TAKING DRY LAND UNDER NAVIGABLE WATERS: THE FRIANT DAM RETURNS TO THE DOCKET

INTRODUCTION

The Friant Dam, located in California's San Joaquin River Valley, cannot stay out of the courtroom. Only a few years ago, a legal battle over the dam that has spanned two decades finally reached settlement.[1] The result of the compromise can be found in Congress's passage of the Omnibus Public Land Management Act of 2009.[2] Among other things, the Act mandates the renewed flow of water to the San Joaquin River, which has been dry for nearly seven decades, by opening flow valves in the Friant Dam.[3] The purpose of increasing the flow is to achieve a water level sufficient to allow the threatened Chinook salmon to return to their native spawning grounds.[4]

However, on August 26, 2010, several farmers filed suit claiming that the restoration of water flows in the San Joaquin River will result in a violation of their constitutionally protected private property rights.[5] The farmers have several theories of relief,[6] including a claim of ownership of the dry San Joaquin riverbed that has been leveled and farmed for the last six decades.[7] They argue that the excavation of the channel and the subsequent flooding of the riverbed will result in a taking of their land without just compensation under the Fifth Amendment.[8]

Part I of this Note summarizes the history of the Friant Dam, the litigation leading to the recent settlement, and the terms of the settlement itself. Part II describes the pending takings litigation, focusing on the ownership of the San Joaquin riverbed. Part III discusses the alleged property interest in the riverbed claimed by the farmers and concludes that

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1. This litigation resulted in four different decisions. For a complete summary of these cases, see Nathan Matthews, *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*, 34 ECOLOGY L.Q. 1109 (2007).

2. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991, 1349–67 (2009), *available at* http://www.gpo.gov/fdsys/phg/PLAW-111publ11/pdf/PLAW-111publ11.pdf. The Act was originally named the San Joaquin River Restoration Settlement Act of 2009 because it was grouped with 160 other bills relating to public land management. *H.R. 146—Omnibus Public Land Management Act of 2009*, OPEN CONGRESS, http://www.opencongress.org/bill/111-h146/show (last visited Dec. 6, 2010).

3. Omnibus Public Land Management Act § 10004(a)(2).

4. *Id.* § 10011.

5. Complaint at 25, Wolfsen Land & Cattle Co. v. United States, No. 10-580L (Fed. Cl. Aug. 26, 2010).

6. The complaint consists of eleven counts, including the taking of water rights, land by flooding, and damage due to severance of the property. *Id.* at 15–24.

7. *Id.* at 23.

8. *Id.*

the courts will likely reject the farmers' claims of ownership. Finally, Part IV explores the court's likely takings analysis in the event that the farmers do have a valid property interest.

I. THE FRIANT DAM AND PRIOR LITIGATION BACKGROUND

At 330 miles long, the San Joaquin River is the second longest river in California.[9] The river begins in the Sierra Nevada Mountain Range, then flows west into California's Central Valley before eventually turning north until it joins the Sacramento River, which drains into San Francisco Bay through the Sacramento–San Joaquin River Delta.[10]

The Bureau of Reclamation constructed the Friant Dam on the San Joaquin River to provide irrigation water to semi-arid land that could not otherwise be farmed.[11] Prior to the construction of the dam, the landowners sought an injunction to prevent construction of another proposed project at the site.[12] The court granted an injunction preventing waters from being stored at the site where the Friant Dam now stands.[13] The court reasoned that the project would allow a company to monopolize the water and harm the landowners downstream who used it for their own farms.[14] The fallout from this decision was so great that California passed a constitutional amendment limiting water rights across the state.[15] When the Friant Dam was proposed several decades later, downstream landowners filed another suit. On appeal, the U.S. Supreme Court held that, in order for the project to continue, the federal government had to pay just compensation to the affected farmers for depriving them of their water rights.[16]

Despite the opposition, the government completed construction of the dam in 1942 and dug two irrigation canals, the Madera Canal and the Friant-Kern Canal.[17] These two canals diverted almost all of the water impounded by the dam, leaving a stretch of 60 to 100 miles of the former

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9. *California: San Joaquin River and Wetlands*, THE NATURE CONSERVANCY, http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/california/placesweprotect/san-joaquin-river-and-wetlands.xml (last visited Mar. 24, 2012).

10. Complaint at 7–8, Wolfsen Land & Cattle Co. v. United States, No. 10-580L (Fed. Cl. Aug. 26, 2010).

11. Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1123 (9th Cir. 1998).

12. Matthews, *supra* note 1, at 1111.

13. *Id.*

14. *Id.* (citing Herminghaus v. S. Cal. Edison Co., 252 P. 607, 612 (Cal. 1926)).

15. *Id.* at 1111–12 (citing CAL. CONST. art. X, § 2).

16. *Id.* at 1112.

17. *Id.*

San Joaquin riverbed effectively dry for the past sixty-three years.[18] The Bureau of Reclamation then conveyed rights to the impounded water to twenty-eight different entities through forty-year contracts.[19]

Ecologically, the diversion of the water and creation of a dry riverbed devastated the Chinook salmon that used the San Joaquin River as an annual migration route.[20] In 1989, over four decades after the Friant Dam was completed, the National Marine Fisheries Service listed the Chinook salmon as threatened under the Endangered Species Act (ESA).[21] Several environmental groups had already challenged the lack of environmental analysis prior to the renewal of the water contracts as a violation of the National Environmental Policy Act (NEPA).[22] The groups argued that the Bureau of Reclamation had violated NEPA by failing to produce an Environmental Impact Statement (EIS) to assess the environmental impacts of continued dam operations under renewed contracts.[23] After the salmon was designated as threatened, the environmental groups amended the complaint to assert violations of the ESA as well.[24] They also alleged violations of section 8 of the Federal Reclamation Act of 1902, which they claimed compelled the Bureau of Reclamation to act in accordance with the California fishery law.[25]

After a long courtroom battle, the environmental groups and the government reached a settlement agreement on September 13, 2006.[26] The agreement required Congress to enact settlement-implementing legislation, establishing three basic mandates.[27] First, the Bureau of Reclamation had to make improvements to the San Joaquin River channel as needed to guarantee the channel's ability to handle the increased flow.[28] Second, the

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18. Complaint at 9, Wolfsen Land & Cattle Co. v. United States, No. 10-580L (Fed. Cl. Aug. 26, 2010) (indicating that the riverbed has flow during extreme flood events).

19. Matthews, *supra* note 1, at 1112.

20. *Id.* at 1113.

21. Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1124 (9th Cir. 1998). The Chinook Salmon are currently listed as endangered. *Chinook Salmon,* NOAA OFFICE OF PROTECTED RES., http://www.nmfs.noaa.gov/pr/species/fish/chinooksalmon.htm (last visited Mar. 24, 2012).

22. *Houston*, 146 F.3d at 1124.

23. *Id.*

24. *Id.*

25. Matthews, *supra* note 1, at 1123. Section 8 of the Reclamation Act of 1902 states that nothing in the Act interferes with the laws that are traditionally the jurisdiction of the States to regulate. Reclamation Act of 1902, Pub. L. No. 161, ch. 1093, § 8, 32 Stat. 388, 390 (1902). Section 5937 of the California Fish and Game Code requires owners of dams to provide for a fishway or enough flow to pass over so it does not hinder fish migrations. CAL. FISH & GAME CODE § 5937 (West 1998).

26. Matthews, *supra* note 1, at 1130.

27. Complaint at 12–13, Wolfsen Land & Cattle Co. v. United States, No. 10-580L (Fed. Cl. Aug. 26, 2010).

28. *Id.* at 13.

Bureau of Reclamation was required to open the flow valves in increasing intervals to restore the flow to a level suitable for Chinook salmon to migrate upstream.[29] Finally, after all of the improvements are finished, the federal government must reintroduce Chinook salmon to the San Joaquin River.[30]

II. THE FRIANT DAM GOES BACK ON THE DOCKET

As a result of the settlement, the Bureau of Reclamation opened a bypass valve on October 2, 2009, releasing over 83,000 gallons of water per minute into the river channel.[31] This release, combined with a second flow increase in February 2010, resulted in a flow rate just shy of 720,000 gallons per minute.[32] Under the terms of the settlement, the flow rates are set to continue to increase, without a specified goal.[33]

The Wolfsen Land and Cattle Co. (Wolfsen) and others own land downstream from the Friant Dam. On August 26, 2010, these landowners filed suit in the U.S. Court of Federal Claims seeking just compensation for the increased flow under the Takings Clause of the Fifth Amendment.[34] The eleven-count complaint includes several takings claims based on differing theories, including an alleged taking of the landowners' water interests, a taking as a result of inundation of the owners' private property, and a taking due to the expansion of the floodwater easement granted by the landowners.[35] The main focus of this Note is count 11, which states in its entirety: "Plaintiffs Wolfsen Entities own the land known as Reach 4B (or substantial portions thereof). The U.S. Bureau of Reclamation's excavation and then release of continuous fish water upon any of the Reach 4B, is therefore a taking of Plaintiff Wolfsen's solely owned private property without just compensation."[36]

Reach 4B is the stretch of the original San Joaquin riverbed that has been dry since the irrigation channels diverted the flow in 1942.[37] This reach has become flattened and has been farmed "virtually continuously"

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29. *Id.*
30. *Id.*
31. *Id.* at 14.
32. *Id.* at 15.
33. *Id.*
34. *Id.*
35. *Id.* at 16–23.
36. *Id.* at 23.
37. *See id.* at 9; U.S. BUREAU OF RECLAMATION, http://www.usbr.gov/mp/PA/images/reach4b_500.jpg (last visited Mar. 24, 2012) (map of Reach 4B of the San Joaquin River).

for the last sixty-three years.[38] Count 11 suggests ownership of both Reach 4B itself and the land that is currently filling it in. The following sections focus solely on the farmers' ownership claims over Reach 4B.

III. DEFINING THE PROPERTY INTEREST

Courts undertake several steps when examining takings claims. First, takings analysis questions the existence and nature of the plaintiff's asserted property interest.[39] This may be merely a fleeting thought in the mind of a judge when the existence of the property is obvious, such as when the government appropriates someone's home for public use.[40] In other cases, however, the property interest issue may be the main focus of the litigation.[41] For example, in *Wolfsen*, Reach 4B has been subject to several relevant events in which its ownership might have changed hands.

This Part explores the property interest at stake in *Wolfsen* through an analysis of the ownership of Reach 4B over time. The analysis begins by discussing who had ownership at the moment of California's statehood, when the river was unhindered. The next Part addresses whether ownership changed the moment the dam closed its doors and Reach 4B ceased flowing. Next, ownership might have changed after the dam was completed and the flow to the riverbed ceased. After the riverbed dried, sixty years passed before the government asserted dominion over the land, possibly affecting its ownership claim. Finally, the experimental flow increases have reclaimed the land, which also could affect title. This Part also addresses several alternative arguments the farmers might make in an attempt to establish a property interest. These arguments are discussed individually.

A. Who Initially Owned Reach 4B?

Ownership analysis of Reach 4B of the San Joaquin River necessarily has to proceed chronologically. At the time of statehood, when the water in the river was flowing freely, California owned Reach 4B. In the famous

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38. However, the complaint does not mention how the reach was filled. Complaint at 17, 23, Wolfsen Land & Cattle Co. v. United States, No. 10-580L (Fed. Cl. Aug. 26, 2010).

39. *See* Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests Is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 FED. LAW. 30, 30–31 (Oct. 2007).

40. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 475, 477 (2005) (focusing exclusively on the "public use" aspect of takings because of the obvious property interest Ms. Kelo had in her own home).

41. *See, e.g.*, Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1377, 1383 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 2963 (2005) (holding that a waterman does not have a property interest in federal fishing permits).

case of *Pollard v. Hagan*, the U.S. Supreme Court addressed two competing private claims to submerged lands under navigable waters.[42] Georgia had ceded territorial land to the United States for the creation of what is now Alabama.[43] Mr. Hagan claimed ownership of a section of that land through a grant by Spain, which the state of Georgia recognized.[44] In opposition, Mr. Pollard claimed ownership to the same land through a patent from the U.S. government.[45] This conflict raised the issue of whether the state or federal government had the authority to convey the land. The Court ruled in favor of Mr. Hagan, holding that land under navigable water is held in trust for the states and vests upon them at the moment of statehood.[46] As a result, the federal government did not have the power to grant patents to the land.[47]

This rule applies similarly to California and the San Joaquin River because Mexico granted the land in the San Joaquin basin to the U.S. government in the Treaty of Guadalupe Hidalgo.[48] The U.S. Supreme Court has indicated that California gained ownership of its inland navigable waters under the Equal Footing Doctrine and the reasoning in *Pollard* when it was admitted to the union.[49] None of the litigation preceding this case indicates any federal reservation of the San Joaquin River. In fact, California first proposed the Friant Dam and created its plans. California turned to the federal government when it became obvious the project could not be funded at the state level.[50] Thus, all of the relevant evidence indicates the riverbed downstream of the Friant Dam was originally owned by the State of California.

B. Whose Law Is Controlling?

Once the dam was finished and the valves were closed, the water along Reach 4B dried up. Did ownership change? As an initial matter, a quick disposal of some procedural matters will make the subsequent sections more clear. In the present litigation, the farmers claim a constitutional violation of their property interests in state-owned lands by the actions of a federal agency, the Bureau of Reclamation. Federal takings jurisprudence

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42. Pollard v. Hagan, 44 U.S. 212, 220 (1845).
43. *Id.* at 221.
44. *Id.* at 220.
45. *Id.*
46. *Id.* at 230.
47. *Id*.
48. John E. Thorson, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 361 (2005).
49. United States v. California, 332 U.S. 19, 30 (1947).
50. Matthews, *supra* note 1, at 1112.

will ultimately be applied, but the court will have to decide any issues regarding the ownership of Reach 4B by applying state law.

The Supreme Court's opinion in *Bonelli Cattle Co. v. Arizona* demonstrates why state law ultimately will apply.[51] In that case, the Court held that federal law should apply to relicted or accreted land when the title originally came from the United States.[52] This rule was derived from federal common law because no federal statute addressed the subject.[53] Four years later, however, the Court expressly overruled its decision in *Bonelli* to apply federal law in *Oregon ex. rel. State Land Board v. Corvallis Sand Co*.[54] There, the Court stated that "the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law."[55] Therefore:

> The equal-footing doctrine did not . . . provide a basis for federal law to supersede the State's application of its own law in deciding title to the Bonelli land, and state law should have been applied unless there were present some other principle of federal law requiring state law to be displaced.[56]

The Court conceded that no other principle of federal law could have been aptly applied and held that *Bonelli* should have been decided under state law.[57] Consequently, the Court decided the property interest in *Corvallis Sand Co.* under Oregon law. As a result, the issues of the ownership of Reach 4B, whether in its entirety or just the excavated land, will also be decided as a matter of California law.

C. Reliction of the Water by the Bureau of Reclamation upon Completion of the Friant Dam?

Reliction occurs when the water level of a stream drops slowly, exposing areas of dry land that were once submerged.[58] When navigable

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51. *See* Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 324–25 (1973) (focusing on limits to the control over land and navigable water that Congress granted to the states).

52. *Id; see also* Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305, 350 (2010) (discussing the *Bonelli* Court's erroneous finding that federal law should apply).

53. *Id.*

54. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977).

55. *Id.* at 370–71.

56. *Id.* at 371.

57. *Id.* at 372.

58. Phillip W. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems*, 11 J. LAND RESOURCES & ENVTL. L. 265, 279 (1991).

waters are involved, reliction most frequently transfers title of the newly exposed lands from the state to the adjacent landowner.[59] In contrast, a sudden change, "whether the land encroaches on the water or the water encroaches on the land," is treated as an avulsion and no change in ownership occurs.[60] The Friant Dam is an artificial manmade structure, not a naturally occurring recession of a river, which could factor into a court's decision. Most jurisdictions generally treat artificial relictions the same way that they treat natural ones:

> [E]xcept for the courts of California, the overwhelming number of courts, whether in suits between private parties and governmental entities or in suits between private litigants, have not been deterred from awarding accreted or relicted lands to riparian or upland owners by the fact that some act of man served in whole or in part to cause the otherwise natural processes of accretion or reliction to function.[61]

California treats reliction differently, however, applying the exception rather than the rule. In *People v. Hecker*, a California appeal court was called upon to rule on a dispute over the accretion[62] of land on a private landowner's shoreline that was caused entirely by the construction of the Santa Monica Pier.[63] Citing a long list of California precedent, the court noted that "accretion resulting from artificial means does not inure to the benefit of the upland owner, but the right to recover possession thereof is in the state or its successor in interest."[64] The court applied this reasoning to affirm the lower court's holding that the state was the owner of the newly accreted land.[65]

In another case, an upstream hydraulic mining operation diverted a river's flow.[66] Though the court's primary concern was just compensation for a condemnation action, it still noted that ownership of the accreted land did not pass to the landowner.[67] The court also held that "[t]he state did not

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59. *Id.* at 279–80. Some states have gone so far as to codify this rule. *See, e.g.*, MONT. CODE ANN. § 70-18-201 (2011).

60. HERBERT THORNDIKE TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND § 765 (Carl Zollman ed., 1940).

61. *Riparian Owner's Right to New Land Created by Reliction or by Accretion Influenced by Artificial Condition Not Produced by Such Owner*, 63 A.L.R.3d 249, 256–57 (1975) (citations omitted).

62. Accretion, similar to reliction, is discussed *infra* in Part III.D.

63. People v. Hecker, 4 Cal. Rptr. 334, 334 (Cal. Dist. Ct. App. 1960).

64. *Id.* at 344.

65. *Id.* at 354.

66. People *ex rel.* Dep't of Public Works v. Shasta Pipe & Supply Co., 70 Cal. Rptr. 618, 621 (Cal. Dist. Ct. App. 1968).

67. *Id.* at 628.

lose title to the bed of the stream in the old location in the absence of some formal type of abandonment."[68]

California's precedent indicates that it is quite difficult for a landowner to claim ownership of land artificially accreted or relicted in a suit against the state. The construction of the Friant Dam is analogous to the Santa Monica Pier because they both exposed the previously submerged land to which the private parties claim ownership. It is worth noting, however, that California has been deemed an outlier in this area of law, and another state might treat a similar situation differently. It is possible that other courts might not see the closing of a valve that exposes dry land as a gradual event as required for reliction to change ownership of the land.

Thus, if treated as a reliction, California law suggests that the state would still own Reach 4B. Moreover, when the Friant Dam closed its flood gates and trapped the river water, the exposure of Reach 4B likely happened very quickly. In that case, the event would be treated as an avulsion and the ownership of Reach 4B would not have changed either. Consequently, it is almost certain that the State of California retained title to Reach 4B once the Friant Dam became operational and exposed the San Joaquin riverbed.

D. Six Decades of Dryness

After the Friant Dam trapped the water upstream, thereby exposing Reach 4B, the riverbed remained exposed for six decades. During this time, the riverbed gradually filled in by both natural and artificial means. However, the ownership of Reach 4B did not divest from the State of California.

Substantially similar to reliction, accretion law states that if water shifts the boundary of a property line slowly so that it is barely noticed, the property boundary shifts as well.[69] For example, imagine a sinuous stream is slowly eroding a more direct path downhill over many years and eventually succeeds. That more direct path will create a new boundary between the properties on either side of the stream. Accretion law says that the landowner on either side retains any extra land resulting from the new path.[70]

In contrast, traditional avulsion law, as discussed briefly above, is invoked when change happens very quickly.[71] If a sudden storm floods that same stream, creating the same path as it did in the accretion example but

68. *Id.*
69. Sax, *supra* note 52, at 313–14.
70. *Id*. at 315–16.
71. *Id.* at 316.

almost at once, the property would not change hands in the eyes of the law.[72] Rather, one landowner would be left with a section of his or her land on the other side of the stream.

At least one commentator has noted that these seemingly easy-to-apply traditional rules have not held steadfast in more contemporary settings.[73] Two U.S. Supreme Court cases involving the Missouri River have blurred the distinction between accretion and avulsion. In *Nebraska v. Iowa*, the two states battled over their boundary after the Missouri River ripped a straight path through a curved section of the river during a flood event.[74] The Court held that this was an avulsion, as one would expect, but stated that accretion law applied when the change happens rapidly but the exact moment of change in the land could not be pinpointed.[75] The second case established accretion as the general rule when one cannot demonstrate the precise amount of change that occurs between two intervals.[76] Together, these cases indicate a propensity for treating most boundary shifts as accretion, whereby property lines change with the movement of the water.

The preceding cases involved situations where the shift in boundary occurred naturally. If this were the case for the Friant Dam, the resolution would be clear because California has passed a statute providing:

> Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.[77]

However, after completion of the dam, Reach 4B of the San Joaquin River remained dry for more than sixty years.[78] The *Wolfsen* Complaint indicates that the "Reach 4B old riverbed channel has been flat and farmed over by Plaintiffs or their predecessors for approximately 68 years."[79] Hence, the riverbed has been altered—specifically, the bed has been filled in—which is

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72. *Id.*

73. *See id.* at 343 (discussing how, despite "superficial appearances," the distinction between accretion and avulsion is less clear in contemporary law than in traditional law).

74. Nebraska v. Iowa, 143 U.S. 359, 360 (1892).

75. *Id.* at 367–70.

76. *See* Sax, *supra* note 52, at 344 (discussing how the speed of change was irrelevant because the question was whether the exact amount of change could be identified or perceived from one time period to the next).

77. CAL. CIV. CODE § 1014 (West 2007).

78. Complaint at 17, Wolfsen Land & Cattle Co. v. United States, No. 10-580L (Fed. Cl. Aug. 26, 2010).

79. *Id.*

also bolstered by the settlement agreement for restoration of the San Joaquin River. The agreement provided for "[t]he digging out and modification of the old original San Joaquin riverbed channel located on Plaintiffs' land at Reach 4B that currently has a zero flow capacity."[80] Whether the farmers actively filled in the land or if natural causes such as the wind helped could matter for ownership purposes.

Initially, it seems probable that the filling in of Reach 4B did not happen instantaneously. The farmers, along with natural processes such as wind, likely filled in the strip of land slowly over the decades. Given the law's propensity for treating situations as accretions rather than avulsions, it is highly unlikely that the court will rule that Reach 4B's six-decade transition was an avulsion. Second, while courts generally do not distinguish between artificial or natural accretion, there is one important exception—a landowner claiming the benefit of accretion cannot create the artificial change.[81] Stated another way, the party claiming the benefit of the change in property ownership cannot be the means by which the artificial change arose. Only artificial accretions that are completed by a third-party, with no ties to the landowner, are treated as traditional accretion cases.[82]

Nevertheless, as noted above, California does not necessarily follow the general rule when dealing with accretion.[83] The law greatly favors the retention of state-owned land when possible.[84] Also, because the farmers actively farmed Reach 4B, it seems obvious that they had at least some role in the filling of the riverbed, which would disqualify them from claiming a change in ownership. Further, it is possible a court would treat the invasion by the farmers onto state-owned land as a trespass in tort, rather than an artificial accretion, which would render their claim moot. Thus, California almost certainly retained ownership of the riverbed during the sixty years the bed was dry.

E. Restoration of Flow: Present Day

Finally, the timeline ends with the current and future state of the Friant Dam. The government has been systematically increasing the flow from the dam in order to accommodate the Chinook salmon. As the flow is increased, California will still retain ownership of Reach 4B.

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80. *Id.*
81. 78 AM. JUR. 2D *Waters* § 314 (2002 & Supp. 2010).
82. *Id.*
83. *See supra* Part III.C.
84. *Id.*

In *Bonelli Cattle Co. v. Arizona*, the landowner's shoreline was slowly eroded by the Colorado River and became part of the riverbed, effecting a transfer of ownership to the State of Arizona.[85] Subsequently, a dam upriver released more water, which deepened the water channel, narrowed the river, and exposed the land Bonelli had lost.[86] The U.S. Supreme Court, deciding the case under federal common law, reversed the Arizona Supreme Court and held that the land revested in Bonelli.[87] The Court ruled that the event was a reliction, noting that no valid policy existed to support the claim that Arizona should retain title.[88] As noted above, the Court has since overruled the *Bonelli* decision, ruling that state law applies in title cases.[89] However, the Court did not expressly overrule the outcome of *Bonelli*, nor did it indicate that the case should have been resolved differently.

The release of dam water changed the structure of the water channel in *Bonelli*. Bonelli regained the land that he once lost, and the flow returned to natural conditions. Applying this analogy, the restored flow of Reach 4B from the Friant Dam will revert the San Joaquin River back to a more natural condition. Further, because California has been the owner of Reach 4B at every prior interval, the release of water back into the river, returning it to navigability, further buttresses the argument for state ownership.

F. Possible Alternative Theories for Ownership

1. Adverse Possession

The complaint does not indicate the legal theory on which plaintiffs rely to support their ownership claims. So far, this Note has assumed that the doctrines of reliction, accretion, and avulsion will be the main focus of the litigation. However, several alternative means to ownership are considered in this Part.

First, sixty years is a long time to farm someone else's land. If this land belongs to a private owner, the statute of limitations would allow the farmers to claim adverse possession of Reach 4B.[90] However, it is a general

85. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 315–16 (1973).

86. *Id.* at 316.

87. *Id.* at 332.

88. *Id.* at 327–30.

89. *See supra* Part III.B.

90. *See* CAL. CIV. PROC. CODE § 325 (West Supp. 2011) (requiring, among other things, a minimum of five years possession).

rule that a private individual cannot adversely possess public lands.[91] The government justifies this rule by pointing to the state's sovereign character as well as the practical consideration that it would be ludicrous to expect governments to constantly patrol vast amounts of public land in order to exclude others.

An exception to the general rule states that one may adversely possess public lands when the government has acquiesced via statute. The federal government allows adverse possession against itself in limited circumstances. For example, when a good-faith landowner, under the color of title, has adversely possessed public land for at least twenty years and made valuable improvements to the land, the landowner may claim title for a nominal fee.[92]

However, California, not the federal government, owns Reach 4B of the San Joaquin River. California state law expressly forbids any private claim over state lands via adverse possession.[93] Therefore, plaintiffs cannot claim adverse possession of Reach 4B regardless of how long they have farmed the riverbed.

2. Estoppel

The farmers could also claim that because California waited so long to assert ownership, the state should be estopped from asserting superior title over Reach 4B. Estoppel has been used in similar cases to avoid injustice.[94] However, courts generally reject estoppel claims against the government.[95] For an example involving the federal government, a health care provider argued that the government should be estopped from demanding a return of excess federal money allotted for Medicare costs.[96] The health care provider relied on assurances of another that the reimbursement program would cover certain costs.[97] After receiving the extra money, the government concluded that the health care provider could not use the funds for those specific costs and requested that the money be returned.[98] The health care provider filed suit claiming that the government should be estopped from

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91. 3 AM. JUR. 2D *Adverse Possession* § 269 (Supp. 2011). For a California-specific example, see *South Pacific Co. v. City of San Francisco*, 396 P.2d 383, 386 (Cal. 1964) (en banc).

92. 43 U.S.C. §§ 1068–1068(a) (2006).

93. CAL. CIV. CODE § 1007 (West 2007).

94. *See, e.g.*, Heckler v. Cmty. Health Serv. of Crawford Cnty., Inc, 467 U.S. 51, 59 (1984).

95. *Id.* at 60.

96. *Id.* at 58.

97. *Id.* at 56–57.

98. *Id.* at 57.

requesting the money because it relied on the intermediary's assurances.[99] The Court ultimately rejected the estoppel claim but stated:

> [W]e are hesitant, when it is unnecessary to decide this case, to say that there are *no case*s in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.[100]

Other cases provide additional authority for the theory that private actors can invoke estoppel against the government. In a case involving public lands, the Ninth Circuit expressly held that "estoppel may be applied against the [federal] government acting in its sovereign capacity."[101] The suit involved a family who moved to Oregon and established a homestead on public lands in 1919.[102] At the time, the Desert-Land Entry Act allowed private individuals to enter and live on specified tracts of public land, which they could obtain fee title to through a patent, if the land was suitably cultivated and the private citizen made a payment of $1 per acre.[103] The family cultivated the land as required. However, because of sickness within the family and a fire that destroyed much of the forty acres they settled upon, they never paid the forty-dollar fee to obtain a patent.[104] Nevertheless, the family lived on the land for nearly fifty years before the Bureau of Land Management (BLM) informed the family that they were trespassing and ordered them to vacate the property.[105]

The court held that estoppel could be applied against the government for affirmative misconduct on the part of a government actor.[106] A BLM official had told the family that they would never be able to obtain title, even though it was still possible to do so prior to the reclassification of the land in 1967.[107] Thus, the basis of the estoppel claim became the misrepresentations of the BLM official. The family also argued that the government should be estopped because the BLM waited over forty years to assert jurisdiction over the land, but the court did not reach this claim.[108]

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99. *Id.* at 58.
100. *Id.* at 60–61.
101. United States v. Wharton, 514 F.2d 406, 410 (9th Cir. 1975).
102. *Id.* at 407.
103. *Id.*
104. *Id.*
105. *Id.* at 408.
106. *Id.* at 409–10.
107. *Id.* at 410.
108. *Id.* at 412.

These two cases demonstrate that it is possible to assert a claim of estoppel against the government. As in general with estoppel claims, the courts look for a showing of injustice, such as where one party has relied on the conduct of another and changed his position to his detriment.[109]

Unfortunately for the farmers of Reach 4B, the Complaint does not indicate any reliance on affirmative misleading conduct from the government. Once the government finished the dam and the riverbed dried, the farmers likely knew that the exposed land was not theirs. They had reason to believe, via the water contracts, that the water that flowed over that land was not necessarily theirs. Further, the Ninth Circuit did not rule on the issue of whether a forty-year time lapse was sufficient for an independent, cognizable claim of estoppel. A favorable ruling could have helped the farmers' estoppel claim. Reach 4B has been dry and farmed for just as long as the family in Oregon lived on the public lands. Similarly, there is no indication that the government attempted to assert its jurisdiction over the land during this time. However, absent precedent to the contrary, the general rule that one cannot claim estoppel against the government does not afford the farmers a remedy.

3. The Public Trust Doctrine Considered

Underlying all of the cases that discuss the disposal of public lands is the requirement that the government hold the lands for the benefit of the general public.[110] This is the basis of the public trust doctrine, which provides a powerful counter-argument to those sympathetic to the claims of the farmers.

For example, in *Illinois Central Railroad Co. v. Illinois*, the state conveyed, through an act of the state legislature, a portion of its land in Chicago to a railroad company.[111] The property in question bordered Lake Michigan and included portions of the submerged land contained in the Chicago Harbor.[112] The transfer was challenged as an invalid exercise of power by the state government.[113] The Court voided the transfer stating:

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109. *See, e.g.*, Heckler v. Cmty. Health Serv. of Crawford Cnty., Inc, 467 U.S. 51, 58–59 (1984) (holding that the government is estopped from taking back funds from a health care provider who requested the money after relying on advice from a fiscal intermediary).

110. *See* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649 (2010) (discussing how the public trust doctrine affects private property).

111. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 439 (1892).

112. *Id.* at 433.

113. *Id.* at 452.

> [T]he State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale.[114]

The Court further held that public land is held in trust for the citizens of each state, and the legislature cannot convey the land out of its general control.[115] However, the state could convey certain portions of the land for improvements, such as a pier or dock, which could increase access without impeding the public's interest in using the resource.[116]

Illinois Central applies to Reach 4B in two ways. First, the decision draws a major distinction between the land under navigable waters and the land the government intends to sell. This further undermines the estoppel claim just discussed because the land at issue in *Wharton*, where the BLM official's statement misled the landowners, was land that the government gave away for very little in return. Contrast this with Reach 4B, which consists of submerged lands more akin to those in *Illinois Central*. Furthermore, there is no indication that California has ever intended to sell this economically and ecologically valuable property.

Second, in a broader sense, *Illinois Central* demonstrates the potential power of the public trust doctrine with respect to lands under navigable waters. The Court invalidated an act of the state legislature, deciding how to use or dispose of its own land, under the principles of public trust. Because the public trust doctrine reaches so far, it poses a problem for the farmers claiming ownership of Reach 4B. The policy behind the doctrine counsels against turning land that should be used for the benefit of the public over to private ownership.

IV. ASSUMING A PROPERTY INTEREST: A TAKINGS ANALYSIS

This Part takes the opposite position and assumes that the *Wolfsen* court will find that the farmers have a legitimate property interest in Reach 4B. It illustrates how important the property-interest analysis can be and

114. *Id.*
115. *Id.*
116. *Id.*

how it protects against unripe claims. Fifth Amendment takings jurisprudence examines the nature of the invasion by the government. As an initial step, a court will ask whether the government has gone "too far" in regulating the use of the property, or whether it has physically appropriated the property through some governmental regulation or action.[117]

In determining whether a governmental regulation amounts to a taking, courts generally apply the *Penn Central* test.[118] *Penn Central* concerned the designation of Grand Central Terminal as a historical landmark, which required any changes to be permitted by the New York City Landmarks Preservation Commission.[119] The owners of the terminal applied for a permit to build office space on top of the existing terminal or to revamp the façade to the existing structure.[120] The Court established a three-prong test that balances (1) the economic impact on the plaintiff; (2) the distinct investment-backed expectations of the plaintiff; and (3) the character of the regulation.[121] The *Penn Central* test is generally considered a difficult test for a plaintiff to meet.[122]

The *Penn Central* test is even more daunting when compared to the Court's well-established law concerning physical invasions of property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, a New York statute required building owners to allow cable television companies to install access cables on the outside of their rental buildings.[123] Noting the doctrine at the heart of the matter was the right to exclude others, often seen as one of the most important of all private property rights, the Court held: "[W]hen the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[124] Thus, *Loretto* established a straightforward per se takings test: If the government or actor with the government's permission permanently and physically occupies private property, compensation must be paid however minuscule the effect may actually be.[125]

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117. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

118. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (establishing a three-prong test for determining if a government regulation amounts to a taking).

119. *Id.* at 107.

120. *Id.* at 116–17.

121. *Id.* at 124.

122. *See, e.g.*, Zach Whitney, *Regulatory Takings: Distinguishing Between the Privilege of Use and Duty*, 86 MARQ. L.R. 617, 624 (2002) ("The burden on a landowner to establish a regulatory taking under *Penn Central* is a difficult obstacle to overcome.").

123. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

124. *Id.* at 434–35 (quoting *Penn Central*, 438 U.S. at 124).

125. *Id.* at 437.

In *Loretto*, the Court cites an old case in which the construction of a dam, pursuant to government authority, flooded the land of a private landowner.[126] In that case, the Court held that "it remains true that where real estate is actually invaded by superinduced [sic] additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[127]

These contrasting branches of takings law demonstrate the importance the Court places on the nature of the invasion by the government. With respect to Reach 4B, it seems likely that if the farmers have a property interest cognizable by the courts, and the release of the water has not itself changed the boundary line (again), the release of water over that property falls within the permanent physical occupation category discussed in *Loretto*. Therefore, because the government activity invaded the land owned by the plaintiff, it must pay just compensation and the *Penn Central* balancing test does not apply. Plainly, the property interest claimed by the farmers is the crux of this litigation because a court will likely find that a taking has occurred if a property interest can be established.

CONCLUSION

The *Wolfsen* case demonstrates how the property interest in a takings claim may be a dispositive factor. Wolfsen and any other farmers claiming ownership of Reach 4B of the San Joaquin River will most likely lose their ownership claims in court. Under the Equal Footing Doctrine, California owned Reach 4B upon its admission into the union. Further, once the dam was completed and the flow stopped, California remained the owner because California's reliction law is tough on private parties claiming ownership of public land. Moreover, the farmers have, at least to some degree, artificially accreted the land through their farming activities. This is repugnant to the generally accepted principle that one cannot claim title to land affirmatively accreted by oneself. Rather, any activity engaged in by the farmers on Reach 4B more closely resembles simple trespass onto state-owned land. The courts' treatment of artificially accreted lands in the same way that they treat naturally occurring ones is a recent development. The possibility of inequity arising in artificially accreted lands likely means the courts will be grappling with this issue into the future.

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126. *Id.* at 427.

127. Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871).

Similarly, the farmers will not likely prevail if they seek relief under alternative theories. Upon resumption of the flow, the land that was always owned by the state remains with the state because the navigability of the water is restored. California law bars the assertion of adverse possession against the state government. Furthermore, estoppel against the government has only been allowed in circumstances in which the government misled the plaintiff, which is not likely the case here. Lastly, strong public-trust-doctrine policy dictates that the land under navigable water is generally not subject to alienation.

Nonetheless, if the court were to find a property interest, the restoration of flow to Reach 4B would most assuredly be ruled a taking. Any permanent physical occupation of land by the government requires just compensation. However, without a valid property interest, this inquiry will never be reached.

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