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WATER RIGHTS LAW

PETERSON v. DEPARTMENT OF THE INTERIOR: ARE CONTRACT RIGHTS EVER PROPERTY RIGHTS UNDER THE RECLAMATION REFORM ACT?

I. INTRODUCTION

In *Peterson v. Department of the Interior*¹ the Ninth Circuit held that section 203(b)² of the Reclamation Reform Act of 1982 (RRA),³ a comprehensive amendment of the Federal Reclamation Act,⁴ did not unconstitutionally take the property of state Water Districts in California's Central Valley without due process or compensation.⁵ The court found that pre-existing

1. *Peterson v. Department of the Interior*, 899 F.2d 799 (9th Cir. 1990) (per Norris, J.; the other panel members were Noonan, J. and Leavy, J.), *cert. denied*, 111 S. Ct. 567 (1990).

2. 43 U.S.C. §§ 390cc(a)-(b) (1989).

3. Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1263-75 (codified as amended at 43 U.S.C. §§ 390aa-390zz-1 (1989)). The RRA made substantial changes in the Federal Reclamation Act of 1902 (codified as amended at 43 U.S.C. §§ 371-616 (1989)). The RRA was intended to curtail longstanding abuses in the administration of the 1902 Act. *Peterson*, 899 F.2d at 804-06.

Section 203(b) of the RRA, 43 U.S.C. § 390cc(b), (the "Hammer Clause") provided that, upon passage of the Act, state water districts must either amend pre-1982 water delivery contracts with district landowners, so that federally subsidized water would be delivered only to owners or leaseholders of tracts of less than 960 acres; or charge excess landowners full cost for previously subsidized water. *Peterson*, 899 F.2d at 806-07.

4. Federal Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-616 (1989)). The Reclamation Act provides for a federal system of water development and delivery in 17 Western states. Sax, *Federal Reclamation Law*, 2 *WATERS AND WATER RIGHTS* § 110.2 at 121 (R. Clark ed. 1967 & Supp. 1978).

5. *Peterson*, 899 F.2d at 813. The Ninth Circuit held that neither Congressional failure expressly to reserve the right to amend the terms of water delivery contracts in its original legislative scheme, nor ambiguous language in the plaintiff Water Districts' contracts with the Bureau of Reclamation, amounted to a waiver of the federal government's sovereign right to change its laws so as to affect contracts previously made under those

water delivery contracts with the Bureau of Reclamation did not confer a constitutionally protectable right to receive federally subsidized water upon the Water Districts.⁶

In *Peterson*, the first ruling by any circuit court⁷ on a direct challenge to the RRA, the Ninth Circuit examined the retroactive effect of a federal statute on a pre-existing federal water delivery contract.⁸

The issues of vested rights in reclamation water, due process and taking raised by the plaintiffs in *Peterson* had been considered in many pre-1982 cases⁹ involving the Reclamation

laws. *Id.* at 812.

6. *Peterson*, 899 F.2d at 811, 813. Since mere contract rights rather than property rights were affected, there could be no taking. *Id.* at 813. Nor was there an issue of due process, because the challenged "Hammer Clause" (43 U.S.C. §§ 390cc(a)-(b)), which changed the terms under which water could be delivered, was rationally related to a legitimate congressional purpose, and thus was not arbitrary or irrational. *Peterson*, 899 F.2d at 813.

7. Two previous federal cases involved the Act, but did not challenge its new provisions. See *Etsi Pipeline Project v. Missouri*, 484 U.S. 495 (1988) (Secretary of Interior lacked authority to contract for withdrawal of water from Army reservoir, since RRA provision that lands benefiting from Army Corps projects are exempt from ownership limitations unless expressly provided otherwise did not change substantive provisions of Flood Control Act for manner in which water may be withdrawn from Lake Oahe for irrigation); *Bostwick Irrigation Dist. v. United States*, 900 F.2d 1285 (8th Cir. 1990) (under RRA, Department of Interior could charge irrigation districts in Kansas for expenses incurred by Army Corps of Engineers for operation and maintenance of dam supplying districts' water).

8. *Peterson*, 899 F.2d at 801. See also *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990), *cert. denied sub nom. Boston Ranch Co. v. Department of the Interior*, 111 S. Ct. 555 (1990) (amendment to RRA that altered terms of water delivery contracts did not take property of individual landowners without due process); *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990) (Secretary of the Interior had statutory authority to set prices for reclamation project groundwater). The court in *Flint* followed *Peterson* in finding as a matter of law that plaintiffs had no property right in groundwater and that therefore there was no fifth amendment violation when the prices were changed. *Flint*, 906 F.2d at 476-77.

9. *E.g.*, *Bryant v. Yellen*, 447 U.S. 352 (1980) (Imperial Valley landowners who, by virtue of membership in pre-1928 private irrigation plans, possessed perfected state law water rights in Colorado River irrigation water exempt from Reclamation Act ownership provisions); *California v. United States*, 438 U.S. 645 (1978) (under section 8 of Reclamation Act Bureau of Reclamation may not interfere with vested state law water rights, and state of California may impose state-law restrictions on Bureau's water appropriation permit); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958) (Reclamation Act's excess lands provisions did not effect unconstitutional taking of vested property rights without due process, because provisions were reasonable conditions imposed on federal grant under taxing and spending powers); *Israel v. Morton*, 549 F.2d 129 (9th Cir. 1977) (rights to receive reclamation water and to sell land for ex-project prices were not vested beyond the government's power to take without compensation, as there is no vested right

Act's excess lands provisions.¹⁰ In *Peterson* the Ninth Circuit relied on past Reclamation Act case law¹¹ to illustrate Reclamation Act history and legislative purpose.¹² To determine whether contract rights to receive water equalled property rights, however, the court made use of a retroactivity analysis not adopted in previous reclamation-law cases.¹³ The Ninth Circuit concluded that the Water District's contract rights were not vested property rights so that a taking analysis was not necessary.¹⁴ The court also found that there was a rational relationship between the provisions of the Reclamation Reform Act and the legislative purpose underlying federal reclamation law, so there was no basis for due process protection of contract rights.¹⁵

II. FACTS

The plaintiffs in *Peterson* were ten California Water Districts,¹⁶ that held forty-year contracts,¹⁷ some originating thirty

to continuation of status conferred by government contract).

10. 43 U.S.C. § 431 (1989) (delivery of subsidized water limited to resident owners of lands of less than 160 acres); 43 U.S.C. § 423e (1989) (to receive subsidized water for excess lands, owners must execute recordable contracts with Department of the Interior, promising to divest excess lands within 10 years, subject to Department approval).

11. *Peterson*, 899 F.2d at 802-03. The cases included *California v. United States*, 438 U.S. 645 (1978); *City of Fresno v. California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976).

12. *Peterson*, 899 F.2d 799. This was also true in a related case decided two days after *Peterson*. *Barcellos & Wolfsen, Inc. v. Department of the Interior*, 899 F.2d 814 (9th Cir. 1990).

13. *Peterson*, 899 F.2d at 807-12. In this analysis the court examined the government's right to amend legislation affecting its own pre-existing contracts, whether the government's sovereign right to amend must be express rather than implied, and the extent to which rights under government contracts equalled constitutionally protected property rights. *Id.* See also *Barcellos & Wolfsen Inc. v. Department of the Interior*, 899 F.2d 814 (9th Cir. 1990). In *Barcellos & Wolfsen*, by contrast with *Peterson*, the Ninth Circuit postulated that contract rights *could* equal property rights. *Id.* at 821. The issue of retroactivity with respect to irrigation contracts under the the Reclamation Act was previously considered in *Israel v. Morton*, 549 F.2d 129 (9th Cir. 1977).

14. *Peterson*, 899 F.2d at 813.

15. *Id.* at 814.

16. *Peterson*, 899 F.2d 799. *Peterson* consolidated four cases, all brought in the United States District Court for the Eastern District of California. The plaintiff Water Districts were Dunnigan Water District, Westside Water District, Kanawha Water District, Arvin-Edison Water Storage District, Southern San Joaquin Municipal Utility District, Panoche Water District, San Luis Water District, Lower Tule River Irrigation District, Delano-Earlimart Irrigation District and Tulare Irrigation District. Plaintiffs also

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years ago¹⁸ to purchase irrigation water from the Department of the Interior.¹⁹ These contracts typically guaranteed water to each district at a fixed price for the contract period.²⁰ Each Water District distributed water to landowners²¹ in the district after determining, as the Water Districts' federal contract required,²² that the land to which water was delivered met the statutory eligibility requirement that water not be delivered to any farm of more than 160 acres.²³

included the Central Valley Project Water Association, the Sacramento River Water Contractors Association, and Peter D. Peterson, Catherine Stevens Zahn, and Laverne Stevens Siebert who were individual landowners who received reclamation water. *Id.* at 801 n.1. Since the landowners' claim to any rights in reclamation water was dependent on the Water Districts' contractual right to the water, the court referred to plaintiffs collectively as "Water Districts." *Id.*

Defendants in each case were the United States Department of the Interior; Donald Hodel, Secretary of the Department of the Interior; and C. Dale Duvall, Commissioner of the Federal Bureau of Reclamation. The Natural Resources Defense Council, a public interest law firm, was a defendant/intervenor. *Peterson*, 899 F.2d at 799.

17. *Id.* at 801. For any water delivery to take place, the Bureau of Reclamation is required by statute to have executed contracts with Water Districts. 43 U.S.C. § 423e (1989). The statute provides:

No water shall be delivered upon the completion of any new project . . . until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law

Id.

18. *Peterson*, 899 F.2d at 801 n.2.

19. *Peterson*, 899 F.2d at 801. Most of the contracts at issue in *Peterson* run for 40-year terms. *Id.* While many of the contracts are due to expire in the 1990s, one, at least, will not expire until 2026. *Id.* at 801 n.2. The statutory maximum for contracts is 40 years. 43 U.S.C. §§ 485h(d)(3)-(e).

20. *Peterson*, 899 F.2d at 801. Contract prices ranged from \$2.00 to \$7.00 per acre-foot; actual cost of delivered water was \$8.43 to \$55.61 per acre foot. *Peterson*, 899 F.2d at 805 (citing 125 CONG. REC. 24,342 (1982) (statement of Sen. Nelson)). The exact amounts differed with each District. The Ninth Circuit noted, "[a]lthough each District was charged a different rate for the water it received, all of the contract rates represent a significant government subsidy." *Peterson*, 899 F.2d at 801.

21. *Peterson*, 899 F.2d at 801. Water delivery contracts between landowners and Water Districts are controlled by state law, rather than by federal reclamation law. Roos-Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the Bureau of Reclamation*, 13 *ECOLOGY L.Q.* 773, 825, 848 (1987). Compare *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 825 n.18 (9th Cir. 1990) (law applied to United States contracts is federal law).

22. *Peterson*, 899 F.2d at 801.

23. *Id.* The court in *Peterson* noted that the only express eligibility requirement in the contracts was the 160-acre ownership limitation, regardless of whether the owner was a natural person or a corporation. *Id.* The contracts did not expressly prohibit the Water Districts from delivering water to leased acreages of more than 160 acres. *Id.* See 43 U.S.C. § 431 (1989).

Under the Omnibus Adjustment Act of 1926, landowners who owned more than 160

In 1982 the Reclamation Reform Act (RRA)²⁴ was enacted by Congress.²⁵ The eligibility requirements for receiving federally subsidized water were changed so that a single landholder could own or lease up to 960 acres;²⁶ but no subsidized water could be delivered to tracts held in excess of 960 acres.²⁷ The provision²⁸ was designed to close a “leasing loophole”²⁹ that for many years had permitted large agricultural companies to circumvent the law limiting delivery of subsidized water to tracts of 160 acres per person.³⁰ Congress permitted each water district to choose its means of conforming with the new law.³¹

acres and who wished to receive subsidized water for their excess lands had only to sign “recordable contracts” directly with the Bureau of Reclamation, stating that they would sell their lands in excess of 160 acres within 10 years of signing, and that the sale would be subject to the approval of the Secretary of the Interior. 43 U.S.C. § 423e (1989). See also *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990).

Before 1982, the statute was silent on whether federal water could be delivered to leased land, and the residency requirement was not enforced. Candee, *The Broken Promise of Reclamation Reform*, 40 HASTINGS L.J. 657, 661 (1989).

24. 43 U.S.C. §§ 390aa-390zz-1 (1989).

25. *Peterson*, 899 F.2d at 806.

26. 43 U.S.C. § 390dd(1).

27. 43 U.S.C. § 390dd. Water for land in excess of 960 acres could be supplied at full cost. 43 U.S.C. § 390ee. See also *Peterson*, 899 F.2d at 806. Large business entities, benefiting more than 25 persons, could only receive subsidized water for land owned or leased up to 320 acres. 43 U.S.C. § 390ee(a)(2)-(3); *Peterson*, 899 F.2d at 801 n.3.

28. 43 U.S.C. § 390cc(a)-(b).

29. *Peterson*, 899 F.2d at 806.

30. *Id.*

31. *Id.* at 801. The pertinent parts of 43 U.S.C. § 390cc (b) read:

New or amended contracts.

(a) Generally. The provisions of this subchapter shall be applicable to any district . . . (3) which amends its contract for the purpose of conforming to the provisions of this subchapter.

(b) Amendment of existing contracts. Any district which has an existing contract with the secretary as of October 12, 1982, which does not enter into an amendment of such contract as specified in subsection (a) of this section shall be subject to federal reclamation law in effect immediately prior to October 12, 1982, as that law is amended or supplemented by sections 209 through 230 of this title. Within a district that does not enter into an amendment of its contract with the secretary within four and one-half years of October 12, 1982, irrigation water may be delivered to lands leased in excess of a landholding of one hundred and sixty acres only if full cost, as defined in section 390bb(3)(A) of this title, is paid for such water as is assignable to those lands leased in excess of such landholding of one hundred and sixty acres: Provided, That the interest rate used in computing full cost under this subsection shall be the same as provided in section 390ee(a)(3) of this title.

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The Water Districts, in four lawsuits that were consolidated by the Ninth Circuit, sued the Department of the Interior.³² They claimed that their pre-existing contracts with the government gave them a vested property right in receiving the water promised under the contracts at the previous subsidized prices.³³ They requested a declaration that the RRA's section 203(b) (the "Hammer Clause") was unconstitutional, asserting due process and taking violations of the fifth amendment.³⁴ The district

Id. Sections 209 through 230 of the Reclamation Reform Act are codified at 43 U.S.C. §§ 390ii-390zz-1; 373a; 422e; 425b; 485h.

"Full cost" is defined in the statute as 1) an annual rate calculated to amortize capital expenditures for property and construction of projects; 2) all costs of operation and maintenance (O&M) over the period of the contract; and 3) interest on both capital costs and O&M costs, beginning in October 1982. 43 U.S.C. § 390bb(3)(A). 43 U.S.C. § 390ee(a)(3) provides for full cost delivery of water to landholdings in excess of 960 acres for "qualified recipients," individuals, legal entities that benefit fewer than 25 persons (43 U.S.C. § 390bb(9)); in excess of 320 acres for "limited recipients," legal entities that benefit more than 25 persons (43 U.S.C. § 390bb(7)), provided the landholder had been receiving water before October 1981; or to all land held by a limited recipient that had not received any irrigation water before October 1981.

32. *Peterson*, 899 F.2d at 800-01.

33. *Id.* at 807. The contract used by the court as an example, the Lower Tule River Irrigation District water service contract, included the following provisions:

Duration: 40 years (Article 2).

Price ceiling: For the duration of the contract, water prices were limited to \$3.50 per acre foot for Class 1 water and \$1.50 per acre foot for Class 2 water (Article 5(a)).

Right to water: Under the contract and its renewals, not to be disturbed as long as the District fulfilled all its obligations under the contracts (Article 7(f)).

Delivery of water to excess lands: The water could be delivered to lands in excess of 160 acres held in the beneficial ownership of any private individual, whether a natural person or a corporation, "so long as a recordable contract to divest the lands had been executed with the Department of the Interior" (Articles 18(a) and 20(a)).

Provisions for congressional amendments to the Reclamation Act: 1. In the event of *repeal* of the "so-called excess land provisions," the provisions relating to excess lands will no longer have any force or effect. 2. In the event of *congressional amendment* of the excess lands provisions, or other provisions of the federal reclamation laws, the United States agrees, *at the option of the District*, to negotiate amendment of appropriate articles of this contract, all consistently with the provision of such repeal or amendment (Article 21).

Peterson, 899 F.2d at 809 (citing to Excerpt of Record ("E.R.") Vol. IX, Tab 2, Exh. E) (emphasis added). The Ninth Circuit's opinion did not cite any provision for contract amendment at the option of the federal government. *Peterson*, 899 F.2d at 809.

34. *Id.* at 801-02.

court rendered summary judgment in favor of the government on the fifth amendment claims.³⁵ The Water Districts appealed.³⁶

On appeal, the Water Districts contended that, because Congress had not expressly reserved the right to amend the Act's eligibility requirements in the original Reclamation Act, Congressional right to amend the water service contracts was limited.³⁷ The Districts also argued that, where there was no express reservation of the right to amend the contracts in the controlling legislation, the court could look only to the language of the contracts for guidance in interpretation.³⁸ The Districts claimed that the language of the contracts gave them an implied right to deliver subsidized water to leased tracts of any size,³⁹ and that the contracts included an express waiver by Congress of its right to amend the contracts without the consent of the Water Districts.⁴⁰

III. BACKGROUND

A. RECLAMATION ACT PURPOSE AND HISTORY

Congress passed the Federal Reclamation Act⁴¹ in 1902 to promote the settlement of arid Western public lands by small farmers.⁴² The Act was designed to help settle the West,⁴³ to

35. *Peterson*, 899 F.2d at 802. The Water Districts' other claims, based on 42 U.S.C. § 1983 (1989) (provides a federal cause of action for a person deprived of federal constitutional or statutory rights by a person acting under color of state law), the *ex post facto* clause of the Constitution, the equal protection clause of the fourteenth amendment and the doctrine of equitable estoppel were dismissed by the trial court and were not appealed. *Id.* at 802 n.5.

36. *Peterson*, 899 F.2d at 802.

37. *Id.* at 807.

38. *Id.*

39. *Id.* at 807-08. The Water Districts contended that because under Article 18(a) of the contracts the only express limitation was upon the ability of the Water Districts to deliver water to "forty acres of a 200 acre family-owned farm," they therefore had an implied right to deliver unlimited amounts of subsidized water to leased acreages. *Id.* at 809-10.

40. *Id.* at 808.

41. Federal Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-616 (1989)).

42. *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 521 (9th Cir. 1977). See also Sax, *supra* note 4 § 110.1; Taylor, *Excess Land Law: Calculated Circumvention*, 52 CALIF. L. REV. 978 (1964).

The Federal Reclamation Act evolved from previous Congressional actions designed

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prevent monopoly of Western lands by large companies such as railroad companies⁴⁴ and to increase agricultural production.⁴⁵ The Act provided federal funds to construct dams, reservoirs and waterways to collect Western water and deliver it to the arid lands in the Southwest.⁴⁶ The funds were to come from the sale of public lands,⁴⁷ and were to be replenished by repayment of construction costs by participating irrigators.⁴⁸

In the mid-nineteen-thirties, the State of California developed the Central Valley Project (CVP) in cooperation with the United States government.⁴⁹ In the CVP, California irrigation

to promote settlement of the West. In 1862, Congress passed the Homestead Act. *California v. United States*, 438 U.S. 645, 656 (1978); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 748 (1950). The Homestead Act (which was repealed in 1976) provided that a person who occupied, irrigated and cultivated a 160-acre tract for five years would gain title to the land from the government.

Homesteading proved not to be possible on arid western lands because of lack of water, so Congress passed the Desert Land Act of 1877. Landowners could not irrigate by themselves, since it required enormous systems of dams, canals and aqueducts to collect water from rivers and deliver it to lands hundreds of miles away. *California v. United States*, 438 U.S. 645, 657 (1978); Sax, *supra* note 4, § 110.1 at 114. The Desert Land Act was abused by speculators who paid witnesses to testify that they had qualified for ownership because they had "seen water upon the land" (for example, a bucket had been emptied on the ground in their presence), and who then conveyed the land to large companies. *Id.* at 115. The Act's purpose clearly could not be achieved without a government-funded irrigation system. *Gerlach*, 339 U.S. 725, 728-29; Sax, *supra* note 4, § 110.1 at 115. The Court in *Gerlach* noted, "[The Central Valley's] rich acres, counted in the millions, are deficient in rainfall and must remain generally arid and unfruitful unless artificially watered." *Id.* at 728. See also *California v. United States*, 438 U.S. at 649; *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 280 (1958); S. REP. NO. 373, 97th Cong., 2d Sess. 8, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2570, 2572.

43. *California v. United States*, 438 U.S. at 655-63.

44. Sax, *supra* note 4, § 110.1 at 115; Taylor, *Circumvention*, *supra* note 41 at 979. See also *California v. United States*, 438 U.S. at 657.

45. *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 815 (9th Cir. 1990).

46. Act of June 17, 1902, ch. 1093, §§ 2-4, Stat. 388. Central Valley reclamation projects now develop and sell water for multiple uses, including power, municipal, commercial and industrial uses. S. REP. NO. 373, 97th Cong., 2d Sess. 8, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2570, 2572; Sax, *supra* note 4, § 110.2 at 121. See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958). Some uses are never expected to be remunerative to the government. *Id.*

47. Sax, *supra* note 4, § 111.1 at 129 (citing the Federal Reclamation Act of 1902 and later amendments that added Texas (1906), Alaska (1950) and Hawaii (1955)).

48. Sax, *supra* note 4 § 111.1 at 129 (quoting *Swigard v. Baker*, 229 U.S. 187, 194 (1913)). It was soon recognized, however, that in fact payments for water would not be nearly enough to replenish the construction costs. *City of Fresno v. California*, 372 U.S. 627, 631 (1963).

49. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 279 (1958); *California v. United States*, 438 U.S. 645, 650 (1958). *But cf.* *United States v. Gerlach Live Stock Co.*,

and water districts, organized under state law,⁵⁰ contracted⁵¹ to buy water at a set price per acre-foot⁵² from the Bureau of Reclamation, and then resold it to private landowners.⁵³ The contract price represented a significant subsidy to the farmers.⁵⁴

Under the Reclamation Act, the CVP could supply water to plots of land that were 160 acres or less and on which the landowner lived.⁵⁵ The Bureau of Reclamation routinely permitted delivery of federal water to owners of plots larger than 160 acres, however.⁵⁶ This was tacitly legalized by the Omnibus Adjust-

339 U.S. 725, 728 (1950) (Central Valley project was taken over by the United States in 1935 and has since been a federal enterprise). By further contrast, the California Supreme Court in *Ivanhoe v. All Parties and All Persons*, 47 Cal. 2d 597, 631, 306 P.2d 824, 836 (1957) characterized the relationship as that of debtor and creditor, and of purveyor-buyer. *Cf. Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 145 (1982) (a sovereign can occupy both a commercial and sovereign relationship with its contractors); *Sinking Fund Cases*, 99 U.S. 700, 724 (1878) ("The United States occupy toward this corporation a two-fold relation — that of sovereign and that of creditor.")

50. CAL. WATER CODE §§ 11102; 20500-26875; 34150-37214 (West 1984 & Supp. 1991).

51. See 43 U.S.C. § 511 (1989) (under water delivery contracts, water rights applications on the part of landowners and entrymen may, in the discretion of the Secretary of the Interior, be dispensed with). See also CAL. WATER CODE §§ 23195-502 (cooperation with the United States).

52. Roos-Collins, *supra* note 21, at 821. One acre-foot is 43,560 cubic feet, the volume of water that will cover an area of one acre to a depth of one foot. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (W. Morris ed. 1981). As the nation's largest water utility, the Bureau of Reclamation delivers a total of 30 million acre-feet a year, of which 26.3 million are for agricultural use. Roos-Collins, *supra* note 21, at 776-77. One acre-foot of water can supply the water needs of approximately 10,000 three-person California households for one year (figures supplied by East Bay Municipal Utility District).

53. 43 U.S.C. § 423e (1989). See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816 (9th Cir. 1990). Subscribers in the Water Districts are beneficiaries of the Districts' federal contracts even though they are not parties to the contracts. *Id.* See also *Peterson v. Department of the Interior*, 899 F.2d 799, 801 n.1 (9th Cir. 1990).

54. E.P. LeVeene & L. King, *Turning off the Tap on Federal Water Subsidies: The Central Valley Project: The \$3.5 Billion Giveaway* at 2-3; 51-91 (Natural Resources Defense Council, Inc. and California Rural Legal Assistance Foundation 1985). The subsidy includes four elements: forgiveness of interest, relaxation of the original timeline for repayment of capital costs, fixed rate contracts that do not reflect operating and management costs, and free hydropower for pumping water. *Id.*

55. 43 U.S.C. § 431. A man and wife could receive water for 320 acres. *Id.* The restriction was intended to serve the same purposes as the restrictions of the Homestead Act and other public land laws. *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1094 (1976). These purposes were to provide land to citizens of modest means, to bring more lands into agricultural production, and to prevent land monopoly. *Id.* See also Sax, *supra* note 4, § 110.2 at 121.

56. Candee, *supra* note 23, at 672; Sax, *supra* note 4, §120.12 at 232; Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955); Taylor, *Cir-*

ment Act of 1926.⁵⁷ Under this amendment to the Reclamation Act, state water districts⁵⁸ were permitted to deliver water to owners of lands in excess of 160 acres if the owner executed a recordable contract with the Department of the Interior in which he promised to sell the excess lands in ten years.⁵⁹

The statute did not address, either to condone or forbid, whether leased land could receive subsidized water.⁶⁰ Because the statute applied only to land that was "privately owned," a leasing loophole was created that was liberally taken advantage of by agricultural companies.⁶¹ The companies frequently leased 160-acre tracts from the owners and farmed the land to circumvent the 160-acre restriction and benefit from the subsidy.⁶²

The Department of the Interior and the Bureau of Reclamation continued not to enforce the acreage requirement or the excess lands provision, in policy and in implementation.⁶³ Admin-

cumvention, *supra* note 42 at 987-89; Taylor, *National Reclamation in the Imperial Valley: Law v. Policy*, 11 *ECOLOGY L.Q.* 125 (1983). In 1981, farms of 160 acres or less that were receiving federal irrigation water comprised less than 23% of the total water recipients. 128 *CONG. REC.* 16,599 (1982) (document submitted by Sen. Exon). Three percent of the owners controlled 30% of the lands receiving federal water. 128 *CONG. REC.* 16,421 (1982) (statement of Sen. Proxmire).

57. Act of May 25, 1926, ch. 383, 44 Stat. 636 (codified as amended at 43 U.S.C. § 423e (1989)). After passage of the Omnibus Adjustment Act, the Department of the Interior ignored the residency requirement completely. The federal statute did not address, either to condone or to forbid, whether owners of the 160-acre tracts could lease them to other farmers; S. REP. NO. 373, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2570, 2573; Kelley, *Acreage and Residency Limitations in the Imperial Valley: A Case Study in National Reclamation Policy*, 23 *SAN DIEGO L. REV.* 621, 622 (1978).

58. 43 U.S.C. § 423e. A Water District is a state agency under California law. CAL. WATER CODE § 11102 (West 1971).

59. 43 U.S.C. § 423e. The clause noted in the text is the "excess lands provision." The land was to be sold subject to approval by the chief of the Bureau of Reclamation at ex-project prices. *Id.* See also *Barcellos & Wolfsen*, 899 F.2d at 816; *Israel v. Morton*, 549 F.2d 129 (9th Cir. 1977). Ex-project prices were calculated with a working assumption that the land would not receive subsidized water. *Id.* at 131. See 43 U.S.C. § 390ii(e) (1989) (excess lands disposed of by Secretary of Interior are to be sold for fair market value unrelated to irrigation water deliveries).

60. S. REP. NO. 373, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2570, 2573.

61. 128 *CONG. REC.* 16,596 (1982) (statement of Sen. Exon). See also Candee, *supra* note 23.

62. Candee, *supra* note 23 at 661-62; E.P. LeVeen & L. King, *supra* note 54 at 12.

63. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 817 (1990); Taylor, *Excess Land Law*, *supra* note 56; Taylor, *Circumvention*, *supra* note 42 at 987-89 (1964); Taylor, *National Reclamation*, *supra* note 56. Repayment periods have been

istrative policies and practices were often in conflict with the law and the rules.⁶⁴ Administrative rules governing water delivery to excess lands were often reversed.⁶⁵ The practical effect was that, for most of the history of the Reclamation Act, the excess lands provisions were circumvented.⁶⁶

The excess lands legislation and its administrative abuse stimulated litigation both by parties that wanted the provisions invalidated⁶⁷ and by parties that wanted to have them enforced.⁶⁸ In the 1970s the number and complexity of these cases increased.⁶⁹ In 1976 the Department of the Interior was enjoined from approving excess land sales until the Department had promulgated rules detailing the criteria and procedures for approving sales.⁷⁰ Water delivery contracts continued, in spite of

extended for 50 years or more. Sax, *supra* note 4, § 110.3 at 122 .

64. S. REP. No. 373, 97th Cong., 2d Sess. 10, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2570, 2574; Taylor, *Circumvention*, *supra* note 42 at 990-1008; Taylor, *Excess Land Law*, *supra* note 56 at 490-95.

65. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 740-42 (1950); *Bryant v. Yellen*, 447 U.S. 352, 363 (1980); *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816-19 (9th Cir. 1990); *Washington v. Udall*, 417 F.2d 1310, 1313 (9th Cir. 1969) (after passage of a law bringing school districts under general provisions of reclamation law, Bureau officials refused to deliver water to school-owned tracts in excess of 160 acres).

66. Taylor, *Circumvention*, *supra* note 42 at 990-1008.

67. *E.g.*, *Ivanhoe Irrigation Dist. v. All Parties and All Persons*, 47 Cal. 2d 597, 306 P.2d 824 (1957), *rev'd*, *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). In an *in rem* action by water districts for approval of their repayment contracts with the Bureau of Reclamation, the California Supreme Court declared the contracts invalid on the ground that section 8 of the Reclamation Act, which provides that the Act should not interfere with state water law, obtained, and the excess land provisions interfered with state law. *Id.* at 277-79. The United States Supreme Court reversed, holding that section 8 applied only to situations in which the government must purchase water rights to build or operate the project. *Id.* at 291. See also *United States v. Imperial Irrigation Dist.*, 322 F. Supp. 11 (S.D. Cal. 1971), *rev'd*, 559 F.2d 509 (9th Cir. 1979), *modified*, 595 F.2d 525 (9th Cir. 1979), *rev'd* *Bryant v. Yellen*, 447 U.S. 352 (1980).

68. *Yellen v. Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971) (in suit by non-land holders to enforce residency requirement, requirement upheld as a critical component of national policy), *supplemented* by *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972), *vacated*, *United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977), *modified*, 595 F.2d 525 (9th Cir. 1979).

69. *E.g.*, *Bryant v. Yellen*, 447 U.S. 352 (1980) and underlying cases. In 1967 the 160-acre limit on the size of tracts that could receive federal water was called the "most litigated" issue in reclamation law. Sax, *supra* note 4, § 120 at 209.

70. *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D. D.C. 1976) (would-be small landholders granted standing to intervene in the Imperial Valley litigation; and injunction on further processing of land sales under recordable contracts granted). In *National Land For People*, Central Valley dwellers were granted an injunction against the Bureau, requiring it to revise its regulations before approving any

judicial decisions to the contrary, to be administered in contravention of both statute and decisional law.⁷¹

In 1982, the Reclamation Reform Act (RRA)⁷² was passed. The purpose of the RRA was to resolve the many controversies that would result if the original law were to be implemented as written.⁷³ The RRA closed the leasing loophole,⁷⁴ restricting delivery of subsidized water to owners or operators of tracts that did not exceed 960 acres.⁷⁵ The RRA also decreased the amount of federal subsidy,⁷⁶ effectively raising the price of all reclamation water.⁷⁷

The "Hammer Clause"⁷⁸ required water districts that had

further excess lands sales. *Id.* The injunction granted in *National Land for People* resulted in the six-year delay in processing excess lands sales that figured in *Barcellos & Wolfson, Inc. v. Department of the Interior*, 899 F.2d 814 (9th Cir. 1990)). *See also* *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976) (family farmers in Central Valley denied standing to intervene in Imperial Valley cases).

71. Candee, *supra* note 23 at 661-62 (citing Taylor, *Circumvention*, *supra* note 42; Taylor, *Excess Land Law*, *supra* note 56).

72. Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1264-75 (amended 1987) (codified as amended at 43 U.S.C. §§ 390aa-390zz-1 (1989)). The history of the Reclamation Reform Act is detailed in Candee, *supra* note 23 and in Huffaker & Gardner, *The "Hammer" Clause of the Reclamation Reform Act of 1982*, 26 NAT. RESOURCES J. 41 (1986).

73. S. REP. NO. 373, 97th Cong., 2d Sess. 11, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2570, 2575.

74. Candee, *supra* note 23, at 667-68.

75. 43 U.S.C. § 390dd (1989).

76. 43 U.S.C. § 390ee(b) (1989). Among the significant provisions in the Federal Reclamation Act are:

Acreage limitation. Increased to 960 acres from 160 acres. 43 U.S.C. § 390dd.

Residency requirement. The requirement was eliminated. 43 U.S.C. § 390kk.

Excess lands. Subsidized water would no longer be delivered to lands in excess of 960 acres that benefited more than 25 natural persons. 43 U.S.C. § 390bb (9); 390dd (1).

Recordable contracts. Landowners were required to amend their existing recordable contracts to provide for disposition of excess lands by October 1992. 43 U.S.C. § 390 ii(a). New recordable contracts would provide for disposition within five years of execution. *Id.* After expiration of the contracts the Secretary of the Interior would have power of attorney to sell the lands. 43 U.S.C. § 390ii(d). The statutory period was tolled when administrative actions precluded sale. 43 U.S.C. § 390ii(e).

Price increase. The price of water was to include operating and management (O & M) costs. 43 U.S.C. § 390hh.

The "Hammer Clause." Water Districts had the option of amending their contracts with landowners to conform to the RRA, or of charging full price for the water. 43 U.S.C. § 390-cc(a) and (b).

77. Candee, *supra* note 23 at 664-67.

78. 43 U.S.C. § 390cc(b). The Hammer Clause has been called "the single most important reform in the act." 131 CONG. REC. S1129 (daily ed. Feb. 6, 1985) (statement of

pre-existing contracts with the federal government to choose among three alternatives. These were to amend their pre-existing contracts with water users to conform to the new provisions; to deliver water at the original contract price to land held in common ownership that did not exceed 160 acres; or to deliver unsubsidized water at full cost to leased landholdings exceeding 160 acres.⁷⁹

At the time the RRA was passed, many Central Valley landowners had long-term contracts with water districts to receive project water at subsidized prices for their lands in excess of 160 acres.⁸⁰ The landowners had also signed recordable contracts with the Secretary of the Interior requiring them to sell their excess lands within ten years after the date of execution of the recordable contract.⁸¹ The Water Districts in turn had contracts with the Bureau of Reclamation to receive water at subsidized prices.⁸²

B. RETROACTIVE STATUTES.

1. The Problem Created by Retroactive Statutes

A statute is retroactive when its legal effect extends backward as well as forward from the time the statute is passed.⁸³ A retroactive statute disturbs relationships predicated on the law

Sen. Proxmire).

79. *Peterson*, 899 F.2d at 801.

80. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816 (9th Cir. 1990). (In *Barcellos & Wolfsen* plaintiffs were owners of more than 1000 acres of land receiving federal water and had executed recordable contracts before 1976.)

81. *Barcellos & Wolfsen*, 899 F.2d at 816. Some landowners owned or held more than 100,000 acres under leases or recordable contracts. *Peterson*, 899 F.2d at 805. One customer received a ten-year taxpayer subsidy of \$60 billion. Candee, *supra* note 23 at 663 (citing 125 CONG. REC. 24,342 (1979)(statement of Sen. Nelson)).

82. *Peterson*, 899 F.2d at 801.

83. *Sturges v. Carter*, 114 U.S. 511 (1885) (legislative amendment to state tax laws was not retrospective because it did not impose new duties or take away vested rights of taxpayer). In *Sturges* the Court noted, "[a] retrospective law . . . takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty . . . in respect to transactions and considerations already past." *Id.* at 519 (quoting *The Society for Propagating the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13156) (C.C. D.N.H. 1814)). See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960). Professor Hochman defined a retroactive statute as one which "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Hochman, *supra*.

as it was before passage of the statute.⁸⁴ This can occur whether or not such a change in legal relationships was intended by the legislative body.⁸⁵

Retroactive statutes change "apparent obligations"⁸⁶ under a former statute,⁸⁷ the terms of private contracts,⁸⁸ or contracts with a government agency.⁸⁹ Although the language of the Con-

84. *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 340 (1922) (when legislature passed retroactive statute prohibiting collection of canal tolls, judgment that refunded tolls, issued on same day legislation passed, was valid because legislature's knowledge of parties that would benefit from law was too specific, even though "constitutional principles must leave some play to the joints of the machine"). See *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 830-33 (9th Cir. 1990) (Fernandez, J., dissenting). Justice Fernandez argued that even though the judgment in *Barcellos & Wolfson* was a consent judgment, it was a judicial act, as sacrosanct as if it had been entered after a full trial. *Id.* Justice Fernandez also suggested that in *Barcellos & Wolfson* the right involved was not a "public right that Congress can change at will" but was a private vested right arising out of contracts to which the government happened to be a party. *Id.* at 831-32 (citing *Perry v. United States*, 294 U.S. 330 (1935); *Lynch v. United States*, 292 U.S. 571 (1934); *Sinking Fund Cases*, 99 U.S. 700 (1878)).

85. *E.g.*, *Society for the Propagation of the Gospel v. Wheeler*, 22 Fed. Cas. 756 (No. 13156) (C.C. D.N.H. 1814). See Hochman, *supra* note 83 at 692 n.3.

86. *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935) (Congress may pass tariffs, bankruptcy acts, declarations of war, or embargos that can impair contracts). *Id.* at 305 (quoting *Knox v. Lee*, 79 U.S. (12 Wall) 457, 549-51 (1870)).

87. *Lynch v. United States*, 292 U.S. 571 (1934); *Sinking Fund Cases*, 99 U.S. 700 (1878). See also *Education Assistance Corp. v. Cavazos*, 902 F.2d 617 (8th Cir. 1990) (federal government requirement, under amended statute, that state agency return student loan funds, did not effect unconstitutional taking of the agency's property or due process violation because funds were not property within the meaning of the fifth amendment). *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21-25 (1977) (legislature created a "statutory bond covenant" on which purchasers of bonds financing a government installation relied; a statutory contract had been created).

88. *E.g.*, *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) (statutory amendment prohibiting withdrawal of funds from Multiemployer Pension Plan that affected pre-existing agreements with private corporations effected no taking of private property without compensation because there was no permanent appropriation of companies' funds); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (Multiemployer Amendments Act, guaranteeing pension payments to employees of employers who withdrew from pension plans did not impose liability for employees' vested benefits on employers without due process, even though effective date of amendment was five months before passage of Act); *Manigault v. Springs*, 199 U.S. 473 (1905) (downstream riparian owners' prior contract right to enforce removal of upstream owners' dam invalidated retroactively by South Carolina law that endorsed wetlands drainage as implementing public purpose of increasing tax base). Compare *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 246 (1978) (state law that increased obligations of employers who terminated pension plan violated Contract Clause because retroactive impairment of contracts was substantial); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

89. *E.g.*, *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986) (state agency contract with federal government under statute that permitted

stitution prohibits both the federal⁹⁰ and state⁹¹ governments from passing *ex post facto* laws, a civil statute may have retroactive effect⁹² as long as constitutional rights⁹³ are not infringed.⁹⁴ In 1810,⁹⁵ the Supreme Court found that retroactive laws affecting government contracts could be constitutional.⁹⁶

Retroactive passage of a statutory amendment permits the government to breach, amend or invalidate its own contract without private party's having the same privilege.⁹⁷ The non-

withdrawal from social security system with notice, ineffective against amended statute which prohibited withdrawal, and which was passed after notice of withdrawal had been given but before it took effect); *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958) (apartment house developer insured under Federal Housing Act of 1948 did not have implied right to continue rentals to transients after statutory amendment specifically prohibiting such rentals was passed in 1954). As sovereign, the United States has the power to enter into contracts with private parties and other government agencies, and a concomitant duty to honor those contracts. *Public Agencies*, 477 U.S. at 52 (citing *Perry v. United States*, 234 U.S. 330, 350-54 (1935); *Lynch v. United States*, 292 U.S. 571 (1934)).

90. U.S. CONST. art. I, § 9, cl. 3: "No . . . *ex post facto* Law shall be passed."

91. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . pass any . . . *ex post facto* Law . . ." The Contract Clause also limits retroactivity in state laws: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10, cl. 1. Compare CAL. CONST. art. I, § 9: "A bill of attainder, *ex post facto* law, or law impairing the obligation of contracts may not be passed."

92. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Connecticut law that retroactively invalidated probate court award not constitutionally prohibited *ex post facto* law, because even though retrospective action deprived plaintiffs of property rights, purpose of *ex post facto* clause was to secure a person from injury or punishment, and clause was limited to legislation criminalizing a pre-existing fact or action).

93. Hochman, *supra* note 83 at 694.

94. *Calder*, 3 U.S. at 393. In *Calder*, the Court noted,

[Only] one instance can be found in which a British judge called a statute, that affected contracts made before the statute, an *ex post facto* law . . . If the term *ex post facto* law is to be construed to include and to prohibit the enacting of any law, after a fact, it will greatly restrict the power of the federal and state legislatures.

Id. But see *Sinking Fund Cases*, 99 U.S. 700 (1878) In *Sinking Fund*, the Court stated, [T]he alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.

Id. at 721 (quoting *Shields v. Ohio*, 95 U.S. 319, 324 (1877)).

95. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). See Zigler, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV. 1447 n.5 (1984).

96. *Fletcher v. Peck*, 10 U.S. at 137.

97. *Sinking Fund Cases*, 99 U.S. at 737 (Strong, J. dissenting). Justice Strong proposed that when government has entered into a contract with a private party, it has "deposed" its constitutional authority, exchanging the "character of legislator for that of

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governmental party suffers both because the legislation may impose new duties and liabilities,⁹⁸ and because the government's sovereign right to amend legislation limits the rights and remedies that can be asserted against the government as breaching party.⁹⁹ The net effect is that a non-federal party risks that its

a moral agent, with the same rights and obligations as an individual." *Id.* at 731 (citing 3 Hamilton's Works at 518, 519). Since the power to affect contract terms by retroactive legislation, changing the stipulations of the contract and imposing additional liabilities upon a contractor with the government, is not an enumerated Congressional power, said Justice Strong, it is not constitutional for Congress to do so. *Sinking Fund Cases*, 99 U.S. at 732.

98. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

99. *Lynch v. United States*, 292 U.S. 571, 581-82 (1934). In the case of a federal government contract, the rights that can be asserted are limited to constitutional rights, or rights that have been conferred by a statutory waiver of sovereign immunity, such as is provided by the Tucker Act. *Lynch*, 292 U.S. at 580-82. In *Lynch*, the government contended that the court had no jurisdiction to entertain the suit, because the United States had withdrawn its consent to be sued under the "Economy Act" of March 20, 1933. The Economy Act had included a clause providing that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed." *Id.* at 515. However, the original War Risk Insurance Act had contained an express waiver of sovereign immunity from suit. *Id.* at 581. This right to sue was not effectively repealed by the Economy Act. *Id.* at 586. The Court in *Lynch* stated, "The sovereign's immunity from suit . . . applies alike to [actions] arising under acts of Congress and to those arising under some violation of rights conferred upon the citizens by the Constitution." *Id.* at 582 (citations omitted).

In federal reclamation law, several causes of action have been dismissed by the Supreme Court and courts of appeal on the ground that there had been no waiver of sovereign immunity. *E.g.*, *Dugan v. Rank*, 372 U.S. 609 (1963) (injunction suit by private parties against the United States, requesting a "physical solution" to interference with previous water supply by newly constructed dam, failed for lack of consent); *City of Fresno v. California*, 372 U.S. 627 (1963) (municipality's suit against the United States sought injunction against continued operation of Friant Dam and declaratory relief as to water rights but failed for lack of consent); *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969) (Bureau officials who refused to deliver water to school district owning more than 160 acres fell within the ultra vires exception to sovereign immunity, thus imposing liability on the federal government, because they were acting without authority). *Compare Ickes v. Fox*, 300 U.S. 82 (1937) (even where sovereign immunity not waived, individual federal officials could be joined as indispensable parties where enforcement of government order would deprive landowners of vested rights in water). *See also Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 491 F. Supp. 263 (S.D. Cal.1980) (federal government consented to suit on water contracts in the Tucker Act). The Department of the Interior had disputed the validity of a 1963 contract between Westlands and the Department, and had threatened not to deliver water under the contract. *Barcellos & Wolfson*, 491 F. Supp. at 264. The Department said that unless "substantial concessions were made in regard to salient features" of the contract by the Water District, no water would be delivered to Westlands from federal sources. *Id.* The federal government contended that sovereign immunity protected it from suit. *Id.* The district court ruled in favor of the landowners, holding that the government had consented to suit in the McCarran Act (43 U.S.C. § 666), that the plaintiffs were requesting adjudication of the rights of all the parties, and that under *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), con-

reasonable expectations of performance under the contract terms will not be fulfilled.¹⁰⁰

2. Judicial Construction of Retroactive Statutes

In *Bowen v. Public Agencies Against Social Security Entrapment*,¹⁰¹ the Supreme Court found that the first step in reviewing the constitutionality of a retroactive federal law, as it affects a pre-existing government contract,¹⁰² is to determine

tract interpretation must be in accordance with federal, rather than state law. *Barcellos & Wolfson*, 491 F. Supp. at 265-67.

100. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (Black Lung Amendments Act, retrospectively mandating disability compensation for miners who left employment before Act was passed, did not violate Due Process Clause even though it upset settled expectations). In *Turner Elkhorn* the Court noted, "[o]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Id.* (citing *Fleming v. Rhodes*, 331 U.S. 100 (1947); *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935), *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Louisville & Nashville Ry. v. Mottley*, 219 U.S. 467 (1911)). Professor Hochman named the following reasons for hostility to retroactive statutes: 1) parties should be able to plan their actions with reasonable certainty of the legal consequences; 2) in passing retroactive legislation, the legislature does so knowing exactly who will benefit from it; 3) courts should pronounce on past behavior and legislatures should declare for the future. Hochman, *supra* note 83 at 692-93.

101. 477 U.S. 41 (1986). In *Public Agencies*, the State of California had participated in the federal social security scheme under an agreement executed under federal law. *Id.* at 48. The agreement included a provision that states could withdraw from the system with two years' notice to the federal government. *Id.* at 49 n.13. After California filed a notice of intent to withdraw from the system, Congress changed the legislation to read that states could not withdraw after the date of passage of the amendment. *Id.* at 49. The state and its employees alleged that they had been deprived of "contract rights" without just compensation, that federal defendants had acted in excess of their constitutional authority, and that the federal government had violated the tenth amendment. *Id.* at 49-50. The district court held there was an unconstitutional taking of property. *Id.* at 50-51. The Supreme Court reversed, holding that Congress had reserved the right to amend by providing in the original legislation that the agreements needed to be "in conformity with" the legislation. *Id.* at 53. Together with the sovereign power to amend, the language itself provided an adequate congressional reservation of the right to amend. *Id.* at 52-53. The Court also held that the contract right alleged by the State did not amount to a vested property right, subject to due process or taking protections; but rather was a provision of a regulatory program subject to Congressional authority. *Id.* at 55.

102. *Public Agencies*, 477 U.S. at 54-55. The Contract Clause does not apply to federal legislation. See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In *Gray* the Court observed, "[r]ecords from the . . . Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation . . . to the literal requirements of the Contract Clause." *Id.* at 732 n.9. Notwithstanding this distinction, the Supreme Court has at times used a similar analysis to construe Contract Clause challenges to state laws as is used for fifth amendment taking and due process challenges to federal laws. *E.g.*, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) (retroactive state law creating infeasible statutory contract invalid because impairment

whether the rights affected are constitutionally protected.¹⁰³ This inquiry is conducted in two parts.¹⁰⁴

First, the court must determine whether the federal government had the power under any circumstances to make the challenged retroactive law.¹⁰⁵ Second, if it is found that the government may exercise its sovereign power to amend, the court must examine the nature of the rights that are affected by the law;¹⁰⁶ and whether those rights have vested beyond the government's power to take and are constitutionally protected.¹⁰⁷

When retroactive legislation may affect a constitutional right, there is a presumption of constitutionality.¹⁰⁸ Courts are also required to avoid deciding issues on constitutional grounds where there may be some other grounds for doing so.¹⁰⁹ Finally, a court will construe a law to avoid limiting the exercise of the

of contract not reasonable or necessary means of serving the important public purpose of refinancing bond issue); *Manigault v. Springs*, 199 U.S. 473 (1905) (retroactive state law invalidating private contract valid because legislature has power to change its mind); *Sturges v. Carter*, 114 U.S. 511 (1885). A state statute that survives a due process challenge may, however, be invalidated under the Contract Clause. *Gray*, 467 U.S. at 733 (less searching standards imposed on economic legislation by the due process clauses).

103. *Public Agencies*, 477 U.S. at 54-55. See also *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

104. *Public Agencies*, 477 U.S. at 52, 55.

105. *Id.* at 50; *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Sinking Fund Cases*, 99 U.S. 700 (1878).

106. *Public Agencies*, 477 U.S. at 55. There has been a recent increase in federal courts on the preliminary sovereignty/vested rights analysis to taking and due process challenges. *E.g.*, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990) (in stockholders' antitrust suit, statutory amendment passed between first and second dates of judgment, governing post-judgment interest, applied retroactively); *Western Fuels-Utah v. Lujan*, 895 F.2d 780 (D.C. Cir. 1990) (1976 provisions of Mineral Lands Leasing Act apply to pre-1976 leases upon lease renewal). A number of circuits have recently employed the sovereignty/vested rights analysis to hold that state agencies that received and distributed federal loan funds, and that were required to return reserve funds to the Department of Education, had no vested right to the funds and therefore no valid taking or due process claim. *Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10 (7th Cir. 1990); *Education Assistance Corp. v. Cavazos*, 902 F.2d 617 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 246 (1990); *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 245 (1990); *South Carolina State Educ. Assistance Auth. v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 243 (1990).

107. *Public Agencies*, 477 U.S. at 55-56.

108. *Usery v. Turner Elkhorn*, 428 U.S. at 15 (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963)); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955); *Sinking Fund Cases*, 99 U.S. at 718.

109. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1984).

sovereign's authority.¹¹⁰

The federal government has the sovereign's right¹¹¹ to amend laws to preserve the public welfare.¹¹² Congress can thus enact legislation that takes away contract rights because the sovereign must be able to consistently implement broad legislative policies that may change over time.¹¹³ The exceptions arise when Congress is found to be exceeding its constitutional authority;¹¹⁴ when the new law would violate a constitutionally protected private right;¹¹⁵ or when the sovereign's right to amend has been surrendered in unmistakable terms.¹¹⁶

110. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52, 53 (1986).

111. *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 307-08 (1935) ("Gold Clause" Amendments, making private obligations to pay in coin payable in paper money, constitutional even if obligation predated passage of laws, because regulation of the economy is an express Congressional power that cannot be fettered by private contracts); *Sinking Fund Cases*, 99 U.S. at 721 (Congress retains the power to amend any rules included in original railroad charter). *Cf. Perry v. United States*, 294 U.S. 330, 350-54 (1935) (when incurring bonded indebtedness, Congress is bound by its contractual obligations and Gold Clause Amendments exceeded congressional power to amend government obligations).

112. *Sinking Fund Cases*, 99 U.S. at 720.

113. *National R.R. Passenger Corp. v. Atchison T. & S.F. Ry.*, 470 U.S. 451 (1985) (Congressional amendment imposing statutory fees on private railways for Amtrak's carriage of private railways employees did not alter prior agreement between Amtrak and private railways, under which Amtrak had assumed full responsibility for all passenger carriage without due process). The Court in *National R.R. Passenger Corp.* noted, "[t]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state Policies, unlike contracts, are inherently subject to revision and repeal" *Id.* at 466 (citing *Indiana ex rel Anderson v. Brand*, 303 U.S. 95, 104-05 (1938)). *See also Keefe v. Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)) (continued existence of government would be of no great value, if by implications and presumptions, government was disarmed of the power necessary to accomplish the ends of its creation); *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign). *Legal Tender Cases*, 79 U.S. 457, 551 (1870) (contracts must be understood as made in reference to the possible exercise of the rightful authority of government and no obligation of a contract can extend to the defeat of legitimate government authority).

114. *Lynch*, 292 U.S. at 579 (due process limits Congressional right to annul government contracts unless the action falls within the federal police power or some other paramount power).

115. *Perry*, 294 U.S. at 350-51; *Lynch*, 292 U.S. at 579.

116. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (retrospective law passed by Indian tribe to tax oil taken under pre-existing leases did not violate Commerce Clause because tribe possessed sovereign power to amend with respect to its own contracts). *See also United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987) (waiver by United States of sovereign authority over navigable waters will not be implied

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The Supreme Court has observed that a statute operates retrospectively when it was the legislature's intention that it do so.¹¹⁷ Legislative intent is determined by the plain language¹¹⁸ of the statute, reviewed in light of the statute's underlying purpose.¹¹⁹ A statute designed to make "small repairs"¹²⁰ in a preexisting administrative system, is a curative statute.¹²¹

Language in the original legislation that expressly allows later amendment of contracts, or express reservation in a contract of the government's right to amend¹²² to conform to changing legislation is sufficient for a finding of constitutionality.¹²³

but must be surrendered in unmistakable terms); *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986).

117. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). See also *Hassett v. Welch*, 303 U.S. 812 (1938) (tax law had no retrospective effect, based on legislative history).

118. *Kaiser Aluminum & Chem. Corp. v. Bonjorno* 110 S. Ct. 1570, 1576-78 (1990); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); *National R.R. Passenger Corp. v. Atchinson, T. & S.F. Ry.* 470 U.S. 451, 466 (1985). See also *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989) (retroactive application of law awarding portion of claims under Iran-United States Claims Tribunal to Federal Reserve Bank satisfied national Congressional purpose of equalizing treatment of claimants); *Systems Fed'n Corp. v. Wright*, 364 U.S. 642, 651-53 (1961) (parties cannot require court to act as an equity court when what is sought to be enforced is a statute, not a promise); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (ambiguity in a United States government contract with a private individual must operate against the adventurer and in favor of the public). Compare *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1033 (9th Cir. 1989) (citing *United States v. Seckinger*, 397 U.S. 203, 215-16 (1970)) (ambiguous contract provisions are to be construed against the drafter even if the drafter is the government).

119. *Bonjorno*, 110 S. Ct. at 1577; *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 n.15 (1974). See *Huffaker & Gardner, supra* note 72. The authors discussed "plain meaning" versus legislative intent as a means of testing the validity of a retroactive statute, and how these approaches might be applied to the Reclamation Reform Act. They suggested that where the plain language of a statute does not sufficiently address constitutional considerations of retroactivity, a court must then look to the intent of the legislature. *Id.* at 51 (citing *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 16 (1972)).

120. Hochman, *supra* note 82 at 705 n.4.

121. Hochman, *supra* note 82 at 704. A curative statute rectifies previous actions by government officers who acted without authority, or gives effect to the original intentions of parties to a contract through its application to past transactions. *Id.* Emergency legislation and retroactive tax laws receive the same treatment. *Id.* See *Rogers v. Keokuk*, 154 U.S. 546 (1866); *Johnson County v. Thayer*, 94 U.S. 631 (1876).

122. *National R.R. Passenger Corp.*, 470 U.S. at 467-69; *Sinking Fund Cases*, 99 U.S. 700, 720 (1878) (Congress has given special notice of its intention to retain full and complete power to make alterations and amendments of private railway charter that come within just scope of legislative power).

123. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 54-55 (1986) (section of Act reserving to Congress the power of amendment had been "ex-

The sole issue is whether the language of the law or of the contract amounts to an express reservation.¹²⁴ For example, in *Bowen*,¹²⁵ the Court disposed of the issue of the government's right to amend legislation by finding that Congress had expressly reserved the right of future amendment in the original Act.¹²⁶

The Supreme Court also has held that the sovereign has a broad implied reservation of the right to amend legislation.¹²⁷ In *FHA v. The Darlington, Inc.*¹²⁸ the Court held that even where a specific form of conduct on the part of a private party to a contract is not expressly prohibited in the enabling legislation or

expressly incorporated" into contract by contract language); *FHA v. The Darlington Inc.*, 358 U.S. 84, 91 (1958) (quoting *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)) (immunity from federal regulation is not gained through forehanded contracts).

124. *National R.R. Passenger Corp.*, 467 U.S. at 467 (express statutory reservation of right to repeal, alter or amend statute at any time confirmed Congressional intent not to make a statutory contract).

125. *Bowen v. Public Agencies Against Social Sec. Entrapment*, 477 U.S. 41 (1986).

126. *Public Agencies*, 477 U.S. at 52. The power to amend is very broad. See *Sinking Fund Cases*, 99 U.S. 700 (1878): "[T]he reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state." *Id.* at 720 (quoting *Tomlinson v. Jessup*, 82 U.S. (15 Wall) 454, 459 (1872)).

127. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

128. 358 U.S. 84 (1958). In *Darlington*, the FHA insured a construction loan under the Federal Housing Act for an apartment house in 1949. *Id.* at 85. The regulations governing the insurance provided only that the building should be used "principally" for residential use. *Id.* The apartment house owner submitted a schedule of rents to be charged that did not include any provision for transients but it did furnish and rent out some of its apartments to transients. *Id.* at 86. In 1954 the statute was amended expressly to exclude transient or hotel use from permitted uses for buildings mortgaged under the Federal Housing Act. *Id.* The corporation requested declaratory judgment that so long as it complied with the terms of the statute that were in effect when the loan was made, it had an implied contractual right to rent to transients. *Id.* at 87. The Supreme Court held that, in light of the legislative purpose of the FHA, which was to provide homes for veterans and their families, and of the fact that rental to transients was not expressly included in the legislation, rentals to transients could not be permitted. *Id.* at 90. The Court noted that there is a presumption of constitutionality of a statute, that a contractual right does not rise to the level of a property right, and that "those doing business in a regulated field" are in a bad position to complain about changes made in the regulations. *Id.* at 91.

In dissent, Justice Frankfurter observed that the scope of the legislation at issue was particularized rather than "broad and unfolding" like anti-trust legislation, and therefore was not susceptible to amendment "by judicial function." *Darlington*, 358 U.S. at 92. Justice Harlan, joined by Justices Frankfurter and Whittaker, noted that since *Darlington* had not been forbidden to make occasional transient rentals, and since the evidence showed that *Darlington* was not engaged in a scheme to subvert the purpose of the enabling legislation, it should be permitted. *Id.* at 97.

the contract, the conduct is not permitted where it violates the legislative purpose of the regulatory scheme.¹²⁹ Further, in *Merrion v. Jicarilla Apache Tribe*,¹³⁰ the Court held that the power to amend is abrogated only when the sovereign has “surrendered its power in unmistakable terms.”¹³¹

3. Nature of Rights Affected

The traditional definition of property is “the group of rights inhering in [a] citizen’s relation to [a] physical thing, as the right to possess, use and dispose of it.”¹³² The Supreme Court has referred to this group of rights as a “bundle of sticks” or “bundle of rights” rather than the thing itself,¹³³ and since

129. *Darlington*, 358 U.S. at 87-88; *Manigault v. Springs*, 199 U.S. 473, 487 (1905) (state passing law that retroactively abrogated private contract possessed sovereign right to do so just as federal government did); *See also* *Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987) (courts may not set aside legislation because it is inconsistent with prior legislation; Congress may repeal, amend or ignore any statute it has enacted); *Community Serv. Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113 (D.C. Cir. 1978) (en banc) (in amending legislation Congress is not bound by the intent of an earlier body, although it is bound by the Constitution). Congressional intent to make the law retroactive is a key factor in its determination of whether there is an implied reserved right to amend. *National R.R. Passenger Corp.*, 470 U.S. at 467. A contract right is not conferred by a prior statute, and the presumption that amendatory legislation is constitutional is greater when an entire regulatory scheme is involved. *Id.* at 467-68.

130. 455 U.S. 130 (1982).

131. *Merrion*, 455 U.S. at 148. Having acknowledged a degree of sovereignty on the part of an Indian Tribe, the Court observed:

Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.

Id. Further:

It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that [the sovereign] has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.

Id. at 146. *See also* *Keefe v. Clark*, 322 U.S. 393, 397 (1944) (statute in effect at time of sale of state bonds did not become part of bond contracts because in contracts between a political entity and private entities, absent a clear and unequivocal expression of the state’s intent to bargain away its powers, there is none); *City of St. Louis v. United Rys.*, 210 U.S. 266, 280 (1908) (government’s power to tax remains unless it has been specifically surrendered in clear and unmistakable words).

132. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). *See also* *Schulz & Weber, Changing Judicial Attitudes Toward Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 *PAC. L.J.* 1051, 1033-35 (1988).

133. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 857 (1987) (state law is the source of those strands that constitute a property owner’s bundle of property rights);

1960¹³⁴ has not limited the definition of property to a physical object.¹³⁵ The bundle includes, among other rights, the rights to possess, use and dispose of property, and to exclude others from using property.¹³⁶ Property includes any estate¹³⁷ that can be owned or transferred from one person to another.¹³⁸

Property rights are not created by the federal Constitution, but are conferred by state law¹³⁹ or by another external system, such as a statute.¹⁴⁰ However, once rights in property have been established, the fifth amendment guarantees that the property may not then be taken from the owner without due process or just compensation.¹⁴¹

In the *Sinking Fund Cases*¹⁴² the Court stated that a valid

Hodel v. Irving, 481 U.S. 704, 715 (1987) (bundle of rights includes the right to exclude others and the right to pass on property to ones heirs); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (right to exclude others is one of the most essential sticks in the bundle of rights commonly characterized as property); *United States v. Security Indus. Bank*, 459 U.S. 70, 76 (1982) (bundle of rights of a secured party is smaller than that of an owner in fee simple, but it can still be property subject to a taking by retroactive governmental action); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327, 1332 (9th Cir. 1982)(current notions of property adopt a bundle of rights analysis, based on the notion of a set of legal relations or relationships among persons with respect to things).

134. *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

135. *PVM Redwood Co.*, 686 F.2d at 1332 (Alarcon, J., dissenting) (citing Oakes, "Property Rights," *Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981)). The dissent noted, "[w]hile the generic term "property" refers to land, possessions and incorporeal entitlements, the concept of property embodies the 'fruition of a number of expectancies.'" *Id.*

136. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984).

137. *United States v. Security Indus. Bank*, 459 U.S. 70, 76 (1982) (although bundle of rights accruing to a secured party is smaller than that of an owner in fee simple, this does not relegate the secured party's interest to something less than property).

138. *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (bundle of rights includes the right to exclude others and the right to pass on property to one's heirs).

139. *E.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 857 (citing *Hughes v. Washington*, 389 U.S. 290, 295) (1967)); *California v. United States*, 438 U.S. 645 (1978) (state law controls disposition of federal irrigation water rights in the Central Valley Project); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1971) (property rights protected by due process are defined by state law or other independent source of rules and understandings); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-43 (1950) (state law entitled owners of riparian rights to compensation for deprivation of property rights by Bureau of Reclamation dam construction).

140. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21-25 (1977).

141. U. S. CONST. amend. V.

142. 99 U.S. 700 (1878). In the *Sinking Fund Cases* Congress had chartered a private corporation to build railways, and had subsidized bonds issued by the corporation. *Id.* at 719. The railway was to repay principal and interest to the United States. *Id.* In a separate transaction, the government used the services of the railways to transport

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contract, either executory or executed, is property.¹⁴³ In most cases, however, such a right has not been found to be protected by the fifth amendment's Takings Clause if the contract has been altered by a legitimate government action.¹⁴⁴

troops during the Civil War. *Id.* at 701. The railway billed the government for approximately \$10,500. *Id.* Instead of paying the bill directly to the railroad, the government, acting under a federal statute, paid half of it into a "sinking fund" in the treasury, to help offset the accrued interest and principal of the bonded indebtedness. *Id.* The railway sued in the court of claims for the remainder, alleging unconstitutional taking of property without due process. *Id.* at 703. The Supreme Court held that since the original legislation had expressly reserved the right of amendment, there was no taking. *Id.* at 728, 730.

A statute is primarily read as not creating a contract in itself. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 479 U.S. 41, 55 (1986); *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985): "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National R.R. Passenger Corp.*, 470 U.S. at 465-66 (quoting *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937)).

143. *Sinking Fund Cases*, 99 U.S. 700 (1878). The Court observed:

The United States are as such bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

Id. at 719. See also *National R.R. Passenger Corp.*, 470 U.S. 451 (1985) (two-prong test for whether there is a vested contract right: plaintiffs must show they had such a right before statute was passed and there was constitutional impairment of their pre-existing right by the statute); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States).

144. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) (contractual limitation of employer's liability to pension plan not compensable property even though amendment to legislation governing plan increased employer liability, because government interference with employer's property rights arose from public program that adjusts the benefits and burdens of economic life to promote the common good). Even though the legislation disregards or destroys existing contractual rights, it does not always mean there has been an illegal taking. *Id.* at 224 (citing *Bowles v. Willingham*, 321 U.S. 503, 517 (1944); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-10 (1923)). The Court in *Connolly* noted, however: "[t]his is not to say that contractual rights are never property rights or that the government may always take them for its own benefit without compensation . . ." *Connolly*, 475 U.S. at 224 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

In the *Sinking Fund Cases*, 99 U.S. 700 (1878) the government action was legitimately taken by an express Congressional reservation of the right to amend, which was included in the original legislation. *Id.* at 720. In general, retroactive legislation is seen as valid if it affects a remedy but not if it affects a right. *FHA v. Darlington, Inc.*, 358 U.S. 84, 92 (1958) (Frankfurter, J., dissenting). See also *Lynch v. United States*, 292 U.S. 571, 586 (1934) (when retroactive legislation completely destroys a remedy but not the right,

In *Lynch v. United States*¹⁴⁵ the Supreme Court held that insurance policies bought by veterans of World War I, as well as compensation granted to veterans for the insurance premiums, were property within the protection of the fifth amendment's Due Process Clause.¹⁴⁶ Even though the policies contained an express provision that they should be "subject to all amendments to the original act,"¹⁴⁷ subsequent legislation, which repealed all laws granting or pertaining to yearly renewable term insurance,¹⁴⁸ could not invalidate the United States' prior consent to be sued on its pre-existing contracts.¹⁴⁹

A right that is conferred as part of a regulatory scheme has some of the indicia of ownership but not all.¹⁵⁰ In *FHA v. The Darlington, Inc.*,¹⁵¹ although the owners of an apartment house inferred an implied contract right from statutory language that did not expressly forbid a certain kind of conduct,¹⁵² the Court

parties have no recourse; but if the right is destroyed, there may be a fifth amendment violation).

145. 292 U.S. 571 (1934). See also *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21-25 (1977); compare *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 468 (1985) (court will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the state is a party); *Keefe v. Clark*, 322 U.S. 393 (statute in force at issuance of special assessment drain project bonds was not a part of bond contract and could be changed by legislature).

146. *Lynch*, 292 U.S. at 579.

147. *Id.* at 577.

148. *Id.* at 575.

149. *Id.* at 583. The Court noted that Congress's purpose in passing the Economy Act of 1933 was to abolish rights to insurance, rather than remedies to recover rights that had already vested. *Id.* at 586.

150. *Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 627 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 246 (1990) (reserve student loan funds held by state agency were not "property" for purposes of the Due Process Clause because right to funds was determined by federal law which dictated the existence, content and uses of fund, and Congress had reserved the right to amend legislation). See also *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 245 (1990); *South Carolina State Educ. Assistance Auth. v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 243 (1990).

151. 358 U.S. 84 (1958).

152. *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (when federally insured apartment house owner's contract with government did not expressly prohibit rentals to transients they did not have a pre-existing implied right to do so). The Court noted, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* at 91. See also *Mugler v. Kansas*, 123 U.S. 623 (1887) (an implied contract against government interference with use of property cannot be inferred when an express contract would not be permissible).

did not allow this.¹⁵³ In *Darlington*, the Court found that such an implied right did not equal a vested right.¹⁵⁴

4. Constitutional Limitations on Sovereign Power: Taking and Due Process

In the fifth amendment, the Constitution provides two bases for challenging a government action that has deprived a party of vested rights.¹⁵⁵ Private property may not be taken for public use without the owner receiving just compensation in return,¹⁵⁶ and property may not be taken without due process.¹⁵⁷

A government action that deprives a property owner of all economically viable use of its property, without payment of com-

153. *Lynch v. United States*, 292 U.S. 571 (1934) (where a federal statutory scheme set up an War Risk Insurance Plan for totally disabled veterans, insurance contracts purchased under the plan remained valid after the law was repealed).

154. *Darlington*, 358 U.S. at 90.

155. U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.* See *Sinking Fund Cases*, 99 U.S. 700 (1878) (Congress's express reservation of the right to amend legislation governing railroads' repayment contract obligations to the federal government settled the question of whether there was an unconstitutional deprivation of property). In his dissent, Justice Strong noted that these fifth amendment rights originated with the Magna Carta. *Id.* at 737.

156. *E.g.*, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (just compensation clause designed to bar government from forcing some people alone to bear public burdens which should be borne by public); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984) (compensation under the Tucker Act, not injunctive relief, is the remedy for a regulatory taking absent express Congressional withdrawal of Tucker Act jurisdiction); *California v. United States*, 438 U.S. 645, 671 (1978); *Dugan v. Rank*, 372 U.S. 609 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 290 (1958) (if imposition of federal conditions for receipt of water impaired vested rights in water, the remedy was compensation); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (when federal government action has deprived a private landholder of riparian rights, compensation, not injunctive relief, is the remedy).

157. U.S. CONST. amend. V. Property may be taken for public use *with* due process, however. *Berman v. Parker*, 348 U.S. 26 (1954). The government entity properly takes property by eminent domain proceedings, condemning the property, and paying compensation to the landowner. *E.g.*, *City of Fresno v. California*, 372 U.S. 624, 630 (1963); *Dugan v. Rank*, 372 U.S. 609, 616 (1963) (Congress authorized taking of vested water rights by eminent domain proceedings); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 732 (1950) (when federal government action deprived a private landholder of state law riparian rights, the government must institute eminent domain proceedings and compensate the landowner). Due process further requires adequate notice to the parties affected.

pensation, has effected a regulatory taking.¹⁵⁸ The taking can be of physical¹⁵⁹ or incorporeal¹⁶⁰ property. The remedies are compensation¹⁶¹ or a judicial declaration that the law or action is unconstitutional.¹⁶²

In *Ruckelshaus v. Monsanto Co.*¹⁶³ the Court determined that a trade secret could be property subject to a fifth amendment protection under a federal statute.¹⁶⁴ However, after the law was amended to remove a prohibition against use of the information for product evaluation, there was no taking.¹⁶⁵ The

158. *E.g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (state law requiring coal companies to retain underground support for surface owners violated the Takings Clause and was unconstitutional).

159. *E.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (campground); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (New York City ordinance requiring apartment house owner to permit cable TV installations on his property effected a physical taking); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (riparian rights).

160. *E.g.*, *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989) (fees on awards from impounded Iranian funds); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (aid to families with dependent children); *Hodel v. Irving*, 481 U.S. 704 (1987) (Indians' individual rights to fractional share of trust for benefit of tribe); *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986) (state government's contractual right to withdraw from federal Social Security plan); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) (pension funds); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (creditors' rights under new bankruptcy law); *Armstrong v. United States*, 364 U.S. 40 (1960) (material-men's liens under state law); *Lynch v. United States*, 292 U.S. 571 (1934) (War Risk Insurance contracts created under federal statute). Only in rare instances has the Court found these rights protected, or compensation the appropriate remedy. *See, e.g.*, *Monsanto*, 467 U.S. 986; *Armstrong*, 364 U.S. 40; *Lynch*, 292 U.S. 571.

161. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting).

162. *E.g.*, *Agins v. Tiburon*, 447 U.S. 255, 258 (1980) (under California law the sole remedies for inverse condemnation are mandamus and declaratory judgment).

163. 467 U.S. 986 (1984). In *Monsanto*, secret information had been submitted to the Environmental Protection Agency for use in pesticide evaluation under a series of amendments to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

164. *Monsanto*, 467 U.S. at 1003-04. The Court determined that trade secrets and commercial and financial information submitted between 1947 and 1972 under the original FIFRA were *not* protected by the Taking Clause. *Id.* at 1013. In 1972, however, Congress expressly prohibited the EPA from public disclosure of a trade secret or from using secret data submitted by one company to evaluate a product submitted by a second company statute. *Monsanto*, 467 U.S. at 1010-14. Information submitted under the 1972 version of the Act, however, could be protected. *Id.* at 1010, 1013.

165. *Monsanto*, 467 U.S. at 1013. In *Monsanto*, the Court noted that a taking of property is determined by the deprivation of the owner, rather than by any accretion to the sovereign. *Id.*, at 1004-05 (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). The Court did not discuss the issue of retroactivity in *Monsanto*, except by implication. A central question in *Monsanto*, however, was whether amendments to

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Court in *Monsanto* noted that there is no set formula for determining when justice and fairness require that economic injuries caused by public action amount to a compensable taking.¹⁶⁶ The Court identified several factors to be taken into account when a taking claim is asserted: 1) the character of the governmental action; 2) its economic impact; and 3) the extent to which the regulation has interfered with distinct investment-backed expectations.¹⁶⁷

The Court emphasized that a reasonable investment-backed expectation was more than a unilateral expectation or abstract need.¹⁶⁸ The Court held that Monsanto Co. had no basis for a

an environmental statute can be applied to property that was protected under an earlier statute. *Id.* at 1011-12. *See also* *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) (Multiemployer Pension Plan Amendments Act of 1980, retroactively requiring companies that withdrew from pension plan to pay their share of the plan's unfunded liabilities, was not an unconstitutional taking of property under the fifth amendment because amendment was made within the framework of a regulated field, contractual rights under the legislation did not rise to the level of property rights, and employers had adequate notice that participation might trigger additional financial obligations).

166. *Monsanto*, 467 U.S. at 1005 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); *accord* *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981)).

167. *Monsanto*, 467 U.S. at 1005 (citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. at 164, 175 (1979); *Penn Cent. Transp. Co.*, 438 U.S. 104, 124 (1978)). *See also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-98 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-28 (1986); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

168. *Monsanto*, 467 U.S. at 1005-06 (citing *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980)). The Court held that even though the 1978 amendments to FIFRA required Monsanto to give up its property interest in the data, this was a burden in return for which Monsanto received the ability to market pesticides in this country. *Id.* The Court further noted that the burden was one Monsanto was apparently willing to bear, since the company had continued to expand its research and development and to submit data to EPA after the 1978 FIFRA amendments were passed. *Id.*

See also *United States v. Locke*, 471 U.S. 84, 105 (1985) (vested economic right to income flow is subject to government's power to regulate for the public good and to redistribute benefits and burdens of economic life; unperfected mining claim must be taken by claimant with understanding that government retains substantial regulatory power over owner's property interests); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (government action may cause economic harm without interfering with interests that are sufficiently bound up with the owner's reasonable expectations to constitute property for fifth amendment purposes); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)). *Cf.* *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1978) (Army Corps of Engineers' interference with a private developer's reasonable investment backed expectations amounted to a taking). *See also* *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (mere unilateral expectation or abstract need is not a

taking challenge since such restrictions were burdens that must be borne in exchange for the advantage of living and doing business in a civilized community.¹⁶⁹

The Due Process Clause of the fifth amendment protects both property and contract rights.¹⁷⁰ A due process challenge to

property interest entitled to protection); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (law prohibiting Indians from selling feather ornaments from endangered bird species did not unconstitutionally take Indians' property because interest in an anticipated gain is viewed as less compelling than property-related interests); *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327, 1329 (9th Cir. 1982) (quoting *Omnia Co. v. United States*, 261 U.S. 502 (1923)) (frustration and appropriation are essentially different things)).

169. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 983, 1007 (1986) (citing *Andrus v. Allard*, 444 U.S. 51, 67 (1979)). Further, government imposition of burdens was an expected part of the privilege of doing business in an area that had long been the subject of public concern and government regulation. *Monsanto*, 467 U.S. at 1007.

See also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). The Court in *Connolly* held that an interference with the property rights of an employer, arising from a public program that adjusts the benefits and burdens of economic life to promote the common good, does not constitute a compensable taking (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *Andrus v. Allard*, 444 U.S. 51, 65 (1979) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). In *Connolly*, in holding there was no taking, the Court also cited *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732; (1984); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) and *Turner Elkhorn*, 428 U.S. at 15-16, to emphasize that employers had more than adequate notice that they were doing business in a regulated field, that withdrawal might trigger additional financial obligations, and that there might be amendments to achieve the legislative purpose to promote the common good. *Connolly*, 475 U.S. at 226. In *Monsanto*, the Court held that as long as Monsanto was aware of the conditions under which the data were submitted, and the conditions were rationally related to a legitimate government interest, there was no taking. *Monsanto*, 467 U.S. at 1007, 1013, 1017.

The requirement in *Monsanto* that companies be aware of the conditions imposed amounts to a due process notice requirement. See *Bowen v. Public Agencies Against Social Sec. Entrapment*, 477 U.S. 41, 54 (1986); *Sinking Fund Cases*, 99 U.S. 700, 719 (1878).

170. *E.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Due process includes notice and a right to be heard. Notice is interpreted broadly in favor of the government when the government's own contracts are affected. *E.g.*, *Bowen v. Public Agencies Against Social Sec. Entrapment*, 477 U.S. 41, 52-54 (1986) (where a state government agency had a contract with the federal government that provided for cancellation of the agreement with notice, language in the statute providing that the agreements must conform to the law was sufficient notice to state that the government had expressly reserved a right of amendment). See also *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731-32 (1984); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 296 (1958) (quoting *Wickard v. Filburn*, 317 U.S. 111, 113 (1941)) (it is not lack of due process for government to regulate that which it subsidizes). The implication is that a private party doing business with the government is, by that very fact, put on notice that its previous contracts may be changed. *Public Agencies*, 477 U.S. at 54; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-48 (1982) (contractual arrangements remain subject to subsequent legislation by the presiding sovereign). See also *Norman v. Baltimore*

a retroactive statute examines whether the retroactivity itself impairs property or contract rights¹⁷¹ even if the statute, as a prospective measure, would be constitutional.¹⁷²

Congress may not modify an existing federal contract if in doing so it deprives the other party of contract benefits that have already been reduced to possession.¹⁷³ Even if the contract rights were not vested property rights,¹⁷⁴ however, a statute that impairs contracts may be subject to a due process challenge.¹⁷⁵

In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*¹⁷⁶ the Court set forth a rational basis analysis¹⁷⁷ for a due process

& O.R.R., 294 U.S. 240, 307-08 (1935) (citing *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) "Contracts, however express, cannot fetter the constitutional authority of congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of congress, they have a congenital infirmity.") See also *Sinking Fund Cases*, 99 U.S. 700, 719 (1878) (express reservation by Congress of right to amend satisfies due process notice requirement). Cf. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1007 (1984) (when company is dealing in a regulated field and is aware that conditions attach to its submission of trade secrets to a government agency, there is no taking as long as the conditions are rationally related to a legitimate government interest).

171. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)).

172. *Turner Elkhorn*, 428 U.S. at 16-17.

173. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 54 (1986) (citing *Sinking Fund Cases*, 99 U.S. 700, 720 (1878)).

174. *Public Agencies*, 477 U.S. at 55.

175. *Board of Regents v. Roth*, 407 U.S. 564, 571-72 (1972).

176. 467 U.S. 717 (1984).

177. *Id.* at 729-30. Statutes that retroactively change the terms of a pre-existing contract are presently accorded rational basis scrutiny because they are economic legislation. *Gray*, 467 U.S. at 729 (quoting *Turner Elkhorn*, 428 U.S. at 15-16). To pass the rational basis test a statute must satisfy two requirements: 1) the law shall not be unreasonable, arbitrary or capricious; 2) the means selected shall have a real and substantial relation to the objective sought to be attained. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). The *Gray* rational basis standard was reasserted in *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985): "Congress' decision . . . is rational and reasoned, and the railroads have failed to demonstrate a due process violation." *Id.* at 478.

See also *Turner Elkhorn*, 428 U.S. at 15-20 (retroactive application of federal law requiring companies to pay compensation to miners suffering from black lung disease did not violate due process, because Act was a rational means of achieving legislative purpose of spreading liability among employers). The Court in *Turner Elkhorn* also stated an "arbitrary and irrational" standard for a due process violation of contract rights, noting that the standard for retrospective legislation is more demanding than for prospective legislation. *Id.* at 17. It is not clear whether the "arbitrary and irrational" standard differs from the rational basis standard as applied in *Turner Elkhorn* and subsequent cases or whether they are alternative applications of the same rule. The Court in *Gray* used a rational basis analysis and an "arbitrary and irrational" standard, seemingly inter-

challenge to retroactive legislation.¹⁷⁸ The analysis applies whether or not the contracts affected are government contracts.¹⁷⁹

In *United States v. Security Industrial Bank*¹⁸⁰ the Court distinguished “property” as defined for the Takings Clause from “property” that can raise a due process challenge.¹⁸¹ A property

changeably. *Gray*, 467 U.S. at 729 (arbitrary and irrational standard for due process challenge applies in absence of a vested property right). The Court in *Gray* also noted that retroactive legislation may not be “harsh or oppressive.” *Id.* at 733 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 n.13 (1977)). *See also Gray*, 467 U.S. at 732: “[T]hat standard does not differ from the prohibition against arbitrary and irrational legislation . . . enunciated in *Turner Elkhorn*” *See Huffaker & Gardner, supra* note 82. The authors, who accurately predicted that retroactivity would be a key issue with respect to Central Valley under the RRA contracts, analyzed section 205(b) of the Reclamation Reform Act (the “Hammer Clause”) under both heightened scrutiny and rational basis analyses, and concluded that the legislation would not be found constitutional under either approach. *Huffaker & Gardner, supra* note 82 at 47-62.

178. *Gray*, 467 U.S. at 729. The Court observed, “[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means; judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.” *Id.*

179. *Bowen v. Public Agencies Against Social Sec. Entrapment*, 477 U.S. 41, 55 (1986). Due process also prevents Congress from repudiating federal contracts if saving money is the only object. *Id.*

Congressional amendments changing the terms of federal contracts have demanded heightened scrutiny under previous Supreme Court decisions. *E.g.*, *Perry v. United States*, 294 U.S. 330, 350-51 (1935) (Congressional resolution providing that the Gold Standard no longer applied in satisfaction of contracts was unconstitutional when applied to government obligations). *See also United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 24-26 (1977); *contra Keefe v. Clark*, 322 U.S. 393, (1944) (sovereign may not bargain away state’s power absent a clear and unequivocal purpose to do so); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1033 (1989) (ambiguous contract provisions should be construed against the drafter, even where the drafter is the government) (citing *United States v. Seckinger*, 397 U.S. 203, 215-16 (1970)). On the other hand, there has been an occasional presumption that government should have a greater right than a private party to amend its own contracts. *See Lynch v. United States*, 292 U.S. 571, 580-81 n.9 (1934) (quoting *THE FEDERALIST*, No. 81 (A. Hamilton)). In the *Sinking Fund Cases*, 99 U.S. 700 (1878) the Court found simultaneously that the government is bound by its contracts as any private party would be, and that Congress has a sovereign’s right to amend legislation even when its own contractual promises are abrogated. The Court in the *Sinking Fund Cases* stated, “[t]he United States occupy toward this corporation a two-fold relation, — that of sovereign and that of creditor. Their rights as sovereign are not crippled because they are creditors” *Id.* at 724. *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46 (1982) (tribe could act both as commercial partner and as sovereign); *Perry v. United States*, 294 U.S. at 350-51; *Lynch v. United States*, 292 U.S. at 576-77.

180. 459 U.S. 70 (1982).

181. *Security Indus. Bank*, 459 U.S. at 75 (noting that *Arnett v. Kennedy*, 416 U.S. 134 (1974) (government employment) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare under federal program) had defined “property” for purposes of the Due Process

interest protected by procedural due process extends beyond actual ownership of real estate, chattels or money.¹⁸² However, for a property interest to be protected by procedural due process: 1) a person must have more than an abstract need or desire for it; 2) the claimant must have more than a unilateral expectation of receiving it; and 3) the claimant must have a legitimate claim of entitlement to it.¹⁸³ In *Board of Regents v. Roth*,¹⁸⁴ the Supreme Court explained that a constitutional purpose of due process protection for certain rights is that, although claimants may not ultimately show their rights were protected, they have a right to do so.¹⁸⁵

C. STANDING

A party has standing under Article III of the Constitution¹⁸⁶ to assert a claim when it can allege a particularized injury, concretely and demonstrably resulting from defendants' action that will be redressed by the remedy sought.¹⁸⁷ A trade association may assert a claim on behalf of its members even where it has suffered no injury from the challenged activity,¹⁸⁸ but where the

Clause sufficiently broadly to include rights which at common law would have been deemed contractual). In *Security Indus. Bank*, the Bank's interest in secured collateral was held to be a property interest, because "the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral." *Id.* at 84. *See also the Sinking Fund Cases*, 99 U.S. 700, 721 (1878) (present prohibition against contracting debts will not avoid debts already incurred); *Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 628 (8th Cir. 1990) (whether a contractual right against the United States constitutes a vested property right for fifth amendment purposes depends on whether Congress reserved power to alter the terms of the contract (citing *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986))).

182. *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

183. *Id.* at 577.

184. *Id.*

185. *Id.*

186. U.S. Const. art. III, § 2, provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States. . . [and] to Controversies to which the United States shall be a Party"

187. *Bowker v. Morton*, 531 F.2d 1347, 1349 (1976) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975)). *See also United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977). *See Kelley, supra* note 57 at 630. The author discussed standing as it was interpreted by federal courts during the 1970s with respect to reclamation law.

188. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977) (citing *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

remedy sought will inure to the benefit of the association's members actually injured.¹⁸⁹ The association will have standing to sue on behalf of its members when (a) the members would have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the organization's purpose; (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.¹⁹⁰

A state agency may sue on behalf of its members if the agency performs the functions of a traditional trade association for all practical purposes,¹⁹¹ even when membership is compulsory.¹⁹² However, a state agency that performs a traditional governmental function may not have standing on behalf of its members.¹⁹³ A state government may also have standing to assert claims on behalf of its citizens, as in *parens patriae*.¹⁹⁴

A party to a contract may assert the rights of third party beneficiaries to the contract,¹⁹⁵ if the parties intended to benefit the third party and the terms of the contract make that apparent.¹⁹⁶

189. *Hunt*, 432 U.S. at 344 (quoting *Warth v. Seldin*, 422 U.S. at 515).

190. *Hunt*, 432 U.S. at 344.

191. *Id.* at 345.

192. *Id.*

193. *Washington State Dairy Prod. Comm'n v. United States*, 685 F.2d 298 (9th Cir. 1982) (tax exemption applies only to entities authorized to use a state's sovereign powers, such as irrigation districts exercising eminent domain powers, or to associations that perform traditional governmental functions).

194. *United States v. Nevada*, 412 U.S. 534, 535 (1973) (in water rights dispute Nevada had the right to represent all non-federal users in its own state against California and federal government); *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945) (in Supreme Court determination of water rights of federal and state governments, states had right to represent their citizens *in parens patriae*); *California v. United States*, 180 F.2d 596 (9th Cir. 1950) (state had right to intervene in quiet title action between federal government and state-owned water company).

195. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819 (9th Cir. 1985). The law governing federal contracts is federal law. *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947). *Cf. Roos-Collins, supra* note 21 at 825, 848.

196. *Karo*, 762 F.2d at 821-22. *See Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 820 (9th Cir. 1990) (landowners assert they are third party beneficiaries of Bureau of Reclamation contract with Water District).

D. WATER RIGHTS

1. Federal Versus State Determination of Property Interests in Water

Section 8 of the Reclamation Act¹⁹⁷ provides that the Reclamation Act is not to affect or interfere with state law vested water rights or with state law as to the "control, appropriation, use or distribution" of irrigation water.¹⁹⁸ California statute declares that all water within the state is the property of the people.¹⁹⁹ Since the people of California have a paramount interest in the use of all the water of the State,²⁰⁰ the State is to determine the way in which water is developed.²⁰¹ The California Constitution²⁰² states that the general welfare requires any rights to water or to the use of water to be limited by the rules of reasonable use and beneficial use.²⁰³ The ultimate decision as to whether State or federal law applies is in the hands of the Supreme Court,²⁰⁴ and the Court has not provided clear guidance.

In *Ivanhoe v. McCracken*²⁰⁵ the United States Supreme

197. 43 U.S.C. §§ 371-600 (1989).

198. 43 U.S.C. § 383 (1989). The statute reads:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder.

199. CAL. WATER CODE § 102 (West 1971).

200. CAL. WATER CODE §§ 104, 105 (West 1971).

201. CAL. WATER CODE § 105 (West 1971). The highest use of water, under California law, is domestic; the next highest use is for irrigation. CAL. WATER CODE § 106 (West 1971).

202. CAL. CONST. art X, § 2 (added as art. 14, § 3, Nov. 6, 1928; amended Nov. 5, 1974). The Constitution also provides that the acquisition of an interest in real property by any government agency, including the federal government, constitutes an agreement that that agency will conform to California law as to the acquisition, control, use and distribution of the property. CAL. CONST. art. X, § 7.

203. CAL. CONST. art X, § 2.

204. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 289 (1958) (rights and duties of United States under water delivery contracts are matters of federal law on which the Supreme Court has the final word) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)). Whether the Court would determine that state-law definitions of water ownership (including ownership by the state) would withstand a taking challenge is not certain. Walston, *The Public Trust and Water Rights: National Audubon Society v. Superior Court*, 22 LAND & WATER L.R. 701, 721-23 (1987).

205. 357 U.S. 275 (1958). In *Ivanhoe* the Supreme Court reviewed four decisions in

Court held that section 8 was limited to federal government acquisition of riparian or other vested rights for the purpose of dam construction.²⁰⁶ In all other circumstances, once Central Valley water rights were appropriated to the federal government by the state, they were retained by the federal government.²⁰⁷ Thenceforth Central Valley water was to be managed by the government under the Property Clause²⁰⁸ of the Constitution.²⁰⁹ The Court noted that pre-existing water rights or vested rights in water could, if necessary, be acquired by the federal government, using its powers of eminent domain.²¹⁰ Once water rights had been acquired by or appropriated to the United States, the

which the California Supreme Court had held that the excess lands provision effected an unconstitutional taking of property without due process, and that proposed water district contracts with the Bureau of Reclamation that required the districts to adhere to the excess lands provisions were therefore invalid. *Ivanhoe Irrigation Dist. v. All Parties and All Persons*, 47 Cal. 2d 597, 306 P.2d 824 (1957); *Santa Barbara County Water Agency v. All Persons and Parties*, 47 Cal. 2d 699, 306 P.2d 875 (1957); *Madera Irrigation Dist. v. All Persons and Parties*, 47 Cal. 2d 681, 306 P.2d 886 (1957); *Albonico v. Madera Irrigation Dist.*, 47 Cal. 2d 695, 306 P.2d 894 (1957).

In *Ivanhoe v. All Parties*, an *in rem* action, the Ivanhoe Irrigation District had submitted a contract with the Bureau of Reclamation to a state superior court for confirmation. *Id.* at 606, 306 P.2d 824, 828. This was in accordance with federal and state law. 43 U.S.C. § 423e; CAL. WATER CODE §§ 22670; 23225. The two named defendants were the California Attorney General (Edmund G. Brown, Sr.) and Courtney McCracken, who owned 309 acres. *Id.* at 607, 306 P.2d 824, 829. Intervening landowners asserted, among other claims, that the contracts violated the Due Process and Taking Clauses of the fifth amendment. *Id.* at 608-09, 306 P.2d 824, 830. It was also asserted that the federal government could not place conditions on delivery of the water to landowners. *Id.* The California Supreme Court found that waters appropriated under the proposed contracts were held under an express trust of which the beneficiaries were the district landowners and other California water users. *Id.* at 628, 306 P.2d 824, 837. The California Supreme Court held that the Reclamation Act's acreage provisions were void because they violated due process and equal protection. *Id.* at 637, 306 P.2d 824, 848.

Remanded to state court after the Supreme Court's reversal in *Ivanhoe v. McCracken*, 357 U.S. 275 (1958) the contracts were approved by the California Supreme Court in light of the United States Supreme Court's decision. *Ivanhoe Irrigation Dist. v. All Parties and All Persons*, 53 Cal. 2d 692, 350 P.2d 69, 3 Cal. Rptr. 317 (1960); *Albonico v. Madera Irrigation Dist.*, 53 Cal. 2d 735, 350 P.2d 95, 3 Cal. Rptr. 343 (1960); *Santa Barbara County Water Agency*, 53 Cal. 2d 743, 350 P.2d 100, 3 Cal. Rptr. 348 (1960).

206. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291 (1958).

207. *Id.* at 291-92.

208. U.S. CONST. art. IV, § 3, cl. 2. The clause provides, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States . . ."

209. *Ivanhoe*, 357 U.S. at 294. The government's power over such "federal property" was found to be "without limitations." *Id.* at 294-95 (citing *United States v. City & County of San Francisco*, 310 U.S. 16, 29-30 (1940)).

210. *Ivanhoe*, 357 U.S. at 291. Invoking the Supremacy Clause (Art. VI) of the Constitution, the Court indicated that a state cannot compel use of "federal property" on terms other than those prescribed by Congress. *Ivanhoe*, 357 U.S. at 294-95.

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government could make a grant to the landowners of the subsidy they received on water prices,²¹¹ under the Welfare Clause.²¹² The Court then held that the excess lands limitation was constitutional under the Welfare Clause²¹³ as a condition on the use of federal funds, property and privileges.²¹⁴

In 1978 the Supreme Court modified the *Ivanhoe* doctrine in *California v. United States*.²¹⁵ The Court found that section 8, read in light of the social, political and legislative history²¹⁶ of the Act, clearly was intended to preserve the States' control over water rights.²¹⁷ The Court distinguished²¹⁸ *Ivanhoe*²¹⁹ and other former decisions²²⁰ in which it had been held that state law control of water appropriated to the Bureau of Reclamation was limited to the acquisition of water rights or of vested interests in

211. *Id.* at 295.

212. U.S. CONST. art. I, § 8, cl. 1. The clause provides: "The Congress shall have Power To . . . provide for the . . . general Welfare of the United States . . ." See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736 (1950) (power of Congress to promote general welfare through large scale reclamation and irrigation projects is clear and ample).

213. U.S. CONST. art. I, § 8, cl. 1.

214. *Ivanhoe*, 357 U.S. at 295. The Court said further,

The lesson of those cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress.

Id.

215. 438 U.S. 645, 672-73 (1978). The federal government had sought to impound unappropriated water for the Central Valley Project. *Id.* at 647. The State Water Resources Board had ruled that the government could only receive the water under state law if it agreed to and complied with conditions dealing with the water's use. *California v. United States*, 438 U.S. at 647. The federal government sought a declaratory judgment that it could impound unappropriated water without complying with state law. *Id.* at 646. The district court found that the federal government must seek a permit, but that the permit must be issued without conditions if water was available. *United States v. California*, 403 F. Supp. 874, 902 (1975), *aff'd*, *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), *rev'd*, *California v. United States*, 438 U.S. 645 (1978).

See CAL. WATER CODE § 1201 (West 1971) (all water not applied to riparian lands or otherwise appropriated is public water of the state and subject to appropriation under state law); CAL. WATER CODE § 1225 (rights to appropriate water must be initiated or acquired in compliance with the Water Code).

216. *California v. United States*, 438 U.S. at 653-70.

217. *Id.* at 664, 676-77. See also *Nevada v. United States*, 463 U.S. 110, 121-126 (1983).

218. *California v. United States*, 438 U.S. at 670-77.

219. 357 U.S. 275 (1958).

220. *City of Fresno v. California*, 372 U.S. 627 (1963); *Arizona v. California*, 373 U.S. 546 (1963).

water.²²¹ The Court held that the federal government should follow state law to the extent that state law did not directly conflict with federal law,²²² and that the imposition by the state of conditions on the use of water did not create such a conflict.²²³

In *Bryant v. Yellen*²²⁴ the Supreme Court expanded the *California v. United States* doctrine. The Court held that under

221. *California v. United States*, 438 U.S. at 645. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291-92 (1958); *United States v. Gerlach Live Stock Co.* 339 U.S. 725 (1950).

222. *California v. United States*, 438 U.S. at 678.

223. *Id.* at 676, 679.

224. 447 U.S. 352 (1980), *reh'g denied*, 448 U.S. 911 (1980); *reh'g denied sub nom. California v. Yellen* (1980); *reh'g denied sub nom. Imperial Irrigation Dist. v. Yellen*, 448 U.S. 911 (1980). *Bryant* involved irrigation water supplies to the Imperial Valley from the Colorado River which had been imported by a private company via a canal that ran through Mexico beginning in 1901. *Bryant*, 447 U.S. at 356-57. In 1929 the Boulder Canyon Project Act set up a federal project to dam the Colorado River and pipe the water directly into California. *Id.* at 358. The Act contained language that could have been read as expressly exempting prior Imperial Valley recipients of Colorado River from the Reclamation Act's 160-acre limit receipt of water. *Id.* at 360. The Act provided that the works be used "for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of . . . [the] Colorado River compact" *Bryant v. Yellen*, 447 U.S. at 359. The compact, involving seven states that were to benefit from the Project, provided that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." *Id.* at 357. On the basis of a ruling by the Solicitor of the Department of the Interior, low cost federal water was delivered to Imperial Valley landowners for both excess and non-excess land. *Bryant*, 447 U.S. at 362. In 1964 the Department reversed its position and issued an administrative ruling to enforce the 160-acre limit and the residency requirement. *Id.* at 365.

Compare *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (1976) *aff'd*, *Tulare Lake v. United States*, 677 F.2d 713 (1982). The second *Tulare Lake* decision held that, even in light of *California v. United States* and *Bryant v. Yellen*, water users did not have any vested right in relief from excess land provisions.

In *United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977), *modified* *United States v. Imperial Irrigation Dist.*, 595 F.2d 524 (9th Cir. 1979) and *amended* *United States v. Imperial Irrigation Dist.*, 595 F.2d 525 (9th Cir. 1979), *rev'd*, *Bryant v. Yellen*, 447 U.S. 352 (1980), the Ninth Circuit had found that under *Ivanhoe*, the Project Act did not contain express language exempting Imperial Valley landowners from the excess lands provisions, and in light of the legislative history of the Act the lands must be included. *Imperial Irrigation Dist.* consolidated two district court cases with contradictory holdings. See *Yellen v. Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971) (in suit for enforcement of residency requirement by non-landowners, residency on land required for receipt of federally subsidized water because, if it were not, excess lands sold in the Imperial Valley would be priced on the basis of the appurtenant water rights); *modified* *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972) (non-owners had standing to sue, and as a matter of law the existence of present perfected rights to water was within the exclusive jurisdiction of the United States Supreme Court); and *United States v. Imperial Irrigation Dist.*, 322 F. Supp. 11 (S.D. Cal. 1971) (Imperial Irrigation District members not bound by residency requirements under the Boulder Canyon Act). See Kelley, *supra* note 57 (discussing the cases underlying *Bryant v. Yellen*).

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section 8,²²⁵ as construed in *California v. United States*, landholders whose water rights had been perfected before Imperial Valley lands were brought under the federal reclamation project could receive subsidized water for both excess and non-excess lands.²²⁶

However, in *California v. Federal Energy Regulatory Commission*,²²⁷ the Supreme Court, interpreting section 27²²⁸ of the Federal Power Act (FPA),²²⁹ which is nearly identical in wording to section 8 of the Reclamation Act,²³⁰ held that for purposes of the FPA, federal law preempts state law,²³¹ and that California could not impose stream flow restrictions that exceeded federal standards on a proposed hydroelectric plant. In *FERC* the Court distinguished *California v. United States*,²³² noting that because section 8 was part of a different statutory scheme from the FPA, it was to be viewed in an entirely different light, even though the language was nearly identical.²³³

225. 43 U.S.C. § 383.

226. *Bryant v. Yellen*, 447 U.S. at 373-74 (since under the Flood Control Act of 1944 Congress clearly had intended the Reclamation Act to apply to subsidized irrigation water delivered to lands receiving water from the Pine Flats Dam, excess lands provisions apply to those lands even where construction costs had been prepaid by the water districts).

227. 110 S. Ct. 2024 (1990), *reh'g denied*, 110 S. Ct. 3304 (1990) [hereinafter *FERC*].

228. 16 U.S.C. § 821 (1989). The section reads:

Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

229. Act of June 10, 1920, ch. 285, 41 Stat. 1063 (codified as amended at 16 U.S.C. §§ 791a-825e (1989)).

230. 43 U.S.C. § 383 (1989).

231. *FERC*, 110 S. Ct. at 2033. *Cf. Ruckelshaus v. Monsanto Chem. Co.*, 467 U.S. 986, 1012 (1984) (if in taking claim against EPA Congress can pre-empt state property law, Taking Clause has lost all vitality).

232. 438 U.S. 645 (1978). *See Walston, State Regulation of Federally Licensed Hydropower Projects: The Conflict Between California and First Iowa*, 43 OKLA. L. REV. 87 (1987) (postulating that in the Rock Creek case, the subject of the *FERC* decision, the *California v. United States* doctrine would prevail).

233. *FERC*, 110 S. Ct. at 2032. *See also National Audubon Soc'y v. Department of Water & Power of Los Angeles*, 869 F.2d 1196 (9th Cir. 1988) (federal common law nuisance claim for pollution of the waters of Mono Lake preempted by Federal Water Pollution Control Act).

2. California Law

To determine ownership of water rights, California water law blends²³⁴ common law riparian rights²³⁵ with the doctrine of prior appropriation.²³⁶ California also applies²³⁷ the rules of beneficial use²³⁸ and of reasonable use.²³⁹ California partially relies

234. Attwater & Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC. L.J. 957, 959-61 (1988) (California water rights system a plural system). See also *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 425-26, 658 P.2d 709, 712, 189 Cal. Rptr. 346 (1983) (state's sovereign authority to exercise continuous supervision and control over navigable state waters bars any party from claiming vested right to divert waters if diversion harms public trust interests). The public trust res includes navigation, commerce, fishing, preservation of open space, recreation and ecology. *Id.* at 434-35, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356. Under the public trust doctrine, navigable waters and the land underlying them are held subject to a trust over the property which cannot be placed beyond the direction and control of the state. *Id.* at 437-38, 658 P.2d 709, 721, 189 Cal. Rptr. 346, 358 (quoting *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453-54 (1892)). See also *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (public trust protects environmental and recreational values).

235. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361 (1983). Riparian rights are landowners' rights to water contiguous to their property, on land that is within the stream's watershed. Riparian rights apply only to the smallest tract in one title in the chain leading to the current owner. *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 528-529, 81 P.2d 533, (1938). See also CAL. WATER CODE § 101 (West 1971).

Riparian rights vest absolutely in their private owners. *Lux v. Haggin*, 69 Cal. 255, 391, 4 P. 919 (1886). A riparian right that predates the statute is a vested property right. *Ivanhoe Irrigation Dist. v. All Parties and All Persons*, 47 Cal. 2d 597, 621, 306 P.2d 824, 839 (1957). See also *Palmer v. Railroad Comm'n of California*, 167 Cal. 163, 138 P. 957 (1914). A riparian right that has vested cannot be retroactively taken. See *Ivanhoe v. All Parties*, 47 Cal. 2d at 621, 306 P.2d 824, 839; *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 252 P. 607 (1926), *cert. dismissed*, 275 U.S. 486 (1927).

236. See also *Huffner v. Sawday*, 153 Cal. 86, 94 P. 424 (1908) (riparian owners who irrigated their lands from stream had superior rights as either riparian owners or appropriators against upstream diverters). See CAL. WATER CODE §§ 1201-1801 (West 1971) (appropriation of water).

237. CAL. CONST. art. X, § 2 (formerly art. XIV, § 3) (added Nov. 6, 1928; amended 1974): "[B]ecause of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable."

238. CAL. WATER CODE § 1240 (West 1971) (appropriation must be for a beneficial purpose, and when water is no longer used for that purpose the right ceases). See also *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935).

239. CAL. CONST. art. X, § 2. Section 2 provides:

[T]he waste or unreasonable use or unreasonable method of use of water [shall] be prevented, and . . . the conservation of [state] waters is to be exercised with a view to the reasonable and beneficial uses thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this

on the public trust doctrine,²⁴⁰ a common law doctrine of sovereign control over a public resource.

California water belongs to the people of California.²⁴¹ but the right to use water may be acquired by appropriation.²⁴² Under California law, a water right is only the right to use the water.²⁴³ For purposes of the statute, "water" includes the term "use of water."²⁴⁴ Such a usufructuary right to water is still con-

State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not . . . extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

See also CAL. WATER CODE § 100 (West 1971), containing the same language. The rule of reasonable use is determined by the state's interest in the use, rather than whether the use has been beneficial to the owner of the water right. *People v. Forni*, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851, 856 (1976). The reasonableness of a particular use of water will vary with the facts and circumstances of the particular case. *Joslin v. Marin Municipal Water Dist.*, 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1987).

240. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 433-38, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (California water law incorporates elements of riparianism, appropriation and the public trust doctrine). See also, *National Audubon Soc'y v. Department of Water & Power of Los Angeles*, 869 F.2d 1196 (9th Cir. 1988). See Note, *National Audubon Society v. Department of Water: the Ninth Circuit Disallows Federal Common Law Nuisance Claim for Mono Lake Water and Air Pollution*, 20 GOLDEN GATE U.L. REV. 209 (1990). California also recognizes prescriptive rights and pueblo rights. *Attwater & Markle*, *supra* note 234 at 969. Prescriptive rights are created when an appropriator has successfully diverted water from the riparian or appropriative allotment of another for over five years, adverse to the prior owner's interest. *Attwater & Markle*, *supra* note 234 at 969. See *Rank v. Krug*, 142 F. Supp. 1 (1956), *aff'd in part, rev'd on other grounds in part*, 293 F.2d 340 (9th Cir. 1961), *aff'd in part, rev'd on other grounds in part*, 372 U.S. 689 (1963). Pueblo rights, deriving from Spanish land grants, give the city that claims them a paramount right, superseding riparian and appropriative rights, to the use of waters of a river flowing through the city. *Attwater & Markle*, *supra* note 234 at 969. See CAL. WATER CODE § 106.5 (municipal water rights); *Los Angeles v. Hunter*, 156 Cal. 603, 105 P. 755 (1909).

241. CAL. WATER CODE § 102 (state ownership of water; right to use).

242. *Id.* See also CAL. WATER CODE § 1201 (West 1971) (unappropriated water not already vested in riparian owners may be appropriated in accordance with the Code). The legislature moved in 1987 to protect California streams from depletion by limiting the appropriations that may be approved in a "fully appropriated stream system." CAL. WATER CODE §§ 1205-07 (West 1971 & Supp. 1991). See *People v. Shirokow*, 26 Cal. 3d 301, 605 P.2d 859, 162 Cal. Rptr. 301 (1980).

243. CAL. WATER CODE § 1001 (West 1971)(no right, title or interest to or in the corpus of any water is given or confirmed by the statute). In *Eddy v. Simpson*, 3 Cal. 249 (1853), the California Supreme Court observed, "it is laid down by our law writers, that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use." *Id.* at 252 (italics in original). See also *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533 (1938).

244. CAL. WATER CODE § 1000 (West 1971).

sidered to constitute a vested property right, however.²⁴⁵

3. Water Rights in Federal Reclamation Law

Under the Reclamation Act²⁴⁶ water rights are appurtenant to the land irrigated.²⁴⁷ Under this rule water rights may be considered to be a property right.²⁴⁸ Under the Act,²⁴⁹ as in California law²⁵⁰ rights in water are subject to beneficial use.²⁵¹ The Reclamation Act also includes section 8,²⁵² which by its language makes reclamation law subordinate to California law.²⁵³

Since the federal government has jurisdiction over navigable

245. *Crandall v. Woods*, 8 Cal. 13, 142 (1857). See Schulz & Weber, *supra* note 132 at 1049-50 (1988).

246. 43 U.S.C. § 372 (1989). "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated" *Compare Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977) (by contrast with natural flow water which is appurtenant to land irrigated, project water is subject to terms and conditions set by the United States).

247. 43 U.S.C. § 372. A thing is "appurtenant" to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the principal property. *BLACKS LAW DICTIONARY* (5th ed. 1979). Under federal law a water right becomes appurtenant to land when the water has actually been beneficially used on the land. *Nevada v. United States*, 463 U.S. 110, 126 (1983). It may be that this provision reflects a proposal made by John Wesley Powell that the right to use water should inure in the land to be irrigated, and water rights should go with land title. Sax, *supra* note 4, § 110.1 at 117. Powell reasoned that if land titles and water rights were severed, water rights might all be purchased by irrigation companies and landowners would then be "at the mercy of the owner of the water right," creating "an intolerable burden to the people." Sax, *supra* note 4, § 110.1 at 117 (quoting Powell, Report on the Lands of the Arid Region). *But compare Ivanhoe v. McCracken*, 357 U.S. 275, 297 (1958) (Reclamation Act designed to benefit people, not land); Taylor, *Excess Land Law*, *supra* note 56 at 497: "Legislative history of the reclamation law shows that appurtenance was not intended to vest as an unconditional property right." Professor Taylor made it clear that in his view, "[a]ppurtenance does not equate water ownership with land ownership, but even if it did, conditions limiting an owner's use of land to which he holds fee title are well known to the law, whether written in the deed or imposed by ordinance or statute"

248. *Nevada v. United States*, 463 U.S. 110, 126 (1983); *Ickes v. Fox*, 300 U.S. 82, 94 (1937).

249. 43 U.S.C. § 372 (beneficial use shall be the basis, the measure and the limit of the right).

250. CALIF. CONST. art. X § 2; CAL. WATER CODE § 100 (West 1989).

251. *United States v. Alpine Land and Reservoir Co.*, 697 F.2d 851, 853 (9th Cir. 1983); *Ickes v. Fox*, 300 U.S. 82, 92-95 (1937). See Roos-Collins, *supra* note 21 at 840-43.

252. 43 U.S.C. § 383 (1989).

253. *California v. United States*, 438 U.S. 645 (1978); *United States v. Orr Ditch Co.*, 914 F.2d 1302 (9th Cir. 1990).

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waters under the Commerce Clause,²⁵⁴ questions can arise as to whether taking of riparian rights is compensable under the Takings Clause.²⁵⁵

In *Ickes v. Fox*,²⁵⁶ the Supreme Court held that under the Reclamation Act, landowners who had fully paid their share of construction and operating and maintenance costs²⁵⁷ had acquired a fully vested right to the amount of water necessary to "beneficially and successfully" irrigate their land,²⁵⁸ and that the right was appurtenant to the land irrigated under the Reclamation Act.²⁵⁹

In *United States v. Gerlach Live Stock Co.*,²⁶⁰ the Court interpreted the California Constitution's statement of water rights²⁶¹ to hold that in the Central Valley reclamation project, state law riparian rights took priority over the federal government's navigation powers because of the language of Section 8²⁶² and were compensable.²⁶³ The Court discussed the doctrines of

254. U.S. CONST. art. I § 8, cl. 3. See also *United States v. Gerlach Live Stock Co.*, 399 U.S. 725 (1950).

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

256. 300 U.S. 82 (1937). The government argued that as the appropriator of the water, the United States had become the owner of the water rights, and that the landowners had only a contract right against the government. *Id.* at 83. Cf. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). See *Crandall v. Woods*, 8 Cal. 136 (1857) (prior appropriator has vested right to use of water). See also Bell & Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, The Prospects for Accommodation*, 21 ENV. L.R. (1991). The authors stated, "An important characteristic of the appropriative water right is that, once vested, it becomes a constitutionally protected property interest . . ." *Id.* at 5.

257. *Ickes v. Fox*, 300 U.S. at 94-95. Cf. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982).

258. *Ickes v. Fox*, 300 U.S. at 92-95.

259. *Id.* at 95-96. See 43 U.S.C. § 372 (1989) (water rights appurtenant to the land irrigated).

260. 339 U.S. 725 (1950).

261. CAL. CONST. art. X, § 2.

262. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950). The Court observed: "Whether required to do so or not, Congress elected to recognize any state-created rights and to take them under its power of eminent domain." The Court noted that federal law adopts that of the state as the test of federal liability. *Id.* at 743. See also *Dugan v. Rank*, 372 U.S. 609 (1963), arising out of the same litigation as did *Gerlach*. The Court held that when valid state law rights of landowners have been interfered with, there has been a partial compensable taking rather than a mere trespass. *Id.* at 620.

263. *Gerlach*, 339 U.S. at 753. The Bureau had previously contracted with the riparian claimants to purchase some of the rights at issue in the Supreme Court case, and had placed money in escrow to pay for the rights if the Supreme Court ruled against the claimants. *Id.* at 740-42. Justice Douglas, dissenting in part, said that there are no pri-

riparian rights and prior appropriation, noting that the United States stood in the position of an upstream appropriator for a beneficial use.²⁶⁴

In *City of Fresno v. California*,²⁶⁵ the Court decided the rights of the city of Fresno to underground water, the City's priority to the use of water for municipal or domestic purposes, and its entitlement to receive water at the same price irrigators would pay.²⁶⁶ The Court held, following *Ivanhoe v. McCracken*,²⁶⁷ that the federal government had statutory authority to exercise the power of eminent domain to acquire water rights of others,²⁶⁸ and that the nature of those rights was to be determined by state law.²⁶⁹ As to the priority of rights, however, the city's rights were subordinate to those of the Bureau of Reclamation, and the price was at the discretion of the Secretary of the Interior.²⁷⁰

4. Retroactivity in Federal Water Law

In *Barcellos & Wolfson, Inc. v. Department of the Interior*,²⁷¹ Central Valley landowners challenged a 1987 amendment

vate property rights in the waters of a navigable river, and conformity with Reclamation Act authorization to acquire rights was satisfied by filing of notice of appropriation under state law. *Id.* at 756-60.

264. *Id.* at 742-43.

265. 372 U.S. 627 (1963). *City of Fresno* arose out of the construction of the Friant Dam, the same project litigated in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) and in *Dugan v. Rank*, 327 U.S. 609 (1963).

266. *City of Fresno*, 372 U.S. at 628-29.

267. 357 U.S. 275 (1958).

268. *City of Fresno*, 372 U.S. at 630.

269. *Id.*

270. *Id.* at 630-31.

271. *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816, *cert. denied sub nom. Boston Ranch Co. v. Department of the Interior*, 111 S. Ct. 555 (1990) (per Fletcher, J.; other panel members were Ferguson, J.; and Fernandez, J., dissenting). *Barcellos & Wolfson* was decided by the Ninth Circuit two days after *Peterson v. Department of the Interior*. Plaintiffs were Boston Ranch Company, Edwin J. O'Neill and West Haven Farming Company, all owners of more than 1000 acres of land receiving federal water. *Barcellos & Wolfson*, 899 F.2d at 815.

In *Barcellos & Wolfson*, landowners had signed recordable contracts before 1976, pursuant to the Federal Reclamation Act. *Barcellos & Wolfson*, 899 F.2d at 817. They sued the Water District, requesting that the \$8.00 price in their contracts be enforced. *Id.* Between 1976 and 1982, when the RRA was passed, landowners could not sell lands according to their contracts, but during that time some did continue to receive subsidized water for both 160-acre plots and excess lands. *Id.* In 1984 the recordable contracts

to the RRA.²⁷² The amendment enforced the application to recordable contracts of section 205(c)²⁷³ and of the revised Rule.²⁷⁴ The landowners argued that the amendment did not apply to them, or that if it did, it retroactively impaired the contract between the federal government and the Water District, of which they were third party beneficiaries.²⁷⁵ The Ninth Circuit affirmed the district court's dismissal of the claim, holding that the landowners' due process and separation of powers claims could not be sustained.²⁷⁶ The court found that while contract rights derived from government contracts may be property rights for the purpose of a due process claim,²⁷⁷ the *Barcellos and Wolfsen* plaintiffs had not fulfilled the conditions imposed on them by the contract, and thus no rights had vested.²⁷⁸ Further, the right to a remedy of the landowners' choosing, specific performance, was not a constitutionally protectable right.²⁷⁹

were amended to provide extra time for disposal of excess lands, but nothing was included in the contracts to reflect the current Department of Interior rule that water prices would remain at the contract rate during the extended period. *Id.* at 819. The landowners claimed they should receive subsidized water for the entire duration of the extra time they were allowed to sell their excess lands. *Id.* at 817.

See also *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 491 F. Supp. 263 (S.D. Cal. 1980); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (1970) (granting injunction against sale of excess lands under recordable contracts until new regulations promulgated).

272. Section 224(e); 43 U.S.C. § 390ww(h) (1989) specifically made section 205(c) applicable to all recordable contracts executed before 1982.

273. 43 U.S.C. § 390ee(c) (1989). The section provides:

Notwithstanding any extension of time of any recordable contract . . . lands under recordable contract shall be eligible to receive irrigation water at less than full cost for a period not to exceed ten years from the date such recordable contract was executed by the Secretary in the case of contracts existing prior to the date of enactment of this Act

274. 43 C.F.R. § 426.11(i)(4)(ii), providing that "[f]or land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate . . . commencing December 23, 1987, through the effective termination date of the extended recordable contract." The law clarified that water prices would be at full price from then on. If the new law and rule were followed, they would supersede the 1986 district court's stipulated judgment. *Barcellos & Wolfsen*, 899 F.2d at 819. The landowners sued to have the judgment enforced. *Id.* at 815.

275. *Barcellos & Wolfsen*, 899 F.2d at 820.

276. *Id.* at 825, 826. The Ninth Circuit held that the stipulated judgment in favor of plaintiffs did not enter vested rights. *Id.* at 826. The dissent disagreed. *Id.* at 830-33.

277. *Id.* at 821 (citing *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

278. *Barcellos & Wolfsen*, 899 F.2d at 822. The court stated further that the right to own excess land for more than 10 years under the contracts was in no way linked to an entitlement to receive subsidized water for more than 10 years. *Id.* at 824.

279. *Id.* at 823.

In *Israel v. Morton*²⁸⁰ the plaintiff purchased both excess and non-excess lands which received reclamation water from the Grand Coulee Dam in Washington State.²⁸¹ He wished to sell his excess land²⁸² at market price, with an assurance that the land would be eligible to receive reclamation water.²⁸³ In 1962 the enabling legislation for the dam was amended, providing that the Columbia Basin Project was thenceforth to be governed by federal Reclamation Law.²⁸⁴ The Water District that delivered water to Israel's land entered into an amended repayment contract with the government, incorporating the change in the statute. The plaintiffs alleged a deprivation of property without due process, asserting that after the five years stipulated in the 1945 contract had passed, they had become vested with an unrestricted right to sell their excess lands, including the entitlement to water.

The court found that reclamation water was not "natural flow" water, appurtenant to the land and subject to state law; but that it was instead "project water," appropriated to the United States and not appurtenant to the land, and that it was not there for the taking by the landowner, but "for the giving by the United States."²⁸⁵ The court found that if rights to receive and use water were to vest "beyond the power of the United States to take without compensation," that such vesting could only occur on terms fixed by the government.²⁸⁶ The court also noted language in the contracts that subjected the rights it conveyed to "'any acts amendatory thereof or supplementary thereto.'"²⁸⁷ A restriction on the right to sell excess lands at a price above the value set by the Secretary of the Interior was held not to be a taking without due process, because there is no vested right to a continuation of status conferred by the original

280. 549 F.2d 128 (9th Cir. 1977).

281. *Israel v. Morton*, 459 F.2d at 130-31.

282. *Id.* The excess land had not received reclamation water while Israel owned it. *Israel v. Morton*, 549 F.2d 128, 131 (9th Cir. 1977).

283. *Id.* at 131. The appraised value of the land at the time of the suit was \$6,900. *Id.* The market value, taking into account its potential to receive reclamation water, was \$24,000. *Id.*

284. *Israel*, 549 F.2d at 131. 43 U.S.C. § 423e provided that all owners of land in excess of 160 acres must sign recordable contracts and divest within 10 years from the signing of the contract.

285. *Israel*, 549 F.2d at 132.

286. *Id.* at 133.

287. *Id.*

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government contract.²⁸⁸

In *United States v. Alpine Land & Reservoir Co.*²⁸⁹ Nevada Indian tribes sought to have court-approved transfers of state-law water rights invalidated.²⁹⁰ The government had sought to transfer water rights that had been held but not used from government lands to irrigated lands that were receiving water under federal or state Reclamation projects.²⁹¹ The tribes contended that the proposed transfers violated Nevada law governing abandonment of water rights, and that section 8 of the Reclamation Act should apply.²⁹² The federal government contended that the 1913 Nevada law did not apply retroactively to affect rights that had vested in the United States in 1902.²⁹³ The Ninth Circuit held,²⁹⁴ following *California v. United States*,²⁹⁵ that Nevada state law governed, by application of the 1902 law itself,²⁹⁶ although under Nevada law the tribes had already abandoned their rights because they had not been used.²⁹⁷

288. *Id. Compare Barcellos & Wolfson*, 899 F.2d at 824, indicating that ownership of excess land under recordable contracts is not linked to entitlement to subsidized water.

289. 878 F.2d 1217 (9th Cir. 1989). The litigation leading up to *Alpine Land* began in 1913 and encompassed the Supreme Court's decision in *Nevada v. United States*, 463 U.S. 110 (1983). *Alpine Land*, 878 F.2d at 1219. The most recent case is *United States v. Orr Ditch Co.*, 914 F.2d 1302 (9th Cir. 1990) (Nevada state law applies to cities' proposal to divert sewage effluent from Truckee River to land irrigation).

290. *Alpine Land*, 878 F.2d at 1219.

291. *Id.* at 1221.

292. *Id.*

293. *Id.* at 1222. The United States contended that when lands were withdrawn from the Pyramid Lake Indian Reservation in 1903 to form the Truckee-Carsen Irrigation District, the water rights vested in the federal government, and that even though there had been non-use of the water after 1913, there was no intent by the government to abandon. *Id.* at 1220, 1222.

294. *Alpine Land*, 878 F.2d at 1223.

295. 438 U.S. 645, 664 (1978).

296. 43 U.S.C. § 383 (1989).

297. *Alpine Land*, 878 F.2d at 1226. Judge Hall observed (quoting *Nevada v. United States*, 463 U.S. 110, 126 (1983)): "The law of Nevada, in common with most other Western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land." The court in *Alpine* quoted a previous Ninth Circuit decision, *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983), to note that Nevada law governed only so long as it was not inconsistent with the section 8 requirement of beneficial use. *Alpine Land*, 878 F.2d at 1228 (quoting *California v. United States*, 438 U.S. 645, 668 n.21 (1978)). See CAL. WATER CODE § 1201(b) (West 1971) (water appropriated before 1914 that has not been put to its appropriative purpose or to some useful or beneficial purpose becomes unappropriated water).

In *United States v. Quincy-Columbia Basin Irrigation District*,²⁹⁸ a water district challenged Bureau of Reclamation regulations,²⁹⁹ promulgated pursuant to the Reclamation Reform Act,³⁰⁰ that required landowners to report the amount of acreage they controlled to the water district, which then reports to the Secretary of the Interior.³⁰¹ The district court found that enforcement of the new regulation was not inconsistent with the general policy underlying the original Reclamation Act, that the Reclamation Reform Act was not a change of the original Act but a supplement to it,³⁰² and that the Water District could, if necessary, cease to supply water to non-complying landowners.³⁰³

IV. COURT'S ANALYSIS

The Ninth Circuit held that the Water Districts' contract rights were not vested property rights protected under the fifth amendment, and it was not necessary to undertake a taking or due process analysis.³⁰⁴ The court said that in a fifth amendment challenge to a government action, the first step is to determine whether there is a protectable right.³⁰⁵

In determining whether the Districts' rights under the contracts included "a constitutionally protected property interest in the delivery of subsidized water to leased tracts of any size,"³⁰⁶ the Ninth Circuit followed two lines of inquiry. First, the court examined the sovereign power of Congress to amend legislation so as to affect rights under contracts executed under the prior legislation.³⁰⁷ Second, the court examined the extent to which

298. 649 F. Supp. 487 (E.D. Wash. 1986).

299. 43 C.F.R. §§ 426.1-.24 (1983).

300. 43 U.S.C. § 390ww(c); 43 U.S.C. § 390zz.

301. *Quincy-Columbia Basin Irrigation Dist.*, 649 F. Supp. at 489. The landowners were exempt from statutory reporting requirements under 42 U.S.C. § 390ff. *Id.*

302. *Id.* at 492.

303. *Id.*

304. *Peterson v. Department of the Interior*, 899 F.2d 799, 813 (1990).

305. *Id.* at 807 (citing *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 54-55 (1986) and *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)). The Ninth Circuit noted that in this case there was no Contract Clause issue raised since the statute involved is a federal rather than a state law. *Peterson*, 899 F.2d at 807 n.15 (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984)).

306. *Peterson*, 899 F.2d at 807.

307. *Id.*

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the Water Districts' rights under the contracts could equal indefeasible property rights.³⁰⁸

A. SOVEREIGN POWER

1. Sovereign Power and Duty to Enter and to Honor Contracts

The court first noted that as sovereign the federal government has the power to enter contracts, and a concomitant duty to honor its contracts.³⁰⁹ In the opinion, the court applied three principles to interpret the federal government's contractual agreements: 1) the federal government's sovereign power to change its contracts legislatively remains intact unless it is surrendered in unmistakable terms;³¹⁰ 2) if possible, government contracts should be construed to avoid foreclosing the exercise of sovereign authority;³¹¹ and 3) government contracts should be interpreted against the backdrop of the legislative scheme that authorized them, and interpretation of ambiguous terms or implied covenants can be made only in light of the policies underlying the controlling legislation.³¹²

2. Sovereign Power To Amend Legislation Affecting Government Contracts

The court noted that where, as in the *Sinking Fund* line of cases,³¹³ legislation has altered or repudiated the provisions of a government contract, language that expressly reserves to Congress the right to amend the act at any time is dispositive of the question.³¹⁴

The court stated, however, that the Legislature has a right to amend legislation even where the original legislation contains no express provision for subsequent amendment.³¹⁵ The sover-

308. *Id.*

309. *Id.* (citing *Public Agencies*, 477 U.S. at 52).

310. *Peterson*, 899 F.2d at 807 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

311. *Id.* (citing *Public Agencies*, 477 U.S. at 52-53).

312. *Id.* (citing *Darlington*, 358 U.S. at 87-88).

313. *Sinking Fund Cases*, 99 U.S. 700 (1878). See also *Lynch*, 292 U.S. 571 (1934); *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 170 U.S. 451 (1985).

314. *Peterson*, 899 F.2d at 808.

315. *Id.* The plaintiffs had contended that where there is no express provision in

eign power to amend subsequent legislation affecting its own contractual arrangements “endures, albeit with some limitations.”³¹⁶

The Ninth Circuit noted that Congress always has the power to amend, repeal or ignore legislation passed by earlier Congresses.³¹⁷ The court suggested that in *Public Agencies*³¹⁸ the Supreme Court had confirmed this with a statement that “Congress must surrender its sovereign power ‘in unmistakable terms’ before a court may find that Congress has yielded such power. . . .”³¹⁹

B. VESTED RIGHTS

1. Language of Contracts

Since the Reclamation Act did not contain an express provision for later amendments, the court examined the Water Districts’ contracts to determine whether, as the Districts contended, Congress had expressly surrendered its right to impose limitations on the size of leased tracts that could receive reclamation water, giving rise to a vested right in the Districts.³²⁰ The court rejected this claim, analogizing to *Darlington*.³²¹ The Ninth Circuit looked instead to the purpose of the legislation, finding that, as in *Darlington*, the interpretation the plaintiffs wanted to give the language was contrary to Congressional intent.³²²

legislation for amendment, Congress’ right to amend is limited. *Id.* at 807.

316. *Id.* at 808 (citing *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 53-54 (1986)). The court in *Peterson* noted, “the exercise of the ‘reserved power’ is not absolute . . . Congress could not rely on that power to ‘take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.’” *Peterson*, 899 F.2d at 808 n.16 (citing *Public Agencies*, 477 U.S. 41, 55 quoting *Sinking Fund Cases*, 99 U.S. 700, 720 (1878)).

317. *Peterson*, 899 F.2d at 808 (citing *Manigault v. Springs*, 199 U.S. 473 (1905)); *Sierra Club v. Froehle*, 816 F.2d 205 (5th Cir. 1987); and *Community Serv. Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113 (D.C. Cir 1978)).

318. 477 U.S. 41.

319. *Peterson*, 899 F.2d at 808 (citing *Public Agencies*, 477 U.S. at 52).

320. *Id.* at 809.

321. *Id.* at 810 (citing *FHA v. The Darlington Inc.*, 358 U.S. 84 (1958)).

322. *Id.* The court cited *California v. United States*, 438 U.S. 645 (1978); *City of Fresno v. California*, 372 U.S. 672 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1095 (9th Cir. 1976);

The court held that since the reclamation projects were funded by the federal government with the express purpose of using the subsidized water to promote the development of family-owned farms with the "end" of dismantling large landholdings in the West and the redistribution of that land to families, any other interpretation would seriously impair Congress' sovereign power to pass laws for the public welfare.³²³ The court said that it did not believe that Congress must exhaustively proscribe conduct in a regulated field to prevent parties from claiming an "implied vested right" to engage in conduct that was found by later Congresses to be harmful to the public welfare.³²⁴

The court also cited *Public Agencies*, noting that in that case a statutory amendment to the enabling legislation did not amount to a repudiation by the government of its contractual obligations.³²⁵ In *Public Agencies*, as in *Darlington*, the new provision was simply a part of a regulatory program over which Congress retained its authority to amend in the exercise of its power to provide for the general welfare.³²⁶

The court further held that the language of the contract did not contain an express waiver of Congressional power to amend the law in a way that would interfere with that right, reiterating, "[t]he contracts contain no language that can be construed as a 'surrender in unmistakable terms' of the sovereign's ability to regulate the quantity of subsidized water that may be provided to leased farm lands."³²⁷ The court applied the *Public Agencies*

and *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976) to illustrate the history and purpose of the Reclamation Act of 1902 and of the Reclamation Reform Act of 1982. The court made extensive references to legislative history to show both the facts underlying the Reclamation Reform Act and the policy that informed the Act. *Peterson*, 899 F.2d at 802-06. The Ninth Circuit suggested, "[t]he implied right asserted here clearly violates the spirit, if not the letter, of the reclamation laws which authorized such contracts." *Id.*

323. *Peterson*, 899 F.2d at 811. This was regardless of the Department of the Interior's contrary actions. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* (quoting from *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 55 (1986)). The court in *Peterson* noted, "[i]f anything, California had a greater claim to a vested right in *Public Agencies* than do the Water Districts in this case because in *Public Agencies* the federal government had incorporated in an agreement with the states an express promise that they could withdraw from the social security system." *Peterson*, 899 F.2d at 811.

327. *Id.* at 812. The court looked to *Public Agencies*, 477 U.S. at 52, for the lan-

principle of construing government contracts to avoid foreclosing the exercise of sovereign authority whenever possible.³²⁸ A reasonable interpretation of the contract language was that the Districts were merely given a choice between renegotiating their contracts so as to conform with the new law or withdrawing from the reclamation program altogether.³²⁹ The Districts did not receive the right to receive water under pre-existing contracts that violated new amendments to the statute.³³⁰ The Districts only option for receiving subsidized water was to conform to the new law.³³¹ The court further noted that this interpretation was reasonable in light both of the *Public Agencies* principle and of the contract language itself, which provided that where there was Congressional amendment of reclamation law, the Water Districts' actions must be "consistent with the provision of such repeal or amendment."³³²

2. Reasonable Investment-Backed Expectations

The court briefly addressed the Water Districts' claims of "reasonable investment backed expectations."³³³ The Districts claims had relied³³⁴ on these expectations in making the contracts and contended that the expectations would amount to a property interest protected by the fifth amendment.³³⁵ The court distinguished *Ruckelshaus v. Monsanto Co.*,³³⁶ noting that the *Ruckelshaus* proposition that a reasonable investment-backed expectation is "one of several" factors taken into account in a taking inquiry is relevant only where the court has already

guage concerning a surrender in unmistakable terms. *See also* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

328. *Peterson*, 899 F.2d at 812 (citing *Public Agencies*, 477 U.S. at 53).

329. *Peterson*, 899 F.2d at 812.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Peterson*, 899 F.2d at 813.

334. *Peterson*, 899 F.2d at 812. The court suggested that the "argument takes on the flavor of an equitable estoppel claim against the government." *Id.* at 813 n.18.

335. *Peterson*, 899 F.2d at 812. The water districts had argued that their expectation of subsidized water was reasonable based on the law that was in effect at the time the contracts were made. *Id.* at 813 (citing Appellants' Opening Brief at 36). The Districts claimed that the new statute destroyed their expectations. *Peterson*, 899 F.2d at 813.

336. 467 U.S. 986, 1005 (1986).

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found a vested right subject to fifth amendment protection.³³⁷ In *Peterson*, there was no protectable vested right, and certainly not one created by the plaintiffs' investment backed expectations.³³⁸

3. Due Process

The Ninth Circuit found that since there was no vested property right in the Water Districts, there could be no due process claim under the Takings Clause of the fifth amendment.³³⁹ In the absence of a vested property right, due process would apply only if the Districts could show that the Hammer Clause was "arbitrary and irrational."³⁴⁰ The court upheld the district court's decision that the Hammer Clause was rationally related to a legitimate governmental purpose,³⁴¹ and said therefore, the clause was not arbitrary or irrational.³⁴² The court relied on the provisions of the Act, together with its legislative history, to conclude that Congress's primary concerns were not with the federal budget,³⁴³ but with the promotion of family farming.³⁴⁴

V. CRITIQUE

A. ISSUES DECIDED BY NINTH CIRCUIT

1. Sovereign Right to Amend

The cases relied on by the Ninth Circuit in deciding *Peterson* indicate that the federal government, as sovereign, may pass statutes that retroactively change the rights of non-federal parties to contracts, even if the contract is with the government.³⁴⁵

337. *Peterson*, 899 F.2d at 813.

338. *Id.*

339. *Id.*

340. *Id.* (citing *Gray*, 467 U.S. at 729).

341. *Peterson*, 899 F.2d at 813 (citing 128 CONG. REC. 8809 (1982)(statement of Rep. Clausen); H.R. REP. No. 458, 97th Cong., 2d Sess. 34 (1982)(statement of Rep. Miller)).

342. *Peterson*, 899 F.2d at 813.

343. *Id.* at 813 n.20 (citing *Public Agencies*, 477 U.S. at 55). The Court emphasized that "[t]he Due Process Clause prevents Congress from 'repudiat[ing] its own debts . . . simply in order to save money' and also from modifying an existing contract to which the United States is a party if the legislation deprives the other party of contract benefits 'actually reduced to possession.'" *Id.*

344. *Peterson*, 899 F.2d at 813 n.19.

345. *Peterson v. Department of the Interior*, 899 F.2d 799 (9th Cir. 1990). Cases cited by the Ninth Circuit in support of the sovereign right to amend contracts included *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986); *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 541 (1985); *Pension*

In *Peterson* the Water Districts entered into water delivery contracts with the Bureau of Reclamation with ample notice that the terms of the contract might be changed by Congress.³⁴⁶ The Water Districts and their individual members had reason to know that their contracts with the Bureau of Reclamation were subject to change, even if there were no express provision in the statute or in the contracts for amendment at the option of the government.³⁴⁷

2. Contract Rights

*Bowen v. Public Agencies Opposed to Social Security Entrapment*³⁴⁸ and *FHA v. The Darlington, Inc.*³⁴⁹ were the opinions cited most extensively by the Ninth Circuit in support of a finding that the Water Districts' contract rights were not constitutionally protected property rights.³⁵⁰ In these, as in other Supreme Court decisions governing retroactive impairment of contracts by the federal government,³⁵¹ the contracts did not confer vested rights partly because the non-federal parties were consid-

Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Perry v. United States*, 294 U.S. 330, 350-51 (1935); *Lynch v. United States*, 292 U.S. 571, 576-77 (1934); *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Sinking Fund Cases*, 99 U.S. 700, 730 (1878); *Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987); *Community Serv. Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113 (D.C. Cir. 1978).

Some of the same cases were cited for the same proposition in *Barcellos & Wolfson, Inc. v. Department of the Interior*, 899 F.2d 814 (9th Cir. 1990). See *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985); *Lynch v. United States*, 292 U.S. 571, 579 (1934). In *Barcellos & Wolfson* the panel also cited *Horowitz v. United States*, 267 U.S. 458, 461 (1925).

346. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The case law supporting this principle is consistent and significantly predates the Water Districts' contracts. See *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Lynch v. United States*, 292 U.S. 571, 576-77 (1934); *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Sinking Fund Cases*, 99 U.S. 700 (1878).

347. *Peterson*, 899 F.2d at 808.

348. 477 U.S. 41 (1986).

349. 358 U.S. 84 (1958).

350. *Peterson*, 899 F.2d at 813.

351. *E.g.*, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990); *Western Fuels-Utah v. Lujan*, 895 F.2d 780 (D.C. Cir. 1990); *Education Assistance Corp. v. Cavazos*, 902 F.2d 617 (8th Cir. 1990); *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990).

ered to have adequate notice that the government could amend.³⁵²

In pursuing an analogy between *Peterson* and *Darlington* the Ninth Circuit implied that a further reason for not considering the Districts' contract rights to be vested was that the contracts were entered into under a comprehensive regulatory scheme.³⁵³ In a number of decisions on retroactivity, the Supreme Court has noted that when a nonfederal party has entered into the contract in order to receive the benefits of pursuing the activity regulated, it is therefore expected to assume the burdens as well.³⁵⁴ In *Peterson* the Water Districts and their members were participating in the Central Valley Project in order to receive low-cost irrigation water.³⁵⁵ As in *Darlington*,³⁵⁶ the Water Districts had also been benefiting from administrative failure to enforce some aspects of the program.³⁵⁷ However, in neither *Darlington* nor *Peterson* did such previous non-enforcement bestow an implied vested right to continue to engage in conduct that was later found by Congress to be harmful to the public welfare.³⁵⁸

3. Judicial Interpretation

Reliance on *Public Agencies*³⁵⁹ and *Darlington*³⁶⁰ permitted the Ninth Circuit to adhere to principles of construction that required it to avoid constitutional issues.³⁶¹ The court also

352. *Peterson*, 899 F.2d at 808, 811.

353. *Id.* at 807, 811.

354. *United States v. Locke*, 471 U.S. 84, 105 (1985); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). See *Barcellos & Wolfson, Inc. v. Westland Water Dist.*, 899 F.2d 814, 817 (9th Cir. 1990) (RRA created a new regime of benefits and burdens for excess landowners).

355. *Peterson*, 899 F.2d at 810.

356. *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958).

357. *Peterson*, 899 F.2d at 811.

358. *Id.*

359. 477 U.S. 41 (1986).

360. 358 U.S. 84 (1958).

361. See *Barcellos & Wolfson, Inc. v. Westland Water Dist.*, 899 F.2d 814, 821 (9th Cir. 1990) (citing *Johnson v. Robison*, 415 U.S. 361 (1974)). In *Barcellos & Wolfson* landowners, suing the Water District, suggested that a court, given two possible interpretations of a statute should "stretch" to find the construction that does not raise a "serious" constitutional question. *Id.* The court noted that while this was true, there was no need for the court to "play the role of contortionist" to avoid constitutional issues. *Id.* However, since the court did not find a constitutionally protected right in *Barcellos & Wolf-*

avoided an interpretation of any possible ambiguities that would limit the exercise of sovereign authority.³⁶² The decision was made in light of the legislative purpose³⁶³ that informed both the Reclamation Act of 1902³⁶⁴ and the Reclamation Reform Act,³⁶⁵ rather than merely relying on the plain language of the statute or the contracts.³⁶⁶

4. Policy

In *Peterson* the court analyzed the Districts' water delivery contracts in light of legislative intent.³⁶⁷ The court relied on *Darlington*³⁶⁸ to hold that a literal interpretation of the contracts could result in an outcome that directly violated Congressional purpose.³⁶⁹ This approach was consistent with that applied in the Reclamation Act decisions on which the court relied to illustrate Congressional purpose with respect to the Reclamation Acts,³⁷⁰ as well as with the approach of the retroactivity cases preferred by the Ninth Circuit.³⁷¹

sen, no constitutional issue arose in any case. *Id.*

362. *Peterson*, 899 F.2d at 812 (citing *Bowen v. Public Agencies Against Social Sec. Entrapment*, 477 U.S. 41, 52-53 (1986)).

363. *Peterson*, 899 F.2d at 807 (citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 87-88 (1958)). The court in *Barcellos & Wolfson* also grounded the opinion in legislative intent, although in *Barcellos & Wolfson* the language would have been enough. *Barcellos & Wolfson, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 824 (9th Cir. 1990).

364. 43 U.S.C. §§ 371-616 (1989).

365. 43 U.S.C. §§ 390aa-390zz-1 (1989).

366. *Peterson*, 899 F.2d at 810. The Districts' contracts expressly provided that the contracts could be amended at the option of the Water Districts, if legislation were altered. *Id.* at 809, 812. The Ninth Circuit interpreted this provision as giving the Districts the choice of amending to conform with new laws or staying with the provisions of the old law. *Id.* at 812. It also seems possible to draw the inference from the express contract provision in favor of the Districts, however, that the government's right to amend the contracts to conform to new legislation was implicit, whereas that of the Districts was not. If that were so, there would have been no need to include an express provision permitting contract amendment by the government.

367. *Id.* at 802-07.

368. 358 U.S. 84 (1958).

369. *Peterson*, 899 F.2d at 810.

370. *E.g.*, *California v. United States*, 438 U.S. 645 (1978); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1095 (9th Cir. 1976).

371. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986); *National R.R. Passenger Corp. v. Atchinson, T. & S.F. Ry.*, 470 U.S. 541 (1985); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958).

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B. ISSUES NOT EXAMINED BY NINTH CIRCUIT

1. Standing

Under the Ninth Circuit's test for standing in Reclamation Act cases,³⁷² the Districts had not met the first or last prongs of the three-part standing test.³⁷³ First, the Districts had not suffered an injury in fact by the government's actions.³⁷⁴ The right asserted by the Water Districts was a statutory and contractual right to receive water from the federal government and pass it on to landowners.³⁷⁵ To meet the actual injury prong of the standing test, the Districts would have had to show the ways in which deprivation of this right injured them.³⁷⁶

It is not easy to see how implementation of the RRA, which provides that the districts must change their contracts with their customers or charge them full price, would constitute an injury to the Water Districts, when their statutory function is to facilitate implementation of the law.³⁷⁷ If the federal government were simply going to charge the Water Districts more, the Districts could presumably pass the extra costs on to individual landowners.

The remedy sought also did not meet the third prong of the standing test, redressability.³⁷⁸ The remedy sought by the Water Districts was a declaration that the "Hammer Clause" was unconstitutional.³⁷⁹ Under the facts of *Peterson*, a declaration that

372. *United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977); *Bowker v. Morton*, 531 F.2d 1347 (9th Cir. 1976).

373. *Bowker*, 531 F.2d at 1349.

374. *Imperial Irrigation Dist.*, 559 F.2d 509; *Bowker*, 531 F.2d 1347.

375. *Peterson*, 899 F.2d at 801.

376. *Imperial Irrigation Dist.*, 559 F.2d 509; *Bowker*, 531 F.2d 1347.

377. *Peterson*, 899 F.2d at 804. See 43 U.S.C. §§ 423e (1989); CAL. WATER CODE §§ 11102; 20500-26875; 34150-37214 (West 1984 & Supp. 1991).

378. *Bowker*, 531 F.2d at 1349.

379. *Peterson*, 899 F.2d at 801. In *Barcellos & Wolfson* the court observed that the remedy sought by landowners against Westlands Water District was specific performance on "a contract that they argue[d] entitle[d] them to subsidized water for as long as they own their lands," rather than compensatory damages. *Barcellos & Wolfson*, 899 F.2d 814, 823 (9th Cir. 1990). Even when there has been a taking of vested rights, the Supreme Court favors compensation as a remedy. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984); *California v. United States*, 438 U.S. 645, 671 (1978); *Dugan v. Rank*, 372 U.S. 609 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 290 (1958); *United*

the RRA was unconstitutional could have put the Districts in a worse position than they would enjoy if it were allowed to stand. The Bureau of Reclamation might then have enforced the more stringent acreage or repayment requirements of the original Reclamation Act.³⁸⁰

Although the Districts might not have had standing on their own, they might have had it as representatives of the landowners. The theories under which such representation could have conferred standing are: 1) the Water Districts were essentially a trade association;³⁸¹ 2) the State was suing the federal government *in parens patriae*,³⁸² or 3) the Districts were suing on behalf of third party beneficiaries of the contracts.³⁸³ The Districts are more likely to be a traditional government agency than a trade association, since they are established by state law to redistribute irrigation water.³⁸⁴ The *in parens patriae* right is asserted by the state itself, not by state agencies like the Water Districts.³⁸⁵ Of the three, the third-party beneficiary approach was expressly recognized by the Ninth Circuit in *Barcellos & Wolfson, Inc. v. Westlands Water District*.³⁸⁶ In *Peterson* such right was also acknowledged, at least implicitly.³⁸⁷ The Districts were apparently the intended beneficiaries of the contracts.³⁸⁸

States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). Thus, although the landowners might have been able to allege breach of contract, such a breach could not have been redressed by the remedy the landowners requested. *Barcellos & Wolfson*, 899 F.2d at 820.

380. *Peterson*, 899 F.2d at 814. The Ninth Circuit noted that any water district that wanted to retain the lower contract price and the 160-acre ownership limit, rather than amending its contracts, was free to do so. *Id.*

381. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977); *Washington State Dairy Prod. Comm'n v. United States*, 685 F.2d 298 (9th Cir. 1982).

382. *United States v. Nevada*, 412 U.S. 534, 535 (1973); *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945).

383. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819 (9th Cir. 1985).

384. *Washington State Dairy Prod. Comm'n v. United States*, 685 F.2d 298 (9th Cir. 1982).

385. *United States v. Nevada*, 412 U.S. 534, 535 (1973); *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945).

386. 899 F.2d 814, 816 (9th Cir. 1990).

387. *Peterson*, 899 F.2d at 801 n.1. The court stated that landowners did not have any rights in reclamation water that was not dependent on the Water Districts' contractual right to the water. *Id.* However, it also seems possible that the Water Districts may not have any right to the water that is not dependent on the landowners' third-party rights.

388. *Peterson*, 899 F.2d at 801 n.1. See *Karo*, 762 F.2d 819.

2. Property Rights

Ruckshaus v. Monsanto Co.,³⁸⁹ *Lynch v. United States*³⁹⁰ and the *Sinking Fund Cases*³⁹¹ emphasized that the sovereign right to amend stops short when a vested property right is touched by a retroactive statute.³⁹² In *Peterson* the Ninth Circuit acknowledged this limit in citing a passage from *Bowen v. Public Agencies Against Social Security Entrapment*³⁹³ that listed the kinds of contract rights that could be considered vested under a retroactive statute.³⁹⁴

In *Peterson*, the court decided that *because* the Districts' contract rights arose under circumstances that clearly permitted the sovereign to amend,³⁹⁵ the contracts could not have conferred vested rights.³⁹⁶ As in *Peterson*, the *Barcellos & Wolfsen* panel used only retroactivity cases³⁹⁷ to determine whether the plaintiffs had a protectable right. The analysis could be reversed. The Ninth Circuit could have looked at the nature of the rights first to see whether under other state or federal criteria any rights had vested, and then could have determined whether

389. 467 U.S. 986 (1984).

390. 292 U.S. 571 (1934).

391. 99 U.S. 700 (1878).

392. *Lynch*, 292 U.S. at 577; *Sinking Fund Cases*, 99 U.S. at 718-19.

393. 477 U.S. 41 (1986).

394. *Peterson v. Department of the Interior*, 899 F.2d 799, 811 (9th Cir. 1990) (quoting *Public Agencies*, 477 U.S. at 55). The passage from *Public Agencies* listed debts of the United States (probably a reference to *Perry v. United States*, 294 U.S. 330, 350-51 (1935)), obligations of the United States for which the obligee had paid a monetary premium (probably a reference to *Lynch v. United States*, 292 U.S. 571 (1934)), and provisions specific to the particular contract, for which the non-federal party had bargained and had given consideration, as rights that could be constitutionally protected. *Peterson*, 899 F.2d at 811 (quoting *Public Agencies*, 477 U.S. at 55).

395. *Peterson*, 899 F.2d at 811. The right to amend had not been surrendered in unmistakable terms. *Id.* at 812. The statute amended was a comprehensive regulatory scheme, in which nonfederal parties could expect Congressional amendment. *Id.* at 810-11.

396. *Peterson*, 899 F.2d at 813. A similar analysis was used for the due process challenge in *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990). The Ninth Circuit cited *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985) to illustrate the principle that the first step in a due process analysis of a contract right is to show that a contract right exists. *Barcellos & Wolfsen*, 899 F.2d at 821. The second step is to show substantial impairment of the right. *Id.* As in *Peterson*, the court found in *Barcellos & Wolfsen* that since no constitutionally protected right existed, there was no need to pass on to the second step of the inquiry. *Id.*

397. *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451 (1985); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732-33 (1984); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Horowitz v. United States*, 267 U.S. 458 (1925).

any vested rights had been reached by the retroactive statute.

In *Barcellos & Wolfsen, Inc. v. Westlands Water District*³⁹⁸ the court, citing *Lynch*³⁹⁹ implied that the rights of landowners against Water Districts *could* equal property rights, at least for due process purposes,⁴⁰⁰ if not for taking purposes.⁴⁰¹ This conclusion leaves open the question as to whether, under retroactivity cases, there are any circumstances in which a contract right to receive reclamation water could be a vested right.

3. Water Rights

In *Peterson* the extensive body of reclamation law was used only to illustrate Reclamation Act history and legislative policies.⁴⁰² The assumption the Ninth Circuit seemed to have made in *Peterson*, as did the Supreme Court in *Ivanhoe Irrigation District v. McCracken*,⁴⁰³ was that water, once appropriated to the federal government, becomes its property and is subject to federal control.⁴⁰⁴ The issue of whether federal or California law determines the nature of rights to receive subsidized irrigation water might require a different analysis from that in *Peterson*, however, if the Ninth Circuit took into account two more recent Supreme Court decisions on the Central Valley, *California v.*

398. 899 F.2d 814 (9th Cir. 1990).

399. 292 U.S. 571, 579 (1934) (rights against the United States arising out of a contract with it are property rights).

400. *Barcellos & Wolfsen*, 899 F.2d at 821. It was the *Barcellos & Wolfsen* plaintiffs' failure to fulfill contract conditions, including timely repayment of capital costs that caused their due process claim to fail. *Id.* The difference between this conclusion and that of the panel in *Peterson* may simply be a reflection of the different facts in *Barcellos & Wolfsen*. For example, the contracts involved are to be interpreted under state, rather than federal law. *Roos-Collins*, *supra* note 21 at 848. The challenged law is an amendment to the RRA that was passed after a stipulated judgment in favor of the landowners was handed down. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 819 (9th Cir. 1990). In *Peterson* there had been no prior judgment.

401. *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982).

402. *Peterson v. Department of the Interior*, 899 F.2d 799, 802-06 (9th Cir. 1990). See *California v. United States*, 438 U.S. 645 (1978); *City of Fresno v. California*, 372 U.S. 672 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1095 (9th Cir. 1976); *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976).

403. 357 U.S. 275 (1958).

404. *Peterson*, 899 F.2d at 803 ("Congress prohibited the *sale of project water*" to non-resident landowners) (emphasis added).

*United States*⁴⁰⁵ and *Bryant v. Yellen*⁴⁰⁶ and applied section 8 of the Reclamation Act.⁴⁰⁷

If the Ninth Circuit were to interpret the *Peterson* facts under *California v. United States*⁴⁰⁸ the court might find that the ultimate disposition of irrigation water was a matter to be determined according to state law under section 8 of the Reclamation Act.⁴⁰⁹ If, as in *Bryant v. Yellen*,⁴¹⁰ any state law water rights had vested in the Water Districts, or in their member landowners, there could then have been a valid fifth amendment claim.⁴¹¹

Under *California v. United States*,⁴¹² the State of California would have an interest in the allocation of irrigation water that would supersede that of either the federal government or of individual irrigators because of the precisions of section 8 of the Reclamation Act.⁴¹³ However, the Ninth Circuit might be presented with a choice between *California v. United States* and the most recent Supreme Court declaration on section 8 language, *California v. Federal Energy Regulation Commission*.⁴¹⁴ Although *California v. United States* was distinguished in *FERC*, the latter case would be more consistent with the approach under *Peterson*.

4. Fifth Amendment Considerations

If there were any vested property rights involved in *Peterson*, whether by contract or by state water law, the rights would need to be analyzed in terms of the Taking⁴¹⁵ and Due Process Clauses of the fifth amendment.

405. 438 U.S. 645 (1978).

406. 447 U.S. 352 (1980).

407. 43 U.S.C. § 383 (1989).

408. 438 U.S. 645 (1978).

409. 43 U.S.C. § 383 (1989).

410. 447 U.S. 352 (1980).

411. *Bryant v. Yellen*, 447 U.S. at 372-73.

412. 438 U.S. 645.

413. 43 U.S.C. § 383 (1989).

414. 110 S. Ct. 2024 (1990).

415. U.S. CONST. amend. V. Since the Taking Clause is limited to "private property," it is unclear on what basis the Districts would raise a taking claim.

Although the Ninth Circuit did not undertake a taking or due process analysis, the panel indicated the way these issues might be decided if a vested right were to be found. If the right to receive water were found to be a state-law-defined right, a taking question would then be raised. However, to establish a taking, the rights would need to be well-established as the riparian owners' rights were in *United States v. Gerlach Live Stock Co.*⁴¹⁶ The Ninth Circuit noted that under *Ruckelshaus v. Monsanto Co.*,⁴¹⁷ once a vested right in an incorporeal property⁴¹⁸ is found, a "reasonable investment-backed expectation" is only one of several factors to be taken into account in a taking analysis.⁴¹⁹ In *Monsanto*, another of these factors was the nature of the governmental action.⁴²⁰ When the area in which the amendment was made was known to be a subject of public concern and government regulation⁴²¹ and when the party claiming the right was aware of conditions attaching to its property,⁴²² there was still no taking.⁴²³ It could be said of the Water Districts and their customers that they too were operating in an area of public concern and extensive regulation⁴²⁴ and were aware of the conditions attaching to their participation.⁴²⁵ The Ninth Circuit has expressed in *Peterson* the conviction that the Water Districts' expectations did not meet the standard of "distinct investment backed expectations." As in *Monsanto*, the government action was a statute amending a comprehensive regulatory scheme. It is also doubtful that the Districts or their members could have been shown to have suffered a significant economic loss, under

416. 339 U.S. 725 (1950).

417. 467 U.S. 986 (1984).

418. The extent to which the right to receive federal water is viewed as a physical property would determine the Taking analysis that would apply, since a different standard is used for physical property. *E.g.* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). *Compare* *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

419. *Peterson*, 899 F.2d at 813. *See* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1986).

420. *Monsanto*, 467 U.S. at 1005.

421. *Id.* at 1007.

422. *Id.*

423. *Id.*

424. *Peterson*, 899 F.2d at 811.

425. *Id.* (citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) to emphasize the "ever present possibility" that Congress would amend the reclamation laws).

the third prong of the *Monsanto* test.

The Ninth Circuit disposed of the Districts' due process claim on the basis that only contract rights were involved, and applied the "arbitrary and irrational" standard.⁴²⁶ However, the court indicated that even if property rights were claimed, they would have to be "practical, substantial rights"⁴²⁷ to sustain a due process claim.⁴²⁸ If the Districts' rights *were* shown to be property rights under section 8⁴²⁹ of the Reclamation Act, due process would require a similar rational relationship standard.

5. Policy

The *Peterson* decision was founded on legislative intent.⁴³⁰ A question remains unanswered by the Ninth Circuit in *Peterson*, and in *Barcellos & Wolfsen* as well; this is whether the Reclamation Act, even as revised by the RRA, addresses purposes that can be realized.⁴³¹ It is not certain that in the Central Valley a farm of 960 acres is significantly more sustainable than a farm of 160 acres. It may be that a more realistic purpose for subsidized water is production, as stated in the Bureau of Reclamation rules.

VI. CONCLUSION

The Ninth Circuit's holding in *Peterson* was economical and efficient. The court apparently did not wish to take the opportunity to address the issues of state law control or ownership of water. The constitutional issue of taking was avoided. The opinion is structured to preserve the status quo. The Ninth Circuit preserved adherence to the legislative purpose that had in-

426. *Peterson*, 899 F.2d at 813 (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)).

427. *Peterson*, 899 F.2d at 813 (citing *Darlington*, 358 U.S. at 91).

428. *Peterson*, 899 F.2d at 813. In a similar vein, the Supreme Court observed in *Monsanto* that a "reasonable investment-backed expectation" should be based on more than a unilateral expectation or need. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984).

429. 43 U.S.C. § 383 (1989).

430. *Peterson*, 899 F.2d at 814.

431. See 43 C.F.R. § 230.68 (1990): "The purpose . . . is to secure the reclamation of arid or semiarid lands and to render them productive The final and only conclusive test of reclamation is production."

formed Reclamation Act decisions since 1937. While it was proper for the court to make the decision in *Peterson* as it did, the questions raised by a contrast between *Peterson* and *Barcellos & Wolfsen* emphasize that *Peterson* is a fairly fact-specific decision.

As has been noted, there is a recent increase in cases that have focused on questions of what constitutes a vested right, and the extent to which government may infringe on incorporeal rights. *Peterson* and *Barcellos & Wolfsen* offer two differing interpretations of the issue of vested rights, since the result of the cases is effectively the same, they do not offer a square conflict of holdings. We may expect further actions designed to force court decisions on two issues: what constitutes a vested right under a retroactive statute; and whether federal or state law determines what a property right in water is.

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