Sam Fox School Distinguished Alumni Awards S13

When I first read Rick's writeup of the Supreme Court's decision in *USDA v. Horne*, concerning the federal government's Depression-era system of "marketing orders" that required farmers to set aside a percentage of their raisin crop in a government-controlled account, I was worried about water. And that's not just because I *always* worry about water.

Horne turned on whether the federal program is better considered as a *physical* taking or a regulatory one. That has huge implications for water law, because of recent controversies about whether the government's failure to deliver contracted water amounts to a physical taking or a regulatory one. That is critically important because whereas regulatory takings generally implicates a balancing test, physical takings doctrine uses a *per se* test that purposefully ignores any public policy considerations. In times of drought, one can shudder about lawsuits mandating water usage completely apart from public policy considerations.


Lake Casitas: Can you take it?

Seven years ago, in *Casitas Municipal Water Dist. v. United States*, the Federal Circuit strongly held — over a vigorous dissent — that if the government does not deliver contracted water because of Endangered Species Act requirements (i.e. keeping water instream to protect fish), then that could be a physical taking. But as far as I know, no other circuit has adopted that holding, and neither has the Supreme Court. And it was a rather odd holding because under California state water law, individuals and private actors cannot *own* water: they can only hold the right to use it. If you cannot own something, you still may have valuable rights, but it is harder to call it a physical taking.

So the question is whether Chief Justice Roberts' opinion in *Horne* would include dicta supporting the *Casitas* decision. The answer appears to be no. The opinion distinguishes an earlier case, *Leonard & Leonard v. Earle,* 279 U. S. 392 (1929), which

> upheld a Maryland requirement that oyster packers remit ten percent of the marketable detached oyster shells or their monetary equivalent to the State for the privilege of harvesting the oysters.…The oysters, unlike raisins, were "feræ naturæ" that belonged to the State under state law, and "[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire." Leonard v. Earle, 155 Md. 252, 258, 141 A. 714, 716 (1928). The oyster packers did not simply seek to sell their property; they sought to appropriate the State's. Indeed, the Maryland Court of Appeals saw the issue as a question of "a reasonable and fair compensation" from the packers to "the state, as owner of

> the oysters." Id., at 259, 141 A., at 717 (internal quotation marks omitted). Raisins are not like oysters: they are private property— the fruit of the growers' labor—not "public things subject to the absolute control of the state," id., at 258, 141 A., at 716. Any physical taking of them for public use must be accompanied by just compensation.

It's pretty easy to make an analogy between oysters and water because both are owned by the state. Indeed, if anything, the opinion might *undermine* the *Casitas* decision for precisely this reason. If so, it's good news.

Drought brings suffering. The question is how that suffering should be distributed. There are lots of ways to do this, some better, and some worse. But throwing it into the Fifth Amendment almost guarantees a bad result because of the lack of flexibility, without any assurance that it will protect less powerful interests — the touchstone of any constitutional right. Politicians might decide things badly here — they certainly have done that for decades if not centuries. But judges might be worse.