irrigation trenches, canals, and reservoirs.²⁷ It also required, for the first time, filing an easement application.²⁸ Finally, in 1986, Congress adopted a third Act. Known as the “Ditch Bill,” providing that upon written application submitted prior to December 31, 1996, the Secretary of Agriculture shall “issue a permanent easement . . . traversing federal lands within the National Forest System . . . constructed [and] placed into operation prior to October 21, 1976”²⁹ Consequently, until 1976, water users could simply enter national forest land without prior authorization and construct water storage and conveyance facilities diverting, storing, and transporting water.³⁰

²² See *supra* notes 16–17 and accompanying text.

²³ See 1866 Mining Act, *supra* note 16, § 9.

²⁴ An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes (Ditch Right-of-Way Act), ch. 262, § 9, 14 Stat. 25 (1866).

²⁵ *Id.*

²⁶ 1891 Forest Reserve Act, *supra* note 19.

²⁷ *Id.*

²⁸ *Id.* § 18.

²⁹ An Act to Authorize the Secretary of Agriculture to Issue Permanent Easements for Water Conveyance Systems in Order to Resolve Title Claims Arising Under Acts Repealed by the Federal Land Policy and Management Act of 1976, and for Other Purposes, Pub. L. No. 99-545, § 1(c)(1), 100 Stat. 3047 (1986).

³⁰ Subsequent court decisions on the scope of easements limited the rights of easement holders by subjecting them to regulations similar to those relating to a special use permit issued by the Forest Service, which is the only current authorization to use national forests for water facilities.

II. POLICY SHIFT RESTRICTING USE OF FEDERAL LANDS

A. *Easement Curtailments*

The second half of the twentieth century began with Western states controlling water allocation under state law. Those holding water use rights under state law were free to locate their water facilities on national forests.³¹ However, as popular music and political commentary noted, “the times they were a-changin’.”³² After several early 1960s studies, Congress established in 1964 the bipartisan Public Land Law Review Commission. This Commission was tasked with making proposals on how to better manage public lands.³³ The Commission’s efforts resulted in the 1970 report, *One Third of the Nation’s Land*.³⁴ Following the Commission’s recommendations, Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976.³⁵ Under FLPMA, the United States retained ownership of public domain lands unless disposal of a particular parcel served the national interest.³⁶ FLPMA established, amended, or repealed many land and resource management authorities. Part of the result was untangling the farrago of land-grant laws passed during the preceding century.³⁷ Passage of FLPMA marked an end to the era of water facility easements on National Forest land. The only water facility easements available following FLPMA were the 1986 Ditch Bill easements applying only to facilities constructed prior to 1976 and those easements applied for by 1996.³⁸ Consequently, since 1996, no federal land easements are

³¹ See *supra* notes 22, 23, 25 and accompanying text.

³² Bob Dylan, *The Times They Are A-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia 1964).

³³ Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 817 (2005) (stating that in 1964, Congress “established the Public Land Law Review Commission to study the overall issues regarding management of the public lands”); Sandra Zellmer, *A Preservation Paradox: Political Prestidigitiation and an Enduring Resource of Wildness*, 34 ENVTL. L. 1015, 1060 (2004) (stating that the Commission was “a bipartisan entity”).

³⁴ U.S. PUB LAND LAW REVIEW COMM’N, *ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS* (1970).

³⁵ Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–1785 (2012)); *The Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage was Set for BLM’s “Organic Act”*, BLM, <http://www.blm.gov/flpma/organic.htm> (last visited Nov. 19, 2013); Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management’s Planning Process*, 26 ENVTL. L. 771, 794 (1996) (“Congress incorporated many of the [Commission’s] recommendations in FLPMA.”).

³⁶ 43 U.S.C. § 1701(a)(1).

³⁷ See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 877 (1990) (“In 1976, Congress passed the FLPMA, which repealed many of the miscellaneous laws governing disposal of public land”); *Public Rewards from Public Lands* (1995), BLM, (stating that FLPMA “repealed many of the land disposal laws enacted since the mid-19th century”).

³⁸ Pub. L. No. 99-545, 100 Stat. 3047 (1986) (codified as amended at 43 U.S.C. § 1761 (2012)).

available. Instead, modern day water users must apply for and receive a special use authorization from the Forest Service to construct new facilities on forest land.³⁹

B. 16 U.S.C. § 528 and Special Use Permits

In the post FLPMA era, utilizing national forest land for water or other facilities such as a wilderness lodge or ski area, requires users to qualify for and obtain a special use authorization under 16 U.S.C. § 528, part of the Multiple-Use Sustained-Yield Act of 1960 (MUSY).⁴⁰ The MUSY Act is the modern equivalent of granting easements for special use purposes of the forest. Under MUSY, a “special use authorization” is a broad category of authorizations including “a written permit, term permit, lease, or easement that authorizes use or occupancy of National Forest System lands.”⁴¹ None of these, however, rise to the legal status of a permanent, non-revocable easement, such as was available pre-FLPMA.⁴² Instead, the “permit” is “a special use authorization which provides permission, without conveying an interest in land, to occupy and use National Forest System land or facilities for specified purposes”⁴³ The permits, nevertheless, can grant a fairly broad set of uses including “[p]ermits, leases and easements under the Federal Land Policy and Management Act of 1976 for rights-of-way for . . . [r]eservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution.”⁴⁴

Applicants who receive a special use authorization are known as permit “holders.”⁴⁵ Holders may only “occupy such land and structures and conduct such activities as is specified in the special use authorization.”⁴⁶ Each special use authorization must contain terms and conditions which, among other things, “[m]inimize damage to scenic esthetic values and fish and wildlife habitat and otherwise protect the environment.”⁴⁷ Additionally, the authorization may contain terms the Forest Service deems necessary to “[p]rotect the interests of individuals living in the general area of use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes” and to “[o]therwise

³⁹ See 43 U.S.C. § 1761 (“Any future extension or enlargement of facilities after October 21, 1976, shall require the issuance of a separate authorization”); Evaluation Applications and Issuing Easements for Certain Water Development Facilities on National Forest System Lands That Qualify Under the Act of October 27, 1986, 69 Fed. Reg. 39, 404 (June 30, 2004).

⁴⁰ Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528–531 (2012)).

⁴¹ 36 C.F.R. § 251.51 (2006).

⁴² See *supra* notes 18–21 and accompanying text.

⁴³ See *supra* notes 18–21 and accompanying text.

⁴⁴ 36 C.F.R. § 251.53(l) (2009) (citation omitted).

⁴⁵ *Id.* § 251.51.

⁴⁶ *Id.* § 251.55(a).

⁴⁷ *Id.* § 251.56(a)(1)(i)(A).

protect the public interest.”⁴⁸ All permits cease to be valid after a fixed term and must be renewed for use to continue. Holders, in other words, must reapply for a permit at the expiration of each fixed term. In resubmitting to the entire permitting process, permit holders run the risk their permit may not be renewed, or approved, as each application, even for a continuing use, is viewed as if it is a first application. Despite the fact a permit was previously issued and substantial facility construction investment made relying on that permit, there is no right to permit renewal. Even if it is renewed, different conditions than those required under the earlier permit may be imposed. Finally, the Forest Service also requires payment of an annual rental fee determined by an authorized Forest Service officer.⁴⁹ The officer has complete discretion determining the fee.⁵⁰ In addition to being subject to renewal requirements discussed above, the authorized Forest Service officer also has the power to suspend or revoke permits.⁵¹ In sum, special use permits represent a much lesser right than the real property interest of an easement holder.

III. EASEMENTS AND THE RISE OF WATER DEDICATIONS

As long as water right holders could construct and maintain water conveyance facilities on federal land with little to no restrictions, few controversies arose. If controversies did arise, courts generally upheld the United States’ right to control, regulate, and revoke use of federal land accessing appropriated water rights. The first court decisions clarified that the right to use water under state law did not provide any access rights on federal land. Early in the twentieth century, *Snyder v. Colorado Gold Dredging Co.* established that when granting a water right, the

⁴⁸ *Id.* § 251.56(a)(1)(ii)(E), (G). In the West, many ski resorts are located partially or entirely on National Forest land under a permit issued by the Forest Service. A recent change in ski area permits issued by the Forest Service, known as Clause D-30, requires the ski resort to assign ownership of state acquired water rights, obtained for the use of the ski resort, to the United States. Such water rights for snow making, domestic and other uses are integral to the ski resort. Thus, water rights potentially worth millions of dollars would be taken under this change in permit policy. Accordingly, the Nation Ski Areas Association, Inc. has brought suit in the United States District Court of Colorado challenging the water dedication requirement as being defectively adopted and as a taking of the water rights. *National Ski Areas Assn., Inc. v. United States Forest Serv., et al.*, No. 1:2012cv00048 (D. Colo. filed Jan. 9, 2012). On December 19, 2012 the district court entered an Order enjoining the Forest Service from enforcing water dedication requirements in ski area permits. *National Ski Areas Assn., Inc. v. United States Forest Serv., et al.*, No. 1:2012cv00048 (D. Colo. filed Jan. 9, 2012) (order of Dec. 19, 2012). The court found that the adoption of the dedication requirement and its subsequent amendment in 2012 violated the Administrative Procedures Act, the Regulatory Flexibility Act, and the National Forest Management Act. *Id.* The matter was remanded back to the Forest Service for further action not inconsistent with the Order. *Id.* The court did not rule on the takings claim. *See id.*

⁴⁹ 36 C.F.R. § 251.57(a) (2009).

⁵⁰ *See id.* § 251.57(a)–(b) (stating that the fees are “determined by the authorized officer” and allowing the officer to waive the fees in certain circumstances).

⁵¹ *Id.* § 251.60.

grant is for water use only, not to access it.⁵² This holding was adopted by the United States Supreme Court in *Utah Power & Light Co. v. United States*.⁵³ There, the Court noted that a question of public land access does not present “a controversy over water rights, but over rights of way through lands of the United States, which is a different matter.”⁵⁴ When later courts examined the requirement to dedicate water as a condition to continued access to public lands, the dichotomy remained.⁵⁵ Courts have not viewed the requirement to dedicate water as a condition to continued use of federal land as affecting the water rights, or potentially a taking of property, of the dedicator.

A. Water Dedication Requirements

In recent years, the Forest Service routinely requires easement and permit holders alike to dedicate a portion of their water right for uses in the forest as a condition to permit issuance or renewal or to replace, maintain, or expand facilities on the forest.⁵⁶ Requiring dedication of non-monetary property interests for government use to approve a permit is common in local land use regulation. For example, those seeking land use approvals are routinely required to dedicate easements on, or fee title to, land for roads, parks, water lines and other public uses to local governments as a condition of receiving the sought after land use approval. Such required nonmonetary dedications are referred to as exactions.⁵⁷

⁵² 181 F. 62, 69 (8th Cir. 1910) (“The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use”); Thomas K. Snodgrass, Comment, *Bypass Flow Requirement and the Question of Forest Service Authority*, 70 U. COLO. L. REV. 641, 669 (1999) (“According to [Snyder], the state of Colorado, when granting a water right, only grants a right to the use of the water; it does not grant a right-of-way providing guaranteed access to that water.”).

⁵³ 243 U.S. 389 (1917).

⁵⁴ *Id.* at 411; *see also id.* at 404 (“From the earliest times Congress by its legislation, applicable alike in the states and territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines, and the like.”); *Utah Power & Light Co. v. United States*, 230 F. 328, 337 (8th Cir. 1915) (“The United States can prohibit absolutely or fix the terms by which [public land] can be used.”).

⁵⁵ *See infra* Part III.B.

⁵⁶ *See* Snodgrass, *supra* note 52, at 641 (discussing a controversy, between the Forest Service and owners of municipal water facilities located in national forests, in which the Forest Service has required the owners to maintain certain instream flows as a condition for the renewal of right-of-way permits).

⁵⁷ *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (defining exactions as “land-use decisions conditioning approval of development on dedication of property to public use”).

Typically, the Forest Service exacts water in the form of either (1) a bypass flow, requiring a water right holder to allow certain stream flows to bypass storage or diversion facilities thereby increasing instream flows,⁵⁸ or (2) a conservation pool, requiring retention of a certain amount of water in forest reservoirs so fish may overwinter.⁵⁹ These exactions are required not only of special-use permit holders, but also of pre-FLPMA easement holders.⁶⁰ Both bypass flows and conservation pool exactions diminish easement holder or permittees' water rights and require leaving water behind to benefit the forest.

By treating easements the same as permits, well established property law is ignored. A Forest Service permit issued for use of forest service land is more analogous to a revocable license issued by a landowner than an easement. The key distinction between an easement and a revocable license is the perpetual nature of an easement as opposed to the expiration and revocability of a license or permit. Thus far, courts examining water exactions have not distinguished between easements and permits but have treated a pre-FLPMA easement the same as a special use permit.⁶¹

B. Challenges to Water Exactions

When the federal government began exacting water, easement holders asserted that, unlike their special-use permit holding peers, their easement rights could not be diminished by subsequent regulation.⁶² Nevertheless, courts do not agree. Exemplary are *Elko County Board of Supervisors v. Glickman* and *Overland Ditch & Reservoir Co. v. United States*.⁶³ In *Glickman*, the Nevada Federal District Court held that 1866 land grant easements—the earliest and most expansive federal easements discussed above—do not give easement holders a property right

⁵⁸ U.S. FOREST SERVICE, FOREST SERVICE HANDBOOK: ROCKY MOUNTAIN REGION, at R2-D-101 (2006), available at http://www.fs.fed.us/im/directives/field/r2/fsh/2709.11/2709.11_50.doc [hereinafter HANDBOOK] (containing a special use authorization clause requiring the holder to “maintain stream flows adequate to protect the environment, including fishery resources and channel stability”); see Snodgrass, *supra* note 52, at 641 (describing “bypass flows” as the requirement that water facility owners “release water from their reservoirs or allow a certain amount of their water to ‘bypass’ their diversion structures during low flows in the fall and winter to protect fish and wildlife habitat and other environmental resources”).

⁵⁹ HANDBOOK, *supra* note 58, at R2-D-105 (containing a special use authorization clause requiring the holder to maintain [a] minimum level of the reservoir pool”). If there is not a sufficient volume of water in a lake or reservoir the icing over during the winter may kill all of the fish due to lack of oxygen. Alternatively, the entire water body may freeze also killing all the fish.

⁶⁰ See *infra* Part III.B.

⁶¹ *Id.*

⁶² See *Elko Cnty. Bd. of Supervisors v. Glickman*, 909 F. Supp. 759 (1995).

⁶³ 909 F. Supp. 759, 764 (D. Nev. 1995); No. 98N1149, 1999 WL 1087478, at *9–10 (D. Colo. June 17, 1999).

free from subsequent Forest Service regulation.⁶⁴ Additionally, in *Overland Ditch & Reservoir Co.*, the Colorado District Court determined that holding an 1891 Forest Reserve Act easement similarly does not grant easement holders property rights free from subsequent Forest Service regulation.⁶⁵ Thus, unlike a private landowner, the Federal government may grant an easement and then impose new conditions upon it decades later. These conditions may exact a portion of the water right if the water right holder wants to continue utilizing the easement. Such regulations are not totally without bounds, however, as they are scrutinized under the “reasonable regulation” deferential standard of review.⁶⁶

The reasonable regulation test applies the narrow scope of judicial review typically applied to other agency actions, to determine if the action is permissible. The court examines whether the Forest Service took a “hard look” at the relevant factors and reached a decision neither “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁶⁷ Review of Forest Service interpretations of its own regulations is even more limited. The agency’s interpretation controls where not “plainly erroneous or inconsistent with the regulation.”⁶⁸ Under this standard, challengers to Forest Service water exactions face a difficult, if not impossible, task in court.⁶⁹ Current judicial review of permit

⁶⁴ 909 F. Supp. 759, 764 (D. Nev. 1995); *see also supra* notes 16–17 and accompanying text (discussing easements under the 1866 act).

⁶⁵ No. 98N1149, 1999 WL 1087478, at *9–10 (D. Colo. June 17, 1999); *see also supra* notes 19–21 and accompanying text (discussing easements under the 1891 act). *See generally* Act of June 4, 1897, ch. 2, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 474–482, 551 (2012)) (“[The] Organic Act gave authority to the Forest Service such that the agency could require owners to abide by laws enacted by the federal government, ‘ . . . in the Organic Administration Act of 1897 [The Act] sets forth the purposes of the national forest and the management authority of the forest service.’ Additionally, the Act spells out that, ‘[n]o National Forest shall be established, except to improve and protect the forest within the boundaries, or for the purposes of securing favorable conditions of water flows’”).

⁶⁶ Subsequent to *Overland Ditch and Reservoir Company*, two district courts have issued published opinions of their review of the holding in *Overland Ditch*, neither reached the question of whether an easement holder was still subject to regulation of the forest service, just as permit holders are. In *Roth v. United States*, the district court quieted title to an easement under the 1866 Act but specifically refused the request of the government to opine to the scope of regulation by the Forest Service, noting that the issue was not properly before it. 326 F. Supp. 2d 1163 (D. Mont. 2003).

In *Pine River Irrigation District v. United States*, the district court criticized both the *Overland Ditch* and *Roth* decisions and refused to find the existence of an easement in the absence of a filing of a post construction map it found to be mandatory under the 1891 Act. 656 F. Supp. 1298 (D. Colo. 2009).

⁶⁷ 5 U.S.C. § 706(2)(A) (2000).

⁶⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

⁶⁹ *See* Michael Goodman, Comment, *Forest Service Appeals Reform: Searching for Meaningful Review*, 3 N.Y.U. ENVTL. L.J. 117, 137–38 (1994) (arguing that because the scope of review of the Forest Service’s interpretations of its own regulations is “so limited and biased in favor of the agency, challengers to Forest Service action begin at a disadvantage and face a heavy burden in the courts”).

or easement holder exactions fails to account for, or even consider, constitutional taking implications posed by such exactions.⁷⁰ While judicial inquiry focused on property interests in facilities themselves, no court has yet scrutinized whether the exaction of water rises to the level of a compensable taking under the Fifth Amendment to the United States Constitution, ignoring any property interest in the water taken.

IV. WATER RIGHTS AS PROPERTY

During the era of federal acquiescence, most Western states developed their own water law schemes recognizing constitutionally protected property interests in water rights.⁷¹ Water rights are commonly compared to land ownership due to similarities conveying land and water interests.⁷² Under state legal systems, water property interests are more complicated and subtle than land property interests.⁷³ Prior appropriation states do not recognize *ownership* of water, unlike land. Individuals, public, and private entities may obtain an exclusive right to *use* the public water in perpetuity; thus the phrase *water right*.

Many courts recognize the compensable property nature of a water right when such a right is taken by the government.⁷⁴ One recent example is *Hage v. United States*.⁷⁵ In *Hage*, after more than twenty years of litigation, the Federal Circuit Court of Appeals overturned a \$14,243,542.00 award for the Forest Service and BLM's taking of the Hages' water right. The Hages claimed a taking based on federal regulatory actions interfering with the Hages' water diversion and conveyance abilities on federal land. The Federal Circuit Court held, *inter alia*, that the Hages' claims were not ripe as the Hages could have sought special use permits to maintain their federal land diversions and ditches. However, the Court agreed that the government could not prevent the Hages from accessing their state granted right water rights without just compensation.⁷⁶

⁷⁰ U.S. CONST. amend. V. The Fifth Amendment prohibits the taking of private property without just compensation. *Id.*

⁷¹ See *infra* note 75 and accompanying text.

⁷² See *supra* note 64 and accompanying text.

⁷³ Several recent articles have argued that water rights should be viewed as a revocable license that can be taken and reallocated, without compensation, as the water needs of society change. See Shelley Ross Saxter, *The Fluid Nature of Property Rights In Water*, 21 DUKE ENVTL. L. & POL'Y F. 49 (2010); Carol Necole Brown, *Drinking From a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1 (2006).

⁷⁴ For example, the Utah Supreme Court in a footnote in *UDOT v. G. Kay, Inc.*, held that the Utah Department of Transportation may condemn water rights as water rights are a type of interest in real property. 2003 UT 40, 78 P.3d 612 (2003).

⁷⁵ 687 F.3d 1281 (Fed. Cir. 2012).

⁷⁶ However, this statement was likely of little solace to the heirs of the Hages (who had both died during the long course of litigation) who received nothing after more than two decades of court battles.

Following *Hage*, the question remaining for the courts reviewing water exactions is: under what circumstances can mandate exactions as a condition for using and maintaining facilities on forest land constitute compensable Fifth Amendment takings. The current “reasonable regulation” test does not address takings implications of exactions. However, courts have come close to considering water rights taking implications in analyzing government exactions under similar circumstances.

V. APPLYING AN EXACTION ANALYSIS TO MANDATORY WATER DEDICATIONS

In similar circumstances involving private property rights, courts employ a less deferential standard than “reasonable regulation.”⁷⁷ For example, the court in *Overland Ditch* relied on the *Albrecht v. United States* holding that, respecting forest land inholders (that is, persons whose property is landlocked by federal land), government conditions unrelated or disproportionate to any expected public benefit constitute arbitrary and capricious conduct in violation of the law.⁷⁸ Rather than focusing on the rights holders begin with and their possible government divestiture, the standard focuses instead on: (1) the relationship between the conditions imposed and (2) the government’s rationale for imposing those conditions.

The exaction test applied in *Albrecht* echoes the well-established Fifth Amendment exaction-takings analysis first enunciated by the United States Supreme Court in *Nollan v. California Coastal Commission* and later refined in *Dolan v. City of Tigard*.⁷⁹ In *Nollan*, the United States Supreme Court considered whether the California Coastal Commission’s exacting a beach access easement as a condition for a building permit to reconstruct a beachfront house constituted a taking.⁸⁰ Ten years later in *Dolan*, the Court considered whether a municipality’s requirement to dedicate bike path and stream flooding easements constituted a taking when a plumbing supply store sought to expand.⁸¹ In both cases, the Court found that the required exactions constituted takings. The Court in *Dolan* created the current test: a two-pronged examination of the balance between: (1) the exaction and (2) the impacts of the proposed development.⁸²

The first prong examines the nexus between the impact and the exaction.⁸³ *Dolan* stresses that the government may seek exactions to offset development

⁷⁷ *Albrecht v. United States*, 831 F.2d 196 (10th Cir. 1987).

⁷⁸ *Id.*

⁷⁹ *Nollan v. Cal. Coastal Comm’n.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁸⁰ *Dolan*, 512 U.S. 374.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

impacts, but such exactions must relate to the impacts created by the development.⁸⁴ The government cannot convert a land-use approval process into an excuse to capture and take, without compensation, a property interest unrelated to the impact of the development.⁸⁵ The second prong *Dolan* introduced is “rough proportionality.” After demonstrating an “essential nexus,” the government must then show the permit conditions are “roughly proportional” to the impact created by proposed use.⁸⁶ The nexus/rough proportionality test determines whether an exaction is necessary to address the public impact created by the property owner’s proposed activity or if the exaction is merely an opportunity to acquire a property of someone who needs a government approval, license, or permit.⁸⁷ To pass the rough proportionality/nexus test and be deemed non-compensable, an exaction must correlate to both the type and scope of impact on the public, created by the approval given.

Traditional exaction analysis—the *Nollan/Dolan* nexus/rough-proportionality test—is widely used in the land use approval context. Since the test is based on the constitutional protection against taking of property without just compensation the test is available to anyone in the nation who believes that an exaction required as a condition of a land use approval is a taking without just compensation. The court’s two-step nexus-and-“rough-proportionality” test is best viewed as an attempt to ensure property exactions relate appropriately to development impacts. The Supreme Court did not elaborate on what the phrase means exactly but it did explain that proving the degree of the relationship will not require a high degree of precision.⁸⁸ According to one commentator, the Court found “the type and extent of the exaction must be justified by the need to address a development-related impact.”⁸⁹ This proportionality does not require mathematical precision. “Rough proportionality” reflects balancing governmental extortion and permitting local governments to engage in legitimate land use regulation.

VI. CONCLUSION

Although not originally tailored for questions of water exactions, the nexus/rough-proportionality test is nevertheless a good fit for analyzing taking

⁸⁴ *Id.* at 386–8.

⁸⁵ *Id.* at 390 (quoting *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W2d 297, 301(1980)).

⁸⁶ *Id.* at 388–396.

⁸⁷ *See id.*

⁸⁸ *Id.* at 391.

⁸⁹ Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U.L. REV. 513 (1995).

implications of water exactions by the federal government.⁹⁰ The exaction of a portion of a water right is analogous to the physical invasion and the taking of a portion of land ownership through the easements exacted in *Nollan* and *Dolan*.⁹¹ Also, unlike the reasonable-regulation test, it considers whether the exaction is a taking of private property without just compensation as required by the Constitution.⁹² Additionally, comparing the impact to the exaction fairly balances the public and private interests in the use of public land to convey private water. The reasonable-regulation analysis, on the other hand, is not an appropriate test when exaction of property interests are at issue. It fails constitutional muster by not even considering the water right taking implications of the exaction. This failure alone should disqualify this test. In addition, it is much too deferential, and subjective. When constitutional rights and protections are at issue courts should not defer to the determination of an executive branch employee. The difference between what is *reasonable* as compared to what is both *related to* and *proportional* in the context of exacting interests in property is vast.

The Reasonable-regulation test also fails for the same reasons that the United States Supreme Court rejected a “substantially advances legitimate state interests” test in *Chevron v. Lingle*.⁹³ In an excellent discussion of federal takings jurisprudence, the Supreme Court explained that whether or not a regulation substantially advances a legitimate state interest does not consider the burden the regulation places on property. The Court also discussed and reaffirmed the *Nollan/Dolan* nexus/rough proportionality test when governments exact property interests. Similarly, whether a regulation is reasonable also fails to consider the burden that the regulation that exacts either an easement (as in *Nollan* and *Dolan*) or part of a water right (as in the case of regulation requiring a bypass flow or conservation pool) places on private property.

⁹⁰ The author does not claim to be the only or even the first to advocate the essential nexus/rough proportionality test for water exactions by the federal government. Back in 1997, a Federal Water Rights Task Force created pursuant to Section 389(D)(3) of Public Law 104-127 issued its report. FOREST SERV., Report of the Federal Water Rights Task Force (1997), available at <http://www.fs.fed.us/land/water/>. The Task Force was created as a result of controversy due to the Forest Service requiring owners of existing water supply facilities to dedicate water to forest use through bypass flows and conservation pools. The Task Force recommended the essential nexus/rough proportionality test be applied to determine if such dedication requirements constituted a taking. Unfortunately, the Report’s recommendation appears to be unheeded in subsequent challenges of dedication requirements to maintain an easement or permit.

⁹¹ In *Nollan* the California Coastal Commission was attempting to exact an easement for the public to have access to a private beach. In *Dolan* the City of Tigard was trying to exact easements for a bike path and flood control.

⁹² U.S. CONST. amend. V. While some argue that the taking of a portion of a water right is not a physical invasion, the fact remains that actual water is being exacted. See *supra* note 73 and accompanying text.

⁹³ 544 U.S. 528 (2005).

When local governments exact land or an interest in land as a condition of granting land use approval, courts throughout the country use the nexus/rough proportionality test to determine if the exaction rises to the level of a compensable taking. Although a recognized form of property, water, is also exacted as a condition of a regulatory approval, as of yet no court has applied the nexus/rough proportionality test in the water context. In light of the importance of both water in western states, where there has never has been and never will be enough, and the constitutional protection of property rights, whether a requirement to leave water in a stream or reservoir is a constitutionally compensable taking must be examined. Courts should utilize the nexus/rough proportionality to make this determination.