

## Chapter 3

# Regulatory Takings in the Oil, Gas and Mineral Context

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<sup>1</sup> All views expressed herein are those of the author, and not of the Energy, Minerals and Natural Resources Department, the New Mexico Oil Conservation Division, the New Mexico Mining and Minerals Division, or any other agency or officer of the State of New Mexico.

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**§ 3.01. Introduction.**

The Fifth Amendment to the United States Constitution provides that the government may not take private property for public use without “just compensation.”<sup>2</sup> Most, if not all, state constitutions contain similar provisions, and the United States Supreme Court has held that the federal “takings” provision applies to the states by virtue of the Fourteenth

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<sup>2</sup> U.S. Const. Amendment V.

Amendment.<sup>3</sup> Does this provision require compensation when the government (federal, state or local), without taking possession of private property, imposes regulatory restrictions or requirements that strip private property of some or all of its value?

The answer to this question is generally “no.” However, the United States Supreme Court has not been entirely satisfied with this negative answer, and has held that *some* laws and regulations limiting or prohibiting the use of private property, in *some* circumstances, constitute “takings” for which the governmental authority must pay compensation.<sup>4</sup> The body of jurisprudence that has developed from these decisions is the jurisprudence of “regulatory takings.”

This chapter examines the current state of regulatory takings law, with special emphasis on cases involving restrictions on oil, gas or mineral development. Examination of published court opinions would suggest that claimants rarely win regulatory takings cases, and that, except for certain relatively infrequent factual *scenarios*, that trend will continue. Nevertheless, there have been an enormous number of such cases brought. It is possible that the mere existence of an occasional claimant victory, coupled with the lack of definite legal rules, significantly influences the actions of regulators or provides meaningful opportunities for settlement. Judging whether that is true would require field research not undertaken for preparation of this chapter. This chapter is intended as an exposition of the legal considerations that can be gleaned from appellate court opinions. Hopefully, it will be useful to guide attorneys in the preparation of such cases.

### § 3.02. Origin, History and Significance.

#### [1] — Origin.

The jurisprudence of regulatory takings began with the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon*<sup>5</sup> where Justice Oliver Wendell

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<sup>3</sup> Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

<sup>4</sup> *Id.*

<sup>5</sup> Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

Holmes, writing for the Court, struck down a Pennsylvania law prohibiting coal mining that caused surface subsidence. The Court held that the challenged law defeated the “support estate,” a real property right recognized by Pennsylvania common law that allowed a coal miner who owned that estate to conduct mining operations without liability for subsidence. Justice Holmes expressly stated that not all regulations that abridged property rights would require compensation.<sup>6</sup> However, he did not undertake to define the characteristics of an abridgment of that would, as opposed to one that would not, require compensation.

The result in *Pennsylvania Coal* was reversed much later by the Supreme Court’s decision in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>7</sup> where the Court upheld a later Pennsylvania statute similarly regulating mining that tended to cause subsidence. The *Keystone* Court seized on some differences in application of the newer statute to hold that it served a public, versus a private, purpose, and therefore did not effect a “taking” as found in *Pennsylvania Coal*. The fact that the Court tenuously distinguished *Pennsylvania Coal* instead of overruling it may be due to Justice Holmes’ prestige. However, the Court may also have been concerned that overruling *Pennsylvania Coal* would have undermined the precedential basis for holding that there is such a thing as a regulatory taking. This is something that, despite its refusal to define the concept,<sup>8</sup> the Court has never been willing to do.

## **[2] — Development of Regulatory Takings Jurisprudence Prior to *Lucas v. South Carolina Coastal Council*.**

The history of regulatory takings jurisprudence from its origin in *Mahon* to the relatively recent decision in *Lucas v. South Carolina Coastal*

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<sup>6</sup> His characteristically eloquent statement in this regard will not be repeated here, especially as no court has found it to give meaningful guidance.

<sup>7</sup> *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

<sup>8</sup> *See, e.g., Penn Central Transp. Co. v. City of New York*, *infra*, where the Court said: [T]his Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated. . . . *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) at 123. This statement has been frequently quoted by the Supreme Court and other courts.

*Council*<sup>9</sup> is summarized in my 2002 article in the A.B.A. publication, *Natural Resources & Environment*.<sup>10</sup> Because *Lucas* shifted the focus of takings law in a way that has largely eclipsed analyses in prior decisions, this intervening history is not here discussed, and the present chapter concentrates on post-*Lucas* developments.

### **[3] — Current Importance of Takings in One Word: “Fracking.”**

The Supreme Court has not handed down any significant new regulatory takings decisions recently,<sup>11</sup> and the pace of lower court decisions has slowed somewhat in the last decade. However, developments in the oil and gas industry suggest that there may be a re-birth of takings litigation. The current oil boom is, of course, heavily dependent on drilling of horizontal wells and use of massive, multi-stage fracture stimulations (fracking), a process that is highly controversial. Public pressure for dramatic regulation of fracking may lead to governmental interventions which can possibly be challenged as takings. There is little to report on this front so far, but more can be expected. For example, a recent ordinance in one New Mexico county that bans fracking anywhere in the county would seem not unlikely to be held to constitute a regulatory taking if it is challenged by a producer who acquired oil and gas leases in the county before it was adopted.

### **§ 3.03. Regulatory Takings According to *Lucas*.**

In its 1992 decision in *Lucas v. South Carolina Coastal Council*, the Supreme Court effected a major conceptual recasting of regulatory takings law. Whether *Lucas* changed prior law or merely clarified it has been

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<sup>9</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>10</sup> “Regulatory Takings — Where Environmental Protection and Private Property Collide,” 17 *Nat. Resources & Env’t* 10 (2002).

<sup>11</sup> The last game-changing High Court decision in the area was *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002). The 2005 decision in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, I do not, for reasons discussed below, regard as particularly significant.

debated.<sup>12</sup> But there is no denying the centrality of the *Lucas* analysis to subsequent developments. As a result, any writing on regulatory takings law almost inevitably becomes an extended footnote on *Lucas*.

The holding of *Lucas* was that a regulation that denies “all economically beneficial or productive use of land”<sup>13</sup> is a “categorical” taking<sup>14</sup> for which compensation must be paid (subject to an exception discussed below) regardless of the conceded public purpose of the taking. This was the specific issue presented to the Court. The South Carolina Supreme Court, in *Lucas*, held that legislative findings underlying the subject regulatory action established that a prohibition of building on Lucas’ beachfront lots was a valid exercise of the police power, and for that reason compensation was not required. The Supreme Court reversed, holding that because the building ban deprived Lucas of all economic value of his lots, the public purpose advanced as supporting the action did not affect the outcome.

The facts of *Lucas* were extreme. Lucas purchased two already zoned, single-family home lots on a South Carolina beachfront. The legislation under which the Coastal Council imposed a total ban on building on these lots was passed after Lucas purchased for the purpose of preventing beach erosion. However, the Court did not rely on the particular facts, addressing instead only the effect of total taking.<sup>15</sup>

Justice Scalia, speaking for the Court, divided regulatory takings into two distinct categories — total takings that deprive the owner of all economically viable use of the subject property, and less than total takings that do not. Total takings require compensation without regard either to the importance of

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<sup>12</sup> The initial phase of this debate is found in the majority and dissenting opinions in *Lucas* itself.

<sup>13</sup> See *dictum* distinguishing personal property, *Lucas*, 505 U.S. at 1028.

<sup>14</sup> *Id.* at 1015.

<sup>15</sup> Justice Kennedy, while disagreeing with the Court’s analysis, concurred in the judgment, citing these facts. *Lucas* at 1035-36. However, Justice Scalia’s opinion in *Lucas* garnered the five votes necessary to stand as the opinion of the Court. Thus, unlike the concurrences in *Palazzolo*, Justice Kennedy’s opinion in *Lucas* does not affect the precedential value of the majority’s rationale.

the governmental objective or to other factors relied upon in previous cases. Partial regulatory takings, on the other hand, are to be analyzed based on the factors the Court had cited as indicative of a compensable taking in *Penn Central Transportation Company v. City of New York*.<sup>16</sup> This dichotomy has become the first step in all subsequent takings analysis.

**[1] — The “Total” or “Lucas” Taking.**

**[a] — The Denominator Issue.**

It was easy for the Court to find a “total” taking in *Lucas* because the subject property consisted of particular lots on which all building was prohibited, and there is nothing in the opinion to indicate that Lucas owned any other lots in the same subdivision, or anywhere else for that matter. Thus, although the Court recognized that identifying a total taking would, in other circumstances, require addressing the question of what constituted the whole property that was either totally or partially taken (the denominator issue), it did not have to address that issue in *Lucas*.<sup>17</sup> And, except for a *dictum* disapproving a New York court’s analysis aggregating various commercial properties owned by a claimant in mid-town Manhattan,<sup>18</sup> it did not furnish any guidance for the issue’s resolution in future cases. This “denominator problem” is the principle question on which subsequent litigation about takings alleged to be “total” has focused.

**[b] — The Nuisance Exception.**

Despite holding that a total taking “categorically” requires compensation, the *Lucas* Court delineated an exception. If the property use precluded by the regulation constituted a common law nuisance under applicable, pre-existing state law, then, the Court reasoned, the claimant did not have a legal right

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<sup>16</sup> *Penn Central*, 438 U.S. 104.

<sup>17</sup> *Lucas*, 505 U.S. at 1016, fn. 7.

<sup>18</sup> *Ibid.* This analysis, from *Penn Central Transp. Co. v. New York City*, 42 N.Y.2d 324, 333—334 (N.Y. Ct. App. 1977) (the case which became the Supreme Court’s *Penn Central* case), that the *Lucas* Court characterized as “unsupportable” seems not too far different from results in some cases purporting to follow *Lucas*. See discussion, *infra*.

to so use the property in the first place, and the challenged regulation took nothing.<sup>19</sup> Thus *Lucas* seeks to focus the public interest inquiry (which the totality of the taking otherwise pretermits) on the state's common law of nuisance rather than on the police power. Evidently the Court intended this as an historical inquiry. The opinion states:

We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.<sup>20</sup>

It remains to be seen whether the “police power” genie can be successfully confined in a “nuisance” bottle. The few cases that have addressed this exception suggest this will be difficult.

## **[2] — The “Partial” or “*Penn Central*” Taking.**

According to *Lucas*, any regulatory taking that is not a total taking is to be evaluated on the basis of the factors set forth in the Court's opinion in *Penn Central*. Hence, courts often refer to partial regulatory takings as *Penn Central* takings.

There is an irony to this label, which is wholly a result of the way the *Penn Central* decision was treated in *Lucas*. In *Penn Central* itself, the Court held that there was no taking.<sup>21</sup> The question there was whether the City of New York's denial (based on the historic landmark designation of New York's Grand Central Station) of Penn Central Transportation Company's application to construct an office tower over the terminal constituted a taking requiring compensation. The Court discussed a number of characteristics identified from prior cases concerning regulatory takings, some of which it

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<sup>19</sup> The nuisance exception, unlike the Court's discussion of the denominator issue, is a part of the holding. The Court remanded the case to the South Carolina Supreme Court to determine if the nuisance exception applied in Mr. Lucas' case. The South Carolina Supreme Court held it did not. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

<sup>20</sup> *Lucas*, 505 U.S. at 1032, fn. 18.

<sup>21</sup> *Penn Central*, 438 U.S. at 104.



may have considered definitive, while others were probably makeweights. But, of course, the emphasis was on what does not constitute a compensable taking, not on what does. However that may be, *Lucas* has authoritatively directed courts to look to *Penn Central* to inform their decisions on any claim of a taking that does not qualify as total, in the *Lucas* sense, and that does not involve a physical appropriation of any subject property.

So, we look to *Penn Central* to see what guidance it really provides. The only answer seems to be that “investment-backed expectations” are important. It is often said the *Penn Central* identifies three factors as definitive: (1) economic impact of the taking on the claimant; (2) investment-backed expectations; and (3) the character of the taking,<sup>22</sup> although the Supreme Court only said that these factors “have particular significance.”<sup>23</sup> The *Penn Central* opinion states, in pertinent part:

[T]he [Supreme] Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life . . . .<sup>24</sup>

There is no discussion of the third element — “character of the taking” — in *Penn Central* beyond the above-quoted statement. Generically, the phrase has little meaning. Except for distinguishing physical taking cases, which *Lucas* has subsequently confirmed are categorical takings not subject to “*Penn Central*” analysis, the opinion gives no clue as to what facts could

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<sup>22</sup> See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d at 1348 (2004).

<sup>23</sup> *Penn Central*, 438 U.S. at 123.

<sup>24</sup> *Id.* at 124.

be offered in evidence, or how an argument could be crafted, to lead to a conclusion that the “character of the taking” tends to support or to nullify the existence of a compensable taking.

As to the first element — economic impact — the *Penn Central* Court concedes that the impact on the claimant in that case is adverse and substantial. Although the Court’s opinion does not indicate the percentage of highest and best use value of which Penn Central was deprived, it cites cases where governmental actions were found to deprive the owner of as much as 87.5 percent of value, and were held not to constitute takings.<sup>25</sup> Much of the *Penn Central* opinion is devoted to demonstrating that the governmental action there did not interfere with the existing use, which the Court assumes to be at least marginally economically sustainable.<sup>26</sup> Any instruction as to what facts, short of a *Lucas* total taking, would warrant requiring compensation due to adverse economic effect on the claimant unrelated to investment-backed expectations is absent.

Thus, inevitably attorneys seeking to establish *Penn Central* takings must look primarily to investment-backed expectations. *Penn Central* does not say what investment-backed expectations are, and the holding in the case sheds no light since in that case, there almost certainly could have been none.<sup>27</sup> However, while *Penn Central* gives little guidance with regard to investment-backed expectations, the phrase itself is not generically meaningless. So it

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<sup>25</sup> *Id.* at 131.

<sup>26</sup> The *Penn Central* Court also discusses the fact that the city was willing to allow Penn Central “transferable development rights” that could be used to enhance the value of other property, which it observes, “undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation.” *Penn Central*, 438 U.S. at 137. It is unclear, however, whether these suggested development rights played any material role in the Court’s decision.

<sup>27</sup> Grand Central Station was built in 1913 to be used as a railway station. Presumably the investment made then was in the expectation of such use, with which, as the Court strongly affirms, the city’s permit denial did not interfere. There is perhaps an irony to the fact that the New York Central Railroad constructed a building on its property so beautiful that the citizens of New York decided that it forfeited the value of the property for its successors. There is also an irony to the fact that the state had to take it over after all as a result of Penn Central’s subsequent bankruptcy.

gives lawyers and judges something to talk about when they try to affirm or deny the existence of a *Penn Central* taking. In my view, it is the only criterion that does that.

### § 3.04. U.S. Supreme Court Decisions Since *Lucas*.

#### [1] — *Palazzolo v. Rhode Island* — What It Does and Does Not Say About the Denominator and About Investment-Backed Expectations.

In *Palazzolo v. Rhode Island*,<sup>28</sup> the Supreme Court confronted a case wherein the property owner, Palazzolo, purchased beachfront property in a close corporation in 1959. All but a small portion of the property consisted of wetlands. In 1971, additional restrictive laws and regulations concerning beachfront development were adopted. In 1978, Palazzolo dissolved the corporation and became the individual owner of the subject property. Thereafter, he proposed several development plans, all of which were rejected, and he filed a takings suit. The Rhode Island Supreme Court held that his claim was not ripe because (1) it was not clear that any development plan whatsoever would be rejected, and (2) Palazzolo individually acquired title in 1978, after the pertinent regulations were adopted; thus his ownership was subject to those regulations, and he had no takings claim.

The United States Supreme Court reversed. I discuss this decision in considerable detail because, in my view, there is considerably less here than meets the eye.

The Supreme Court held (1) that Palazzolo's claim was ripe; (2) that there was no *Lucas* total taking because a small portion of his beachfront lands were upland and could be developed; and (3) that his claim, if he had one, for a partial taking under *Penn Central* was not precluded by his 1978 acquisition of title from the corporation after the subject regulation was adopted. The Court remanded the case for determination of whether or not there was a compensable partial taking.

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<sup>28</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

This description of the case would suggest that the *Palazzolo* decision is instructive both on the denominator issue and on the issue of the relevance of the claimant's knowledge or notice of a regulatory scheme at the time he acquired title to the issue of "investment-backed expectations." Actually, *Palazzolo* does not afford authoritative instruction on either of these issues.

### [a] — The Denominator.

Although the Court held that the existence of a small developable part of Palazzolo's beachfront property precluded a finding of a total taking, the Court apparently did not believe that the issue of whether any part of the property could be viewed separately was before it for review. The Court states that the contention that a smaller portion of the property should have been considered separately was not presented in the lower courts or in the *certiorari* petition,<sup>29</sup> a standard reason for an appellate court to not address an issue. Thus, it would seem clear that there was no holding on the denominator issue, and the case is not properly cited as Supreme Court authority on that issue.<sup>30</sup>

### [b] — Investment-Backed Expectations.

The relevance of "investment backed expectations" is discussed in three opinions, none of which commanded a majority of the Court on this issue.

The opinion of the Court, rendered by Justice Kennedy, joined by Justices Rehnquist and Thomas, depends for its majority upon the joinder of both Justices Scalia and O'Connor, who wrote separate concurrences. The Court's opinion held only that the claimant was not precluded from asserting a taking claim because he acquired *title* after the adoption of the regulations. All five of the justices in the majority concurred in this holding, though for different reasons. Since the Court *held* that there was a possibility of a claim for a

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<sup>29</sup> *Palazzolo*, 533 U.S. at 631-32.

<sup>30</sup> The concurring justices joined in Justice Kennedy's opinion, generally, qualified only by the observations in their concurrences, which did not comment on the denominator issue, so the portion of Justice Kennedy's opinion with reference to that issue would seem to be the opinion of the Court.

*Penn Central* taking, which is generally said to require “investment backed expectations,” it would seem that the Court necessarily accepted at least one of the following propositions: (1) such expectations are not, as is commonly supposed, a *sine qua non*, of a *Penn Central* taking, or (2) a claimant can, at least in the circumstances of *Palazzolo*, assert a *Penn Central* taking based on the investment and expectations of a predecessor in title, thus allowing Palazzolo to rely on his expectations in 1959, when he made an investment, rather than in 1978, when he did not.

Justice O’Connor expressly embraced Proposition (1), saying:

The [Rhode Island] court erred in elevating what it believed to be “[petitioner’s] lack of reasonable investment-backed expectations” to “dispositive” status. Investment-backed expectations, though important, are not talismanic under *Penn Central*.<sup>31</sup>

However, since neither the plurality opinion nor Justice Scalia’s concurrence articulates agreement with this view, the case cannot be said to be stand for Proposition (1).

Furthermore, Justice O’Connor, though not so clearly, indicates that she does not disagree with Proposition (2) where, as in *Palazzolo*, title passed by operation of law. She says:

We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, *such as a donee, heir or devisee*.<sup>32</sup>

In contrast to Justice O’Connor’s somewhat ambiguous reasoning, Justice Scalia’s concurrence expresses his opinion with clarity:

In my view, the fact that a restriction existed at the time the purchaser took title . . . should have *no bearing* upon the determination of whether the restriction is so substantial as to constitute a taking. The

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<sup>31</sup> *Palazzolo*, 533 U.S. at 634.

<sup>32</sup> *Id.* at 634-35 [emphasis added].

“investment-backed expectations” that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.<sup>33</sup>

However, Justice Scalia’s view was not, and never has been, adopted by the Court, and is not otherwise supported by any authority I have found. On the contrary, the reverse proposition — that investment made when the restriction ultimately adopted should have reasonably been anticipated does not qualify for “investment-backed expectation” — though not adopted by any Supreme Court decision, has been widely adopted by lower courts, as discussed below.

In view of the diverse understandings of the justices, *Palazzolo* may not stand for anything definite about investment-backed expectations. It probably stands for Proposition (2) as applied to a claimant who acquired title *by operation of law* after a material change in the regulatory environment. Justice Kennedy’s opinion seems to say that the expectations of that claimant’s predecessor are relevant and are not defeated by the regulatory environment existing at the time of the later title transfer. Justice O’Connor suggests that she would probably not disagree with that conclusion in the limited circumstance of a subsequent transfer of title by operation of law, and Justice Scalia, though he would not view the issue as relevant, presumably would not disagree either.

The plurality’s articulated rationale would seem to permit a *purchaser* to rely on a predecessor’s expectations as well, at least in some circumstances. Justice O’Connor, however, though she does not expressly disavow that possibility, clearly would not accept it as a general proposition. Thus *Palazzolo*, in my view, cannot be cited as controlling authority for considering the prior owner’s investment or expectations in a case involving a subsequent purchase. The decision, of course, does not foreclose the contention that a prior owner’s expectations are relevant in that situation. It is doubtful, however, if that argument will often prevail in such cases.

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<sup>33</sup> *Id.* at 637 [emphasis added].

Most courts view “investment-backed expectations” as in the nature of an equitable doctrine that is looked to in order to decide if the owner’s claim appeals to the conscience of the court. If this view is taken, a purchaser will likely not prevail. Based on a market analysis, the purchaser should, indeed, be allowed to step into the shoes of his or her predecessor, because, as Justice Kennedy’s opinion suggests, permitting such reliance enables the owner at the time when a burdensome regulatory regime is imposed to retrieve lost value by selling to someone with greater tolerance for the costs and risks of pursuing a permit application or takings claim.<sup>34</sup> However, a claimant who purchased at a low-ball price from a prior owner whose investment-backed expectations were frustrated might not present a case appealing to the conscience of the Court. Courts are perhaps often more influenced by moralists than by economists.

**[2] — *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* — Does It Preclude All Temporary Total Takings?**

*Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>35</sup> held that a *moratorium* on development, though it absolutely prohibited all building on existing lots during the *moratorium*, was not a total taking.<sup>36</sup> The Court reasoned that since the lots would continue to have value for further development after the moratorium expired, the temporary taking effected by the *moratorium* could not deprive any property of all its value. Though the Court expressly limited its holding to development *moratoria*,<sup>37</sup> and adverts to their importance as a planning device, the observation that a parcel under moratorium necessarily retains value for use after the *moratorium* expires would seem to support a more general conclusion that a temporary taking is necessarily not a total taking.

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<sup>34</sup> *Id.* at 627.

<sup>35</sup> *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S.302 (2002).

<sup>36</sup> No claim for partial taking was before the Court.

<sup>37</sup> The Federal Circuit has observed that *Tahoe’s* holding may be limited to the moratorium situation. *See Seiber v. United States*, 364 F.3d 1356, 1368 (2004).

*Tahoe Sierra* does not add anything to regulatory taking jurisprudence, except as applied to temporary takings. However, it does reiterate, with citation to *Penn Central*, the proposition that the Court will look only to the “parcel as a whole,” and not “discrete segments” to determine if a taking is total.<sup>38</sup> Of course, as applied to geographical divisions, lateral or vertical, this statement in *Tahoe Sierra* is *dictum*.

### [3] — *Lingle v. Chevron* — A Footnote?

The Supreme Court’s most recent foray into the regulatory takings arena was *Lingle v. Chevron U.S.A. Inc.*,<sup>39</sup> where it disapproved<sup>40</sup> a statement in its prior opinion in *Agins v. City of Tiburon*<sup>41</sup> to the effect that a law restricting the use of property “effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.”<sup>42</sup> This statement, particularly in the light of the Court’s subsequent holding in *Lucas*, would seem to elevate the argument that the regulation at issue “does not substantially advance legitimate state interests”<sup>43</sup> to a third ground for finding a categorical taking, independent of, and alternative to, physical taking or the *Lucas* criterion of a total taking. This understanding of the quoted statement was not, however, necessary to the Court’s decision in *Agins*, which held that no compensable taking had occurred.

Although this language from *Agins* has been frequently quoted, it is unclear if it had ever been applied to define a categorical taking prior to the

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<sup>38</sup> *Tahoe Sierra*, 535 U.S. at 327.

<sup>39</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

<sup>40</sup> I am unsure if “disapproved” is the correct word to use here. Ordinarily an appellate court “disapproves” a prior decision of a lower appellate court, and “overrules” its own prior decisions. However, the Court in *Lingle* did not overrule *Agins*. It merely made plain that a statement in that opinion that, in context, was not clearly *dictum*, would no longer be considered authoritative.

<sup>41</sup> *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>42</sup> *Lingle*, 544 U.S. at 260 [emphasis added].

<sup>43</sup> *Lucas*, 505 U.S. at 1016.



opinion appealed from in *Lingle*. More frequently, it was applied, as it was in *Agins*, to support the logical *non sequitur*<sup>44</sup> that because the regulation *did* substantially advance a state interest, it was not a compensable taking.

In *Lingle*, the lower court found that a law regulating rents that oil companies could charge service stations occupying company-leased premises constituted a taking of the oil companies' property, on the ground that the law would not be effective in controlling retail gasoline prices. As suggested by the *Agins* language, though perhaps not by its intent, the attack on the law was based on its *effectiveness* to achieve a public purpose, not on the legitimacy of the public purpose sought to be achieved.

*Lingle* makes clear that the ineffectiveness of a regulation to benefit the public, and probably also any deficiency of true public interest, as perceived by the Court, in the purpose intended, though perhaps relevant to the validity of a law under the due process clause, do not make a categorical regulatory taking. I have characterized *Lingle* as a footnote because this is all that it actually holds, and this is a very limited holding.

Language in *Lingle*, however, suggests that it may also preclude consideration of the cogency of the public interest, except in the sense of the *Lucas* nuisance exception, as an element the government can properly cite to defeat a takings claim even in partial takings cases. This issue is discussed below under the "character of the takings" requirement in partial takings.

#### **[4] —The Silence of the Supreme Court Since *Palazzolo*.**

*Tahoe Sierra* is a holding of enormous importance to the extent that it gives regulatory authorities an apparent safe harbor for *moratoria*. However, it contributes little, if any, guidance as to what sorts of permanent development restrictions will meet constitutional muster. *Lingle* is, for the reasons suggested above, probably a mere footnote to takings law. It dispels some confusion but is unlikely to change outcomes.

Thus the Supreme Court has issued no decision shedding further light on the earmarks of *Lucas* or *Penn Central* takings generally since *Palazzolo*.

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<sup>44</sup> "If not A, then B" does not, in logic, imply "A, therefore not B." But precise logic has never been a hallmark of judicial opinions.

Although lower courts have handed down an enormous number of decisions interpreting *Lucas*, *Penn Central* and *Palazzolo*, the Supreme Court has not reviewed them.

This chapter focuses on the issues raised by these three leading Supreme Court decisions and the interpretations advanced by subordinate appellate courts. Because jurisdiction of takings claims against the federal government resides in the Court of Federal Claims whose decisions are appealable to the Court of Appeals for the Federal Circuit, that court's decisions have necessarily played a leading role in the development of concepts left open by the Supreme Court.

### § 3.05.           **Developments in Other Appellate Courts.**

#### **[1] — Total Takings — Identifying “the Denominator.”**

Because the Supreme Court has divided regulatory takings into “total takings” which require compensation, and “partial takings” which usually do not, one of the most vexing and important issues in regulatory takings law is identifying the denominator. With regard to real property, at least, every tract, interest or aggregation is a part of some larger tract, interest or aggregation. So to determine if all or only a part is taken, one must first identify the whole.

Pennsylvania's Commonwealth Court, in *Machipongo Land & Coal Co. v. Dep't of Environmental Resources*<sup>45</sup> described three tests that could be used to identify the denominator, as follows: “1) the contiguous land under a common owner approach; 2) the property interest as defined by the regulation; and 3) the multi-factor analysis.” The Commonwealth Court opted for a modified version of the second approach which fixed the denominator in terms of the land affected by the regulation.

It should be emphasized that the Supreme Court has not prescribed any approach, except its teaching that the “parcel as a whole” must be considered. That requirement could be satisfied by any of the above approaches. For

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<sup>45</sup> *Machipongo Land & Coal Co. v. Dep't of Env'tl. Res.*, 719 A.2d 19, 26 (1998), *rev'd* 799 A.2d 751 (Pa. 2002).

example, in a subdivision, if a restriction is placed on one lot, that lot is a parcel, but, of course, so is the entire subdivision, and the Supreme Court's instruction does not tell us which parcel must be considered as a whole. Thus, the denominator could, consistently with Supreme Court authority, be limited to the parcel affected by the regulation. Courts rejecting this suggestion often quote the following from the Supreme Court's opinion in *Concrete Pipe and Products v. Construction Laborers Pension Trust*:<sup>46</sup> "To the extent that any portion of property is taken, that portion is always taken in its entirety." That case involved an imposition of a monetary liability, not an alleged taking of real property. The circularity condemned would exist in the real property context only if the denominator were limited to the geographical parcel affected, the interests therein affected, *and* the particular use precluded. It would not be circular to focus attention only on the lateral boundaries of the tract to which the regulation applied.

However, that test has generally been rejected. The Pennsylvania Commonwealth Court's decision was, as indicated, reversed by the Pennsylvania Supreme Court, and I have found no other court which has adopted a similarly claimant-friendly rule.

The following discussion treats a number of issues involving defining the denominator. Although the questions examined are not an exhaustive list of denominator issues, they are among those most often discussed.

### **[a] — Can the Mineral Estate Be Considered Separately?**

Of primary importance to oil, gas and mining lawyers is whether the mineral estate is considered in conjunction with, or separately from, the surface. The conclusion of most courts that have addressed the issue is that the mineral estate is *not* considered separately from the surface unless it is separately owned. The Supreme Court has not squarely addressed this issue, but some of its holdings have nudged other courts in this direction.

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<sup>46</sup> *Concrete Pipe and Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993).

Two Supreme Court decisions are often cited — *Penn Central* and *Keystone Bituminous Coal Ass’n v. DeBenedictus*, and *Goldblatt v. Town of Hempstead*.<sup>47</sup> In my view, none of the decisions is necessarily controlling precedent.

*Penn Central*, is perhaps the most cited authority. The Court there rejected *Penn Central*’s contention that the City’s denial of a permit to build an office building above Grand Central Station constituted a total taking of the air rights, rather than a partial taking of the station property, saying (in a much quoted observation):

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather . . . on the nature and extent of the interference with the rights in the parcel as a whole.<sup>48</sup>

Although this statement by the Supreme Court certainly suggests that a mineral interest should not be treated as separate from commonly owned surfaces, I do not view it as necessarily definitive, because of fundamental differences between air rights and mineral estates, and because of the following observation in *Lucas*:

The answer to this difficult question [defining the denominator] may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property— *i.e.*, whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.<sup>49</sup>

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<sup>47</sup> *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

<sup>48</sup> *Penn Central*, 438 U.S. at 130-31.

<sup>49</sup> *Lucas*, 505 U.S. at 1016, fn. 7.

This observation would seem to provide a basis for treating the mineral interest separately due to its longstanding and frequent recognition in the law of most, if not all states.

It is also noteworthy that the *Penn Central* Court cites as authority for the above statement a case involving lateral division of a “parcel”<sup>50</sup> as well as cases involving vertical division. The emphasis is on maintaining the integrity of a “single parcel” not on precluding vertical versus lateral division. Nor does *Penn Central* say that a “parcel” is necessarily and always defined by the extent of the property in common ownership. No such conclusion can be inferred from the holding of the case, because, intuitively, Grand Central Terminal and the tax block on which it is located, constituted a “single parcel” by reason of more factors than common ownership.

Still less do I view *Bituminous Coal* as precluding separate consideration of the mineral estate. In *Bituminous Coal*, a facial challenge to a regulatory statute of wide application, there was no contention that any miner’s coal estate was totally taken. Rather the total takings analysis looked at Pennsylvania’s “support estate,” a real property interest that is (1) unique to Pennsylvania, and (2) unique in that it has no value except insofar as it increases the value of the surface or mineral estate. That an estate of that unique character was ultimately not considered separate says little about whether mineral and surface estates should be conflated.<sup>51</sup>

*Goldblatt v. Town of Hempstead* is also Supreme Court authority for considering the mineral estate and commonly owned surface as conjoined.<sup>52</sup> However, *Goldblatt* dealt with an aggregates mining operation, and does not discuss New York law concerning ownership of aggregates. Aggregates have a uniquely close relationship to the surface and are not considered a part of the mineral estate in all jurisdictions.

Where not precluded by binding authority, strong arguments can be made that the mineral estate should be considered separately for takings

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<sup>50</sup> *Gorieb v. Fox*, 274 U.S. 603 (1927).

<sup>51</sup> *Keystone Bituminous Coal*, 480 U.S. 470 (1987).

<sup>52</sup> *Goldblatt*, 369 U.S. 590 (1962).

purposes. Mineral severances are recognized in all jurisdictions, and because of the requirement for large investment and specialized expertise to produce minerals, the possessory estates in minerals and surface are extremely likely to be separately owned in areas where there is actual or prospective mineral development. Mineral production is a separate business from agriculture or land development, involving largely different entities and different sources of capital, with a different risk structure and serving a different public demand (energy versus food or space). Denying an oil and gas or coal producer compensation because it also happens to own the surface of all or part of the property at issue seems conceptually little different from denying a claimant compensation for land taken because he or she also owns a stock portfolio. I know of no authority for assessing the “economic impact on the claimant,” at least in cases involving real property, on the basis of the claimant’s overall wealth.<sup>53</sup>

*Not* considering the mineral interest as separate also involves an anomaly because it will often result in different treatment of working and royalty interests in the same property. The royalties and residual mineral estates are far more likely to be owned by surface owners, with the consequence that if a regulation eliminates all productive value of a lease, the mineral lessee may be entitled to compensation, but the owners of the “mineral fee” and royalty interests under the same lease would likely not be.

In fairness, the most persuasive contrary argument — that the law of most states considers the surface and mineral interests as a unitary estate in land until they are severed — should also be stated.

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<sup>53</sup> In cases involving the effect of a taking on a business, the enterprise’s overall financial resources may be relevant. *See* *Rose Acres Farms, Inc.*, 373 F.3d 1177 (Fed. Cir. 2004), involving quarantine of an egg farm’s hens and eggs to prevent spread of salmonella, where the court said:

[I]t is not possible to determine the economic impact of a regulatory scheme applied to a private actor without casting the appropriate absolute measures of the effect of the regulation against the backdrop of the relevant indicators of the *economic vitality of the actor*. *Rose Acres Farms*, 373 F.3d at 1185 [emphasis added].

The court, however, recognized that such analysis had not been applied in cases involving alleged takings of real estate.

Regardless of these arguments, however, most courts that have addressed the issue have aggregated the surface and mineral estates in determining the denominator. Indeed the strongest argument for *not* considering the mineral estate separately now is the number of appellate decisions that have reached that result. Some examples follow.

Ohio's Supreme Court refused to consider the value of land for aggregate mining as separate from the surface in *State ex rel. Shelly Materials, Inc. v. Clark County*.<sup>54</sup> In so holding, the court distinguished disparagingly a prior decision by a plurality of the same court,<sup>55</sup> which had held that the coal estate should be considered a separate parcel. The *Shelly* court distinguished *R.T.G.* (without suggesting any distinction between aggregates and coal) on the ground that the claimant there owned a coal lease only as to part of the property, intimating that *R.T.G.* would be recognized as authority only for the proposition that a severed mineral estate would not be aggregated with the surface estate if separately owned, a proposition probably not seriously in doubt.

The Colorado Supreme Court, also in a case involving aggregates, but expressly referring to the mineral estate generally in the opinion, held that unsevered minerals should not be considered separately for takings purposes.<sup>56</sup> The claim there was brought under Colorado law, but the Colorado court relied on its interpretation of federal precedent.

The Supreme Court of New Jersey reached a similar result in *Bernardsville Quarry, Inc. v. Borough of Bernardsville*,<sup>57</sup> denying separate consideration of aggregates from commonly owned surface. As with the Colorado Supreme Court, the New Jersey Court expressly treated aggregates

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<sup>54</sup> *State ex rel. Shelly Materials, Inc. v. Clark Cnty.*, 875 N.E.2d 59 (Ohio 2007).

<sup>55</sup> *State ex rel. R.T.G. v. State*, 780 N.E.2d 998 (Ohio 2002).

<sup>56</sup> *Animas Valley Sand and Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59 (Colo. 2001).

<sup>57</sup> *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 221, 243-45, 608 A.2d 1377, 1389-90 (1992). The Court cites *Lucas*, decided the same year, for its discussion of the nuisance exception, *Bernardsville Quarry* at 1385, suggesting, perhaps, that the court considered a rock quarry to be a nuisance under *Lucas*. That question, however, was not presented since the court did not find a total taking.

as minerals. Indeed, it criticized as wrongly decided the Federal Circuit case of *Whitney Benefits, Inc. v. United States*,<sup>58</sup> which found a compensable taking of coal.

The Supreme Court of Pennsylvania, in *Machipongo Land and Coal Co., Inc. v. Commonwealth*, finding *Penn Central*, *Keystone* and *Tahoe*<sup>59</sup> controlling on point, and expressly holding that Pennsylvania's constitution affords a miner no greater rights than does the federal provision, ruled that the denominator must include the surface when considering an alleged regulatory taking of an unsevered coal estate.<sup>60</sup>

The Pennsylvania Supreme Court's opinion in *Machipongo* is also interesting and worth flagging, because it expressly holds that a severed coal estate is considered separately for denominator purposes. This holding is probably unremarkable. I have not encountered any suggestion in any of the cases that, absent something suggesting a bad faith or artificial severance,<sup>61</sup> the denominator would ever include an interest not owned by the claimant. Most cases, however, are silent on this issue. Since the *Machipongo* court had before it claimants who owned severed mineral interests, as well as claimants who owned unsevered mineral interests, it addressed the issue specifically and analyzed the takings under both the *Lucas* and the *Penn Central* formulations.

The Federal Circuit did apparently consider the mineral interest separately in holding in *Whitney Benefits, Inc. v. United States* that the enactment of the Surface Mining Control and Reclamation Act (SMCRA), which wholly prohibited surface mining in a terrain category that included all of the claimants' subject mines, constituted a taking, even though one of the claimants owned a small surface tract. Although *Whitney Benefits* was decided prior to *Lucas*, it correctly, as it turns out, anticipated the *Lucas*

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<sup>58</sup> *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *infra*.

<sup>59</sup> *Tahoe*, of course, does not deal with minerals (*see* discussion, *supra*.) and thus has little relevance to the issue.

<sup>60</sup> *Machipongo Land*, 799 A.2d at 768.

<sup>61</sup> *E.g.*, *Forest Props. Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999).



treatment of total takings. In finding a total taking of the claimants' coal, the court rejected an argument that the surface interest that one of the claimants owned should be considered as rebutting the contention of a total taking. The facts, however, were peculiar, in that the surface tract was apparently of little independent value, and was purchased subsequently to the acquisition of the coal estate specifically in order to facilitate mining operations.<sup>62</sup> The Federal Circuit affirmed the Court of Claims' judgment for the claimants, finding that court's fact findings on this and other issues not clearly erroneous. It is uncertain whether *Whitney Benefits* should be analyzed in *Lucas* terms as a case where the mineral interest was considered separately from the surface, or as a case where there was no proof that the surface interest had any independent value.

Although I have found no subsequent case where the Federal Circuit has treated minerals separately for takings purposes, the existence of *Whitney* has apparently prevented that court, and consequently the Court of Federal Claims, from holding that minerals and commonly owned surface must necessarily always be aggregated.

In a more recent case involving an Unsuitable for Mining (UFM) designation under SMCRA, the Court of Federal Claims held that the coal estate could not be considered separately from the surface in a case where the facts indicated that the commonly owned surface estate had substantial value.<sup>63</sup> The Claims Court, in *Cane II*, distinguished *Whitney Benefits* because in *Cane* the claimant purchased several large tracts of surface and minerals. Although acquiring the coal rights was the principal purpose of the claimant's purchase, there was evidence that the investment presentation pursuant to which the claimant purchased also significantly hyped the independent value of the surface.

The Federal Circuit apparently is not among those courts that have definitively said that a mineral interest must be aggregated with commonly owned surface; so in that court the contrary position can be argued, although

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<sup>62</sup> See *Whitney*, 926 F.2d at 1174.

<sup>63</sup> *Cane Tennessee, Inc. v. United States*, 54 Fed. Cl. 100, 106-07 (2002) (*Cane II*).

*Whitney Benefits* is distinguishable from cases where the surface and mineral estates have never been the subject of severance.

### **[b] — Can a Contiguous Tract Owned by a Claimant Ever Be Divided?**

The formulation, “the parcel as a whole,” which is the only denominator definition with Supreme Court *imprimatur*, would seem to import contiguity. That phrase would not necessarily require that all contiguous land owned by a claimant be aggregated, because contiguity is only one of several factors that bear a logical relationship to determining whether a tract should be considered a single parcel. Portions of a contiguous tract may have been purchased at different times, from different sellers, or for different purposes. However, expansion of the denominator beyond a contiguous tract to aggregations of non-contiguous tracts, as has been done in some cases, represents a significant diminution of the circumstances in which a total taking contention is viable,<sup>64</sup> and is also, in my view, with perhaps some limited qualifications such as a parcel divided by a road, unfaithful to the Supreme Court’s injunction to look at “*the* parcel as a whole” [emphasis added]. The tests discussed below in connection with aggregations could be applied to limit the focus to a part only of a contiguous tract rather than the whole, thus increasing the probability of establishing a total taking claim, or to require aggregation of non-contiguous tracts, thus reducing that probability. The question in this section is whether courts will be receptive to arguments that other factors require splitting contiguous parcels.

The Supreme Court’s decision in *Palazzolo* is likely to be cited as a reason not to split contiguous parcels because it held that the denominator included the upland portion of Palazzolo’s property as well as the wetland portion, and because the land Palazzolo owned is characterized as “three

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<sup>64</sup> This observation is likely to be particularly pertinent to oil and gas development, where the prime consideration of explorationists is to acquire an “acreage position” in an area of prospective development. Establishing an acreage position requires leasing those parcels that are available for lease, which are not necessarily contiguous. Because of pooling and unitization, contiguity is not always critical for development.

. . . adjoining parcels.”<sup>65</sup> However, the opinion in *Palazzolo* expresses reservations about whether a contiguous tract should always define the minimum limits of the “parcel as a whole” which *Penn Central* identifies as the measure of the denominator.<sup>66</sup> To the extent that *Palazzolo* is cited as authority precluding division of a contiguous tract in all circumstances, it is probably erroneously cited, as discussed above.

In view of the limitation of the issues the Court considered to be before it, *Palazzolo* may not even constitute binding Supreme Court authority for uniformly rejecting a denominator that would consist only of the property affected by the regulation at issue, as suggested by the Pennsylvania Commonwealth Court in *Machipongo Land & Coal Co. v. Commonwealth*, and reversed by the Pennsylvania Supreme Court, as discussed above. In suggesting that treatment of *Palazzolo*’s contiguous 18 acres as a single parcel for denominator purposes might not have been appropriate, the *Palazzolo Court* does not indicate how it might have treated it differently had the issue been raised.

There are other cases that have defined a denominator consisting of less than the total lateral extent of the property originally owned by the claimant. In a case decided in the immediate wake of *Lucas, Loveladies Harbor, Inc. v. United States*,<sup>67</sup> the Federal Circuit found a total taking of the remaining 12.5 acres of a tract originally comprising 250 acres. The case involved denial of a wetlands fill permit. The claimant had developed and sold 199 acres before the enactment of Section 404 of the Clean Water Act, and donated a conservation easement on 38.5 acres in an effort to secure favorable

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<sup>65</sup> *Palazzolo*, 533 U.S at 613.

<sup>66</sup> The tract involved in *Palazzolo* consisted of “three undeveloped, adjoining parcels.” Thus the property was apparently contiguous, and evidently was purchased at or about the same time. The Court does not elaborate on its characterization of the tract as three separate parcels. However, though the entire property was contiguous, the Court indicates it would not necessarily have been considered a unitary parcel for takings purposes had the issue been properly presented. There is no explanation of why this might have been so. *See* discussion, *supra*.

<sup>67</sup> *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (1994).

consideration of its fill permit application for the remaining 12.5 acres.<sup>68</sup> The court in *Loveladies* did not consider or discuss, as it did subsequently in the coal mining context in *Rith Energy, Inc. v. United States*,<sup>69</sup> whether Loveladies Harbor, Inc. had recovered its investment from the sale of the lots developed on the 199 acres sold.

Some other courts have found total takings of less than the entirety of a contiguous parcel. For example, in *R.T.G., supra*, the Ohio Supreme Court focused on the portion of the claimant's coal holdings that were subjected to a UFM designation, approximately 218 acres, rather than the entire contiguous tract of 500 acres. This case is a little different, however. The reason the court gives for considering the 218 acres separately, that "there is no evidence that the coal outside the regulated area can be economically mined independent of the reserves in the regulated area . . .";<sup>70</sup> suggests the case could be analyzed as finding a total taking in fact of the entire 500-acre parcel. The Court's consideration of the practical effects of the regulation on the development potential of an unregulated portion of the subject property makes this case worth flagging despite its having been criticized by the same court on another point in a subsequent opinion. See discussion above.

Generally, courts have found a claimant's contiguous tracts to constitute a single "parcel as a whole" for takings purposes, notwithstanding various factors urged as reasons for recognizing portions as separate tracts, though factors other than contiguity have often been cited as supporting such conclusions. For example in *Forest Properties v. United States*,<sup>71</sup> the Federal Circuit held that an upland lakeshore tract and an adjacent submerged tract constituted a single parcel despite the fact that the tracts were acquired from different sources, and the claimant held only a contract right to acquire the submerged tract, while it owned the shore tract in fee simple. The controlling

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<sup>68</sup> See also, *Palm Beach Isle Assocs. v. United States*, 208 F.3d 1374, where the Federal Circuit likewise considered the portion of the claimant's land sold before imposition of the regulatory scheme, and the portion owned at the time separately.

<sup>69</sup> *Rith Energy, Inc. v. United States*, 247 F.3d 1355 (Fed. Cir. 2001).

<sup>70</sup> *R.T.G.*, 780 N.E.2d at 1009.

<sup>71</sup> *Forest Props., Inc. v. United States*, 177 F.3d at 1366.

reason cited by the Court for this holding was, consistent with the Federal Circuit’s “business purpose” test, that the claimant treated the two tracts as part of a common plan to develop a residential subdivision.

It may be that the tests considered in the next section with regard to aggregation of non-contiguous properties also import reasons that may be asserted in particular cases for splitting contiguous properties for denominator purposes. Generally, there appears to be a conspicuous dearth of recent authority that has actually found a total taking of a laterally segregated portion of a contiguous tract in common ownership. However, a very recent decision from the Federal Circuit bucks that trend. In *Lost Tree Village Corp. v. United States*,<sup>72</sup> the court held that its business purpose test for identifying the denominator trumped both contiguity and common acquisition, holding that a 6.5-acre wetlands tract which was included in a larger tract of land purchased for development was to be considered separately for denominator purposes because the claimant did not originally intend to include the 6.5-acre tract in the development. The court noted that the 6.5-acre tract was not included in any of the claimant’s development plans, and “[t]he company’s long hiatus from development efforts reinforces the conclusion that Lost Tree did not consider Plat 57 part of the same economic unit as the John’s Island community.”<sup>73</sup> The court accordingly reversed judgment for the government and remanded for analysis based on the more limited denominator.<sup>74</sup>

The *Lost Tree Village* case is unlikely to be of great importance due to its peculiar facts. However, the following quotation should be flagged for inclusion in claimants’ briefs where division of a contiguous tract, or aggregation of proximate tracts, is an issue:

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<sup>72</sup> *Lost Tree Village Corp. v. United States*, 707 F.3d 1286 (2013).

<sup>73</sup> *Id.* at 1294.

<sup>74</sup> The court observes that “Lost Tree was essentially unaware of its ownership of Plat 57 until the company prepared an inventory of its residual properties.” *Id.* If this is true, Lost Tree would have great difficulty showing “investment backed expectations” necessary for a partial taking claim. However, the Circuit’s denominator holding makes it likely that this will be found on remand to be a total taking, which does not require such expectations. The equity of this claim compared to others that the same court has rejected seems questionable.

[T]he mere fact that the properties are commonly owned and located in the same vicinity is an insufficient basis on which to find they constitute a single parcel for purposes of the takings analysis.<sup>75</sup>

**[c] — When Must Non-contiguous Tracts Owned  
by the Same or Related Claimants Be  
Aggregated?**

The more pertinent question now seems to be the extent to which non-contiguous tracts in common ownership must be aggregated. The United States Supreme Court has not addressed this issue, and has never written on a case involving aggregation of separate parcels. There are numerous pertinent opinions from lower courts, however, and some have indicated that aggregation may be required in some, not extraordinary, circumstances.<sup>76</sup>

The Federal Circuit has approved a “business plan” test for ascertaining the breadth of the denominator that arguably requires aggregating non-contiguous properties acquired for a common business purpose. In *Appolo Fuels, Inc. v. United States*,<sup>77</sup> in describing the holding of the Court of Federal Claims that it is reviewing, the court says that:

Following case law [which regrettably the Federal Circuit does not cite in its opinion] that requires a court to consider a plaintiff’s *overall business plan* in determining the relevant parcel, the court [Court of Federal Claims] included [listed leases] because it found that Appolo “viewed [these interests] as part of its overall plan to mine within the [Little Yellow] Creek Watershed.”<sup>78</sup>

The Court of Federal Claims had applied the doctrine to include in the denominator parcels that may have been non-contiguous. The Circuit

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<sup>75</sup> *Ibid.*

<sup>76</sup> In some cases courts refer to aggregations of separate properties of large extent without clearly stating whether or not they are contiguous. *See, e.g., Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717 (2002), *affirmed in Appolo Fuels, Inc., infra.*

<sup>77</sup> *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (2004).

<sup>78</sup> *Appolo Fuels*, 381 F.3d at 1344 [emphasis added].

affirmed summary judgment for the government based on assuming that two specific leases, which were contiguous, though purchased years apart “as part of one unified mining plan”<sup>79</sup> collectively constituted the relevant parcel. Since it found the parcel as so defined had remaining value precluding a finding of total taking, it did not review the claims court’s broader definition of the denominator. However, the Circuit clearly approved the “business purpose test,” albeit in *dictum*. The suggested test would seem to broaden the denominator significantly compared to the Supreme Court’s focus in *Penn Central* and *Palazzolo* on a particular, contiguous tract, but may be more predictable, if arguably more inclusive, than the Pennsylvania Supreme Court’s “flexible approach.”

The Court of Federal Claims subsequently held explicitly that, in a coal mining context, non-contiguous tracts owned by the same claimant were properly aggregated under the business purpose test in order to find that there was no total taking.<sup>80</sup> *Cane V* involved four non-contiguous tracts that were purchased in a single transaction from the same vendor and conveyed by two approximately contemporaneous deeds. *Cane IV* involved six non-contiguous tracts that were given to the claimant by the same donor at different times. In requiring that the six tracts in *Cane IV* be aggregated, the Court stated that “contiguity is just one factor in parcel-as-a-whole test.”<sup>81</sup> These decisions were summarily affirmed by the Federal Circuit in an unpublished opinion without any discussion of the issues involved.<sup>82</sup>

The Supreme Court of Pennsylvania, in *Machipongo*, was faced with claimants owning widely dispersed coal rights in non-contiguous tracts, some of which were designated “unfit for mining” while some were not. Rejecting each particular lease or tract as too narrow a compass for the denominator, and “all coal interests owned by a claimant in the county” as too broad,

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<sup>79</sup> *Id.* at 1346.

<sup>80</sup> *Cane Tennessee, Inc. v. United States*, 60 Fed. Cl. 694 (2004) (*Cane V*); *Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 481 (2003) (*Cane IV*).

<sup>81</sup> *Cane V*, 60 Fed. Cl. at 703.

<sup>82</sup> *Cane Tennessee, Inc. v. United States*, 214 Fed. App’x 978 (2007).

that court directed the trial court on remand to apply a “flexible approach” considering various factors:

These factors would include, *but not be limited to*: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner’s investment backed expectations; and, the landowner’s plans for development.<sup>83</sup>

The Fifth Circuit, in *Vulcan Materials Co. v. City of Tehuacana*,<sup>84</sup> addressed an unusual “denominator” issue. It held, interpreting Texas law, that a municipality could not defeat a takings claim by aggregating the claimant’s holdings in the City with holdings outside the city’s jurisdiction.<sup>85</sup> The court does not explain why the only claim before it was a state law claim, but its *Erie*-based interpretation of Texas law was premised on Texas Supreme Court authority<sup>86</sup> which it read as indicating Texas would follow federal takings law. The case seems worth flagging despite the jurisdictional peculiarity because it addresses a point not likely to arise frequently, and therefore to be persuasive when the issue does again arise.

The authorities examined do not suggest any definite standard for identifying the denominator, and certainly do not indicate that courts will disdain to require aggregation of non-contiguous tracts if there is a business relationship between them. Where a regulation affects non-contiguous properties differently, such aggregation would seem to conflict with the “parcel as a whole” standard, and with the *dictum* in *Lucas* about aggregating Penn Central’s mid-town properties, but courts will find plenty of lower court authority to support aggregation.

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<sup>83</sup> *Machipongo Land*, 799 A.2d at 768-69 [emphasis added].

<sup>84</sup> *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882 (2004).

<sup>85</sup> The city (located in Limestone County, Texas) banned all limestone quarrying within the city. However, the claimant owned limestone quarries both within and outside the city.

<sup>86</sup> *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998).



### [d] — The “Parcel as a Whole” in the Fourth Dimension.

As discussed above in summarizing the Supreme Court’s holding in *Tahoe*, that Court has most recently limited the concept of what can constitute a total taking by holding, or at least intimating,<sup>87</sup> that a temporary taking can never be total because the owner is left with the value remaining after the temporary taking terminates.

If a temporary taking can never be total because the property retains potential future value, is a taking of all that is left of an originally large property prevented from being total because the owner has enjoyed benefits there from in the past? Apparently so, according to the Federal Circuit. In *Rith Energy, Inc.*, *supra*, that court held that a total evisceration of all remaining value in a mining property (by an order under SMCRA prohibiting all further mining) was not a total taking under *Lucas* because the owner had recovered its original investment in the mining property plus a profit prior to the time when the Office of Surface Mining (OSM) stopped further mining. The limited nature of this holding should not obscure its importance. This doctrine may not be limited to mining cases. In any takings case, a governmental defendant can cite *Rith* as authority for the proposition that a taking is not total if the claimant has already recovered its original investment from the property defined as the denominator, or perhaps even if the claimant has already recovered *any* value. One could argue that this conclusion conflicts with the principle that investment-backed expectations do not apply to total takings since it is difficult to understand on what principle, other than the investment expectations, a taking of everything remaining is less than total.

This holding in *Rith* also conflicts with the Federal Circuit’s approach in *Loveladies Harbor*, *supra*, where it found a total taking of the claimant’s remaining wetlands property, disregarding 199 acres of the original 250

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<sup>87</sup> See *Seiber*, 364 F.3d 1356, 1368, where the Federal Circuit suggested that *Tahoe* may preclude finding a temporary, total taking only where a development *moratorium* is involved. Clearly this is a correct description of the *holding* in *Tahoe*. See discussion of *Tahoe*, above. However, Supreme Court precedents tend to take on a life of their own, especially when they provide support for a result the lower courts would like to reach.

acres, which the claimant had developed and sold before adoption of Section 404 of the Clean Water Act and its similar approach in *Palm Beach Isle Associates*.<sup>88</sup> The opinion in *Rith* does not cite *Loveladies Harbor* or *Palm Beach Isle Associates* regarding this issue or explain the conflict. Perhaps the explanation lies in the fact that the lot sales in those cases occurred prior to enactment of the Clean Water Act, whereas all of *Rith*'s purchases and mining activities occurred after the enactment of SMCRA, the taking event thus being viewed as the enactment of the authorizing legislation rather than the actual imposition of the restriction on the claimant's property. This approach, though not articulated in *Rith*, is consistent with the Federal Circuit's interpretation of investment-backed expectations, discussed *infra*.<sup>89</sup> It is a tenuous distinction, however, when one considers the difference between the two statutes involved. Section 404 is designed to prohibit all dredging and filling of wetlands with very limited exceptions. So it is realistic in that context to regard enactment of the statute as the taking event. SMCRA, on the other hand, is primarily designed to *regulate* surface mining, and only in limited circumstances, to prohibit it. Thus, it would seem the takings event should be when a UFM determination was made as to particular property, not when the statute was enacted.

Another relevant holding regarding aggregation in time is in *Cane V*. The question there was the inclusion of coal properties sold by the claimant more than 20 years before the filing of the petition that resulted in the UFM designation. The court found the acquisition of the properties from a common source and, above all, the claimant's common plan to hold these properties for sale for their coal value, were the prevailing considerations in aggregation. Limiting consideration to the properties owned when the

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<sup>88</sup> *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (2000).

<sup>89</sup> The Court of Federal Claims in *Norman v. United States*, 63 Fed. Cl. 231, 256-57 (2004), made this suggestion as a basis for distinguishing *Loveladies Harbor* from *Appolo Fuels*, in which latter case, the Federal Circuit found the "parcel as a whole" to coincide with the claimant's original purchase. However, *Appolo Fuels* did not involve the *Rith* issue. *Appolo Fuels* had sold nothing, and the issue was only the geographical definition of the denominator parcel.

petition for UFM designation was filed or when the UFM determination was made would, the court said, erroneously “place the focus on the expectations of the . . . group which filed the petition . . . , and on the expectations of the Secretary of the Interior” rather than on the expectations of the claimant.<sup>90</sup> In this opinion, the Claims Court does not mention the fact that all of the sales were subsequent to enactment of SMCRA. However, since the earliest sale noted was in 1979, and SMCRA was enacted in 1977, that was the case. Thus the tension between *Loveladies* and *Palm Beach Isle Associates*, on the one hand, and *Rith* and *Cane* on the other, with respect to whether past benefits received by the owner defeat a total taking claim, remains less than satisfactorily resolved.

## **[2] — Total Takings — The Nuisance Exception.**

Even a total taking, according to *Lucas*, does not require compensation if the regulatory action merely prevents a use that would constitute a “nuisance” under “background principles” of state law.<sup>91</sup> This exception would seem to hold the potential of swallowing the total takings rule. Environmental regulation, which has spawned a substantial proportion of takings cases (SMCRA and Section 404 of the Clean Water Act have been particularly productive of such claims), involves underlying values which, whether or not they have been specifically recognized in particular nuisance cases in a given state, are related to values that underlie the common law of nuisance. Justice Scalia (in his opinion for the Court in *Lucas*) attempts to confine the doctrine to existing or historically defined nuisance concepts. The *Lucas* opinion addresses this concern as follows:

There is no doubt some leeway in a court’s interpretation of what existing state law permits — but not remotely as much, we think, as in legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable

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<sup>90</sup> *Cane* V, 60 Fed. Cl. at 704.

<sup>91</sup> *Lucas*, 505 U.S. at 1028.

application of relevant precedents would exclude those uses in the circumstances in which the land is presently found.<sup>92</sup>

But it seems doubtful that the exception can, or will, be so confined as Justice Scalia seems to expect. One can hardly suppose that state nuisance law must remain static, and cannot be changed and expanded by subsequent statutory and judicial development. The Supreme Court has not further explained this concept. Again, however, other courts have done so.

Two and one-half years after *Lucas*, the Federal Circuit decided *M&J Coal Co. v. United States*,<sup>93</sup> in which it affirmed summary judgment for the government in a case where the Office of Surface Mining required leaving more coal in place in underground mine works than M&J's plans provided, in order to prevent subsidence that was apparently occurring. The Court cited the *Lucas* nuisance exception to support its conclusion that "M&J never acquired the right to mine in such a way as to endanger the public health and safety."<sup>94</sup> The reasoning in *M&J* seems faulty because it cites no West Virginia authority; the general discussion of the subject of subsidence and subsidence easements that M&J's predecessors acquired a century or more ago suggests that, at least at a remote time, West Virginia, like Pennsylvania,<sup>95</sup> may have considered the right to cause subsidence to be a property right. Thus its conclusion is unsupported in terms of *Lucas*'s direction that the nuisance exception in total takings cases depends on underlying *state* law.<sup>96</sup> Because the *M&J* court concluded the nuisance exception applied, it did not consider whether there was a total taking. It seems there was not a total taking on the

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<sup>92</sup> *Id.* at 1032, fn 18.

<sup>93</sup> *M&J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995).

<sup>94</sup> *M&J Coal Co.*, 47 F.3d at 1154.

<sup>95</sup> See *Keystone*, *supra*.

<sup>96</sup> *Lucas*, 505 U.S. at 1029. Likewise, the court's observation that background principles that define property law may also stem from federal law is unpersuasive. The only federal law that limited M&J's property right to mine coal was SMCRA and OSM's rulings under it. Clearly the reason that the *Lucas* Court directed attention to background principles was to avoid the circularity of determining that the claimant did not have a property right because such a right was inconsistent with the law claimed to constitute a taking. *Lucas*, 505 U.S. at 1027.

facts the court recites. Thus, the result in *M&J* is consistent with the Supreme Court's pre-*Lucas* decision in *Keystone, supra*, and with the Federal Circuit's subsequent holdings in *Appolo Fuels* and *Bass* that a public interest factor broader than the *Lucas* nuisance exception applies to partial takings. To the extent, however, that *M&J* purports to apply the *Lucas* nuisance exception, it is (1) inconsistent with *Lucas*, and (2) *dictum*.

Another and better reasoned opinion interpreting the *Lucas* nuisance exception is the decision of the Supreme Court of Pennsylvania in *Machipongo*, where it held that since water pollution is a nuisance, a UFM designation based on expected water pollution if the land were mined would not constitute a compensable taking, even if it would otherwise be a total taking. No one thinks that water pollution is desirable and since its effects are not confined to the property in question, conduct of an activity that causes water pollution probably is a common law nuisance. However, water pollution is not a land use but an effect of a land use. So at the outset, the Pennsylvania court has expanded the doctrine of nuisance, as *M&J* did, from a nuisance *per se*, a use of land that is inherently harmful, to a nuisance that is such only because a generally permissible land use has harmful results. This expansion is probably legitimate because nuisance law is not limited to nuisances *per se*. However, the conclusions reached are difficult to distinguish from those explained in earlier decisions presupposing a police power exception to takings law.

Perhaps even more significant than the intuitive conclusion that anything that causes water pollution is a nuisance, however, is the fact that the *Machipongo* court modified, and apparently expanded, the procedure for establishing a nuisance under Pennsylvania law. Since coal mining in Pennsylvania is certainly not a nuisance *per se*, existing Pennsylvania law would, as the court recognized, in an action to abate, have required proof that the nuisance (water pollution) was substantially certain to occur. However, in its instruction for remand<sup>97</sup> the court relaxed that standard to treat nuisance

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<sup>97</sup> The case was remanded to allow the lower court to address the denominator issue. Since the Supreme Court did not, because of the denominator issue, decide whether or not

as proved if mining in the UFM area had a “high potential” to “adversely affect the use of the stream as an auxiliary water supply. . . .”<sup>98</sup>

The Pennsylvania Supreme Court requires the government on remand to prove the necessity for the regulatory imposition to prevent water pollution. The Federal Circuit, in *Appollo Fuels*, *supra*, takes a very different procedural tack. It holds that the necessity of the regulatory imposition to achieve its intended purpose can only be considered in a direct challenge to the *validity* of the administrative decision, and is therefore conclusively established in the context of a takings case.<sup>99</sup> Since *Appollo Fuels* did not find a total taking, this holding related to the “governmental purpose” requirement that the Federal Circuit deems part of the evaluation of the “character of the taking” under *Penn Central*, not the *Lucas* nuisance test. However, the holding may be cited as precluding a judicial inquiry in a takings case into whether, for example, particular coal mining would cause water pollution, even if the *Lucas* nuisance exception were the reason for the inquiry.

How the claimant may challenge the cause and effect rationale asserted to support a confiscatory regulation is crucial to determining the significance to the nuisance exception. Frequently, perhaps in most cases, the nuisance exception will be pled by government to support a contention that an expected *result* of the claimant’s land use, such as water pollution, and not the land use itself, constitutes a nuisance. But the postulated result may be very much at issue. If the claimant contests the regulation in adjudicatory proceedings (administrative or judicial), and incurs adverse fact findings related to the results or probable results of a specific use of specific property, then under accepted principles of issue preclusion, it could not contest the same fact issue in a subsequent takings proceeding. But, the legislative authority (federal, state or local), or an agency in rulemaking, may find that the propensity of particular land uses (such as fracking) to cause particular harms (such as water pollution) necessitates that the offending activities be banned. The

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there was a total taking, the discussion of the nuisance issue constituted an instruction to the trial court on proper handling of the issue if, on re-trial, it found a total taking.

<sup>98</sup> *Machipongo*, 799 A.2d at 775.

<sup>99</sup> *Appollo Fuels*, 381 F.3d at 1351, fn. 17.

legislative authority presumably has power, subject to due process limitations (see *Lingle*), to adopt such a prophylactic approach. But achieving the purpose of *Lucas* would require that the claimant be allowed, in takings proceedings, to contest the validity of such legislative findings.<sup>100</sup> Otherwise, we have come full circle and, even for a total taking, there would be no possibility of compensation unless, as the *Lucas* court observes, “the legislature has a stupid staff.”<sup>101</sup>

A Massachusetts case focused directly on the issue of proof of the factual applicability of the nuisance exception.<sup>102</sup> That case came before Massachusetts’ Supreme Judicial Court on remand from the United States Supreme Court which had granted *certiorari* in the case prior to its *Lucas* decision, and then remanded for reconsideration in light of *Lucas*. The Massachusetts court correctly observed that “[t]he Supreme Court has not said where the burden of proof lies on the various regulatory taking issues discussed in the *Lucas* opinion.”<sup>103</sup> The *Lopes* case involved wetlands zoning which prohibited building on the claimant’s land. The land had been zoned as wetlands because much of it lay below the 88.5-foot minimum contour line, and at the previous trial, apparently conflicting expert testimony had been presented as to whether that definition was appropriate. The court noted that though the claimant would have the burden of proving that the zoning would not substantially advance a legitimate public interest, a consideration no longer relevant in view of *Lingle*:

On the issue whether [claimant’s proposed] use of the land would constitute a nuisance, or some other unlawful use of

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<sup>100</sup> Similarly, if use of a claimant’s property is banned by an administrative determination without an adjudicatory hearing, the claimant should be allowed to contest in a takings case whether that determination is valid where the issue is not whether the use is banned by the statute or rule being applied, but rather is whether the use will cause a result that makes it a nuisance. Though the claimant might have the right to contest the same factual issue in a challenge to the administrative action, such a challenge is not necessarily a prerequisite to a takings claim.

<sup>101</sup> *Lucas*, 505 U.S. at 1025, fn. 12.

<sup>102</sup> *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994).

<sup>103</sup> *Id.* at 1317, fn. 13.

land, principles guiding the placing of the burden of proof may shift that burden to the city or perhaps place on it the burden of going forward to present evidence tending to show that Lopes's proposed use would improperly exceed other limits on his right to use his land.<sup>104</sup>

The court remanded the case to the trial court for resolution of the nuisance issue, as well as other issues, as questions of fact.

Another case that has focused on how issues involved in the nuisance exception are proved is the New Jersey case of *Mansoldo v. State*.<sup>105</sup> There the Supreme Court of New Jersey reversed a judgment in favor of the government in a takings case that involved lots in a floodway. Among other holdings, the court directed the trial court on remand to take evidence on issues including the applicability of the nuisance exception, and not to give preclusive effect to the administrative law judge's findings in connection with the claimant's application for a hardship exception. The court said that the issues in the hardship exception were not the same issues presented in the takings case, thus reaching a result conflicting with the Federal Circuit's in *Appolo Fuels*. These Massachusetts and New Jersey cases seem more nearly aligned with the apparent intent of the *Lucas* Court in crafting the nuisance exception than does the Federal Circuit's position.

As might be expected for a somewhat nebulous doctrine, the concept of "background principles of state law" that define a property interest not subject to compensation under *Lucas* has tended to expand.

The Ninth Circuit, in a case arising in Washington, held that the "public trust" doctrine recognized by Washington courts with regard to tidal lands in private ownership constituted a background principle of state law which, under the *Lucas* nuisance exception, excused an arguably total taking. *Esplanade Properties, LLC v. City of Seattle*.<sup>106</sup> The court accordingly

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Mansoldo v. State*, 898 A.2d 1018 (N.J. 2006).

<sup>106</sup> *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978 (2002).



concluded that the city's denial of a permit for a residential development to be constructed on piers over privately owned tidelands did not constitute a taking because the use was barred by "background principles of state law." However, in this case the court allowed expansion of those background principles, since it conceded that the public trust doctrine did not necessarily prohibit residential development of tidelands property.<sup>107</sup> It held that the city could properly conclude that residential development was barred by the public trust doctrine in the case of the subject property,

Because Esplanade's tideland property is navigable for the purpose of public recreation (used for fishing and general recreation, including by Tribes), and located just 700 feet from Discovery Park, the development would have interfered with those uses, and thus would have been inconsistent with the public trust doctrine.<sup>108</sup>

The Eighth Circuit, in a case arising in Iowa, held that zoning laws in existence at the time that a claimant purchased property constituted "background principles of state law," such that a non-conforming use could be prohibited after an appropriate amortization period even if the prohibition constituted a total taking.<sup>109</sup> The court there affirmed judgment for the city denying a takings claim by a billboard proprietor pursuant to an ordinance that prohibited all billboards in residential areas.

The *Lucas* nuisance exception has been discussed in surprisingly few cases. Possibly this indicates that cases where a total taking is indicated are less often contested to the appellate level, or perhaps recent decisions have so far expanded the denominator for takings cases that such cases rarely occur.<sup>110</sup>

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<sup>107</sup> *Id.* at 987.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (1996).

<sup>110</sup> The development of takings law, as illustrated by cases discussed above, indicates the perspicacity of Justice Stevens' observation in his *Lucas* dissent:

because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. *Lucas*, 505 U.S. at 1065, fn. 2.

### [3] — Partial Takings — When, If Ever, Do They Occur?

Prior to the Supreme Court's decision in *Lucas*, some opinions suggested that compensable takings only occurred if a governmental action (1) deprived the owner of all economic benefit of property or (2) did not substantially advance legitimate state interests. *Lucas* expressly stated that a partial taking would, in some situations, be compensable.<sup>111</sup> This was *dictum* since the case involved only a total taking. However, in *Palazzolo*, the Supreme Court clearly held that a compensable partial taking is a legal possibility, and, having found no total taking, remanded the case for the state court to determine if a partial taking existed.<sup>112</sup> The question in the title to this part is not whether such a creature exists in legal theory, but whether a specimen is ever encountered in practice.

The Federal Circuit has, in fact, upheld a partial regulatory taking in at least one *post-Lucas* case, *Cienega Gardens v. United States*,<sup>113</sup> although the sequel discussed below casts doubt on the viability of that opinion. *Cienega Gardens* involved a statutory program whereby the government guaranteed mortgage loans to apartment developers upon condition that they rent to subsidized low-income tenants. The regulations governing the program at the time claimants began their participation provided that the term of the mortgages would be 40 years, but that after 20 years, the owners could prepay their subsidized mortgages and exit from the program. However, after the

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This and Justice Stevens' other criticisms of the *Lucas* rule are cogent. However, whether his preference for continuing the *ad hoc* approach to all regulatory takings cases would produce better, or even different, results is at least debatable.

<sup>111</sup> *Lucas*, 505 U.S. at 1019, fn. 8.

<sup>112</sup> On remand, after a new trial, the Rhode Island Superior Court decided, on the facts, that Palazzolo suffered no compensable taking. *Palazzolo v. State*, 2005 WL 1645974 (2005). The court concluded that construction in the tidelands marsh portion of *Lucas*' tract was prohibited by the public trust doctrine, *see Esplanade*, and that *Lucas* had no valid investment-backed expectations because there were already laws restricting construction in the tidelands when *Lucas* made his original investment, even though the particular regulatory scheme under which his permit application was denied was enacted later. Thus, 20 years after his original permit was denied, Palazzolo ended up with what he had already been offered before the case got to the Supreme Court — the opportunity to build one home.

<sup>113</sup> *Cienega Gardens v. United States*, 331 F.3d 1319 (2003) (first *Cienega*).

claimants had entered the program and secured mortgage loans containing the contemplated prepayment provisions, Congress amended the statute to remove the prepayment option, in effect compelling the owners to remain in the program for an additional 20 years, or to accept substituted options provided in the statute. The court held that there was not a total taking because the owners' right to pay off the subsidized mortgages and exit the program was merely deferred, not eliminated. Nevertheless, it found a partial taking. The court's justifications for finding in favor of the claimants on each of the "*Penn Central* factors" are discussed below separately with respect to each of the factors.

*Cienega Gardens*, however, had a strange sequel. The opinion upholding the taking claims was rendered in a combined case involving numerous claimants, some of whose cases had been the subject of a full trial in the Court of Federal Claims, whereas others were appealed from preliminary dispositions. The Federal Circuit, after ruling in the claimants' favor on certain issues of law, affirmed judgments for the claimants whose cases had been fully tried, and remanded the other claims. On re-appeal after remand, the Federal Circuit reversed the Claims Court's judgment in favor of the remaining claimants and again remanded.<sup>114</sup> One judge dissented from the 2007 decision, asserting that the court had disregarded the law of the case established by the 2003 decision. While I am tempted to concur with that observation, I have included a summary of the 2007 panel's rationale in my discussion of particular issues.

Partial takings, we are authoritatively told, depend on three factors: (1) hardship for the claimant, (2) investment-backed expectations, and (3) the character of the taking, which, at least according to the Federal Circuit, includes the strength of the governmental interest supporting the regulation. Of these factors, however, I believe that only "investment-backed expectations" has any potential to win a case for a claimant or lose one for a governmental entity. First, intuitively, (a) in view of the *Lucas dictum* that a deprivation of 95 percent of the value of the relevant parcel does not

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<sup>114</sup> *Cienega Gardens v. United States*, 503 F.3d 1266 (2007) (second *Cienega*).

necessarily constitute a compensable taking, a court would not likely find a compensable taking on the basis of any percentage short of a total taking without an articulable rationale under another factor, and (b) courts are unlikely, without guiding principles (and neither the Supreme Court nor the Federal Circuit has provided any), to conclude that government has acted with insufficient reason. Second, as a matter of legal precedent, the Supreme Court said in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, that “our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”<sup>115</sup> And, in *Lingle*, the Court said, “the ‘substantially advances’ formula is not a valid takings test, and . . . has no proper place in our takings jurisprudence.”<sup>116</sup> These statements seem clearly to dictate that neither the hardship on the claimant nor the weakness of the government’s rationale for its rule can alone support finding a compensable taking. There must be something else, and the only other factor the cases suggest is investment-backed expectations.

This conclusion does not, of course, mean that investment-backed expectations are the only element to be considered in structuring a partial takings case. The courts can and do look at the other factors, and may hold that the other factors dictate a result in favor of the government even if the claimant’s investment-backed expectations contentions are viewed favorably.

**[a] — Hardship for the Claimant — Does It Mean Anything Different from “Investment-Backed Expectations”?**

**[i] — How Tough Must It Get?**

A footnote in *Lucas* indicated that a 95 percent diminution of value of property arising from a regulation would not constitute a total taking.<sup>117</sup> A 95 percent reduction in value would certainly be a hardship for the claimant, but it would seem there must be other factors present for this hardship to

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<sup>115</sup> *Concrete Pipe*, 508 U.S. at 644.

<sup>116</sup> *Lingle*, 544 U.S. at 548.

<sup>117</sup> *Lucas*, 505 U.S. at 1019, fn. 8.

be compensable as a partial taking. Thus it is not surprising that, though hardship for the claimant is often stated as a separate factor in the analysis, one finds few cases that turn on that factor.

Though it is doubtful if hardship for the claimant, short of a total taking, can ever make a taking case, a showing of limited hardship can probably break one. The Federal Circuit, in a line of cases beginning with *Florida Rock Industries, Inc. v. United States*,<sup>118</sup> one of the first cases decided after *Lucas*, held that the economic impact of a taking is “measured by the change, if any, in the fair market value caused by the regulatory imposition,”<sup>119</sup> a reasonable enough proposition, except that neither the Federal Circuit, the Supreme Court, nor any other court, so far as I have discovered, has ever indicated a percentage relationship that tips this factor in favor of the claimant. *Florida Rock* reversed a judgment for the claimant, holding that the record, as the appeals court interpreted it, did not support a finding of *any* material reduction in the market value of the wetlands in question due to the adoption of Section 404 of the Clean Water Act, a proposition difficult to believe. Subsequent cases have most often referred to this value comparison to demonstrate that the remaining value tended to negate a finding of substantial impact, though in most cases, this determination has been accompanied by findings favorable to the government on other *Penn Central* factors as well, making it difficult to determine if a significant remaining value was actually a case-breaker.

In *Cane Tennessee, Inc. v. United States*,<sup>120</sup> for example, the court followed the Federal Circuit’s teaching that the hardship factor should be assessed on the basis of the percentage relationship of the value of the relevant parcel immediately before and immediately after the taking. In that case, the court found the value taken to be 49.6 percent, and held that value was inadequate to support a taking on the basis of hardship. It also found, however, that Cane had no reasonable investment-backed expectations, and therefore would likely have found for the government on that ground alone.

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<sup>118</sup> *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (1994).

<sup>119</sup> *Id.* at 1567.

<sup>120</sup> *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115 (2003) (*Cane III*).

The before and after comparison remains significant, however, because if the comparison produces a low percentage figure for the part taken, it presumably could be sufficient alone to defeat a partial taking claim.

**[ii] — Mitigation.**

An issue that is discussed in *Penn Central* and several other cases, without clearly resolving exactly what part it does or should play in takings analysis, is the value of substitutes or alternatives provided or offered by the government. In *Penn Central*, the city offered owners of historical landmarks such as Grand Central Station “development rights” which could be used to develop other property in a manner not otherwise allowed by existing ordinances. The opinion in *Penn Central* admonishes that these development rights “are to be taken into account in considering the impact of regulation,”<sup>121</sup> although it is unclear if the Court did actually attribute any weight to this factor in terms of the result reached.

So far as I can discover, this factor was first accorded an explicit place in the analysis of a partial taking in the Federal Circuit’s second *Cienega* opinion. There, the court held that mitigating alternatives offered to the claimant must be considered in a partial taking case as reducing any hardship otherwise sustained by the claimant.<sup>122</sup> In so holding, the court distinguished, on grounds discussed further below, its prior holding in *Whitney Benefits*. In *Whitney Benefits* it had held that an alternative, allowing access to other government owned coal for owners of coal that could not be mined due to express provisions of SMCRA, was merely an offer of compensation that was not accepted. In *CCA Associates v. United States*,<sup>123</sup> another of the many takings cases arising out of the low-income housing support program involved in *Cienega Gardens*, the court followed second *Cienega* on this point, adding,

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<sup>121</sup> *Penn Central*, 438 U.S. at 137.

<sup>122</sup> The alternatives provided to the claimants in lieu of prepaying their government subsidized loans and exiting the low-income housing program were complex, and accordingly the reader who is interested in the details is referred to the opinion. Second *Cienega*, 503 F.3d at 1284-87.

<sup>123</sup> *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011).

however, that the burden of proving the availability of mitigating options and their value rests on the government. In *CCA*, the Court approved the Claims Court's finding that the government had inadequately demonstrated the value of the mitigating options (basically the same as those described in second *Cienega*), but nevertheless reversed that court's judgment for the claimants because, *inter alia*, it found the hardship on claimants, even without considering the mitigating alternatives, to be inadequate for a compensable taking.

With these cases, the Federal Circuit has given mitigating alternatives an express role in *partial* takings analysis. The more important inquiry, however, is their role in total takings analysis. A total taking must be either literally total or incredibly close thereto. Anything that modifies the totality throws the claim into the partial takings category. As discussed above, the *Lucas* opinion states in *dictum* that a 95 percent of value taking would not be a total taking, and the Federal Circuit in *Cooley v. United States*,<sup>124</sup> held there was not a total taking despite acknowledging that denial of a Section 404 permit deprived Cooley's land of 98.8 percent of its value.<sup>125</sup> The only suggestion I have found that there may be some *de minimis* factor is the *Lucas* court's failure to be swayed by the dissent's suggestion that Mr. Lucas could have used his beachfront lots for fishing or camping,<sup>126</sup> and even this concession may have been possible only because, as the Court observes,<sup>127</sup> there was an unchallenged finding of fact below that the building restriction rendered Lucas's lots valueless.

Must mitigation alternatives be taken into account in determining *whether a taking is total*? If so, then a governmental entity can always prevent liability for a total taking by offering the owner of property taken some character of mitigating alternative, however trivial. Fortunately for claimants, a strong argument can be made that second *Cienega* does not apply

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<sup>124</sup> *Cooley v. United States*, 324 F.3d 1297 (2003).

<sup>125</sup> *Cooley*, 324 F.3d at 1302.

<sup>126</sup> *Lucas*, 505 U.S. at 1065, fn. 3.

<sup>127</sup> *Id.* at 1020, fn. 9.

in determining whether or not a taking is total. To the extent that consideration of alternatives is mandated by *Penn Central*, then that mandate applies only to partial takings, which *Lucas* teaches are to be decided in accordance with the *Penn Central* analysis. *Cienega Gardens*, which holds that the value of mitigation alternatives must be considered, was *not*, even arguably, a total taking case, whereas *Whitney Benefits*, in which the Federal Circuit held that the offered mitigating alternative was not relevant, was a total taking case.

Furthermore, in its distinction of *Whitney Benefits*, the second *Cienega* court says:

[U]nlike in *Penn Central* where the benefits were tied to the property already owned by the affected parties, in *Whitney Benefits* the government offered the parties new properties. This case does not involve a transfer of new property to the owner as in *Whitney Benefits*, but rather an amelioration of the restrictions imposed on the existing property.<sup>128</sup>

This statement is not a valid distinction between *Whitney Benefits* and *Penn Central*, because while the “development rights” offered in *Penn Central* were for use on other property already owned by Penn Central, that other property was *not* part of the denominator identified by the Court (Grand Central Station and the tax block on which it is situated). But it is a valid distinction between *Whitney Benefits* and *Cienega Gardens* since the mitigating alternatives in the latter case related to the specific property allegedly taken. If the government offers alternatives that restore value to the property taken, such alternatives logically should be considered in deciding whether the owner was deprived of all economic value of the property taken. If, however, the government offers alternatives unrelated to the specific property identified in the takings denominator, that offer should not be considered in determining whether a total taking has occurred.

The issue of the part mitigation alternatives might play in a total taking might have been resolved in the Lake Tahoe development controversy, had judicial remedies been pursued to final conclusion. The factual recitations

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<sup>128</sup> Second *Cienega*, 503 F.3d at 1283.



in the Supreme Court’s opinion in *Suitum v. Tahoe Regional Planning Agency*<sup>129</sup> indicate that the eventual solution, or at least one of the solutions, reached to the Lake Tahoe development issue was to permanently prohibit development of some lots, offering the owners of those lots “saleable development rights” that could be applied to other lots. *Suitum* was a regulatory takings suit brought by a lot owner barred from developing a lot but offered such transferrable rights. The only issue addressed by the Supreme Court, however, was ripeness, and WestLaw does not indicate any subsequent judicial resolution of the case in any court.

**[b] — What Are “Investment-Backed Expectations”  
and When Do They Matter?**

**[i] — When Do They Matter?**

Two initial inquiries about investment-backed expectations are (1) is their existence a *sine qua non* for a partial taking? and (2) are they relevant to a total taking?

With respect to the first question, the Federal Circuit apparently takes the affirmative view. In *Rith*, that court affirmed summary judgment denying a partial takings claim due to absence of investment-backed expectations without analyzing the other “*Penn Central* factors.”<sup>130</sup> I do not fault the *Rith* court for this because I remain convinced that the other factors are not susceptible of analysis. However, this approach conflicts with Justice O’Connor’s *dictum* in her *Palazzolo* dissent that investment-backed expectations are not always essential to a finding of a partial taking. Justice O’Connor did not give a clue as to what circumstances would justify such a finding, however, and none suggest themselves.

As to the second inquiry, the Federal Circuit has explicitly held that investment-backed expectations are not relevant in total takings cases.<sup>131</sup>

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<sup>129</sup> *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997).

<sup>130</sup> *Rith*, 247 F.3d at 1355.

<sup>131</sup> *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (2000), *reh. en banc, denied*, 231 F.3d 1365 (2000), disapproving as *dictum* contrary statement in *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

This holding seems consistent with *Lucas*'s treatment of the matter, because *Lucas* says that the *Penn Central* factors only come into play where there is not a "categorical taking." However, the Eighth Circuit in *Outdoor Graphics* discussed investment-backed expectations in its analysis of what it assumed to be a total taking, and evidently gave it substantial, if not controlling, weight.<sup>132</sup>

### **[ii] — What Are "Distinct Investment-Backed Expectations"?**

The issue most frequently addressed by courts regarding investment-backed expectations is whether they can exist at all if the claimant had knowledge of, or reason to anticipate, the regulatory scheme being challenged. The logic apparently is that if the claimant had such knowledge at the time it made an investment, any expectation that it would acquire an asset unburdened by the challenged regulation would not be reasonable. Only reasonable expectations are protected.<sup>133</sup>

In *Rith, supra*, the Federal Circuit relied on this logic in affirming a summary judgment rejecting a takings claim when the OSM banned further coal mining on a lease. After holding that there was no total taking because the claimant had already recovered its investment, as discussed above, the court further held there was no partial taking due to the absence of reasonable, investment-backed expectations. There the particular issue that caused the OSM to order suspension of mining – acid mine drainage – was the subject of regulations adopted before claimant acquired the lease. This, of course, made it an easy case for this doctrine. No speculation about whether or not the claimant was fairly chargeable with notice of the possibility of a subsequently adopted regimen was necessary.

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<sup>132</sup> *Outdoor Graphics*, 103 F.3d at 694.

<sup>133</sup> See, *Creppel v. United States*, 41 F.3d 627, 631 (1994) ("One who buys with knowledge of a restraint assumes the risk of economic loss."); *Forest Props. v. United States*, (Developer acquired tract including wetlands after enactment of Section 404, and after Corps had made public its position that filling wetlands for residential development ordinarily would not be permitted). As I would have predicted, the suggestion in *Palazzolo* that a previous owner's expectations might play a part in takings analysis has never affected any case I have found involving a purchase transaction subsequent to enactment of the regulatory scheme.

In *Appolo Fuels, Inc., supra*, the Federal Circuit again affirmed a summary judgment for the government, holding that a coal owner's partial takings claim for lands – a portion of which were subjected to a UFM designation – was precluded as a matter of law by the claimant's having purchased after enactment of SMCRA.<sup>134</sup> The court rejected the claimant's contention that, under *Palazzolo*, it should be allowed to show investment-backed expectations of prior owners. The court further dismissed the claimant's contention that, though it was knowledgeable about SMCRA, it was unfairly surprised by its particular application in this case.

In *Cane Tennessee, Inc. v. United States*,<sup>135</sup> the court concluded, citing *Appolo Fuels*, that the mere fact that the claimant purchased its coal properties after the enactment of SMCRA rendered any expectations that a UFM designation would not be imposed on the property unreasonable. Whereas the claimant in *Appolo Fuels* pled expertise in SMCRA as a basis for believing in the improbability of a UFM designation for its property in particular, the *Cane* claimant pled ignorance of SMCRA. The claims court said, citing first *Cienega*, that evaluating investment-backed expectations involved a two-part analysis: (1) did the claimant in fact subjectively believe the restriction would not be imposed? and (2) was that belief objectively reasonable?<sup>136</sup> The court concluded that the mere existence of SMCRA would not have put the claimant on actual notice of the probability of a UFM designation, but that a reasonably prudent investor contemplating coal development would have informed himself concerning SMCRA and evaluated the regulatory risk.<sup>137</sup>

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<sup>134</sup> The court concedes that “[i]n some circumstances the determination of reasonable expectations may require a factual hearing,” but concludes that the previous enactment of SMCRA is legally dispositive. *Appolo Fuels* at 1350 [emphasis added]. Of course SMCRA did not entail any presumption that UFM designation would be the general rule for coal properties similar to the presumption against filling of wetlands emanating from Section 404 of the CWA; so the case for denying investment-backed expectations in *Appolo Fuels* and *Cane* is much less persuasive than in *Forest Properties*.

<sup>135</sup> *Cane Tennessee, Inc. v. United States*, 63 Fed. Cl. 715 (2005) (*Cane VI*).

<sup>136</sup> *Cienega*, 331 F.3d at 1319.

<sup>137</sup> *Cane III*, 57 Fed. Cl. at 127.

The holdings of *Appolo Fuels* and *Cane VI* are unsurprising given the broad grounds provided in SMCRA for UFM designation. However, the *Appolo Fuels* opinion, citing several of the Federal Circuit's own prior decisions,<sup>138</sup> adopted a three-prong test for evaluating the reasonableness of investment-backed expectations that has much broader implications. That test is as follows:

- (1) whether the plaintiff operated in a "highly regulated industry;"
- (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and
- (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase.<sup>139</sup>

This three-prong test supports decisions where the Federal Circuit and other courts have looked beyond the particular regulatory scheme at issue to the general regulatory environment to deny the reasonableness of a claimant's expectations.

In some such cases, courts have shown a willingness to charge a claimant with notice of potential adverse regulatory developments on what seem like very flimsy grounds. For example, in *Good v. United States*,<sup>140</sup> the court held that the claimant's investment-backed expectations were nullified because he knew when he purchased the wetlands he sought to develop that permits would be required to develop those lands, and might be denied. This seems reasonable enough, except that his permit request was denied solely due to endangered species concerns, and the Endangered Species Act was passed after his purchase.

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<sup>138</sup> *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001); *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003) and *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

<sup>139</sup> *Appolo Fuels*, 381 F.3d at 1349.

<sup>140</sup> *Good*, 189 F.3d at 1355.

In *District Intown Properties Ltd. Partnership v. District of Columbia*,<sup>141</sup> the court likewise granted summary judgment that the claimant had no valid investment-backed expectations. There the claimant's property was close to the National Zoo,<sup>142</sup> and accordingly subject to some legislative development restrictions at the time of the claimant's purchase. However, the permit denial that the claimant alleged as a taking was made pursuant to historic landmarks laws subsequently adopted. Like the Federal Circuit, the D.C. Circuit held that the subsequent adoption of the particular regulatory burden did not affect the analysis, saying:

Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends.<sup>143</sup>

These holdings could potentially nullify "investment-backed expectations" as a factor that will allow compensation under the *Penn Central* analysis, for most business property. What business does not operate in an industry with a history of regulation? Since the other *Penn Central* factors seem to be inherently unavailing to claimants, one can readily sympathize with the concurring judge in *District Intown*, who characterized the majority opinion as "reinforcing the seemingly predetermined conclusion: in partial takings cases, the government wins."<sup>144</sup>

In first *Cineta*, where the Federal Circuit found a compensable partial taking, it said that claimants' reliance on the 20-year prepayment provision expressly provided in the applicable regulations was reasonable despite its recognition that low-income housing is a highly regulated business, and despite the fact that the government's agreements with the claimants provided that regulations governing the program were subject to change. Distinguishing between this and other cases seemingly holding that participants in regulated

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<sup>141</sup> *District Intown Props. Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999).

<sup>142</sup> Intuitively, not the most cogent public interest rationale for an uncompensated taking.

<sup>143</sup> *District Intown Props.*, 198 F.3d at 884.

<sup>144</sup> *Id.* at 886.

business must anticipate virtually any subsequent adverse regulatory development, the court said:

A business that operates in a heavily regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments. But that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever.<sup>145</sup>

This is a great quotation to include in a claimant's brief. The distinction from other cases, however, would seem to lie in the court's perception that the government, due to the specificity of its regulations on the subject, induced the claimants' reliance on the continuance of the prepayment option.<sup>146</sup> Similar considerations lead the Court of Federal Claims to find that an oil and gas producer had reasonable investment-backed expectations of entitlement to a permit to drill on federal lands based on the rights conveyed to it under a federal oil and gas lease.<sup>147</sup> That court, however, decided for the government because the claim involved only a temporary taking, and thus failed the economic impact test of *Penn Central*. That result was affirmed by the Federal Circuit in *Bass, supra*.

*Bass* does not stand alone in holding that reasonable investment-backed expectations acknowledged by the court to be such do not necessarily win a partial takings case for a claimant. In *Maritrans Inc. v. United States*,<sup>148</sup> for example, the Federal Circuit affirmed a fact finding that Maritrans' expectation that it could continue to operate single-hull oil tankers was reasonable, and it was not bound to anticipate Congress' subsequent

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<sup>145</sup> First *Cienega*, 331 F.3d at 1350.

<sup>146</sup> In second *Cienega*, the court, perhaps not wishing to overrule its previous holdings that the claimants neither did in fact anticipate denial of the prepayment option, nor were bound in reason to do so, added a new twist. That opinion indicated, with citations to the investor prospectus from the original transaction, that the owners' expectation of the right to prepay, even if actual and reasonable, was not investment-backed, because it did not induce their purchase.

<sup>147</sup> *Bass Enterprises Prod. Co. v. United States*, 54 Fed. Cl. 400, 403 (2002).

<sup>148</sup> *Maritrans Inc. v. United States*, 342 F.3d 1344 (2003).

enactment of shipping safety laws requiring double-hull tankers. The court premised its affirmance of this finding on testimony of a Coast Guard official that a double-hull requirement had been considered years earlier and rejected. However, the court nevertheless denied Maritrans' partial taking claims on the ground that the relatively small economic impact on Maritrans and the importance of the public interest in safety overrode the investment-backed expectations.<sup>149</sup>

### [iii] — “Character of the Taking” — Does It Import the Police Power?

What is meant by the “character of the taking” once it is established that a claimant is asserting a regulatory, as opposed to a physical, taking remains obscure. Where courts discuss this factor at all in analyzing partial takings, they usually refer to the government's reasons for the taking, which the courts almost invariably find adequate.

The Federal Circuit has explicitly imported the nature and importance of the public interest supporting a regulatory action as an element in assessing the character of the taking. In *Appolo Fuels, Inc.*, the Federal Circuit refers briefly to the “character of the taking” and describes the Office of Surface Mining's environmental findings relating to water quality effects as establishing that its UFM designation pursuant to SMCRA constituted a proper exercise of the police power, and therefore decided the character of the taking element of the *Penn Central* analysis in the government's favor.<sup>150</sup>

In *Bass Enterprises Production Co. v. United States*,<sup>151</sup> a decision contemporaneous with *Appolo*, the same court cites *Palazzolo* and *Tahoe* as so explicating this *Penn Central* factor, observing:

Based on *Palazzolo* and *Tahoe-Sierra*, our recent decisions mark a return to the pre-*Lucas* evaluation of the “character

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<sup>149</sup> *Accord; Rose Acre Farms*, 373 F.3d 177 (finding of investment-backed expectations affirmed, but judgment for claimant remanded for re-consideration in light of other *Penn Central* factors, particularly the importance of the governmental interest in egg quarantine).

<sup>150</sup> *Appolo Fuels*, 381 F.3d at 1351.

<sup>151</sup> *Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004).

of the Government actions” factor. We therefore consider the purpose of the regulation and its desired effects in determining whether a taking has occurred.<sup>152</sup>

More recently, in second *Cienega*, the Federal Circuit defined the “character of the taking” as “the precise action that the government has taken and the strength of the governmental interest in taking that action.”<sup>153</sup>

Whether this view of the “character of the taking” is consistent with Supreme Court precedent is open to at least some question. I do not find the citations in *Bass* to *Palazzolo* and *Tahoe* supportive of this rationale, and the precise context in which the *Penn Central* Court used this phrase suggests that it was intended to distinguish regulatory takings from physical takings, rather than to provide a platform for consideration of a public interest factor. That said, however, it is plain that the *Penn Central* Court considered the public interest factor to be vitally involved in the decision whether a restriction effected a taking requiring compensation, whether or not that consideration was encompassed within any of the specific “*Penn Central*” factors.<sup>154</sup> Neither in *Lucas* nor in *Palazzolo* does the Supreme Court say that analysis of a partial taking under *Penn Central* is limited to the often quoted three factors.<sup>155</sup> Read as a whole, the *Penn Central* opinion

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<sup>152</sup> *Id.* at 1370.

<sup>153</sup> Second *Cienega*, 503 F.3d at 1270.

<sup>154</sup> The *Penn Central* Court probably did not consider the enunciation of the three “*Penn Central*” factors of “economic impact,” “investment backed expectations” and “character of the taking,” 438 U.S. at 124, to be a comprehensive list of the factors evaluated to reach its decision. Indeed the Court described those factors as “relevant considerations.” The three factors acquired their critical importance from the citation of that particular language in subsequent cases.

<sup>155</sup> The most relevant language from *Palazzolo*, which is the case that definitively established the partial taking concept is:

We have ‘identified several factors that have particular significance’ in these ‘essentially ad hoc, factual inquiries.’ *Penn Central*, 438 U.S., at 124, 98 S. Ct. 2646. Two such factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered \*634 with distinct investment-backed expectations.” *Ibid.* Another is “the character of the governmental action.” *Ibid.* The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.*, at 127, 98 S.Ct. 2646



seems unequivocally to be a police power driven decision. Thus, although I do not accept that *Palazzolo* or *Tahoe* in any sense represented a reversal of *Lucas*, as the Federal Circuit suggests, that Court's consideration of the public interest factor in conducting the *Penn Central* analysis is probably not an illegitimate graft.

*Lucas* adopted a new public interest rationale in the form of the nuisance exception which the *Lucas* Court quite clearly intended to be more restrictive of governmental prerogative than the police power. The question is whether the *Lucas* nuisance exception is to be the cornerstone for considering the public interest factor in takings cases generally, or only in total takings. Initially, the Federal Circuit held that the nuisance exception was the measure of the public interest factor for partial, as well as total takings.<sup>156</sup> It was this conclusion that the Federal Circuit ditched in *Bass*. The reasons the court gives in *Bass* for changing its reading of *Lucas* are unconvincing, and especially so when the citations to *Palazzolo* and *Tahoe* are read in context. But perhaps that does not matter if the court's original reading of *Lucas* was not correct to begin with.

The *holding* in *Lucas* regarding the nuisance exception is necessarily limited to total takings because the Court had already determined that the taking in that case was total and only remanded for consideration of applicability of the nuisance exception. The logic of the nuisance exception (that an owner has no property right to maintain a nuisance, hence suffers no taking from being prohibited from doing so) would mandate its application in partial taking cases as well, but does not preclude application of a more government-friendly public interest rationale in such cases. Nor has the Supreme Court, in *Lucas*, *Palazzolo* or elsewhere, defined what role the nuisance exception should play in partial takings.

In any event, the Federal Circuit's view of the "character of the taking" establishes the law for federal takings unless or until rejected by the Supreme Court and is likely to be persuasive for other courts. Hence, it is worth

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<sup>156</sup> *Creppel v. United States*, 41 F.3d at 631; *Forest Props., Inc. v. United States*, 177 F.3d at 1366.

inquiring how its analysis is affected by *Lingle*. It is, I think, arguable that *Lingle* withdraws the validity of the public interest supporting challenged regulations from proper consideration, except in the sense of the *Lucas* nuisance exception in all takings cases. Clearly *Lingle* does not expressly so hold, but this view is supported by the sweeping language in the concluding paragraph of the *Lingle* opinion, to the effect that:

We hold that the “substantially advances” formula is not a valid takings test, *and indeed conclude that it has no proper place in our takings jurisprudence*.<sup>157</sup>

At least one court has held that *Lingle* does preclude the court from considering the public interest factor. In *Mansoldo v. State*,<sup>158</sup> the New Jersey Supreme Court, in reversing and remanding for reconsideration under what it held to be proper standards for a judgment for the government in a takings case, said:

[A]s the Court explained in *Lingle, supra*, considerations of ‘legitimate states interest[s]’ have no bearing on whether the DEP regulation [prohibiting building in a floodway] effected a taking or what compensation is due.

The logical persuasiveness of the suggested argument may be limited, because *Lingle* specifically denies effect to an *inadequate* public interest rationale, not to an *adequate* one. However, the observation that assessing the validity of the public interest served by a regulatory scheme involves the judiciary in “a task for which courts are not well suited”<sup>159</sup> is as cogent when a court is invited to undertake that task by the government to uphold a regulation as when it is invited to do so by a claimant to question it. If the public interest rationale has “no proper place in takings analysis” for supporting the regulation, as well as challenging it, then the Federal Circuit’s

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<sup>157</sup> *Lingle*, 544 U.S. at 548 [emphasis added].

<sup>158</sup> *Mansoldo*, 898 A.2d at 1018, 1024.

<sup>159</sup> *Id.* at 544.

holding that that factor defines the “character of the taking element of partial takings analysis must yield.”<sup>160</sup>

Assuming that the Federal Circuit’s position prevails, will the public interest factor in the character of the taking analysis dictate a pro-government result in every partial takings case? Will that factor ever be decided in the claimant’s favor? If not, can it be overcome by other factors, particularly investment-backed expectations? There is little in the cases to answer these questions, since courts most often reject a claimant’s position on multiple factors. A few cases have, however, analyzed the factors separately. For example, in *Cane Tennessee, Inc. v. United States*,<sup>161</sup> the court, after discussing the reasons underlying the UFM designation in that case<sup>162</sup> determined that the public interest factor there neither required nor precluded finding a compensable taking. It then decided in favor of the government on the basis that the claimant, having purchased after enactment of SMCRA, could have had no reasonable expectations.

Because the public interest is a factor so easily decided in favor of the government, if the Federal Circuit’s view is correct, claimants seeking to establish a partial taking will probably be relegated, in the vast majority of situations, to arguing that this factor is outweighed by hardship to the claimant and, particularly, investment-backed expectations, when those can be demonstrated.

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<sup>160</sup> I am not insensitive to the distinction between the validity of the public benefit sought to be achieved by a governmental action and the efficacy of the action to achieve that benefit. Clearly the latter was the focus of *Lingle*. However, the “substantially advances” formula that the Court there dismisses would seem to encompass both issues.

<sup>161</sup> *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115, 127-29.

<sup>162</sup> A major and, the claimant argued, controlling reason for the UFM designation there was to protect the esthetic environment surrounding a neighboring state park. The Court said:

Some of the reasons for determining unsuitability may fairly be characterized as necessary to forestall or abate a nuisance (“landslides . . . pollut[ion of] the water . . . creati[on] of hazards dangerous to life and property”). Other reasons, including several of the Secretary’s concerns here, are not within the ambit of traditional nuisance law or within the reach of traditional police powers. *Cane* III, 57 Fed. Cl. 128 at 128.

The public interest factor is inevitably the joker in the regulatory taking deck, and has been so throughout the history of takings jurisprudence. As the Federal Circuit observed in *Florida Rock*, to hold that “when Government acts in pursuit of an important public purpose, its actions are excused from liability . . . would eviscerate the plain language of the Takings Clause . . .” which requires compensation when private property is taken for public use.<sup>163</sup> However, neither the older rationale based on the police power (*i.e.*, the power to protect the public health, safety and morals *and welfare*) or the recent reference in second *Cienega* to “the strength of the governmental interest” in the action that caused the alleged taking gives any practical guidance for distinguishing governmental policies that justify uncompensated takings from those that do not.

### § 3.06 Practical Considerations.

#### [1] — Why Are So Many Cases Brought?

Given the fact that the vast majority of reported appellate decisions in regulatory takings cases reach results favorable to the government, one wonders why so many cases are brought. The number of cases is truly immense. The Westlaw citator lists more than 1,600 reported decisions that have cited *Lucas*, and more than 500 that have cited *Palazzolo*. Perhaps the vagueness of the criteria by which liability is allegedly determined in such cases, coupled with potentially large liability if a governmental entity is held liable, gives such cases a settlement potential that overrides the seemingly dismal prospects suggested by appellate decisions. To test that hypothesis would require field research. Or perhaps, the number of cases merely reflects unjustified optimism.

#### [2] — A Tale of Two Counties.

From the point of view of a governmental agency or entity seeking to prevent property use it deems, or its constituents believe will be, harmful, an

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<sup>163</sup> *Florida Rock* suggests that reciprocal benefits may be a consideration, but since it does not undertake to apply its discussion of the public interest factor to the facts of the case, it gives little guidance.

important practical consideration is avoiding takings liability. That should be relatively easy for most surface land uses, since prohibition of a particular surface use generally will not preclude other uses that will provide the owners at least some economic benefit. Therefore, the use prohibition will usually be a partial taking, and partial takings claims rarely succeed.

If, however, the governmental entity seeks to prohibit mining or drilling, it runs a much greater risk of incurring takings liability because owners adversely affected may own only minerals, making a finding of a total taking more likely. There are different approaches a governmental entity can take, and some are far more likely to result in takings liability than others. Two counties in northern New Mexico — Santa Fe County and Mora County — have recently adopted ordinances restricting oil and gas development.<sup>164</sup> These two counties are similarly situated in that neither has any existing oil and gas production, public opinion in both counties is intensely averse to drilling, and, in both counties, there is private, as well as government land with severed mineral estates.

Santa Fe County has adopted a highly restrictive ordinance that requires permits prior to drilling. In order to obtain a permit, a potential operator must conduct extensive and expensive preliminary investigation of the geology of the area in order to demonstrate that there will be no adverse environmental effects. Mora County's ordinance is expressly designed to ban drilling altogether.<sup>165</sup>

Leaving aside any issues of state pre-emption, since there is no clearly controlling law, judicial or statutory, on that subject in the oil and gas context in New Mexico, and assuming that the objective of both counties is to prohibit oil and gas development within their respective jurisdictions, Santa Fe's ordinance seems very likely to achieve its objective, as to non-federal

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<sup>164</sup> Rio Arriba County has also adopted an ordinance on the subject recently, but differs from the other two counties in that there is existing oil and gas production there, and the ordinance is far less restrictive.

<sup>165</sup> Actually, it prohibits any "corporation" from conducting drilling activities. I will not pause to consider the problems to which that distinction gives rise because they are fairly obvious and not relevant to this narrative.

lands, and to do so without much risk of takings liability. The United States Supreme Court made clear in *United States v. Riverside Bayview Homes, Inc.*<sup>166</sup> that imposition of a requirement for a permit does not, in itself constitute a taking. The Court there said:

A requirement that a person obtain a permit before engaging in certain use of his or her property does not itself “take” the property in any sense: after all, the very existence of a permit system implies that permission may be granted, . . . .<sup>167</sup>

Of course, a wag might add that the very existence of a permit system also implies that permission may be denied. However, where a permitting system exists, the Supreme Court has further required that a property owner must seek a permit and either receive an unequivocal denial, *Williamson County Regional Planning Comm’n v. Hamilton Bank*,<sup>168</sup> or satisfy a court that further pursuit of a permit will be futile, *City of Monterey v. Del Monte Dunes*,<sup>169</sup> before any taking claim will be ripe. Thus, before an oil and gas owner can assert a taking claim by reason of Santa Fe County’s ordinance, it will probably have to perform all of the preliminary work necessary to apply for a permit, and it may have to go through several rounds of revision and re-submission before it will have a ripe claim. Assuming a claim is ripened, the owner will face obstacles to any taking claim. The permit may be denied on site specific grounds which will defeat a claim that denial constitutes a total taking, and that raise governmental interest issues unique to the site that can defeat a partial taking claim.

In Mora County, on the other hand, since drilling is banned county-wide, any taking is likely to be a total taking, especially if the Fifth Circuit’s decision in *Vulcan Materials Co. v. City of Tehuacana*, that property outside the jurisdiction of the taking governmental entity should not be included

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<sup>166</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

<sup>167</sup> *Id.* at 127.

<sup>168</sup> *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>169</sup> *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

in the denominator,<sup>170</sup> is followed. Furthermore, since there is no permit system, there are no prerequisites to assertion of a takings claim, and the county cannot rely on site-specific factors to defend its drilling ban.

In view of the vehemence of anti-drilling sentiment in both counties, I am inclined to assume that banning all drilling represents the actual objective of both these county commissions. However, Santa Fe County had, and obviously took advantage of, sound legal advice. If a local government's objectives are less draconian, and it seeks only to ban drilling or mining in certain places, while allowing it in other places, it can probably do so with little fear of takings liability pursuant to land use planning authority, which has been sustained in *Euclid v. Amber Realty Co.*<sup>171</sup> and many other cases. Clearly limiting mining or drilling to certain locations is a more restrictive form of regulation than similarly limiting surface uses, since the minerals cannot be moved to accommodate the land use planners. However, indications are that this factor will not likely change the outcome of takings litigation.

### **[3] — Speculations About the Future of Regulatory Takings.**

When I wrote on this subject 12 years ago, the relatively recent decisions in *Lucas* and *Palazzolo* indicated that a degree of optimism for claimants might be justified. *Lucas* seemed to define a class of cases where compensation could be expected — a class, too, that would often apply to oil, gas and mineral cases. Denial of permits to drill or mine such properties would be particularly likely to constitute total takings in view of the lack of alternative uses for mineral leases.

While *Palazzolo's* holding was not encouraging on the denominator issue, the fact that the Court expressed reservations on that score — which it dismissed only because the issue was not properly raised — suggested that future cases might confine the denominator within a narrower compass. And the indication that a prior owner's economic expectations might be relevant in assessing partial takings was definitely encouraging as to the prospects of that category of claims. Furthermore, the Federal Circuit's decisions in *Whitney*

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<sup>170</sup> *Vulcan Materials*, 238 F.39 at 383.

<sup>171</sup> *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

*Benefits*, *Loveladies Harbor*, and *Palm Beach Isle Associates* indicated that these Supreme Court precedents might be applied in a somewhat claimant-friendly manner.

Subsequent developments suggest that the leading decisions of that time have much less pro-claimant potential than might have been supposed. The progressive enlargement of the denominator, especially to include non-contiguous tracts, limits the prospects for total takings. The confinement of investment-backed expectations that courts will consider to extremely narrow limits and the Federal Circuit's re-injection of the police power doctrine into the "character of the taking" factor, indicate that nearly all, if not all, partial takings claims will fail. Unless the Supreme Court intervenes to alter these trends, the future for regulatory takings claimants does not seem bright.

The Supreme Court, as it conceded in *Penn Central*, has never developed a regulatory takings doctrine with which it has felt comfortable. Even with regard to *Lucas*, there is force in Justice Stephens' observation in dissent that "[l]ike many bright-line rules, the categorical rule established in this case is only 'categorical' for a page or two in the U.S. Reports"<sup>172</sup> — his commentary on the fact that the opinion establishes the seemingly definite total takings rule but immediately qualifies it with the vague nuisance exception. Yet for all that, no member of the Court has expressly advocated ditching the doctrine.

Noting the Supreme Court's preference for *ad hoc* consideration of particular facts in taking cases, the Federal Circuit in *Florida Rock* optimistically predicted that "[o]ver time, however, enough cases will be decided with sufficient care and clarity that the line will more clearly emerge."<sup>173</sup> This prediction penned nine years ago has not proven accurate. Nor does it seem likely to happen unless my hunch is correct that the jurisprudence in this area is moving toward the conclusion that the government always wins. If that hunch proves true, then the Supreme Court's consistent unwillingness to abolish regulatory takings will have been defeated by the devils in the details.

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<sup>172</sup> *Lucas*, 505 U.S. at 1067.

<sup>173</sup> *Florida Rock*, 18 F.3d at 1571.



My view is that a vague regulatory takings doctrine is better than none at all because (1) it compels legislators and regulators (particularly local officials) to remember that the property of citizens is not their own, and (2) it makes cases settleable, therefore ameliorating political risk, a major disincentive to private investment. I would concede that a judicial solution to this issue is probably impossible under the takings clause because what is rationally to be aimed at is partial compensation or adjustment, limited to relatively meritorious cases. But to achieve the purposes suggested, a vague takings doctrine must establish criteria sufficiently definite to allow actual recoveries in somewhat definable types of cases. Otherwise claimants will give up on the doctrine, and claims will no longer be brought. In that case, the suggested purposes will fail. It seems the present trend may be in that direction.

