Regulatory Takings in Agriculture: Pursuing a Remedy

Roger A. McEowen*

INTRODUCTION

The power to "take" private property for public use (or for a public purpose) without the owner's consent is an inherent power of the federal and state governments.[1] However, the United States Constitution limits the government's eminent domain power by requiring federal and state governments to pay for what is "taken."[2] The Fifth Amendment states in part, " . . . nor shall private property be taken for public use, without just compensation."[3]

Whether a taking has occurred is not an issue when the government physically takes the property, with the only issues being whether the taking is compensable and the amount of compensation owed to the landowner.[4] For non-physical (regulatory) takings, the issue is murkier. At what point does government regulation of private property amount to a compensable taking? Also important to rural landowners when an alleged taking occurs by a state or local government is whether the landowner must "exhaust" state court remedies before seeking compensation for a regulatory taking. If so, such a taking could result in a landowner having no real access to the federal court system on a constitutional taking claim.

I. REGULATORY (NON-PHYSICAL) TAKINGS

A non-physical taking may involve the governmental condemnation of airspace rights, water rights, subjacent or lateral support rights, or the regulation of property use through

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* Kansas Farm Bureau Professor of Agricultural Law and Taxation, Washburn University School of Law. The author acknowledges the assistance of Lindcy Gardner, a second-year law student at Washburn University School of Law who also serves presently as one of the author's research assistants.

[1] The Takings Clause of the Fifth Amendment has been applied to the states since 1897. *See* Chi., B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

[2] *See* U.S. CONST. amend. V.

[3] *Id.*

[4] United States v. Dow, 357 U.S. 17, 21 (1958).

environmental restrictions.[5] In such situations, how is the existence of a regulatory taking determined? The United States ("U.S.") Supreme Court has utilized several approaches, such as a *multi-factor balancing test,*[6] *total regulatory taking,*[7] and *unconstitutional conditions.*[8] Additional issues arise when the alleged taking is the result of regulatory action of a state or local government.[9]

A. Multi-factor Balancing Test

In a key case decided in 1978, the U.S. Supreme Court in *Penn Central Transportation Company v. New York City* set forth a multi-factored balancing test for determining when governmental regulation of private property effects a taking requiring compensation.[10] The Court held that a landowner cannot establish a "taking" simply by being denied the ability to exploit a property interest believed to be available for development.[11] Instead, the Court ruled that in deciding whether particular governmental action effects a taking, the character of the governmental action, the nature, and the extent of the interference with property rights as a whole are the proper focus rather than

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[5] *See* ROGER A. MCEOWEN, PRINCIPLES OF AGRICULTURAL LAW 14–17 (46th ed. Jan. 2020).

[6] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 105, 124–25 (1978).

[7] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992).

[8] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[9] *See, e.g.*, Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 173 (1985).

[10] *Penn*, 438 U.S. at 105, 124–25.

[11] *Id.* In this case, the Supreme Court considered the application of New York City's Landmarks Preservation Law to Grand Central Terminal. *Id.* at 115. In 1967, the city, through the Landmarks Preservation Commission, designated the Terminal a "landmark," the owner of the Terminal, Penn Central, opposed the designation before the Commission, but did not seek judicial review of the final decision. *Id.* at 115-16. In an effort to increase income the following year, Penn Central entered into a renewable fifty-year lease to construct a multistory office building above the Terminal. *Id.* at 116. Penn Central then applied for permission to construct the office building, submitting two separate plans, which both satisfied the terms of the applicable zoning ordinance. *Id.* The Commission rejected the applications, with part of its reasoning being that a fifty-five-story tower on top of the Terminal would be detrimental to the "majestic approach from the south." *Id.* at 117. Penn Central filed suit alleging that the Landmarks Preservation Law had taken their property without just compensation. *Id.* at 119.

discrete segments of the owner's property rights.[12]

B. Total Regulatory Taking

In *Lucas v. South Carolina Coastal Council*, the plaintiff purchased two residential lots with an intent to build single-family homes.[13] Two years later, the state legislature passed a law prohibiting the erection of any permanent habitable structures on the plaintiff's property.[14] The law's purpose was to prevent beachfront erosion and to protect the property as a storm barrier, plant and wildlife habitat, a tourist attraction, and "natural health environment," which aided the physical and mental well-being of South Carolina's citizens.[15] The law effectively rendered the plaintiff's property valueless.[16] The plaintiff sued the Coastal Council claiming that, although the act may be a valid exercise of the state's police power, it deprived him of the use of his property and thus, resulted in a taking without just compensation.[17] The Coastal Council argued that the state had the authority to prevent harmful uses of land without having to compensate the owner for the restriction.[18]

The Supreme Court ruled for the plaintiff and opined that the state's interest in the regulation was irrelevant since the trial court determined that the plaintiff was deprived of any economically viable alternative use of his land.[19] The *Lucas* case has two important implications for environmental (and other) regulation of agricultural activities.[20] First, the Court focused solely on the economic viability of the land and made no recognition of potential noneconomic objectives of land ownership.[21] However, in the agricultural sector, land ownership is typically associated

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[12] *Id.* at 105, 124–25. The court notes that "a 'taking' may be more readily found when the interference with property can be characterized as a physical invasion," as opposed to when "the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

[13] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[14] *Id.* at 1006–07. In 1988, the South Carolina Legislature passed the Beachfront Management Act. *Id.*

[15] *Id.* at 1008, 1021–22.

[16] *Id.* at 1007.

[17] *Id.* at 1009.

[18] *See id.* at 1010.

[19] *Lucas* v. S.C. Coastal Council 1003, 100919.1009–19 (1992).

[20] *See id.* at 1024–27.

[21] *See id.*

with many noneconomic objectives and serves important sociological and psychological functions.[22] Under the *Lucas* approach, these noneconomic objectives are not recognized.[23] Second, under the *Lucas* rationale, governmental regulatory restrictions do not invoke automatic compensation unless the regulations deprive the property owner of *all* beneficial use.[24]

Under the *Lucas* approach, an important legal issue is whether compensation is required when the landowner has economic use remaining on other portions of the property that are not subject to regulation.[25] In other words, has an unconstitutional taking occurred when the government's regulatory impact on a property is not complete, and some economic use remains on a portion of the landowner's property that is not impacted by the government regulation?

C. Unconstitutional Conditions

In *Nollan v. California Coastal Commission*, the plaintiffs owned a small, dilapidated beach house and wanted to tear it down and replace it with a larger home.[26] The defendant was concerned about preserving the public's viewing access over the plaintiffs's land from the public highway to the waterfront.[27] Rather than preventing the construction outright, the defendant conditioned the plaintiffs's right to build on the land upon the plaintiffs giving the defendant a permanent, lateral beachfront easement over the plaintiffs's land for the benefit of the public.[28] Thus, the issue was whether the state could force the plaintiffs to choose between the construction permit and the lateral easement.[29] The Court held that this particular bargain was impermissible because the condition imposed (surrender of the easement) lacked a "nexus" with, or was unrelated to, the legitimate interest used by the state to justify its

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[22] *See generally* Claudia Baldwin et al., *Love of the Land: Socio-Ecological Connectivity of Rural Landholders*, 51 J. RURAL STUD. 37 (2017) (discussing how land ownership provides insight into a social-ecological dynamic that contributes to social resilience) [https://perma.cc/CHY4-KNXL].

[23] *Lucas*, 505 U.S. at 1024–27.

[24] *See id.*

[25] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003. (1992

[26] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[27] *Id.* at 828.

[28] *Id.* at 833–34.

[29] *See id.* at 834, 837.

actions–preserving the view.[30]

The Court ruled similarly in *Dolan v. Tigard*.[31] The plaintiff applied to the city for a permit to redevelop the site where her plumbing and electric supply store was located.[32] The plaintiff's proposed redevelopment plans called for nearly doubling the size of the store and paving the gravel lot.[33] The city granted the permit application subject to conditions imposed by the Community Development Code ("CDC").[34] The city required that the plaintiff dedicate a portion of the property lying within the floodplain for improvement of a storm drainage system, and also dedicate a fifteen-foot strip of land adjacent to the floodplain as a pedestrian/bicycle path.[35] The plaintiff requested variances from the CDC standards, which the city denied.[36] The plaintiff claimed that the city forced her to choose between the approval of her building permit and her Fifth Amendment right to just compensation for the public easements.[37] The Court found that the conditions were not simply a limitation on the use Dolan might make of her land, but "a requirement that she deed portions of the property to the city."[38] The Court discussed the doctrine of "unconstitutional conditions."[39] Under that theory, the government

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[30] *Id.* at 837.

[31] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[32] *Id.* at 379. The site encompassed a 1.67-acre parcel, on which the store and a gravel parking lot sat. *Id.* The store was approximately 9,700 square feet. *Id.* A creek flowed through the southwestern corner of the lot and along its western boundary. *Id.* Due to the year-round flow of the creek, the area within the creek's 100-year floodplain renders the area virtually unusable for commercial development. *Id.*

[33] *Id.* In addition to doubling the size of the existing structure, Dolan proposed to build an additional structure on the northeast side of the site for complementary businesses and to provide more parking. *Id.*

[34] *Id.* The CDC requires Tigard property owners to comply with a fifteen percent open space and landscaping requirement, which limits total site coverage. *Id.* at 377. This includes all structures and paved parking to eighty-five percent of the parcel. *Id.* The city also adopted a plan for pedestrian/bicycle pathways with the intent to encourage short-trip alternatives to car travel, after a transportation study identified congestion as a problem in the Central Business District. *Id.* at 378.

[35] *Id.* at 380–81.

[36] Dolan v. City of Tigard, 512 U.S. 374, 380 (1994). Variances are only granted when the applicant can show that, owing to special circumstances related to a specific piece of the land, the literal interpretations of the zoning provisions would cause an undue or unnecessary hardship, unless the variance is granted. *Id.* Dolan did not show this, instead asserted that the proposed development would not conflict with the policies of the comprehensive plan. *Id.* at 381.

[37] *Id.* at 385–86.

[38] *Id.* at 385.

[39] *Id.*

may not require an individual to give up the constitutional right to receive just compensation when property is taken for a public use, "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[40]

However, the *Dolan* rationale does not apply to situations involving impact fees and other permit conditions that do not involve physical invasions.[41] It does apply to monetary exactions where none of the plaintiff's property is actually taken.[42]

D. Subsequent Cases Applying the Standards

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, an association of property owners near Lake Tahoe brought a takings claim after a regional planning agency imposed a moratorium on development in the area.[43] The Court reasoned that *Lucas* only required analysis of regulatory taking claims as a categorical taking in the unusual case where there is a total prohibition on the beneficial economic use of property.[44] The Court held that a taking had not occurred because moratoria are essential land-use development tools and that the time it takes for a decision to be made should be protected.[45] Three Justices dissented, pointing out that the distinction between temporary and permanent prohibitions is tenuous and that

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[40] *Id.* The city contends that the benefit of the recreational easement along the floodplain is only ancillary to the city's chief purpose in controlling flood hazards. *Id.* at 393.

[41] *See , e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374. (1994).

[42] *Nollan* and *Dolan* involved the special application of the "doctrine of unconstitutional conditions," which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. *Nollan* and *Dolan* involved permit conditions that required dedications of land that would allow permanent physical invasions by the public, and the Court ruled that these physical invasions, if unilaterally imposed, would constitute per se takings. *See also* Koontz v. St. Johns River Water Mgmt. Dist.,. 570 U.S. 595 (2013).In *Koontz,* the Court held that the unconstitutional conditions doctrine espoused in *Nollan* and *Dolan* made no distinction between conditions precedent and conditions subsequent, and applies even though none of the plaintiff's property is actually taken. *Id.* at 619. Thus, monetary exactions absent a physical taking of property are subject to takings scrutiny.

[43] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[44] *Id.* at 330–31.

[45] *Id.* at 302.

takings in the case lasted almost six years.[46] A separate dissent written by Justice Thomas, and joined by Justice Scalia, argued that regulations prohibiting all productive uses of property are subject to *Lucas's* per se rule regardless of whether the property involved "retains theoretical useful life and value if, and when, the "temporary' moratorium is lifted."[47] The Court also made clear that in evaluating whether a regulation works a taking, courts must focus on the landowner's entire parcel of property.[48]

In *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court applied the multi-factor test.[49] The defendant sought a declaration that the rent cap introduced by Act 257,[50] and passed by the Hawaii Legislature, constituted an unconstitutional taking of its property.[51] The defendant sought summary judgment on a "substantially advances" theory in support of its takings claim.[52] However, the Court determined that the "substantially advances" theory was not a valid takings test.[53] In this determination, the Court reaffirmed that a plaintiff may only take one of three approaches to establish a taking: (1) a *Lucas* "total regulatory taking";[54] (2) a *Penn Central* multi-factor balancing test;[55] or (3) a *Nollan* and *Dolan* type land-use exaction.[56] The Court noted that the common touchstone for these approaches in deciding when a regulation is a taking, is whether the restriction on property usage

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[46] *Id.* at 343.

[47] *Id.* at 356.

[48] That means, for example, that a regulation impacting only a portion of a landowner's tract would not constitute a compensable taking. *See, e.g.*, Brace v. United States, 72 Fed. Cl. 337 (2006) (mandated restoration of wetlands on farm property that had been drained with government assistance to create suitable farmland did not result in an unconstitutional taking as the diminution in value of farm as a whole only minimal and non-compensable).

[49] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[50] *Id.* at 533. Hawaii enacted Act 257 "in response to concerns about the effect of market concentration on retail gasoline prices." *Id.* The Act limited the rent amount that an oil company may charge a lessee-dealer. *Id.* It also prohibits "oil companies from converting existing lessee-dealer stations to company-operated stations and from locating new company-operated stations in close proximity to existing dealer-operated stations." *Id.*

[51] *Id.* Chevron also sought an injunction against the application of the rent cap. *Id.*

[52] *Id.* at 533–34.

[53] *Id.* at 548.

[54] *Id.*; *see* Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992).

[55] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005); *see* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[56] *Lingle*, 544 U.S. at 548; *see* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

is functionally equivalent to a physical taking of the property.[57]

Thus, after the Court's *Lingle* opinion, a landowner seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking, a *Lucas*-type total regulatory taking, a *Penn Central* taking,[58] or a land-use exaction violating the *Nollan* and *Dolan* standards.[59]

The Florida Supreme Court applied the multi-factoring balancing test in a case involving hog production in *State v. Basford*.[60] In the case, the state of Florida enacted legislation prohibiting the use of gestation crates in which a pregnant sow could not turn around in freely.[61] A hog producer that utilized gestation crates in its high-volume pig production operation determined that it could not compete with other hog producers and removed its hog production facility and sold it for scrap because it had no alternative use.[62] The producer estimated that it would cost $600,000 to convert the operation to pen-raised hogs.[63] The producer sued for a regulatory taking of his property,[64] and the court entered judgment in the producer's favor.[65] The state failed to offer any evidence that the producer's facility could be used for any other practical use or that the defendant could have converted

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[57] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

[58] *See, e.g.*, Edwards Aquifer Auth. v. Bragg, 421 S.W.3d 118 (Tex. App. 2013) (Edwards Aquifer Act substantially advanced legitimate governmental interest and did not deprive defendants of all economically viable use of their property, but did unreasonably impede defendant's use of their farm as a pecan orchard because the irrigation permit approved withdrawal of water for irrigation at less than sufficient amount which constituted regulatory taking; compensation awarded).

[59] *See, e.g.*, Kafka v. Mont. Dept. of Fish, Wildlife & Parks,348348 Mont. 80, 106 (2008) (no comparable taking under *Penn Central* analysis and because all economic uses not eliminated by state law that banned fee-based shootings of game animals or alternative livestock).

[60] State v. Basford, 119 So. 3d 478, 480 (Fla. Dist. Ct. App. 2013).

[61] *Id.* This legislation was commonly referred to as the "Pregnant Pig Amendment." *Id.*

[62] *Id.* Previous to the removal of the facility, and the passage of the Amendment, the producer made improvements such as adding a breeding barn, a gestation barn, a farrowing barn, two finishing barns, a feed mill, a lab and office for equipment for artificial insemination, multiple water wells with pumps to serve the barns, and a metal chute with hydraulic cylinders for lifting pigs into trailers. *Id.*

[63] *Id.* at 481.

[64] *Id.* The producer was not seeking any value for the land itself but was seeking the value of the improvements made and the fixtures he used in the hog production business. *Id.*

[65] *Id.* at 483. The award was $505,000 plus interest. *Id.* The court's decision was affirmed on appeal. *Id.*

to pen-raising of hogs.[66]

E. What About Recurring Interferences?

In late 2012, the Court further defined the scope of takings jurisprudence.[67] In *Arkansas Game & Fish Commission v. United States*, the United States Army Corps of Engineers deviated from its operating plan for a dam that resulted in increased downstream flooding of a wildlife management area that the plaintiff owned.[68] The flooding was only temporary and was not "inevitably recurring."[69] The trial court determined that the Corp's action constituted a taking of a temporary flowage easement over the plaintiff's property and awarded damages of $5,778,758.[70] On appeal, the Federal Circuit reversed.[71] On further review by the U.S. Supreme Court, the Court agreed with the trial court and held that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." [72]

F. Surface and Subsurface Estates

For constitutional takings purposes, "property" may include more than just the surface estate. For example, in *Edwards Aquifer Authority v. Day*, the Texas Supreme Court unanimously held, on the basis of oil and gas law, that landownership in Texas includes interests in in-place groundwater.[73] As such, water cannot be taken for public use without adequate compensation guaranteed by Article I, Section 17(a) of the Texas Constitution. In *Edwards*, the plaintiffs were farmers that sought a permit to pump

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[66] State v. Basford, 119 So. 3d 478, 483 (Fla. Dist. Ct. App. 2013).

[67] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 513 (2012), *rev'd* and *remanded* 637 F.3d 1366 (Fed. Cir. 2011). On remand, the Court of Federal Appeals affirmed the trial court's ruling, determining that the government's action had given rise to a temporary taking, compensable under the Fifth Amendment. The flooding was foreseeable and a sufficiently severe invasion to constitute a taking. Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364 (Fed. Cir. 2013).

[68] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 513 (2012).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 523.

[72] *Id.* at 515.

[73] Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 817 (Tex. 2012).

underground water for crop irrigation purposes.[74] The underground water at issue was located in the Edwards Aquifer and the plaintiffs's land was situated entirely within the boundaries of the aquifer.[75] A permit was granted, but water usage under the permit was limited to 14-acre-feet of water rather than 700- acre-feet that was sought because the plaintiffs could not establish "historical use." The Court held that the plaintiffs's practice of issuing permits based on historical use was an unjustified departure from the Texas Water Code permitting factors.

II. WHICH APPROACH APPLIES?

In early 2020, the U.S. Court of Appeals for the Ninth Circuit dealt with a case involving the issue of whether local zoning rules resulting in a reversion to agricultural use classification resulted in a taking.[76] In *Bridge Aina Le'a, LLC v. State Land Use Commission*, 1,060-acres of undeveloped land on the northeast portion of the Island of Hawaii were designated as "conditional urban use."[77] For the 40 years prior, the tract was part of a 3,000-acre parcel zoned for "agricultural use."[78] In 1987, the landowner at the time sought "to develop a mixed residential community on the 1,060 acres as the first phase of development of the entire 3,000 acres."[79] The landowner petitioned the defendant to reclassify the 1,060-acres as urban.[80] The defendant did so in 1989, along with development conditions that ran with title to the land.[81]

The land remained undeveloped at the time the plaintiff acquired it in 1999.[82] In 2005, the defendant amended the condition so that fewer affordable housing units needed to be

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[74] *Id.*

[75] *Id.*

[76] Bridge Aina Le'a, LLC v. State Land Use Comm'n, 950 F.3d 610, 618 (9th Cir. 2020).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Bridge Aina Le'a, LLC v. State Land Use Comm'n, 950 F.3d 610, 619 (9th Cir. 2020).

developed.[83] Developmental progress was hampered by the requirement that the plaintiff prepare an environmental impact statement for the development project.[84] In late 2008, the defendant ordered the plaintiff to show cause for the nondevelopment.[85] In the summer of 2010, some affordable housing units had been constructed, but upon inspection, they were determined not to be habitable.[86] The developer then stated that they lacked the funds to complete the development.[87] In 2011, the defendant ordered the land's reversion to its prior "agricultural use" classification due to the unfulfilled representations that the land would be developed.[88] The land had been given its conditional urban use classification based on the representations of development.[89]

The plaintiff was one of the landowners and challenged the reversion as illegal under state law, and that it also amounted to an unconstitutional regulatory taking of the land. [90] The trial court jury found for the plaintiff on the constitutional claim, and the trial court denied the defendant's motion for a judgment as a matter of law.[91] On further review, the appellate court reversed.[92] The appellate court held that no taking had occurred under the multi-factor analysis of *Penn Central*[93] because the reclassification did not result in the taking of *all* of the economic value of the property.[94] Rather, the land retained substantial economic value, albeit at a much lesser amount than if it were classified as urban and developed.[95] An expert valued the land at approximately $40 million as developed land and $6.36 million with an agricultural use classification.[96] The appellate court held that the $6.36 million

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[83] *Id.* at 620.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 621.
[87] *Id.*
[88] Bridge Aina Le'a, LLC v. State Land Use Comm'n, 950 F.3d 610, 618 (9th Cir. 2020).
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[94] Bridge Aina Le'a, LLC v. State Land Use Comm'n, 950 F.3d 610, 623 (9th Cir. 2020).
[95] *Id.* at 626.
[96] *Id.* at 627.

was neither de minimis nor derived from noneconomic uses.[97] Thus, the defendant was entitled to judgment as a matter of law on the issue that a complete economic taking had occurred.[98] It had not. The appellate court also held that the reversion did not interfere substantially with the plaintiff's investment-backed expectations given that the development conditions were present at the time the plaintiff acquired the property, and the plaintiff could expect them to be enforced.[99] The appellate court also determined that the defendant acted properly in protecting the plaintiff's due process rights by holding hearings over a long period of time.[100] Thus, the appellate court concluded, no reasonable jury could conclude that the reversion affected a taking under the *Penn Central* factors.[101] The appellate court vacated the trial court's judgment for the plaintiff, reversed the trial court's denial of the defendant's motion for judgment as a matter of law, and remanded the case.[102]

A. State/Local Takings – The Need for "Exhaustion"

For a landowner that has sustained a state/local regulatory (or physical) taking, can compensation be sought initially in federal court or must legal procedures be first pursued in state court with federal courts only available if compensation is denied at the state level? The U.S. Supreme Court answered this question in 1985.[103] In *Williamson Regional Planning Commission v. Hamilton Bank of Johnson City*, the Court held that if a state provides an adequate procedure for seeking just compensation, there is no Fifth Amendment violation until the landowner has used the state procedure and has been denied just compensation.[104] However, the

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[97] *Id.*

[98] *Id.* at 630.

[99] *Id.* at 633.

[100] *Id.*

[101] Bridge Aina Le'a, LLC v. State Land Use Comm'n, 950 F.3d 610, 637 (9th Cir. 2020).

[102] *Id.* at 630–40. The appellate court also affirmed the dismissal of the plaintiff's equal protection claim.

[103] *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

[104] *Id.* at 185.The bank sued the commission claiming that the application of zoning laws to the bank's residential subdivision was a Fifth Amendment taking. *Id.* The

Full Faith and Credit Clause of 28 U.S.C. § 1738 would then be applied with the result that the failure to receive compensation at the state level generally meant that there was no recourse in the federal courts because of the preclusive effect of the landowner having already litigated the same issue in the state courts.[105] This "catch-22" was what the Court examined in 2019.[106]

In *Knick v. Township of Scott*, the plaintiff owned a 90-acre farm in Pennsylvania on which she grazed horses and other animals.[107] The farm included a small graveyard where ancestors of the plaintiff's neighbors were buried.[108] Such "backyard burials" are permissible in Pennsylvania.[109] In late 2012, the defendant passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[110] The ordinance defined a "cemetery" as "[a] place or area of ground, whether contained on private or public property which has been set apart for or otherwise utilized as a burial place for deceased human beings."[111] In 2013, the defendant notified the plaintiff of her violation of the ordinance.[112] The plaintiff sued in state court for declaratory and injunctive relief on the basis that the ordinance amounted to a taking of her property, but she did not seek compensation via an inverse condemnation action.[113]

While the case was pending, the defendant agreed not to enforce the ordinance.[114] As a result, the trial court refused to rule on the plaintiff's action.[115] Without any ongoing enforcement of the

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court found that the bank's claim was not ripe because the bank did not obtain a final decision for the application of the zoning ordinance and subdivision regulations to the property. *Id.* Nor did the bank use state procedures for obtaining just compensation. *Id.*

[105] *See, e.g.*, San Remo Hotel L.P. v. City & Cty. of San Francisco, 545 U.S. 323 (2005) (discussing whether federal courts could create an exception to the Full Faith and Credit Clause, in order to provide a federal forum for litigants who sought to advance federal takings claims that were not ripe until the entry of a final state judgment denying just compensation.).

[106] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2168 (2019).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2168 (2019).

[113] *Id.*

[114] *Id.*

[115] *Id.*

ordinance, the plaintiff could not show irreparable harm.[116] Without irreparable harm, the court noted, the plaintiff could not establish what was necessary for the equitable relief she was seeking.[117] Frustrated at the result in state court, the plaintiff filed a takings claim in federal court.[118] However, the federal trial court dismissed the case because she had not sought compensation at the state level.[119] The appellate court affirmed, citing the *Williamson* case.[120]

In a 5-4 decision, Chief Justice Roberts, joined by Justices Alito, Gorsuch, Kavanaugh and Thomas, reversed.[121] The Court held that there is a distinction between the substance of a right and the remedy for the violation of that right.[122] The Takings Clause of the Fifth Amendment establishes that the government can only take (either physically or via regulation) private property by paying for it.[123] The government's infringement on private property is what triggers possible compensation.[124] The Constitutional violation occurs at the time of the infringement, while a state court's decision to make the landowner financially whole simply remedies that violation.[125] It does not redefine the property right.[126] Thus, the majority opinion reasoned, laws confer legal rights, and when those rights are violated, there must be legal recourse.[127] As the majority noted, "a government violates the Takings Clause when it takes property without compensation, and…a property owner may bring a Fifth Amendment claim [in federal court] . . . at that time."[128]

The *Knick* decision is a significant win for farmers, ranchers, and other rural landowners that are affected by state and local regulations impacting land use. The Court clearly stated in *Knick* that the Fifth Amendment right to compensation accrues at the

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2168–69 (2019); *see* Knick v. Scott Twp., No. 3:14- CV-2223, 2015 U.S. Dist. LEXIS 146861 (M.D. Pa. Oct. 2928, 2015).
[120] Knick v. Twp. of Scott, 862 F.3d 310, 314 (3d Cir. 2017); *see also,* Williamson Cty. Rg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).
[121] *Knick*, 139 S. Ct. at 2167.
[122] *Id.* at 2168.
[123] *Id.* at 2170.
[124] *Id.*
[125] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).
[126] *Id.*
[127] *Knick*, 139 S. Ct. at 2177.; *see, e.g.*, Marbury v. Madison, 5 U.S. 137 (1803).
[128] *Knick*, 139 S. Ct. at 2177.

time the taking occurs.[129]

CONCLUSION

The governmental regulation of private property is a concern to many farmers, ranchers, and rural landowners. At what point does the regulation of private property rights become substantial enough to trigger compensation under the Constitution? The answer is that "it depends" on the type of taking involved. Judicial opinions over the past 40 years demonstrate that the legal analysis of takings jurisprudence has changed over time. Rural landowners, and their legal counsel, would do well to stay on top of the developing analysis.

[129] *Id.*