

Introductory Program on Takings

Litigating Takings and Other Legal Challenges to Land Use and Environmental Regulation

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Constitution of the United States

Fifth Amendment
Takings Clause

*. . . nor shall private property
be taken for public use,
without just compensation.*

Comparison to State Constitutions: California

CALIFORNIA CONSTITUTION ARTICLE 1 DECLARATION OF RIGHTS SEC. 19

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.

...



California Constitution



- Use of word “damaged” “protects somewhat broader range of property values” than does Fifth Amendment. *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 41 P.3d 87, 100-01 (2002).
 - Clarifies that “application of the just compensation provision is not limited to physical invasions of property taken for ‘public use’ in eminent domain, but also encompasses special and direct damage to adjacent property resulting from the construction of public improvements.” *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 895 P.2d 900 (1995).
- “But aside from that difference ... we appear to have construed the [Federal and State] clauses congruently.” *San Remo Hotel*.

Comparison to State Constitutions: The Other 49 States

- Most states, like California, construe their state constitutions similarly to Just Compensation Clause of Fifth Amendment.
- But there are exceptions. E.g., Nevada
 - *See Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902, 916 (9th Cir. 2007) (recognizing that Nevada Constitution defines takings more broadly than does Fifth Amendment)





WE'RE NOT TALKING ABOUT DIRECT CONDEMNATIONS!!

Kelo v. City of New London
545 U.S. 469 (2005)
(addressing "public use").



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"Yes, you now have to share a room with your brother. But don't worry, the whole family will benefit from my new billiards room!"

State Property Rights Laws

Limits on Exercise of Eminent Domain

- In aftermath of *Kelo*, numerous states have implemented, or are seeking to implement, laws that prohibit condemnations if not for a “public use.”
- California Prop. 99 (passed June 2008)
- Similar federal legislation going nowhere (Private Property Rights Protection Acts—H.R.3053, S.48).

State Property Rights: Partial Takings Legislation

- Typically provides compensation at lower threshold than does Fifth Amendment
 - Arizona Proposition 207
 - Oregon Measure 37
- Past efforts to implement similar federal legislation have been unsuccessful

Inverse Condemnations

- No intent by government to acquire property
 - Government denies that its actions resulted in taking
 - If it is clear that government's actions resulted in taking, property should be acquired by direct condemnation
 - Good public policy not to subject landowners to unnecessary litigation
 - Acquisition by direct condemnation tends to cost government less \$
- So long as a monetary remedy is available, relief is "just compensation," not invalidation of government action.

Eminent Domain

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graph TD; A[Eminent Domain] --> B[Direct Condemnations]; A --> C[Inverse Condemnations]; C --> D[Physical Takings]; C --> E[Regulatory Takings];
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Direct Condemnations

Inverse Condemnations

Physical Takings

Regulatory Takings

Takings vs. Tort

- Takings claims must presume lawfulness
- Two-part inquiry for distinguishing physical takings from torts (*Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003))
 - Must show either intent to invade, or that invasion was “direct, natural, or probable result of an authorized activity”
 - Need not be continuous, but must be “substantial” (e.g., “inevitably recurring”)

Tort vs. Takings: *Moden v. United States*, 404 F.3d 1335 (Fed. Cir. 2005)

- Plaintiffs' ranch 5 miles from Ellsworth AFB, South Dakota.
- Base used TCE in 1940s & '50s to degrease airplane parts.
- In 1998, groundwater under Moden's ranch found to contain TCE
- Undisputed that:
 - there was no accidental or intentional dumping of chemicals
 - base utilized industrial drainage system to dispose of waste water and chemical solvents
 - base met and/or exceeded federal and state requirements for use and storage of chemicals
- Court concluded it was not foreseeable that use of TCE on base would cause it to enter groundwater.

Federal Takings Jurisdiction

- Claims $>$ \$10,000: U.S. Court of Federal Claims has Exclusive Jurisdiction (Tucker Act, 28 U.S.C. § 1491)
- Claims \leq \$10,000: U.S. Court of Federal Claims and U.S. District Courts have Concurrent Jurisdiction (“Little Tucker Act,” 28 U.S.C. § 1346(a)(2))
- Appeals go to US Court of Appeals for the Federal Circuit



Substantive Threshold Issues in Takings Cases

Is There “Property”?

- “Property” in Takings Clause is defined by law (state or federal), existing rules and understandings, and “background principles”
- Unilateral expectations not enough
- Narrower than under Due Process Clause

Is There “Property”?

- Includes almost all land-related interests – including water rights, mineral interests, and airspace
- Plus personal property, tangible and intangible – including money, liens, intellectual property, causes of action

Is There “Property”?

- Does not include permits and licenses, government benefits, uses/access dependent on government authorization, law staying same or changing



Is There “Property”?

- Particularly fundamental property rights
 - physically exclude others
 - pass on property to one’s heirs



Sufficient Link Between Government Action and Property Harm?

- Direct causation required
 - Indirect (aka “consequential”) injuries are without Takings Clause remedy
- Causation issue arises mostly with physical takings



Sufficient Link?

- Causation in fact not enough - must also show government either
 - intended impact, or
 - predicted or foresaw impact, or should have

Sufficient Link?

- Government is liable for actions of third parties when there is way to attribute actions of third party to government
 - private third parties
 - government third parties

Sufficient Link?

- Plaintiff is owner of property as of date of alleged taking
 - Required for physical takings
 - Unclear when required for regulatory takings

Other Substantive Thresholds

- Erroneous/unauthorized government action
- Government agency lacks power to condemn
- Government action not for “public use”
- Government merely asserting proprietary rights
- Miscellaneous exclusions

Physical Takings



- ◆ Physical Occupation or Exclusion from Property by Government
- ◆ Must be Permanent
 - ◆ But not necessarily forever
- ◆ A Single Event is not Sufficient
 - ◆ Must be Inevitably Recurring
- ◆ Size Doesn't Matter
 - ◆ *Loretto* (cable TV box)
 - ◆ *Hendler* (groundwater monitoring well)

Physical Takings

- Per se rule
- Liability generally turns on causation.
 - Oftentimes a highly complex inquiry (e.g., cause of erosion/flooding)
- Claim accrual date frequently difficult to determine; when was property owner on notice of claim?
 - Gradual physical processes (*Dickinson* stabilization)
 - But see *Applegate* (Governmental attempts at mitigation)

Flooding / Erosion

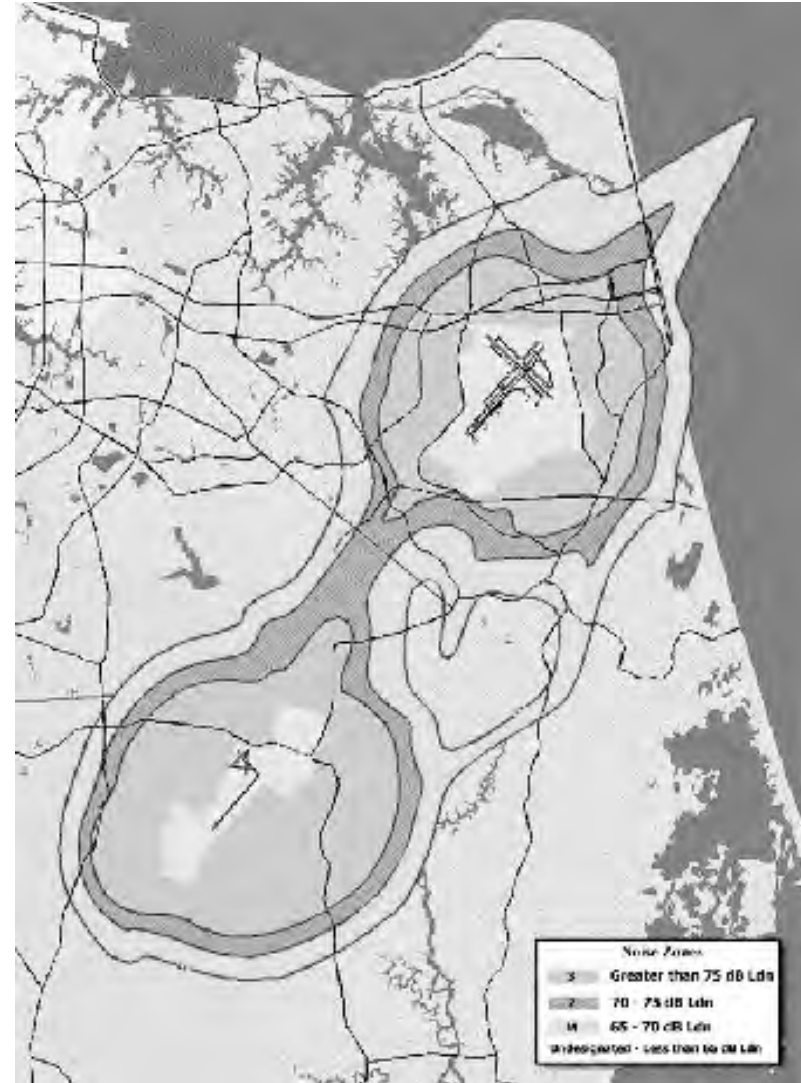




Overflights

Testwuide v. United States (Fed. Cl.)

- Introduction of F/A 18-C/D squadrons to NAS Oceana and NALF Fentress, Virginia
- *Causby* test: Low, frequent, noisy, invasions of airspace
- Settlement reached with 3400 plaintiffs for 2100 properties; U.S. acquiring avigation easements



Groundwater Contamination/Migration



Access/Encroachment



NAS Fallon,
Nevada



Aguero v. US,
Guam



Otay Mesa v. United States (Fed. Cl.)

- Border protection activities on private property
- Trial held in October



Cary v. United States (Fed. Cl.)

- Putative Class Action; destruction caused by Cleveland Nat'l Forest fire (San Diego area) in 2003
- Allege that fire suppression policies resulted in unnaturally dense stands of trees, increasing wildfire risk
- Case recently dismissed, court holding that fire not caused by U.S.; on appeal to Federal Circuit

***El-Shifa Pharmaceutical
Industries v. United States
(Fed. Cir.)***



No taking from destruction
of enemy war-making
instrumentality

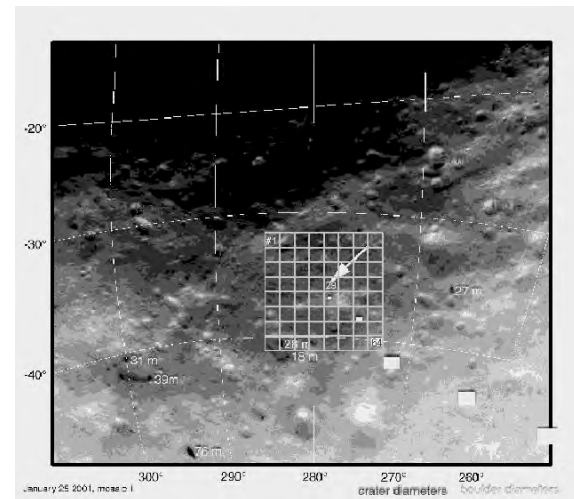
Atamirzayeva: The case of the
Uzbek Falafel Stand:
No causal connection found



Nemitz v. United States: The “Taking” of 433 Eros

Second largest known Near Earth Asteroid, it has a diameter of 16.84 km

NEAR Shoemaker Probe landed February 2001 (on Parking Space 29) – see www.erosproject.com



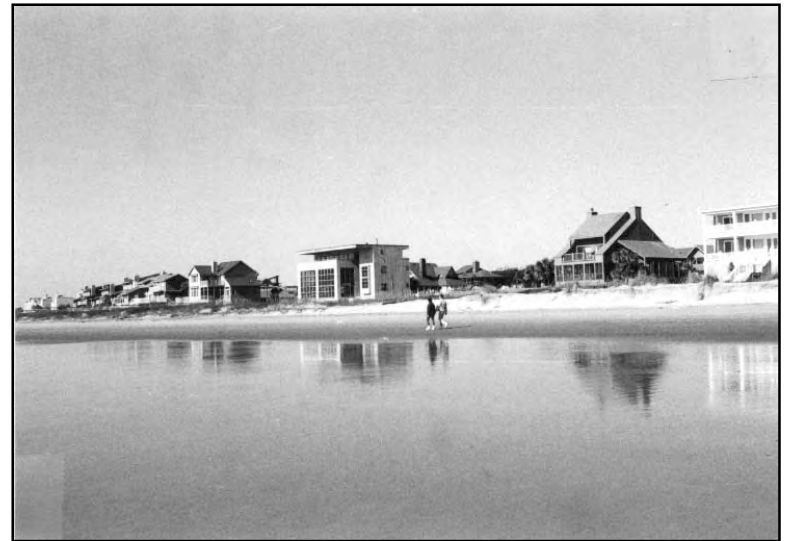
Regulatory Takings Tests

Regulatory Taking

- Government merely restricts property use, but goes “too far”
- Two bedrock principles
 - “fairness and justice” (*Armstrong v. US*, 364 US 40 (1960))
 - “functional equivalence” with appropriation or physical ouster (*Lingle v. Chevron USA*, 544 U.S. 528 (2005))

Total Regulatory Taking

- *Total* elimination of use and/or value
- Per se taking, unless restriction embodies “background principle” existing when property acquired (*Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992))



Partial Regulatory Taking

- *Partial* elimination of use and/or value
- Assessed under broad guidelines in *Penn Central Transp. Co. v. New York City*, 438 US 104 (1978)
 - Economic impact
 - Interference with reasonable/distinct investment-backed expectations
 - Character of government action



Lucas Test Issues

- Use or value, or both?
- How total is “total”?
- Role of expectations
- Non-application to personal property
- Non-application to reasonable land use restrictions known *at the outset* to be temporary (e.g., moratoria)

Penn Central Test Issues

- Economic impact factor
 - Use or value, or both?
 - Severe impact usually required
 - Meaning of “economic use”
 - Calculating value loss



Penn Central Test Issues

- Economic impact factor (cont.)
 - Reasonable return
 - Recoupment of cost basis
 - Offsetting direct benefits
 - Charitable or religious uses



Penn Central Test Issues

- Investment-backed expectations factor
 - Expectations must be actual and objectively reasonable
 - Pre-acquisition regulatory schemes
 - Heavily regulated field



Penn Central Test Issues

- Investment-backed expectations factor (cont.)
 - Initially limited intentions of buyer
 - Permit hard to obtain
 - Low purchase price
 - “Primary” expectations

Penn Central Test Issues

- Character of government action factor
 - Physical invasions
 - Balancing of public interest and private burden
 - Benefit creation vs. harm avoidance
 - Need for specific property

Penn Central Test Issues

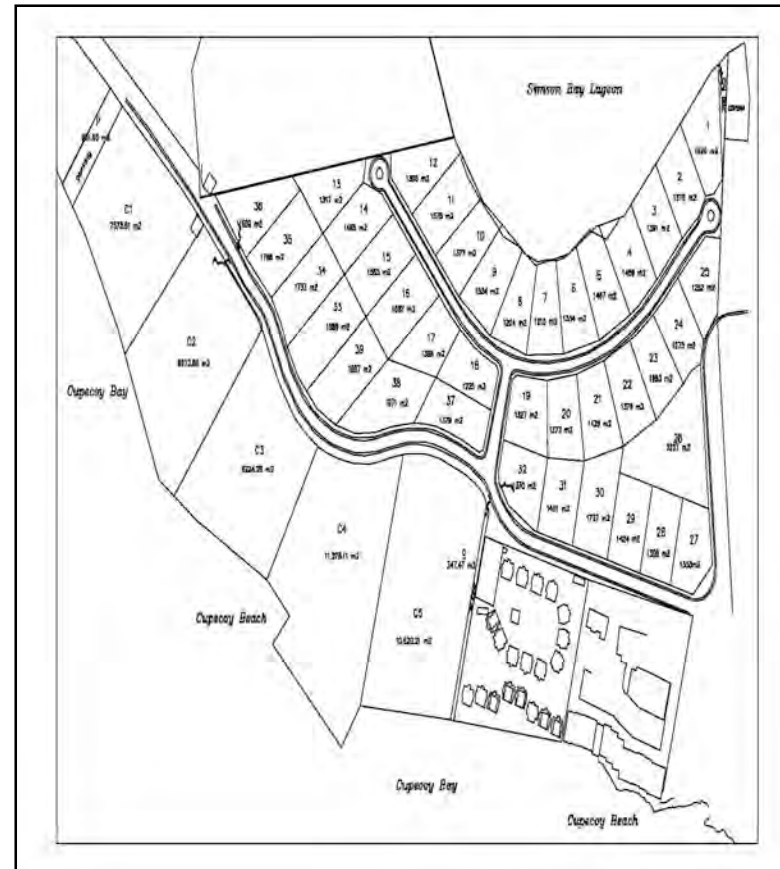
- Character of government action factor (cont.)
 - “Average reciprocity of advantage”
 - Direct benefits for government
 - Government bad faith
 - Voluntariness
 - “Singling out”

Parcel as a Whole Rule

- In assessing economic impact, court looks at plaintiff's "parcel as a whole" – compares what government took *with what plaintiff still has*
- But what *is* parcel as a whole?

Parcel as a Whole Rule

- Spatial dimension
 - Not to isolate regulated portion
 - “Flexible approach” but generally includes all contiguous, same-ownership land
 - Some state courts: Could unregulated acreage be economically developed?



Parcel as a Whole Rule

- Spatial dimension (cont.)
 - Landowner treatment as unified parcel
 - Sold-off portion
 - Vertical parcel as whole



Parcel as a Whole Rule

- Functional dimension
 - Look at all sticks in bundle
 - Exceptions
- Temporal dimension
 - Economic use after restricted period
 - Economic use before restricted period



Background Principles

- No taking where restriction merely makes explicit what could have been prohibited under background principles of state (or federal) law of property or nuisance existing when property was acquired

Announced in *Lucas* total taking decision...but applicable to partial regulatory takings, too

Background Principles

- Reflect “common shared understandings of permissible limitations derived from a State’s legal tradition”
- Common-law principles anointed
 - Public trust
 - Public access to beach (Oregon, Texas)
 - Federal navigation servitude
 - Public ownership of navigable airspace
- Some statutes anointed, too



Penn Central and Retroactivity

- Legislation may effect taking “if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”

Demise of “Substantially Advance” Test

- Old rule: government action that “fails to substantially advance a legitimate state interest” is taking (*Agins v. City of Tiburon*, 447 US 255 (1980))
- In 2005, S.Ct. repudiated because takings law is concerned with *impact* of government action, not means-end fit (*Lingle*)

Hybrid Takings



Plaintiffs



Physical

Government

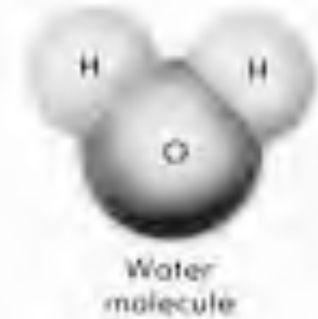


Regulatory

Water Rights

***Casitas Mun. Water Dist. v. United States* (Fed. Cir. Sept. 28, 2008)**

- Alleged taking and breach of contract
- Required construction of fish passage facility to protect SoCal Steelhead.
- Some water diversion was also required for operation of fish passage facility
- Fed. Cir. held that ESA-required water diversion was a physical taking.
- Not first time that diversion of usufructory interest in water was analyzed as physical taking. *See Tulare Lake Basin Water Storage District v. United States* (Fed. Cl.).



Rails to Trails

- Cases in both Court of Federal Claims and District Courts
- Most are certified class actions involving property along single trail
- Liability typically determined by whether fee or easement conveyed to RR, and if easement, whether trail use and “railbanking” are beyond scope.
- Although taking based on operation of National Trails System Act, cases analyzed as physical takings.



Temporary Takings

Temporary Takings

- Development Moratoria (*Tahoe-Sierra*)
- Delay in Permit Processing (*Bass Enterprises; Wyatt*)
 - Must be “extraordinary delay”
 - Length of delay must be compared to complexity of regulatory process.
 - Showing of bad faith typically required.
 - Threshold inquiry; if satisfied, then apply *Penn Central*
- Agency changes its decision (grants permit following denial)
- Post *Tahoe-Sierra*, likelihood of liability for temp. take significantly reduced due to “temporal parcel as a whole”.

Exaction Takings Tests

What are Exactions?

- Things exacted by government from landowners as condition for approving land development – to offset costs imposed on community
 - Dedications
 - Impact fees
 - On-site and off-site improvements

The Question

- Given that exaction would be a taking if imposed *directly*, does imposing exaction merely as *condition for development approval* make it not a taking?

Supreme Court's Answer

- Depends. An exaction imposed as condition for development is not taking if
 - It substantially advances a government purpose that would justify denying the permit ("essential nexus" test) (*Nollan v. California Coastal Comm'n*, 483 US 825 (1987)), AND



- Impact on landowner is "roughly proportional" to burden that development would impose on community (*Dolan v. City of Tigard*, 512 U.S. 374 (1994))



Scope of *Nollan/Dolan*

- Adjudicatively imposed conditions vs. legislatively imposed conditions
- Dedications vs. monetary exactions
- Dedications open to public vs. dedications not open to public

Questions to Always Ask in a Takings Case

Questions to Always Ask in a Takings Case

- What is property interest allegedly taken?
 - Recognized as property under state law?
 - Physical boundaries of property?
- Is property interest limited by “background principles” derived from state, federal or common law (e.g., did government act to abate nuisance)?
- Did plaintiff actually own property on alleged date of taking?
- Was agency action not authorized by Congress?
- For regulatory takings, was there final agency action?

More Questions to Ask

- When did cause of action accrue (taking known or knowable)?
 - Ripe (final agency action)?
 - Futility exception requires “one meaningful permit”
 - Time-Barred (6 year SOL in federal courts, 28 U.S.C. §§ 2401, 2501)?

More Questions to Ask

- Are state exhaustion of administrative remedies requirements satisfied?



Williamson County, 473 U.S. 172 (1985)

- To have a ripe claim, property owner must exhaust administrative remedies
 - Agency has reached a final decision
 - Agency has opportunity to amend its decision or grant a variance
 - But see *Palazzolo* (S.Ct) (takings claim is ripe if agency lacks discretion to permit development or permissible use is known to a reasonable degree of certainty); *Dunn v. County of Santa Barbara*, 135 Cal. App. 4th 1281 (2006).
- To pursue state takings claim in federal court, property owner must exhaust state judicial remedies
 - Exception where state does not have a “reasonable, certain, and adequate provision for obtaining compensation”
 - California procedures are adequate and must be utilized. *San Remo Hotel*, 145 F.3d 1095, 1102 (9th Cir. 1998).

More Questions to Ask

- Claim sounds in tort?
- Is interest allegedly taken a contract right?
- Is plaintiff also seeking to invalidate governmental action in district court (possible stay)?