Exam No. _____

NATURAL RESOURCES EXAM

Wednesday, April 29, 2015

Professor Houck

INSTRUCTIONS

1. This is a three-hour examination. The questions sum to ninety-five (95) points, although I may add a limited number of points for an exceptional answer. Allocate you time accordingly.

2. This is a closed book exam. You may use no outside materials of any type. Relevant portions of statutes and regulations are provided in the appendix attached.

3. In your answers please:

   - Accept the facts as given: No facts are intentionally omitted, but if you feel an additional fact is necessary please state your assumption and how it affects the analysis.

   - If writing by hand, on one side of page only … and legibility matters.

   Thank you, and good luck.

APPENDIX: Statutory Supplement

I. MODERNIZING NEPA (20 points)

Intending to "bring the National Environmental Policy Act into the 21st Century", the US House of Representatives has proposed the following amendments (three of which you have already seen in the course Supplement):

IA: Addressing Delays in the Process: A Supplemental EIS would not be required "unless there is a showing that: (1) an agency has made substantial changes in the proposed action that are relevant to environmental concerns; and (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

IB: Addressing Litigation Issues: NEPA suits would be allowed "only in limited cases and where the following elements are present: (1) a clear demonstration that an agency has made a decision without using the best available information and science; (2) a party has been involved throughout the process; and (3) suit is filed within 180 days of the final decision."

IC: Clarifying Cumulative Impacts: Directs CEQ to issue regulations "clarifying the scope of cumulative actions" and "what actions are reasonably foreseeable", making certain that "speculative actions are not 'reasonable' within the context of cumulative impacts".

ID: Federal-Aid Highways: Authorizes the Federal Highway Administration (FHWA) to approve, "prior to completion of the NEPA process", the advance acquisition of properties within the routes intended for state highway projects in order to move projects smoothly to construction once NEPA is satisfied, *providing that* the states and FHWA find that (1) no "significant environmental effects" are involved, (2) the acquisition will not "limit the choice of reasonable alternatives", and (3) will not "influence the decision of FHWA" in its subsequent review and approval of the project.

QUESTION 1 (20 points): On behalf of the Natural Resources Defense Council, please critique each amendment, using examples and authorities where relevant to illustrate your points.

II. EX-IM BANK (20 points):

The US Export-Import Bank guarantees loans for US exports abroad. One recent guarantee secured a $1.5 billion loan from a private bank in Maryland, PNC, to Xcoal Energy and Resources LLC, for the export of coal from Appalachia (the mountains of West Virginia, Kentucky, and Tennessee) to China, South Korea and Japan, over a period of ten years. An environmental group, the Climate Action Network, filed suit for and EIS on the loan (no EA nor EIS was done), stating its concerns and those of its members over climate change and air quality impacts abroad. The government moved to dismiss on grounds of standing. PNC, joining the case as a co-defendant, filed an affidavit stating that is had "sufficient reserves" to cover the loan even without the Ex-Im Bank guarantee.

QUESTION 2A: For the government (Ex-Im Bank) what are your arguments against standing, and anticipated responses?

QUESTION 2B: Assuming standing is found, as clerk to the trial court please address the merits, is an EIS required?

QUESTION 2C: Assuming one is required, for the plaintiffs this time how would you argue the Ex-Im Bank should address climate change in this situation?

III. ORVS (20 points)

The Bureau of Land Management Plan for the Aravaipa District (Arizona) identifies certain land and resources areas as limits to Off Road Vehicle use, and limits others to

seasons not interfering with wildlife survival in winter and spring breeding. The American Blue Ribbon Coalition (composed of ORV manufacturers and users) sues to enjoin the plan on multiple-use and other FLPMA based on grounds (n.b. these causes of action are not part of this question).

Question 3A: The government moves to dismiss on grounds of ripeness. For the Blue Ribbon Coalition draft your argument in response.

Question 3B: Assume now that Blue Ribbon argues that trails through the identified areas were in fact established in the early 19th century and are thus immune from federal closure. The BLM disagrees, saying the trails were no more than "aboriginal hunting routes and cow paths". Where would this dispute be adjudicated and on the basis of what law and legal standard?

Question 3C: Assume now that the trails are located, instead, in the Aravaipa National Forest, and that Blue Ribbon is demanding an EIS on the plan. The Service has prepared an Environmental Assessment, explaining that an EIS would accompany "particular closures, where major, as they occur". For Blue Ribbon again, evaluate the Service's position here and your response.

IV. TULARE (30 points)

In the *Tulare* opinion (relevant portions below) the Federal Court of Claims upheld a "takings" claim for reductions in water use, required to protect two species of endangered fish (salmon and delta smelt), on the following grounds:

49 Fed.Cl. 313

United States Court of Federal Claims.
TULARE LAKE BASIN WATER STORAGE DISTRICT, et al., Plaintiffs,
v.
The **UNITED STATES**, Defendant.
No. 98-101 L.
April 30, 2001.

Plaintiffs urge us to consider this action as a case involving a physical taking of property. Under that theory, plaintiffs possessed contract rights entitling them to the use of a specified quantity of water. By preventing them from using that water, plaintiffs argue, the government deprived them of the entire value of their contract right.

Defendant sees the case differently. In defendant's view, the court must examine the government's conduct under the three-part test that *Penn Central* prescribes for the evaluation of regulatory action that interferes with an owner's use of his property. Under that rubric, defendant contends, the claim must fail because plaintiffs' reasonable contract expectations were necessarily limited by regulatory concern over fish and wildlife; and because the economic loss asserted here-a fraction of the master contract's overall value-was de minimis.

Of the two positions, plaintiffs', we believe, is the correct one. Case law reveals that the distinction between a physical invasion and a governmental activity that merely impairs the use of that property turns on whether the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *United States v. Causby,* 328 U.S. 256, 265, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). In *Causby,* for instance, the Court ruled that frequent flights immediately above a landowner's property constituted a taking, comparing such actions to a more traditional physical taking: "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.* at 261, 66 S.Ct. 1062 (footnote omitted).

While water rights present an admittedly unusual situation, we think the *Causby* example is an instructive one. In the context of water rights, a mere restriction on use-the hallmark of a regulatory action-completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. *See Eddy v. Simpson,* 3 Cal. 249, 252-253 (1853) ("the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use."). Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete occupation of property-an exclusive possession of plaintiffs' water-use rights for preservation of the fish-mirrors the invasion present in *Causby.* To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical

taking.

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ii. The Public Trust Doctrine, the Doctrine of Reasonable Use and Nuisance Law

There is, as an initial matter, no dispute that all California water rights are subject to the universal limitation that the use must be both reasonable and for a beneficial purpose. Cal. Const. art. XIV, § 3, amended by Cal. Const. art. X, § 2. Included in that definition of reasonable use is the preservation of fish and wildlife. Indeed, the California legislature has specifically declared that the protection of fish and wildlife is among the purposes of the state water projects. Cal. Water Code § 11900 (Deering 1977).

Whether a particular use or method of diversion is unreasonable or violative of the public trust is a question committed concurrently to the State Water Resources Control Board and to the California courts. *See National Audubon Soc'y v. Superior Court of Alpine County,* 33 Cal.3d 419, 451-452, 189 Cal.Rptr. 346, 658 P.2d 709 (1983). Thus, while we accept the proposition that plaintiffs have no right to use or divert water in an unreasonable manner, nor in a way that violates the public trust, the issue now before us is whether such a determination has in fact been made.

* * * *

To the extent that water allocation in California is a policy judgment-one specifically committed to the SWRCB and the California courts-a finding of unreasonableness by this court would be tantamount to our *making* California law rather than merely applying it. This is especially true where, as here, the Board charged with such determinations has responded, and continues to respond, to the concerns about fish and wildlife that the government was seeking to address through the implementation of the ESA.

While we are often asked to interpret state or federal statutes or regulations to determine the scope of a property interest under a takings claim, those determinations do not extend to matters of discretion committed to the authority of the state. As no such determination was made during the period 1992-1994, and subsequent amendments to policy cannot, for contract purposes, be made retroactive, plaintiffs were indeed entitled to the water use provided for in D-1485 and in their contracts.

Question 4A: Please draft an appeal of this decision on the identified grounds.

Question 4B: Had the California water agency made a finding of unreasonable use, would the reductions it required still give rise to a takings claim and the need for compensation?

Question 4C: Facing a severe drought whose end is neither imminent nor certain, California has begun to impose strict limits on water use, particularly commercial and residential. What is your reaction to this situation?

V. BEYOND THE BOX (5 points)

Question 5A: If Natural Resources Law were a song, what would its title be … and why?